IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT COPY

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

APPELLANT'S REPLY BRIEF

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

MELISSA HILL
State Bar No. 71218
P.O. Box 2758
Corrales, NM 87048
Phone: (505) 898-2977
Fax: (505) 898-5085
Email: mhcorrals@msn.com

Attorney for Appellant
Royal Clark

DEATH PENALTY

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APPELLANT'S REPLY BRIEF

Appellant, Royal Clark, through his attorney, Melissa Hill, submits the following arguments in Reply to the Respondent's Brief filed on July 23, 2004.

ARGUMENT SECTION 1
(SUFFICIENCY OF EVIDENCE)
I

EVIDENCE DOES NOT SUPPORT THE ROBBERY CONVICTIONS OF ANGIE AND LAURIE.

A. Robbery of Angie:

In this case, Angie's testimony generally establishes that after killing Laurie, while driving around with Angie, Roy Clark stopped at a pay telephone and voiced an interest in calling Laurie's mother. Angie, whose hands were tied, volunteered that she had money in her pocket to pay for the phone call. Roy removed all the money from Angie's pocket and walked to the pay phone with the change, leaving Angie's paper currency in the car. Roy began dialing

but failed to complete the call. (RT 5087-5088.) Angie's money was not recovered.

Respondent has cited a plethora of cases in an effort to demonstrate why this evidence suffices to prove that Roy Clark committed a robbery of Angie, the surviving victim. (RB, pp. 49-53.) None of the cases cited is apt.

In People v. Mungia (1991) 234 Cal.App.3d 1703, 1708, the victim testified that the defendant shoved her, and snatched her purse. The Court of Appeal reasonably concluded in this context that "neither resistance by the victim nor threats by the perpetrator are necessary elements of robbery." (Ibid.)

People v. Cuevas (2001) 89 Cal.App.4th 689, is a bank robbery case in which the appellate court rejected a claim of instructional error regarding instructions on the "fear" element or robbery. Appellant does not dispute the basic principle stated by the case — that actual fear may be inferred from the circumstances without the necessity of testimony claiming fear by a victim. (Id., at p. 698.)

People v. Prieto (1993) 15 Cal.App.4th 210, rejects a sufficiency-of-evidence challenge to robbery in the context of a purse snatch. The issue in Prieto was whether there was sufficient evidence to show that the second victim relinquished her purse as the product of fear, after the defendant struggled with the first victim to take her purse. The court found sufficient evidence to prove the "fear" element or robbery. (Id., at p. 215.)

In People v. Brew (1991) 2 Cal.App.4th 99, a defendant accomplished a robbery by making a bogus purchase, at which time he physically placed himself between a diminutive cashier and the cash register and removed the money. The appeals court had little difficulty finding that this constituted a robbery accomplished with intimidation and fear. (Id., at p. 104.)

In the 1967 case of People v. Butler (1967) 65 Cal.2d 569, disapproved on other grounds in People v. Tufunga (1999) 21 Cal.4th 935, 956, this Court

held that the trial court erred by removing from the jury's consideration the sole defense to felony-murder — that the defendant had an honest belief he was owed money by the victim. (Id., at p. 572-573.)

This Court's decision in People v. Davis (1998) 19 Cal.4th 301, upholds a defendant's conviction of petty theft, where the defendant intended to claim ownership of a shirt on display in a store, and return it if the store would give him a refund. (Id., at p. 312.) The issue in that case was whether the defendant had the requisite intent to permanently deprive the store of its property. This Court found that he did.

Lastly, in People v. Flynn (2000) 77 Cal.App.4th 766, a robbery conviction was upheld by the Court of Appeal where the defendant, a gang member, snatched the victim's purse from her shoulder. He removed a gun and a five-dollar bill from the purse and displayed them to his fellow gang members. The victim ran from the scene. The appellate court found ample evidence that the victim was frightened into relinquishing her belongings. (Id., at p. 772-773.)

Each of the above cases involves a robbery in the traditional sense. None of the above cases involves facts like the case at bench, where the perpetrator and victim are acquaintances, and money was not received until long after the assault.

In contrast, a case cited by respondent with a "cf" designation (RB, p. 51), People v. Welch (1936) 7 Cal.2d 209, supports appellant's assertion that no robbery occurred. In Welch, the defendant kidnapped a victim and drove her away in a car. Before the victim escaped from the car and fled, the defendant removed cigarettes from the victim's purse, but returned the purse. The defendant's convictions of robbery and kidnapping for the purpose of robbery were reversed. This Court held that the record was devoid of evidence that the complaining witness was afraid to resist the taking of her cigarettes.

Furthermore, it appeared from the record that the defendant's sole intent was to rob the defendant of "her virtue," but nothing else. (Id., at p. 212-213.)

Additional support for appellant's position can be found in cases decided more recently than 1936. (See, e.g., cases previously cited in the Appellant's Opening Brief [hereafter, AOB], including People v. Marshall (1997) 15 Cal.4th 1, 34; People v. Green (1980) 27 Cal.3d 1, 52; People v. Kelly (1992) 1 Cal.4th 495, 530-531.) The case of Rodriguez v. Superior Court (1984) 159 Cal.App.3d 821, is also on point.

In Rodriguez, the defendant forced a female victim into his car and took her to a field behind a high school. He raped the victim, then drove off afterward, leaving her behind while her purse remained in the car. Citing the Welch case as authority, the Court of Appeal issued a writ of prohibition restraining prosecution of the defendant for robbery. The court held that for robbery, "the defendant's wrongful intent and his physical act must concur in the sense that the act must be motivated by the intent." (Id., at p. 826.)

In People v. Morris, (1988) 46 Cal.3d 1, this Court reversed a robbery conviction where the defendant shot the victim twice at close range in a public bathhouse. The defendant had admitted to a witness that he was in business of making money from homosexuals and had recently killed one. (Id., at p. 20.) The deceased victim was found entirely nude except for his shoes and socks. No personal property of the victim was ever recovered, except for a Sears Credit card that another man had loaned to the victim previously. Someone who looked like the defendant attempted to use the card just three days after the murder.

This Court found no evidence "of a taking by force or fear from the person of another." (Id., at p. 20, fn. 8.) This Court also found that "it was impossible to conclude that the shooting was one to advance an independent felonious purpose [of robbery]." (Id., at p. 21.)

Respondent argues that there was a concurrence of force and fear and specific intent because Angie was "understandably fearful" when Roy reached into her pocket and took all of her money. (RB, p. 53.) However, it is undisputed that Roy did not take any money from Angie until an hour or more after the assault. Moreover, she volunteered the money in the hope that Roy would use the money to call Laurie's parents. This does not satisfy the elements of a robbery. (RT 5087-5088.)

A search through Supreme Court decisions decided since the filing of the AOB yield none which uphold a robbery conviction on such slim evidence. To the contrary, cases that uphold robbery, and robbery-murder convictions and special circumstance findings generally involve classic robbery scenarios. (See, e.g., People v. Horning (2004) 34 Cal.4th 871, 902-909 [the defendant bound and blindfolded the victim, shot him, and removed his gun and coin collections]; People v. Valdez (2004) 32 Cal.4th 73, 103-113 [victim was found with his pockets turned inside out with bloodstains on the interior of the pocket, and $3,000 missing currency was not recovered]; People v. Combs (2004) 34 Cal.4th 821, 852-854 [the defendant and an accomplice beat and strangled the victim and stole her car].)

In this case, the taking of Angie's money was wholly incidental to the other crimes committed. Even assuming Angie was afraid of Roy, the record is devoid of evidence that Roy was using intimidation, force or fear to relieve Angie of her money, or that Angie was afraid to resist the taking of money from her pocket as a consequence of her fear of Roy. To the contrary, Angie appears to have offered Roy the money from her pocket to facilitate the making of a telephone call. This is not a robbery and the conviction should be reversed.

B. Robbery of Laurie:

Even less evidence supports a finding that Roy committed a robbery of Laurie. The evidence shows nothing more than that Laurie had a few dollars

and change which was missing when her body was recovered.

Respondent asks this Court to speculate that Roy harbored a pre-existing intent to rob Laurie based on evidence (1) that Roy requested that Laurie use her money to buy him some food at McDonald's Restaurant earlier that evening; (2) that Roy removed Laurie's coat and scattered the contents of her pockets on the bathroom floor during the alleged sexual assault; (3) that only Roy had access to Laurie's money; and (4) that Roy later removed money from *Angie's* pocket to make a phone call, as described above.

Respondent's argument is purely speculative. Roy asked Laurie to buy him some food much earlier in the evening and did nothing when she declined. This hardly proves a motive or plan to commit robbery. The evidence does not suggest that Roy intentionally scattered the contents of Laurie's pockets for the purpose of robbing her. To the contrary, the victim's belongings were scattered during a struggle which the prosecutor argued was an attempted rape.

Roy was not the only person with access to Laurie's money. Any number of speculative possibilities regarding what happened to the money come to mind. Currency may have been scattered in the restroom, parking lot or car during the struggle. Currency may have fallen out of Laurie's pockets, into the trunk of the car, while she was being transported to the location where she was abandoned.

The fact that hours later, Roy removed currency from Angie's pocket under the guise of needing money to make a phone call falls far short of establishing a robbery of Angie, much less of Laurie. The phone call incident does not in logic tend to show that Roy assaulted Laurie several hours earlier for the purpose of taking her money.

Evidence which is merely speculative does not meet the "substantial evidence" standard necessary to support a verdict. (United States v. Stauffe (9th Cir. 1990) 922 F.2d 508, 514; United States v. Thomas (9th Cir.1971) 453

F.2d 141, 143.) "[M]ere suspicion or speculation does not rise to the level of sufficient evidence." (Stauff, supra, 922 F.2d at p. 514.) If the prosecution's evidence is so unclear that the reviewing court must resort to speculation to attempt to determine the existence of facts necessary to establish an element of the crime charged, the prosecution has not sustained its burden of proof. (People v. Marshall, supra, 15 Cal.4th at p. 35; People v. Mendes (1950) 35 Cal.2d 537, 544; People v. Crandall (1969) 275 Cal.App.2d 609.)

No case cited by respondent finds such spare evidence sufficient to support a conviction of robbery of a homicide victim. For example, the case of People v. Shadden (2001) 93 Cal.App.4th 164, 170 (RB, p. 57), involves a video store robbery. In that case, a robbery conviction was affirmed where the defendant hit the owner and was straddling her as she lay on the floor bleeding at the time the victim's videotapes were taken. (Id., at p. 170-171.) In another case cited by respondent, People v. Holt (1997) 15 Cal.4th 619 (RB, p. 57), the defendant was sentenced to death for a burglary incident in which he strangled, sexually assaulted a woman and took her property. This Court found the evidence sufficient to prove that the defendant had physically assaulted the woman with the dual purpose of facilitating a sexual assault and taking her property. These facts are a far cry from the facts in this case, where the appellant was a family friend, fond of the victim, and not the assailant of a stranger in a home intrusion style robbery and rape.

As in the case of Angie, any evidence that money was missing, or removed from Laurie's pockets was wholly incidental to the commission of other crimes. Accordingly, this Court should reverse appellant's conviction of the robbery of Laurie.

II

EVIDENCE IS INSUFFICIENT TO SUPPORT THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING.

Respondent's argument, that sufficient evidence supports the robbery-murder special circumstance finding, is equally deficient. Cases cited by respondent as exemplary bear little resemblance to the facts of this case. (RB, p. 59.)

In People v. Koontz (2002) 27 Cal.4th 1041, the defendant demanded his roommate's car keys at gunpoint and shot him when he refused. This Court found the evidence sufficient to show that the defendant shot the victim in order to force him to accede to his demands, and that he intended to take the victim's car before he committed an act of force. (Id., at p. 1080.)

In People v. Frye (1998) 18 Cal.4th 894, the defendant entered the victims' cabin with a shotgun, killed one victim and searched his pockets. He took vials of gold from the kitchen counter and ripped a gold necklace off another victim's neck. This Court found no authority for the proposition "that a perpetrator who succeeds in killing his victim before taking the victim's personal property cannot be guilty of robbery." (Id., at p. 956.) In appellant's case, it is not just the fact that the taking may have occurred *after* Laurie's death that defeats the robbery-murder special circumstance finding. Rather, it is because the record is devoid of constitutionally sufficient evidence that the disappearance of Laurie's money was anything but wholly incidental to the murder. (Phillips v. Woodford (9th Cir. 2001) 267 F.3d 966, 983; Williams v. Calderon (9th Cir. 1995) 52 F.3d 1465.)

A conviction of a capital crime which is not supported by substantial evidence violates due process of law, undermines the reliability of the death penalty determination and does not sufficiently narrow the class of death eligible defendants, thereby violating the Fifth, Eighth, and Fourteenth

Amendments. (Jackson v. Virginia (1979) 443 U.S. 307; Woodson v. North Carolina (1976) 428 U.S. 280; Beck v. Alabama (1980) 447 U.S. 625.) In determining the sufficiency of evidence, the reviewing court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Jackson v. Virginia, supra, at pp. 318-319.) As shown above, the evidence was not sufficient to support a reasonable finding that Roy robbed either Laurie or Angie. As such, both guilt and penalty verdicts must be reversed.

III

INSUFFICIENT EVIDENCE SUPPORTS THE CONVICTION OF ATTEMPTED RAPE (COUNT II).

Respondent argues that there is constitutionally adequate evidence to support the conviction of attempted rape. In footnotes, the Attorney General goes to great lengths to distinguish this case from the facts presented in cases cited by appellant: People v. Craig (1957) 49 Cal.3d 313, People v. Granados (1957) 49 Cal.2d 490, and People v. Anderson (1968) 70 Cal.2d 15. The effort fails. (See, RB, p. 72-73, fns. 45, 46, and 47.)

In Craig and Granados, as in this case, the defendants had expressed a sexual interest in the victim prior to the killings. In Anderson, the victim's clothing had been ripped off and she had suffered post-mortem rectal and vaginal wounds. In all three cases, as in appellant's case, there was a lack of forensic evidence consistent with sexual assault on the victim's internal and external clothing and genitalia. The evidence was found insufficient in all three cases to prove completed or attempted sexual assaults. (See also, People v. Johnson (1993) 6 Cal.4th 1, 41; People v. Raley (1992) 2 Cal.4th 870, 890.)

Respondent asks this Court to speculate that the presence of blood inside Laurie's blouse proves that Roy had the intent to rape Laurie. (RB., p. 66-67.) There were several blood stains on the interior of Laurie's shirt consistent with

Angie's blood, not Roy's. Blood or mucous stains on Laurie's jeans and jacket were also consistent with Angie's blood type, not Roy's. The stain on Laurie's bra was inconclusive, but generally consistent with Laurie's blood type. It could not be determined in what manner any of these stains to the clothing were applied. (See, RT 4518-5549, 4604-4608, 4622-4627, 4612, 4757, 48-24-4826, 4745.)

Respondent postulates that the blood must have been transferred from Angie to Laurie's blouse by Roy's hand. Evidence that Angie and Laurie had contact with one another inside the restroom, at a time when Angie's nose was bleeding, is conveniently ignored. (RT 5008-5011.) Hence, respondent cannot reasonably rely on evidence of blood inside Laurie's blouse to prove an intent to commit rape.

Respondent also asks this Court to assume that Laurie's blood stained bra could *not* possibly have been disturbed when Laurie was dragged along the ground and placed in the trunk of the car. (RB, p. 66-67, fn. 43.) The Respondent's Brief [hereafter RB] falsely states that the evidence shows "the bra [of Laurie] was crumpled or folded by the upward movement of appellant's hand." (RB, p. 67.) The cited pages – RT 4604-4609 – contain no such testimony. To the contrary, the testifying witness, Criminalist DeBondt, could not conclude that the source of the blood on the blouse or the bra was a hand. (RT 4607.)

Furthermore, in footnote 43 (RB, p. 66), respondent supplies a highly strained analysis, seeking to "prove" that Laurie's bra could not possibly have been folded back by Roy dragging her to the car; therefore it must have been folded back by Roy's hands. Yet Laurie was dragged across the ground, thrown or placed in the trunk of a car, and thrown, dragged, or pushed out of a vehicle on to a roadway before her body and disturbed bra were found. Soil samples consistent with the Lost Lake crime scene were found on Laurie's

jeans. (RT 4311, 4333.) Samples of hair and blood consistent with Laurie's hair and blood were found in Roy's trunk. (RT 4412, 4290-4294, 4295, 4676-4677, 4733.) Respondent's argument that the bra was *not* disturbed by dragging or something other than Roy's hand amounts to nothing more than speculation about how the bra became displaced.

Other facts used by respondent to support an attempted rape conviction include the fact that Laurie was heard to scream "Roy, stop," and "Roy, leave me alone," from inside the restroom. (RB, p. 64.) RT 5002, 6853-6854.) It is asserted that "undoubtedly" Roy made sexual advances at this point. However, Laurie's screaming is equally consistent with a simple assault committed during an explosion of anger.

As evidence of a preexisting intent to commit rape, respondent falsely states: "In the men's bathroom, appellant took Laurie's coat off of her." (RB, p. 65, fn. 42.) From this, respondent asserts that Roy's "use of force in taking off Laurie's jacket and subduing her resistance would have resulted in sexual intercourse had it not been for Angie's timely interference." (RB, p. 64 .) What the evidence shows is that Laurie left Roy's car wearing her jacket, and the jacket was seen on the floor of the restroom when Angie subsequently entered. (RT 5022-5024.) There was no testimony regarding how the jacket was removed, much less that Roy forcibly removed it. This so-called "evidence" of intent is as speculative as all the of respondent's other arguments in support of the attempted rape conviction. Mere speculation is not enough to sustain a verdict. (United States v. Stauffe, supra, 922 F.2d at p. 514.)

Cases cited by respondent are not particularly helpful to the state's position. People v. Maury (2003) 30 Cal.4th 342, 400, (RB, p. 67) is a case involving sexual murders of several women and a rape of a victim who was not killed. In Maury, the defendant committed a rape of a woman who was not murdered and therefore lived to identify the defendant and testify. Several days

after that rape, another female victim disappeared and her body was subsequently found in the same vicinity where the prior rape had taken place. Someone had removed the woman's pants and her jaw had been broken at or near the time of death.

The defendant in Maury was charged with an assortment of crimes including the rape of the first woman and the murder and assault with intent to commit rape of the second. The surviving rape victim testified that the defendant had raped her. At the trial, the coroner testified that the deceased victim had been sexually assaulted. (People v. Maury, supra, 30 Cal.4th at p. 368.) One trial witness testified that the defendant had confided that he had a fantasy about "'strangulation with sexual relations'". (Id., at p. 374.) The defendant had also stated that he hated women and had killed before. (Ibid.) This evidence was found sufficient to establish the crime of assault with intent to commit rape against the deceased victim. (Id., at p. 399-400.) In contrast, in this case, the surviving victim, Angie, was not raped. In fact, when Roy's sexual overtures toward Angie were repelled, he did not even attempt to rape her. In addition, in this case, there was no expert forensic testimony opining that Laurie was the victim of rape, or even an attempted rape. There was no admission by Roy that he hated women and had killed them before, or that he had fantasies about strangling women while having sexual relations.

In People v. Marshall (1997) 15 Cal.4th 1, 36-37 (RB, p. 67), the defendant was convicted of attempting to rape of two different women, one of whom was murdered. The surviving victim, unlike Angie in this case, testified that the defendant told her he intended to rape and kill her. (Id., at p. 11.) Roy did not attempt to rape Angie.

Marshall is also distinguishable from this case because there was substantial evidence, including modus operandi evidence, to support the finding that the defendant had killed the victim during an ineffectual attempt to engage

in sexual intercourse. (Id., at p. 37.) First, the deceased victim in Marshall was found with her underwear and trousers pulled down. Laurie's clothes were disturbed, possibly from dragging, but her pants had not been pulled down or removed. Secondly, there was no forensic evidence of a sexual assault accomplished on Laurie. In contrast, in Marshall, there was expert testimony that an enzyme found in the deceased victim's vagina was mostly likely deposited during sexual intercourse shortly before the victim's death; the defendant was included as a possible donor of the enzyme. (Id., at p. 13.) Thirdly, in Marshall, there was evidence of a struggle, the victim was found gagged, and blood stains on the defendant's clothing were consistent with the victim's blood type. In this case, Laurie was not gagged, nor was her blood found on Roy's clothing.

In People v. Miller (1962) 57 Cal.2d 821, 827 (RB, p. 67, fn. 43), the defendant was seen with the 19-year-old victim shortly before her death; he said to the man who saw them: "You haven't seen me." (Id., at p. 824.) Evidence of the sexual assault included that the deceased 19-year-old victim's body was found in an icebox next to the building where the witness had seen the defendant with the girl. The victim's clothes were disarrayed and torn; her skirt was above her mid-section; her blouse was ripped open and her brassiere was torn off; she had no panties on or other garments. The convictions in Miller were reversed due to faulty, incomplete and misleading jury instructions on the defendant's theory of defense; even so, the case is clearly distinguishable on its facts from the instant case. Laurie's blouse was not ripped open, her bra was not torn off, and she was still wearing her panties and jeans when she was found by a passing motorist.

In People v. Craig (1994) 25 Cal.App.4th 1593 (RB, p. 68, 69), the defendant was convicted of assault with intent to commit rape. In that case, the defendant followed a complete stranger home, shoved her back into her car, and

put his free hand inside her sweater and touched her breasts outside of her bra. At this point, someone intervened in the assault and pulled the defendant off of the victim. The Court of Appeal distinguished the facts in Craig from the case of People v. Greene (1973) 34 Cal.App.3d 622, in which a conviction of assault with intent to commit rape was reversed.

Appellant's case bears much greater similarity to the Greene case than the Craig case. In Greene, the defendant approached a 16-year-old girl and put his arm around her waist. He told her he had a gun and stated that he just wanted to "play" with her. Subsequently, the victim broke from the defendant's embrace and escaped to a friend's home. The defendant did not pursue her. The Court of Appeal found the evidence lacking to prove the specific intent to commit rape. (Id., at p. 651.) Roy's initial conduct with Laurie was not observed by Angie from outside the restroom. After Angie entered the facility, however, she saw Roy attempt to kiss Laurie. Laurie resisted and told Roy she had her period. (RT 5031.) At this point, Roy immediately stopped what he was doing. Later on, Roy invited Angie to have sex with him. When she declined, he started the car without attempting to engage in forced sexual activity. (RT 5081-5085.) As in the Greene case, Roy's overall pattern of behavior suggests he had a sexual interest but did not intend to force either of the girls to engage in an act of sexual intercourse.

In another case cited by respondent, People v. Bradley (1993) 15 Cal.App.4th 1144 (RB, p. 68), the defendant was convicted of kidnapping with intent to commit rape and assault with intent to commit rape. The defendant and a companion forcibly abducted a 16-year-old girl who was using a pay phone and dragged her to a trash enclosure. The defendant's companion remarked that he would not mind "getting a piece of that," referring to the victim, and the defendant responded, "Don't worry, I will." (Id., at p. 1155.) The defendant then proceeded to kiss the victim on the mouth, fondle her

breasts and put his hands under her shorts, as he pressed the front of his body and his erection against her back. (Ibid.) Not surprisingly, the appellate court rejected a challenge to the sufficiency of evidence to prove sexual intent.

In the case at bench, there is no substantial evidence to prove that Roy harbored the intent, or actually attempted to have sexual intercourse with Laurie against her will. First, in contrast to the situation presented in Bradford, Laurie and Angie were not forcibly abducted. Both knew Roy and willingly accompanied him for a ride. Second, Roy was not aided by a companion, nor did he make statements at the time of the crime indicating his intent to have sex with Laurie against her will. Last but not least, there was no testimony that Roy had put his hands inside Laurie's pants, or pressed his erection against any part of her body. Angie's testimony, at most, described an assault.

In People v. Raley (1992) 2 Cal.4th 870 (RB, p. 68-69), the defendant challenged a conviction of attempted oral copulation based on insufficiency of evidence. This Court reversed the judgment, finding that the defendant's statement that he wanted to "fool around" was insufficient to prove the intent to commit the crime of forcible oral copulation. Respondent asserts that the Raley is not dispositive because, in Raley, unlike this case, there was purportedly no evidence of a direct but ineffectual act done toward the commission of forcible oral copulation. (RB, p. 69.)

The Raley case has been discussed at length in the AOB (p. 72) and that discussion need not be reiterated here. It suffices to say that the similarities between the Raley case and this case far outweigh any differences. In Raley, there were also two young female victims. The defendant committed forcible oral copulation against one victim; that was not in dispute. It was equally clear that the second deceased victim was subjected to a forcible sexual attack of some sort. Nevertheless, this Court was not willing to assume that the defendant had necessarily attempted oral copulation against the second victim

just because he had done so against the first. A similar problem of proof exists here. The defendant's mere sexual interest in Laurie, and efforts to kiss her, do not without more prove his intent to commit a forcible act of sexual intercourse.

In People v. Carpenter (1997) 15 Cal.4th 312 (RB, p. 71, fn. 44), the defendant was convicted of seven murders, an attempted murder, attempted rape and rape-murder. This Court found that the defendant's statement, "I want to rape you," was sufficient to establish his intent to rape. (Id., at p. 387.) In People v. Memro (1985) 38 Cal.3d 658, (RB, p. 71, fn. 44), this Court found that the defendant's "entire course of conduct . . . evaluated in light of his confessed intent and his prior history" provided substantial evidence of an attempt to commit lewd and lascivious conduct. (Id., at p. 699.) In Memro, the defendant admitted having the intent to take pictures of his young victim in the nude. (Id., at p. 699.) Arguably, the evidence is sufficient here to establish at most an attempt to commit lewd and lascivious conduct with Laurie. The evidence is not, however, constitutionally sufficient to establish an attempted rape.

Respondent provides a laundry list of Roy's pre-offense statements to Laurie and others (see RB, p. 69) and argues that they are evidence of an intent to commit rape on the night of Laurie's death. As the cases above demonstrate, such statements bespeak Roy's a longstanding, arguably inappropriate sexual interest in Laurie, but not necessarily the intent to have sexual intercourse against her will on the night in question.

The prosecution also argues that Roy "ejaculated into a pair of gym shorts he was wearing that night." (RB, p. 70.) This misstates the evidence. A pair of white boxer shorts worn by Roy at the time of his *arrest* contained a stain positive for the presence of semen. However, the stain on the dirty under shorts could not be dated and could easily have produced by sexual arousal at some other time, or by masturbation. (RT 5543, 5549.) Furthermore, there was

evidence that Roy had changed his clothing before he was arrested; Roy testified that he had changed his clothing and a pair of sweat pants seized from Roy's dirty laundry was stained with blood consistent with Angie's blood type. (RT 4686-4689, 4694.)

In short, respondent has cited no authority that affirms a conviction of attempted rape on such slim evidence. Respondent asks this Court to affirm the attempted rape conviction based on the following assumptions: (1) that Laurie's coat was removed by Roy to accomplish an act of intercourse; (2) that Laurie screamed, "Roy stop," or "Roy, leave me alone," during a sexually motivated assault; (3) that Roy accidentally transferred Angie's blood to the inside of Laurie's blouse when he pushed his hand up her shirt; (4) that the displacement of Laurie's bra took place during a sexual assault and not while she was being dragged along the ground; and (5) Roy ejaculated in his undergarments sometime the night of the killing. As previously shown, mere speculation – not evidence – supports all of the alleged factual predicates for an attempted rape in this case. Speculative evidence does not meet the substantial evidence test. (United States v. Stauffe, supra, 922 F.2d at p. 514.) The conviction of attempted rape should be reversed in this case for the same reasons such convictions were reversed in the Craig, Granados, and Anderson cases, discussed in respondent's footnotes 45, 46, and 47. (RB, p. 72-73.)

IV

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE ATTEMPTED-RAPE MURDER SPECIAL CIRCUMSTANCE.

Respondent argues that the evidence is sufficient to support the special circumstance of rape-murder. Respondent relies on the same evidence relied upon to support the attempted rape conviction, and, as occurred in Argument III, ante, invents or exaggerates evidence to prove his point. (RB, Argument III, p. 78.)

For example, the Attorney General suggests that the evidence shows that Roy removed Laurie's coat and reached underneath her blouse and pushed her bra up, leaving her bare-chested. (RB, p. 78.) Respondent argues that Roy removed Laurie's coat twice – once in the men's bathroom and once in the women's bathroom. (RB, p. 65 & fn. 42.) Such evidence cannot be found in anywhere in the record. (See, Reply, Argument III, ante.)

According to Angie, when Laurie left the car, she was wearing a coat. (RT 5024.) After Laurie entered the restroom, Angie heard Laurie yell, "Roy, stop," Angie's name, and "Roy, leave me alone." (RT 5002.) Angie heard scuffling noises and entered the restroom building. She saw Laurie lying face down on the floor and Roy was seated the backs of his legs on the floor with Laurie's head between his legs. (RT 5004-5005.) When Angie grabbed Laurie's feet and started to pull her friend out of the restroom, Roy violently assaulted Angie, then left the restroom briefly to get a flashlight. (RT 5006-5008.) When Roy returned with the flashlight and illuminated the restroom, Angie could see Laurie's coat, earrings, rings, and soda pop pull tabs scattered about on the floor. Laurie picked up her own belongings and put on her coat. (RT 5024-5025.) Later, while in the car with Angie, Roy used Laurie's coat to cover Angie so she could not be seen. (RT 5084.) Eventually, Laurie's coat was recovered in the center of the roadway near Muscat and Chateau Fresno. (RT 3900.) There was no testimony regarding the manner in which the coat was removed.

Contrary to respondent's claim, there is also no evidence that Roy intentionally pushed up Laurie's bra during the scuffles in the men's and women's restrooms. Angie was present at the end of the first scuffle and she did not describe Laurie's bra as pushed up. A second scuffle was overheard by Angie, but the pushed up bra was only observed hours later, when Laurie's body was recovered from the roadway. By this time, the body had apparently

been put in the trunk of Roy's car. It also exhibited signs of having been dragged. The pushed up bra evidence is as consistent with the possibility that Laurie's clothing was disturbed while she was being lifted into the trunk or dragged along the ground as it is with a sexual assault. Also, the prosecution's own expert never testified that Angie's blood on Laurie's bra was evidence that Roy had pushed up the bra with his hand.

Respondent reiterates the argument that Laurie's crying, screaming and gasping is evidence that she was resisting a rape. (RB, p. 78.) Laurie's crying, pleading, and gasping are, however, consistent with a violent attack, whether sexually motivated or not. Respondent's speculation that the attack was sexual is not enough to satisfy the substantial evidence test. (United States v. Stauffe, supra, 922 F.2d at p. 514.)

In Arguments III and IV of The RB, the Attorney General summarizes the evidence in a way that is intended to convince this Court that sufficient evidence supports the conviction of attempted-rape and the attempted-rape murder special circumstance finding. Seeking to support the attempted rape-murder special circumstance, respondent argues that the evidence shows Roy acted in accordance with a preexisting plan to force Laurie to have sex with him whether she wanted to or not, and that the attempted rape was not incidental to the murder, but rather was part of "'one continuous transaction.'" (RB, Argument III, p. 60, 64-65; Argument IV, p. 76.)

Inconsistently, in Argument V of the RB (which will be addressed in Argument V of the Reply), the Attorney General characterizes the evidence quite differently, in order to convince this Court why the evidence should be found sufficient to support the witness-killing special circumstance. In that context, respondent asserts that the killing of Laurie satisfies the elements of a witness-killing special circumstance, which includes as a crucial first element

"a victim who has witnessed a crime prior to, and separate from the killing." (RB, p. 80.) To quote from respondent's Argument V:

> "Here, instead of a continuous criminal transaction following a predesigned plan . . . , the reasonable inference here is that appellant's criminal conduct ceased, he reevaluated his situation, and then decided to kill Laurie. Initially, appellant drove Laurie to Lost Lake, planning to isolate her and then have sex, consensual sex, with her. It must be stressed that in bringing the girls to Lost Lake Park, appellant had no intention of hurting either of them. His plan was frustrated by Laurie's resistance and Angie's interference. He lost control and brutally beat Angie. His criminal conduct then ceased. Appellant then walked back and forth between his car and the bathroom, assessing the evidence of what had just happened and trying to remove the evidence. His course of conduct now changed. He believed then it was necessary to kill the girls in order to silence them. Though the girls promised that they would make up a story, he was not dissuaded. He said to Laurie, 'No, I don't trust you. You'll tell like you did the last time.' Having made the decision to kill, the girls became mere 'things' which may be used to gratify his lust and greed and ultimately disposed of."

(RB, p. 83.) The above argument is tantamount to a concession that the evidence is insufficient to prove the attempted rape-murder special circumstance. Respondent in essence argues that Roy did not act according to a preconceived plan to rape; rather, he formed the intent to force himself on Laurie, if at all, as a mere afterthought to the decision to kill.

The State's use of inconsistent and irreconcilable theories in separate trials for the same trials has been universally criticized by the judiciary by this Court and the federal courts as a possible violation of due process. (See, In re Sakarias (2005) 35 Cal.4th 140, 156; citing Jacobs v. Scott (1995) 513 U.S. 1067, [dis. op. of Stevens, J., from denial of stay]; Drake v. Kemp (11th Cir. 1985) 762 F.2d 1449, 1479 [conc. op. of Clark, J]; Thompson v. Calderon (9th Cir. 1997) 120 F.3d 1045 [reversed on other grounds *sub nomine* in Calderon v. Thompson (1998) 523 U.S. 538].) In People v. Farmer (1989) 47 Cal.3d

888, 923, this Court indicated that an inconsistent prosecutorial argument made in bad faith could be misconduct. In In re Sakarias, this Court reversed a penalty judgment because the prosecutor had used irreconcilable theories of guilt or culpability in prosecuting unjoined codefendants in a death penalty case. This Court declared:

> "the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for – and, where prejudicial, actually achieves – a false conviction or increased punishment on a false factual basis for one of the accuseds. 'The criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth.'"

(Id., at pp. 159-160; citing United States v. Kattar (1st Cir. 1988) 840 F.2d 118, 127.)

It seems equally bad faith and a violation of due process for a state's attorney in a death penalty case to seek affirmance of multiple special circumstance findings which rely on intrinsically inconsistent facts. This is equally unfair, and violates "'the due process requirement that the government prosecute fairly in a search for truth.'" (In re Sakarias, supra, at p. 160; internal citation omitted.) All three special circumstance findings were a part of the jury's original calculus for imposing a death judgment. In essence, respondent is advocating affirmance of an unreliable death judgment -- one based on the weighing of at least one special circumstance that is not supported by any evidence.

Respondent's inconsistent positions aside, People v. Clark (1990) 50 Cal. 3d 583 (RB, p. 75), and People v. Mendoza (2000) 24 Cal.4th 130 (RB, p. 75), are both cited by respondent to support the proposition that the attempted rape of Laurie was not merely "incidental" to the murder. Neither case offers compelling authority to affirm the attempted rape-murder special circumstance in this case.

In the Clark case, a defendant with the same surname was convicted of the rape of his former wife, the first degree murder of his social worker's husband, the attempted second degree murder of his social worker and her daughter, and arson of the social worker's home. An arson-murder special circumstance finding was sustained. On appeal, this Court found that the facts fell squarely within the purpose of the felony-murder-arson special circumstance rule because the arson fire was set for a completely independent purpose, other than to cause the victim's death. (Id., at p. 608.) Respondent has effectively conceded that Roy did not have as an independent purpose the intent to rape Laurie; rather, the intent was to engage in consensual sex. The Attorney General should be bound by its concession.

In People v. Mendoza (2000) 24 Cal.4th 130 (RB, p. 75), a jury found robbery, rape, and arson-murder special circumstance findings true. The evidence supporting the special circumstance findings included the fact that the victim was observed screaming for help, lying semi-nude in her flaming bed immediately following an explosion. The victim's wrists were tied to tied to the bedposts, preventing her escape. Semen was found deposited in the victim's vagina. (Id., at p. 148-153.) This Court found ample evidence to support a finding that the defendant entered the victim's home with independent, concurrent goals to rape the victim, to kill her and to destroy evidence of the rape.

Forensic evidence, as well as evidence of similar concurrent, multiple-goal-oriented activity is lacking in this case. There was no evidence nudity, much less forensic evidence of ejaculation by Roy at the time of the assault in the restroom. Contrary to respondent's gross misstatement of the facts, there is no evidence that Roy removed any of Laurie's clothing. At most, the evidence shows that Roy made sexual overtures toward Laurie, including attempted kissing, that were rebuffed. Furthermore, according to Angie's

testimony, Roy abandoned his efforts to engage Laurie in any sexual activity upon learning that she was menstruating. (RT 5031-5034.) More importantly, respondent's own synopsis of the evidence should be taken as a concession that the killing of Laurie did not occur during the commission of an attempted rape, or during immediate flight from the scene of an attempted rape. (RB, p. 83.) As respondent argues, Roy did not lure the girls to the park restroom with the intent to rape anyone; to the contrary, he liked Laurie, believed she liked him, and hoped to engage her in consensual sex. When Laurie resisted, and Angie interfered, Roy lost control. (RB, p. 83.) These facts are nothing like the facts in the Mendoza case.

Respondent also quotes People v. Berryman (1993) 6 Cal.4th 1048, People v. Ainsworth (1988) 45 Cal.3d 984, and People v. Hernandez (1988) 47 Cal.3d 315 (RB, p. 76), for the proposition that no strict temporal or "causal" connection is required to prove an attempted-rape felony murder special circumstance; all that is needed is proof that the attempted rape and the murder were "'parts of one continuous transaction.'" (RB, p. 76; internal citation omitted.) Undersigned counsel cannot help but be struck, once again, with the utter inconsistency of arguments offered to support the different special circumstance findings. In Argument V of the RB, to support the witness-killing special circumstance finding, it is argued that the attempted rape and killing occurred during entirely separate transactions. (RB, pp. 80-86.) Respondent cannot have it both ways.

The above cases are distinguishable in any event. In People v. Berryman, supra, the defendant was charged with a consummated rape and murder, not attempted rape. In that case, the victim's body was found nearly nude, with the legs spread apart. There were abrasions in her pelvic area, pubic hairs about the head, and blood and sperm cells in the vagina. The victim had been brutally beaten about the head and body and stabbed in the neck. (Id., at

p. 1064.)

This Court had no problem finding sufficient evidence of a rape and rape-murder special circumstances, and rejected the argument that there needed to be evidence of a "causal" or "temporal" relationship between the felony of rape and the murder. (People v. Berryman, supra, 6 Cal.4th at p. 1086.) That finding is largely irrelevant to this case. Respondent concedes, and the evidence strongly suggests, that Roy did not bring the girls to Lost Lake Park with the intent to rape Laurie. Furthermore, Roy's abandoned his efforts to engage Laurie in sexual activity upon learning she was menstruating. Laurie was subsequently strangled, but the precise time and circumstances of her death remain unknown. Even though all events transpired within a relatively short time frame – between 9 p.m. and 3 a.m. – the evidence does not establish the requisite concurrence of wrongful intent to have intercourse and the act of killing. (People v. Green, supra, 27 Cal.3d at p. 53.)

In People v. Ainsworth, supra, 45 Cal.3d 984, also provides little or no support for respondent's position. In that case, the defendant was convicted of murder with robbery-murder and kidnapping-murder special circumstance findings. (Id., at p. 993.) The victim's body was found four months after she was reported missing. The body was unclothed except for a blouse, and was in such an advanced state of decomposition that testing for the presence of semen was not possible. A pair of panties and a sanitary napkin were found at the victim's feet. (Id., at p. 996.)

In Ainsworth, the rape-murder special circumstance allegation was originally charged, but it was *dismissed* by the prosecutor following the preliminary examination. (Id., at fn. 2.) Laurie's body was found hours, not months, after her death. In this case, the victim's body and clothing were *not* too degraded to test. There was no forensic evidence of sexual activity of any kind. Neither direct nor circumstantial evidence supports a finding that Laurie

was killed in furtherance or Roy's design to rape her.

People v. Guzman (1988) 45 Cal.3d 915 (RB, p. 77), in which this Court affirmed a rape-murder special circumstance, is equally distinguishable from this case. In Guzman, the female murder victim was robbed and kidnapped from the boutique where she worked. Her body was found in an orchard, wrapped in a coat, with a bra wrapped around her waist. Forensic evidence proved that sexual intercourse had occurred within the 24 hours preceding the victim's death. The victim also had visible bruises, possibly caused by fingertips, on her thighs. (Id., at p. 926.) Significantly, the pathologist in Guzman testified that the rape had taken place within minutes of the victim's death, at the same location, and with no intervening flight. (Id., at p. 952.) On that basis, this Court affirmed the rape-murder special circumstance finding. (Ibid.) In this case, there is no evidence that a sexually driven assault occurred within minutes of Laurie's death, or even at the same location.

Respondent also cites People v. Hernandez, supra, 47 Cal.3d 315 (RB, p. 76), an automatic appeal affirming rape-murder and sodomy-murder special circumstance findings. In that case, two young women were brutally murdered. The nude body of one victim was found with bite marks on her breast, burned pubic hair and bruising and tearing of the vaginal area consistent with premortem intrusion of a large object such as a baseball bat. The second victim was also found nude; she, too, had suffered bruising and tearing in the anal and vaginal areas consistent with the insertion of a large object. Hernandez admitted having sex with both victims and claimed it was consensual. (Id., at p. 328-332.) This Court found sufficient evidence to support the rape-murder special circumstance finding.

The factual differences between the Hernandez case and this case are too obvious to require much discussion. In Hernandez, both of the murder victims were subjected to brutal attacks of an indisputably sexual nature. More

importantly, there was evidence that the killings occurred as the victims screamed and struggled to get away. In this case, there was absolutely no forensic evidence of rape, or attempted rape on Laurie or her clothing. Although a semen stain was detected on Roy's boxer shorts, the age of the specimen could not be determined; hence, the semen had little probative value to prove a sexual assault on the night in question. There is also no evidence to support a finding that the killing of Laurie occurred while Roy was trying to rape her, or while he was fleeing from the scene of the attempted rape. (People v. Hernandez, supra, 47 Cal.3d at p. 348.)

Quoting from this Court's opinion in Hernandez, supra, 47 Cal.3d at p. 348, respondent calls appellant's challenge to the attempted-rape special circumstance "absurd." (RB, p. 76.) Respondent specifically imputes to appellant an overly strict construction of the felony-murder special that was advanced by the defendant in Hernandez and rejected by this Court:

> "Defendant's strict construction of the temporal relationship between the rape or sodomy and the killing would preclude a felony-murder conviction or special circumstance in any case save where the victim died in the very midst of the sexual assault."

(Ibid.)

However, it is completely unnecessary for appellant to take the position of strict constructionist on the issues of temporal relationship and causation because in this case, respondent has impliedly conceded that the crimes of attempted rape and robbery were incidental to the killing. (RB, p. 83.) Having conceded that Roy's decided to kill the girls first, and "gratify his lust and greed" as an afterthought (see, RB, p. 83), it is respondent – not appellant – that engages in absurdity, by simultaneously arguing that the evidence in this case is sufficient "to support the attempted rape-murder special circumstance" (RB, p. 77) and also a witness-killing.

Respondent's comparison of this case to other Supreme Court decisions likewise fails. In People v. Wright (1990) 52 Cal.3d 367 (RB, p. 77), for example, the defendant was convicted of murder, rape, attempted robbery and burglary, and a rape-murder special circumstance allegation was found true. In that case, the police found the murder victim in her home, naked from the waist down with socks, slacks, pantyhose and underwear draped over the lower portion of her body. There was sperm detected on the outside of the victim's vagina. (Id., at p. 383.) The defendant confessed that he had tried to rape the victim, and admitted that he killed her, but claimed the killing was unintentional. (Id., at p. 384.) This Court found the evidence to sufficient to prove that the defendant committed the murder during the commission of the rape.

In this case, there was no confession and the condition of Laurie's clothing did not clearly indicate an attempt to rape. Furthermore, respondent's own account of the chronology of events suggests that the murder was not committed during the commission of an attempted rape. (RB, p. 83.)

In People v. Cain (1995) 10 Cal.4th 1 (RB, p. 78), the defendant was convicted of two counts of murder with multiple murder, robbery-murder, burglary-murder and attempted rape-murder special circumstance findings. The defendant confessed that he had entered the victims' home and robbed them but he denied committing murder or rape. The female victim's body was found on a bed, nude from the waist down with genitals exposed. There were pubic hairs found in her socks, suggesting a struggle or lack of consent. Based on the crime scene evidence and nature of vaginal injuries, a sexual assault expert testified that the victim had been raped. (Id., at p. 18-26.) This Court rejected the argument that the rape was incidental to the murder, finding "a lack of evidence from the pathologist or the criminalist that the body was moved or disturbed after death." (Id., at p. 46.) In this case, all "criminal conduct

ceased" for a time. (RB, p. 83.) Laurie's body was found hours later abandoned on a roadway, many miles from the restroom where the sexual assault had allegedly occurred.

Three Court of Appeal cases cited by responded are offered for the proposition that Roy had not reached a place of temporary safety after the attempted rape ended, and before the murder; therefore, the evidence suffices to prove attempted rape-murder as a special circumstance. (People v. Portillo (2003) 107 Cal.App.4th 834; People v. Bodely (1995) 32 Cal.App.4th 311; People v. Alvarado (2001) 87 Cal.App.4th 178; RB, p. 78.) As has already been argued in Argument III, appellant does not agree that the evidence establishes an *attempted rape*.

Additionally, the "temporary safety" argument is really just another way of saying that the attempted rape and murder were a part of the same criminal transaction. This argument is substantially undermined in Argument V of the RB. (See, p. 83.) In that argument, respondent argues that the killing was not a part of the same transaction as the sexual assault. (RB, p. 80-86.) In any event, the cited cases do not compel a finding that the evidence was sufficient to support the attempted rape-murder special circumstance finding in this case.

People v. Portillo involves a defendant convicted of murder, forcible rape and forcible sodomy, with rape-murder and sodomy-murder special circumstance findings. In this case, the female murder victim was dispatched to the defendant's apartment by an escort service. Her body was found in the defendant's apartment. The victim's pants had a broken zipper and her underwear was torn; her bra was pulled down and her sweater pulled up, revealing her breasts. An autopsy revealed blunt force trauma injuries to the victim's vaginal area and bruising around her anus. The defendant's sperm was detected inside the victim's vagina and his DNA was found in scrapings taken from under her fingernails. The defendant admitted having consensual sex with

the victim but denied having any knowledge of how she died. (Id., at p. 838-839.) The Court in essence rejected the notion that the defendant had reached a place of temporary safety in his own apartment, before the victim was dead. (Id., at p. 845.) The facts of this care are vastly different, both from the standpoint of the strength of evidence of intent to rape, and the strength of evidence that the killing was part of the same continuous transaction as the rape.

People v. Alvarado has only marginal relevance to the issues in this case since it is not a death penalty case, and it does not involve a special circumstance finding. In Alvarado, the defendant was convicted of residential burglary, residential robbery, false imprisonment and an enhancement was imposed for a rape occurring during the commission of a residential burglary. The finding of a rape committed during a burglary was affirmed. In Alvarado, the defendant broke into the home of his 81-year-old neighbor, assaulted her, and demanded money. Afterward, he pushed her into the bedroom and raped her. He fled when he heard the victim's relatives arrive. The defendant admitted to the police that he had become aroused after taking the victim's money, and decided to rape her. The Court of Appeal discussed at length the purpose of the rape-burglary enhancement, to protect vulnerable burglary victims from other criminal activity, and found sufficient evidence that the rape was committed during a burglary. (87 Cal.App.4th at p. 191.) Like the other cases cited by respondent, Alvarado does not present facts in which there is any attenuation between the rape of a victim and a subsequent murder. The rape was committed in the victim's house, by the burglar after he entered to steal the victim's property.

People v. Bodely is likewise not a death penalty case involving special circumstance findings. In Bodely, the murder victim was struck by the defendant's car as he attempted to flee from the scene of a burglary. The appellate court applied the "continuous transaction" rule to affirm the

conviction of first degree murder on a burglary-murder theory. (32 Cal.App.4th at p. 313.) In this case, there is a dearth of evidence that Roy intended to rape Laurie; however, even assuming for the sake of argument that he did, there is no evidence that she was strangled to death during the attempt, or to facilitate Roy's flight from the scene of an attempted rape.

Many of the cases cited by respondent are actually helpful to appellant's position because they present such strong evidence proving that the defendants killed their victims in cold blood in order to advance an independent felonious purpose of committing rape. More is required to prove the special circumstance of attempted rape-murder. The finding of rape-murder in the context of a capital trial is supposed to provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. (People v. Green, supra, 27 Cal.3d at p. 61.) Death cannot be imposed unless the defendant killed with an independent felonious purpose to commit rape. (Ibid.) There is no such evidence in this case. Though Roy had sexual interest in Laurie, and possibly felt she had an interest in him, there is no evidence that he killed her with the independent felonious purpose of forcing her to submit to an act of sexual intercourse.

A conviction of a capital crime which is not supported by substantial evidence denies due process of law and a reliable penalty determination guaranteed by the Fifth, Eighth and Fourteenth Amendments. (Jackson v. Virginia, supra, 443 U.S. at pp. 318-319; Woodson v. North Carolina, supra, 428 U.S. 280; Beck v. Alabama, supra, 447 U.S. 625.) The dearth of evidence of attempted rape, and the paucity of evidence that the killing and sexual assault occurred during an attempted rape are underscored by the jury's questions response to the evidence and instructions in this case. On January 3, 1994, during guilt phase deliberations, the jury posed the following question: "What constitutes the beginning and completion of an act of attempted rape? As per

count number one special" (RT 9395, 9402.) The jury was given little guidance, and was referred back to earlier instructions: "There are some questions the answer to which cannot be specific. We have provided you with all the instructions. You may want to review instructions number 6.00 and 6.01." (RT 9396, 9402.) The jury was obviously struggling with whether the attempted rape and killing were part of the same criminal transaction.

Even viewed in the light most favorable to the prosecution, the evidence was not sufficient to support a finding that the killing occurred during the course of an attempted rape. The attempted rape-murder special circumstance finding must accordingly be reversed.

V

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE WITNESS-KILLING SPECIAL CIRCUMSTANCE FINDING

In Argument IV of The RB, the Attorney General argues that Roy is guilty of the special circumstance of attempted-rape murder based on application of the "continuous transaction" rule. In that context, respondent argues that Roy killed Laurie during the same continuous transaction as the assault and attempted rape, rendering him guilty of the special circumstance of attempted rape-murder. (RB, Argument IV, p. 79.) Respondent now strains to argue that there is sufficient evidence to support the witness-killing special circumstance finding on the inverse theory, that Laurie was killed in a separate transaction, rather than during a "continuous transaction." (RB, Argument V, pp. 80-86.) As previously argued in Argument IV, respondent's Argument V is tantamount to a concession that the evidence is insufficient to establish the special circumstance of attempted rape-murder.

Appellant does *not*, by merely pointing out the inherent contradiction in respondent's position, suggest that affirmance of either the attempted rape murder or the witness-killing special circumstance finding, but not both, would

be supportable. To the contrary, appellant contends that none of the three special circumstance findings is supported by constitutionally adequate evidence. At most, the evidence shows that Roy violently assaulted, then strangled two young girls, one of whom died of her injuries. Nothing but speculation supports the finding that Roy had an independent criminal purpose to steal rather than kill, or that he killed Laurie during the course of a robbery, or to advance the purposes of the robbery, or to escape detection. (Reply, Arguments I and II.) No solid evidence of credible value supports the finding that Roy attempted, or even *intended* to force Laurie to have intercourse with him against her will, much less that he beat and strangled her while doing so, or while fleeing to a place of temporary safety. (Reply, Arguments III and IV.) Indeed, respondent, in Argument V of the RB, evidently *concedes* that Roy did not harbor the intent to rape Laurie or do the girls any harm when he brought them to Lost Lake; rather, he intended to isolate Laurie from Angie to engage in consensual sexual activity. (RB, p. 83.) Accordingly, the murder was not committed during the course of an attempted rape or robbery.

The witness-killing special circumstance finding is invalid for the simple reason that Laurie and Angie were not witnesses to any crimes other than the criminal assaults of which they were the victims. The plain language of Penal Code section 190.2(a)(1) forbids liability for witness-killing in such circumstances.. Furthermore, except in the very rare situation, in which it is absolutely clear from the record that the motive to kill the "witness" arose after the threat of prosecution for prior crimes became a reality or at least an imminent threat to the defendant, this Court has never upheld a witness-killing special circumstance where the defendant killed his victims to prevent them from reporting the crimes against themselves, which they "witnessed." Several of the cases cited by respondent fall into this category of case; all are clearly distinguishable from Roy's case, in which both the victims were assaulted,

strangled, and abandoned for dead, all on the same night.

For example, in People v. Stanley (1995) 10 Cal.4th 764, the defendant beat and raped the victim on one date, and killed her on a later date, *after* the filing of felony charges. In People v. Sanders (1990) 51 Cal.3d 471 (RB, pp. 82-83), the defendant and his cohorts botched a robbery, and the victims got away. Several days later, the defendant returned for the purpose of killing the robbery victims, to insure that they could not identify him. Finally, in People v. Almarez (1985) 173 Cal.App.3d 304 (RB, pp. 82-83), the witness-killing special circumstance was predicated on the murder of one man who had witnessed the fatal shooting of another man. The defendants forced the witnesses to the first shooting into a car at gunpoint; they intended to drive them to another location to kill them. Subsequently, one witness escaped, but the other was shot. In these circumstances, the Court of Appeal found substantial circumstantial evidence to support the jury's finding that the second murder victim was murdered to preclude him from testifying in a criminal prosecution for the killing of the first victim.

Apart from whether the 20-year-old Almarez decision would survive scrutiny under the more recent case analyses of this Court, neither that case, nor Sanders, nor Stanley, really support respondent's position. All cases present a much clearer examples of defendants who intentionally killed people to stop them from reporting, or testifying in connection with the defendant's earlier crimes. Here, the record shows nothing more than a series of violent assaults against Laurie and Angie, culminating in the death by strangulation of Laurie and the near-death by strangulation of Angie, and the abandonment of both girls' bodies several miles from the assaults.

Respondent tries vainly to distinguish several of the cases cited by appellant in the Opening Brief. (See, e.g, People v. Silva (1988) 45 Cal.3d 604; People v. Benson (1990) 52 Cal.3d 754; AOB, Argument V, pp. 78-81.)

However, these cases present facts much more similar to the case at bench than do the Stanley, Almarez, and Sanders cases.

In Silva, the defendant committed a series of violent crimes against a man and a woman over a several day period, and eventually murdered them. This Court rejected the notion that one victim had "witnessed" the robbery of the other, making the defendant eligible for a witness-killing. In People v. Benson, the defendant murdered a mother and two children. The mother was murdered on the first day, but the children were taken and molested for several days before they were murdered in order to keep them from talking. This Court rejected the idea that the children were "witnesses" to separate crimes against their mother. In these cases, the witness-killing special circumstance findings were reversed in accordance with the oft-stated principle: "The witness-killing special circumstance applies to the intentional killing of a person who witnessed a crime prior to, and separate from, the killing for the purpose of preventing the victim from testifying about the crime witnessed." (People v. Benson, supra, 52 Cal.3d at p. 785; accord: People v. Beardslee (1991) 53 Cal.3d 68, 95.) Benson and Silva, and the reasonable application of foregoing rule plainly mandate reversal of the witness-killing special circumstance in this case. Indeed, the case for reversal is at least as strong in this case, in which all events occurred during a single night. Accordingly, the witness-murder special circumstance must be reversed.

VI

IF ANY SINGLE SPECIAL CIRCUMSTANCE IS REVERSED, THE DEATH JUDGMENT MUST BE REVERSED.

Respondent argues that the death judgment need not be reversed even if one or two of the three special circumstance findings are reversed. (RB, p. 82.) In support of this proposition, respondent cites the United States Supreme Court's decision in Zant v. Stephens (1983) 462 U.S. 862, 881, and People v.

Sanders (1990) 51 Cal.3d 471, 520-521. Recent developments in the federal courts have created uncertainty regarding the correctness of this court's judgment in Mr. Sander's case, and the application of Zant v. Stephens to California's capital sentencing scheme.

In People v. Sanders, supra, this Court invalidated two of four special circumstance findings in a death penalty case, but did not reverse the penalty judgment. On February 12, 2004, the Ninth Circuit Court of Appeals granted habeas corpus relief to Mr. Sanders and remanded the case to the State of California with instructions to grant a new penalty trial or to vacate the death sentence and impose a lesser sentence. (Sanders v. Woodford (9th Cir. 2004) 373 Fed.3d 1054, 1064.) Recently, the United States Supreme Court granted certiorari in Sanders. (Brown v. Sanders (U.S. March 28, 2005) 161 L.Ed.2d 523, 2005 U.S. LEXIS 2786.) One of the questions presented is whether California's death penalty is a "weighing" statute for which the state court is required to determine the presence of an invalid special circumstance was harmless beyond a reasonable doubt as to the jury's determination of penalty.

In Sanders v. Woodford, supra, the Ninth Circuit Court of Appeals expressed its concern about this Court's affirmance of the death judgment despite the jury's consideration of two invalid special circumstances:

> "A serious concern about whether a death sentence is truly individualized arises when a jury decides to impose a death sentence based on its own assessment of aggravating and mitigating factors, and an appellate court later declares some or all of those aggravating factors legally invalid. Later invalidation of aggravating factors may undermine a jury's original calculus for imposing death, introducing the risk that a defendant in such cases will not receive 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances' [Citations omitted' Moreover, 'employing an invalid aggravating factor in the weighing process creates the possibility of randomness, by placing a thumb on death's side of the scale, thus creating the risk of treating the defendant as more deserving of the death

penalty.' [Citations omitted.]"

(Id., at p. 1059.)

In People v. Sanders, this Court reversed burglary-murder and a heinous murder special circumstance findings but affirmed the death judgment based on valid special circumstances for robbery-murder and witness-killing. Citing Zant v. Stephens, supra, as authority, this Court rejected the defendant's assertion that a jury's consideration of even a single invalid special circumstance would necessarily require reversal of the death judgment. (People v. Sanders, supra, 51 Cal.3d at p. 520.) This Court concluded that a reasonable juror would not have been "swayed by abstract concepts of 'heinous, [, atrocious or cruel].'" (Id., at p. 521.) The Court further characterized the burglary-murder circumstance and "benign" and supported by "virtually the same facts" as the robbery-murder. (Id., at p. 521.) Based on these considerations, the Court held that "there was little chance defendant was prejudiced" by consideration of the invalid special circumstances. (Ibid.)

In reversing this Court's decision in People v. Sanders, the Ninth Circuit in Sanders v. Woodford treated California's death penalty scheme as a "weighing" statute. In "weighing" states,

> "'the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances.' [Citation omitted.] In these states, 'there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose the death sentence.' [Citations omitted.] A remand for rensentencing is not necessarily required, however, in order to correct this error. In weighing states, when a jury has made the sentencing determination, state appellate courts that have declared an aggravating factor invalid in a capital case have three options. They may either: (1) remand for resentencing; (2) independently reweigh the remaining aggravating and mitigating circumstances

> under the procedures set forth in *Clemons,*[1] in which the 'state appellate court reweighs aggravating and mitigating circumstances that have already been found by a jury to exist,' [citations omitted]; or (3) independently conclude that the sentencing body's consideration of the invalid aggravating circumstance was 'harmless beyond a reasonable doubt' under the standard elaborated in *Chapman v. California, 386 U.S. 18, 23 . . . .*'"

(Sanders v. Woodford, supra, 373 F.3d at pp. 1059-1060.)

Although it classified California a "weighing" state, the circuit court also discussed the fact that the state's death penalty law has additional features not present in all weighing states. These unique features played in prominent role in the Ninth Circuit's decision to grant relief from the death judgment in Sanders. (Id., at p. 1061.)

> "A death penalty trial in California proceeds in two stages. At the initial phase of the trial, when the trier of fact decides the issue of the defendant's guilt or innocence, 'a determination must be made as to the existence of any "special circumstances."' [Citation omitted.] Special circumstances found at the guilt phase serve to make a defendant eligible for the death penalty, and are thus the 'criteria in the California capital scheme that define the class of murders for which death is a potential penalty.' [Citation omitted.] [¶] The weighing of factors under [Penal Code section 190.3] becomes relevant only at a subsequent 'penalty' or sentencing phase that occurs once the defendant has been found death-eligible in the guilt phase. At this stage in the proceedings, additional evidence may be offered and the jury is given a list of relevant factors . . . to guide it in deciding whether to impose a sentence of life without the possibility of parole or a sentence of death. [¶] With the exception of [Penal Code section 190.3's] factor (k), which invites consideration of any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, the statute does not explicitly designate any of the factors as exclusively aggravating or exclusively mitigating. It simply directs the trier of fact to aspects of the offense and the defendant's background that are relevant to penalty determination. [Citations omitted.] Although the statute

[1]Clemons v. Mississippi (1990) 494 U.S. 738.

> plainly instructs that the fact-finder 'shall' at this stage impose the death penalty if it finds that the aggravating circumstances outweigh the mitigating ones, 'this weighing is a process that by nature is incapable of precise description. [Citations omitted.] [¶] The weighing of aggravating against mitigating circumstances is a mental balancing process, but not one that involves a mechanical counting of factors on either side of some imaginary scale, or the arbitrary assignment of weights to any factor. Rather . . . a juror faced with making the requisite individualized determination whether a defendant should be sentenced to life without parole or to death is entirely free to assign whatever moral or sympathetic value that juror deems appropriate to each and all of the relevant factors."

(Id., at pp. 1061-1062.)

Based on these features, the Ninth Circuit concluded that California's scheme made it "very difficult for an appellate court that later reviews the jury's sentencing decision to surmise what weight the jury gave to a particular factor." (Sanders v. Woodford, supra, 373 F.3d at p. 1062.) The Court found that there was "a real risk that the jury's decision to impose the death penalty rather than life without parole may have turned on the weight it gave to an invalid aggravating factor." (Id., at p. 1062.)

If this Court were to reverse fewer than all of the special circumstance findings in appellant's case, it would present a much stronger case for reversal than did People v. Sanders, supra, 51 Cal.3d 471. There is nothing "abstract," or "benign" or redundant about any of the special circumstances involved here. Each of the three special circumstances in this case had to be based on completely different, concrete, predicate facts of an extremely aggravating character.

In order to find the attempted rape-murder special circumstance true, the jury had to conclude that Roy assaulted Laurie with the intent to rape her, and killed her in furtherance of that plan. Similarly, to also find true the robbery-murder special circumstance, the jury had to find that Roy had the concurrent

intent to use force or fear to steal money from Laurie and Angie – whom he knew had but a few dollars apiece – and then wantonly killed them in furtherance of robbery as well as attempted rape. Last but not least, conviction of the witness-killing special circumstance required the jury to find that Roy decided to kill Laurie to keep her from reporting an earlier crime.

In contrast to what occurred in Sanders, the prosecutor in Roy's case heavily relied on each of the special circumstance findings to support the guilt and death judgments. (Cf. People v. Sanders, supra, 51 Cal.3d at p. 521.) During the guilt phase, the prosecutor argued extensively that Roy was guilty of first degree murder on a theory of felony-murder, based on the alleged robbery and attempted rape of Laurie F. (RT 9052-9066, 9076.) The prosecutor repeatedly emphasized the "inherently dangerous" character of attempted rape and robbery in explaining the reasons for the felony-murder rule. He also argued at length about the witness killing special circumstance allegation. (RT 9066-9069.) During penalty phase argument, the prosecuting attorney reminded the jury that the "terrible murder of Laurie [F.] and the other crimes against her and against Angie [H.], those are not things that are forgotten." (RT 11834.) He also argued that in selecting the penalty, the jury must consider the circumstances of the crimes and "the existence of any special circumstances." (RT 11839.) For this reason alone, reversal of the death judgment is warranted in this case, regardless of what the United States Supreme Court does in Sanders.

One further factor that sets this case apart Sanders is the complete discontinuity in Roy's legal representation in violation of the Sixth Amendment. Roy's attorney for the penalty phase, Ernest Kinney, was not present during a significant portion of the guilt phase testimony. He was substituted in as lead counsel for the penalty phase over his vehement objection, after lead counsel Barbara O'Neill developed cancer. Mr. Kinney

asserted his very poor health and fatigue, as well as his absence during a substantial portion of the guilt phase as reasons he did not wish to act as lead counsel. Immediately following the deputy district attorney's penalty phase argument, Mr. Kinney renewed an earlier motion for mistrial, explaining that his absence during the guilt phase trial was proving a significant hindrance to adequate penalty phase representation, even more so than he had anticipated. (RT 11929.) The motion for mistrial was nevertheless denied. (RT 11930.)

It remains to be seen whether the United States Supreme Court will agree with the Ninth Circuit that California is a "weighing" state. If so, and assuming this Court reverses fewer than all three special circumstances, the death judgment in this case may not be affirmed without a finding that the jury's consideration of aggravating circumstances was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 23; Morales v. Woodford (9th Cir. 2003) 336 F.3d 1136, 1147.)

Respondent cannot meet the Chapman standard in this case. Not only was the jury invited to consider as separate extremely aggravating circumstances that Roy had committed an attempted rape-murder, and a robbery-murder, and in addition, killed Laurie in cold blood to keep her from testifying. In addition, Roy's ability to defend against these charges was severely impaired. His attorney's performance was severely compromised by health problems and fatigue. In addition, defense counsel was disadvantaged against the prosecuting attorney because he was either *not* present, *not* actively engaged, or *not* acting as counsel at all when much of the guilt phase testimony was presented. Under such circumstances, it is even more likely that the death judgment was materially influenced by the jury's consideration at the penalty phase of three separate aggravating circumstances, including an attempted rape-murder, a robbery, and a witness killing.

Even in a "nonweighing" state, reversal of the death judgment is

necessary when invalid special circumstances have been considered, unless the state appellate court finds that the invalid factor "would not have made a difference to the jury's determination." (Stringer v. Black (1992) 503 U.S. 222, 232.) Even that standard would be difficult to meet here, where the distinct special circumstances included attempted-rape murder, robbery-murder and witness killing, and the jury was clearly directed it must consider "(a) the circumstances of the crime of which the defendant was convicted in the present proceeding *and the existence of any special circumstances found to be true*" (CT 1614; emphasis added). Therefore, in this case more than any other, if one or two – but not all – of the special circumstance findings are reversed, the Eighth Amendment and Fourteenth Amendments' concern for fairness and reliability demands a remand for a new penalty trial.

ARGUMENT SECTION 2
(COUNSEL-RELATED ISSUES)

VII

THE COURT ABUSED ITS DISCRETION IN DENYING THE SEPTEMBER 29, 1993 AND OCTOBER 8, 1993, MARSDEN MOTIONS.

In a separate response to the first of appellant's "Section 2" arguments, which describe the overall breakdown in the attorney-client relationship in appellant's case (AOB, p. 84-180, Arguments VII-XVI), respondent argues that there was no abuse of discretion involved in the denial of appellant's motions to discharge counsel, brought on September 29, 1993, and October 8, 1993, respectively.

Respondent's cited authorities are not on point. A number of the cited cases are rulings of the Court of Appeal arising from noncapital convictions.

For example, in People v. Kaiser (1980) 113 Cal.App.3d 754 (RB, p. 96), a defendant's assault and battery convictions were affirmed by the appellate court despite the denial of motions for a continuance and to discharge counsel. The motions were made in the middle of trial, and the trial court made a finding that the defendant's request to substitute counsel was untimely and made for the purpose of delay. In addition, the trial court made adverse findings that reasons recited for discharging counsel were without substance, and that the breakdown in the relationship was caused by the defendant's obstinacy and failure to cooperate. (Id., at p. 760-762.) None of the foregoing circumstances were present in the instant case.

In People v. Shoals (1992) 8 Cal.App.4th 475 (RB, p. 98), defendant in a cocaine possession case made a motion to discharge counsel on the second day of trial. The attorney moved to be relieved as counsel because of the client's eroded level of confidence and purported inability to cooperate with the

trial. The defendant in Shoals was permitted to state the reasons for his dissatisfaction with counsel, which included alleged pressure to take a plea bargain two months earlier, and lack of diligence in preparing the case. The midtrial request for new counsel was denied. In the instant case, Roy began requesting new counsel early in jury selection. (RT 2848-2863; 3022-3043.) Furthermore, by October 8, 1993, Roy was not just expressing "dissatisfaction" with his attorneys. Counsel, too, reported serious communications problems caused by Roy's symptoms of paranoia. In addition, counsel acknowledged that Roy's treating psychologist had warned them that Roy was suffering from mental problems, that included difficulties relating to women. (RT 3476-3492.)

In People v. Bills (1995) 38 Cal.App.4th 953 (RB, p. 95), the issue was whether reversal was required because the sealed portion of the transcript of a Marsden hearing was missing from the record on appeal. That is not the issue here. The reviewing court in Bills conducted an assessment of trial counsels' performance based on reported portions of the trial, as well as the complaints of defendant and responses that had been placed on the record in open court. The appellate court concluded that none of the asserted grounds justified discharging counsel. The judgment was affirmed.

People v. Brown (1986) 177 Cal.App.3d 537 (RB, p. 95), is not even a case involving a request to discharge counsel. The Brown case is cited by respondent for the general proposition that Roy's attorneys had an obligation to explore possible settlement of the case. Respondent argues that counsels' efforts to get Roy to offer to plead guilty did not furnish grounds for discharging counsel. Appellant does not dispute that an attorney in a death penalty case has an obligation to explore the possibility of a plea agreement that might yield a life sentence. (See, 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.9.1.) However, counsels' advocacy of a guilty plea was not the only ground

advanced to discharge counsel in this case.

People v. Smith (1993) 6 Cal.4th 684 (RB, p. 94), is a California Supreme Court case, but it involves a defendant who pleaded guilty to noncapital felony charges and then moved to withdraw his guilty pleas. He asked for new counsel to represent him at his motion to set aside the pleas. Against this backdrop, this Court discussed the standards to be applied when after trial or guilty plea, a defendant asks the court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel. This Court decided that a defendants seeking post-trial substitution of counsel were governed by the same standards as those seeking new counsel before or during trial. In Smith, this Court concluded that the trial court had not abused its discretion in denying the defendant's post-conviction Marsden motion; the defendant had fully stated his complaints to the court and his counsel had satisfactorily responded "point by point." (Id., at p. 686.)

Respondent has also cited several of this Court's capital case decisions involving denial of Marsden motions, but none with facts and issues that align with those involved in the case at bench. Indeed, in several of the cited cases, the defendant's primary complaint was that the trial court had refused to appoint a specific named attorney.

For example, in People v. Horton (1995) 11 Cal.4th 1068 (RB, p. 94), the defendant wanted the superior court to appoint the *same* attorney who had been appointed to represent him at the preliminary hearing. The trial court refused the appointment of a particular attorney based in part on the requested attorney's lack of any prior experience trying a death penalty case. In addition, in Horton, the trial court listened to each of the defendant's complaints about appointed counsel and counsel offered detailed responses and explanations. This Court rejected the defendant's argument that the trial court failed to conduct an adequate hearing to find out why the defendant was dissatisfied with

the attorney who had been appointed instead of the requested counsel. (Id., at p. 1103.)

People v. Crandell (1988) 46 Cal.3d 833 (RB, p. 95), is a mixed Marsden-Faretta case. In Crandell, a defendant charged with capital murder demanded appointment of Irving Kanarek, a Los Angeles attorney of some notoriety. The Court refused to appoint Mr. Kanarek, and appointed the Public Defender instead. The defendant claimed he had a conflict with the Public Defender, which the Public Defender denied. The defendant expressed particular objections to what he characterized as a policy of the Public Defender to plea bargain cases without investigation. He also complained that his appointed public defender had failed to investigate, had advised him to plead guilty, and had failed to communicate adequately about the case. The appointed attorney categorically denied the charges. (Id., at p. 858-860.) Following a Faretta hearing, the defendant elected to represent himself. The Court found no abuse of discretion in the denial of the client's motion to appoint Mr. Kanarek or other substitute counsel. The death penalty was reversed, however, because the defendant presented no mitigating evidence and merely asserted innocence.

In People v. Jones (2003) 29 Cal.4th 1229 (RB, p. 94), the defendant in pretrial proceedings moved to discharge counsel, reciting several reasons for his dissatisfaction, including his belief that the attorney believed him to be guilty. (Id., at p. 1245.) The attorney offered responses to each of the defendant's complaints and made affirmative showings that he could continue to competently represent the defendant. (Ibid.) The defendant then argued that he would be "happier" if the court would appoint the lawyer of his choice. (Id., at p. 1245.) The motion to discharge counsel was denied, and the ruling upheld on appeal. Roy did not seek to discharge his public defenders to make himself "happier." According to Roy's own doctor as well as his attorneys, he was suffering from mental problems, including sleeping problems, nightmares, and

delusions about poisoning, which were causing a serious breakdown in communication.

In People v. Memro (1995) 11 Cal.4th 786 (RB, p. 95), the defendant sought to discharge his court-appointed attorneys on numerous occasions. Each time a Marsden hearing was held, the attorneys denied with some specificity the defendant's complaints. They also denied that the relationship with the client was deteriorating. The defendant in Memro made a fourth and final motion to discharge counsel because he was in disagreement with his attorney's decision to present mitigating evidence at the penalty phase of his case. The defendant asked to discharge counsel, or alternatively, for an order directing that counsel not mount a penalty phase defense. The attorney acknowledged to the Court that counsel was withholding the identities of penalty phase witnesses from the defendant, who had been attempting to get witnesses to not to cooperate once he learned their identities. (Id., at p. 856.)

The problems of communication in this case were not the result of trial counsels' refusal to comply with Roy's demands not to mount a defense. If anything, Roy's concern was that counsel were not doing enough to mount a defense. Furthermore, in the case at bench, unlike Memro, the attorneys admitted that communication had broken down due to Roy's mental problems.

In People v. Lucky (1988) 45 Cal.3d 259, the defendant never moved for the discharge or substitution of his court-appointed attorney and he declined several opportunities afforded to him by the Court to state grounds for dissatisfaction with counsel. This Court rejected the defendant's argument on appeal, that the trial court had a *sua sponte* obligation to make further inquiries regarding the need for new counsel merely because: (1) the defendant testified against the advice of counsel; (2) the defendant began acting in a bizarre manner and was removed from the courtroom prior to closing argument, which resulted in a referral for a competency evaluation; and (3) the defendant

voluntarily elected not to cooperate with his attorney at several junctures during the trial. (Id., at p. 282-283.) Obviously, in this case Roy made multiple motions to discharge counsel which were denied by the Court.

The case at bench is readily distinguishable from all authorities cited by respondent. The issue here was not just whether Roy's female public defenders were performing competently, as respondent seems to argue is the paramount issue (RB, p. 95), but rather, whether communication had so irremediably broken down at the time of the motions that effective assistance of counsel was unlikely to result. (People v. Crandell, supra, 46 Cal.3d at p. 854; Brown v. Terhune (N.D. Cal. 2001) 158 F.Supp.2d 1050, 1064; Hudson v. Rushen (9th Cir. 1982) 686 F.2d 826, 829; Brown v. Craven (9th Cir. 1970) 424 F.2d 1166, 1170.)

Respondent implies that the breakdown in the attorney-relationship was caused by Roy's intransigence. The record belies this. During the competency trial, one expert, Dr. Woods, found that Roy suffered from major depressive order with psychotic features so severe that it prevented him from being able to rationally assist his public defenders. (RT II 222-261.) By the time of the October 8, 1993, Marsden motion, lead counsel Barbara O'Neill conceded that Roy had become paranoid due to his difficulty with trusting women. She also advised the trial court that she had been warned by Roy's treating psychologist, Dr. Seymour, that potential danger was created by the dynamics of two women lawyers being in control of Roy's case. (RT 3476-3479.) Ms. O'Neill explained that the dynamics of the situation were comparable to circumstances which led Roy to commit crimes against female victims in the past. (RT 3476-3482.) In addition, Ms. O'Neill pointed out testimony by doctors at the prior competency trial, indicating that Roy believed she was trying to poison him. (RT 2856.) Roy himself admitted that this was true, and asserted that he was having sleep problems and nightmares stemming from his distrust of Ms. O'Neill. (RT 2856,

2859.)

Furthermore, to the extent People v. Memro, supra, 11 Cal.4th at p. 857, furnishes precedent for this Court to consider the events subsequent to denial of a Marsden motions in evaluating the trial court's exercise of discretion, the events subsequent in this case suggest that the trial court erred. For reasons to be discussed in the arguments which follow, the communication problems did not abate. Eventually, after repeatedly denying Roy's Marsden motions, the trial court appointed a male attorney help Roy communicate with his female attorneys. This would not have been necessary had communication not irretrievably broken down.

Respondent seeks to distinguish appellant's situation from the facts presented in this Court's decisions in the Stankewitz case. (People v. Stankewitz (1982) 32 Cal.3d 80 [Stankewitz I] and People v. Stankewitz (1990) 51 Cal.3d 72 [Stankewitz II].) In Stankewitz II, this Court approved of the trial court's decision to replace the trial attorney where the defendant harbored delusions of a conspiracy between the district attorney and the public defender. (Id., at p. 88.) Respondent argues that in Stankewitz II, the trial court "'chose to cast the issue in terms of whether there should be a substitution of counsel,'" based upon the court appointed psychiatrist's testimony that the defendant might be able to rationally assist a different attorney appointed from the private bar. (RB, p. 99, fn. 53.) Respondent argues that the trial court viewed the conflict differently; it "cast the issue in terms of whether appellant was competent to stand trial." (RB, p. 99, fn. 53.) This is a distinction without a difference.

In effect, respondent argues from the trial court's finding of competency that Roy's conflicts with counsel were, *ipso facto*, not irreconcilable, but rather the product of Roy's lack of cooperation and obstinacy. Respondent misapprehends the relationship of the earlier competency proceeding to the trial

court's determination of Roy's Marsden motions. Roy's competency trial concluded on July 23,1993, more than two and a half months before October 8th Marsden motion was made. (CT 531, 568; RT IV: 832-834.) Roy's mental state in June and July of 1993 was not dispositive of his ability to communicate and cooperate with counsel in late September and early November of 1993.

Furthermore, at a competency trial, a *presumption* of competency is operative, and the defendant has the burden of convincing a jury by a preponderance of the evidence that, as the result of a mental disorder, he cannot understand the nature of the proceedings, or cannot rationally assist counsel in the conduct of his defense. (Pen. Code, §1369(A)(a) & (f).) When a defendant requests substitution of court-appointed counsel, on the other hand, the trial court's role is to insure that the defendant is not required to undergo trial with an attorney with whom he has become embroiled in an irreconcilable conflict. (Brown v. Craven, supra, 424 F.2d at p. 1170; Hudson v. Rushen, supra, 686 F.2d at p. 829.) The court decides whether the failure to order substitution is likely to result in constitutionally inadequate representation in violation of the Sixth Amendment. (United States v. Moore (9th Cir. 1998) 159 F.2d 1154; Brown v. Craven, supra, at p. 1170.)

By October 8, 1993, things had deteriorated to the point that defense counsel admitted that there had been a near total breakdown in the attorney-client relationship resulting from Roy's intransigent paranoia at having two female lawyers in control of his case. The Court made a finding at the conclusion of the hearing that Roy was "represented by competent counsel who have your best interests at heart and are willing to work like slaves to try to win this case." Ms. O'Neill expressly disagreed with the court's decision that required counsel to continue representing Roy. (RT 3492.) Under such circumstances, it was an abuse of discretion on October 8, 1993, to deny the

motion to substitute different counsel.

Denial of unconflicted counsel – not merely competent counsel – is structural error which requires no demonstration of prejudice. (Arizona v. Fulminante (1991) 499 U.S. 279, 307.) This case involved structural error, not because of a total denial of counsel as in Arizona v. Fulminante, but because Roy and his female public defenders had an irreconcilable conflict, and it is impossible to assess the impact unconflicted counsel could have had on the case. Because conflicted counsel were not removed – until Ms. O'Neill was removed for the penalty phase – there is no way of knowing how those proceedings would have been different. As such, there is no alternative to finding error reversible per se.

In addition, the denial of the Marsden motion was an abuse of discretion and in excess of jurisdiction. (Chapman v. California, supra, 386 U.S. 18, 23-24; People v. Watson (1956) 46 Cal.2d 818.) Under Chapman, reversal is required unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained." The Chapman standard for review of constitutional error must be applied here, because denial of the Marsden motions were a violation of the Sixth Amendment. (People v. Marsden, supra, 2 Cal.3d at p. 126.) The Sixth Amendment provides that criminal defendants are entitled to effective assistance of counsel at all critical stages of the proceedings against them. (Strickland v. Washington (1984) 466 U.S. 668; United States v. Gouveia (1984) 467 U.S. 180, 187.) Given the fundamental role played by defense counsel in ensuring a reliable result, the right to counsel is not satisfied by the mere appointment of counsel. Instead, the Sixth Amendment requires counsel "who plays the role necessary to ensure that the trial is fair." (Strickland v. Washington, supra, at p. 685.)

There are two ways in which counsel can fail to play the critical role. In the first, the avenue most familiar to reviewing courts, the attorney can make

one or more errors or omissions which result in inadequate legal assistance. (Id., at p. 686.) Alternatively, the Supreme Court also recognizes that state interference may violate the right to effective assistance of counsel. Rulings of a state court or state agency may interfere with the ability of counsel to respond to the state's case or conduct a defense. (Ibid.; Geders v. United States (1976) 425 U.S. 80 [trial court precluded defendant from consulting with counsel during overnight recess in the trial]; Herring v. New York (1975) 422 U.S. 853 [trial court refused to allow counsel to make closing argument at bench trial].)

The "state interference" strand of Sixth Amendment jurisprudence recognizes that the right to counsel is not satisfied by appointing even diligent counsel under circumstances which make counsel unable to effectively represent the defendant. The right to counsel "is not discharged by an assignment [of counsel] at such time or under such circumstances as to preclude the giving of effective aid in the preparation of the case." (Powell v. Alabama (1932) 287 U.S. 45, 71.) For these reasons, the denial of the Marsden motions in this case was a violation of the Sixth Amendment, subject to Chapman review.

The state cannot show, beyond a reasonable doubt, that the same result would have been reached had Roy not been forced to trial with lawyers with whom he could not communicate. While there are many indicia of prejudice, one striking example is the inability of his conflicted counsel to convince Roy to testify. (RT 2855.) But once the court later appointed unconflicted counsel, Roy agreed to testify. (RT 5580-5581.) Furthermore, had unconflicted counsel been appointed prior to the guilt phase, he would have been more effective in the penalty phase. As it was, penalty phase counsel complained on the record that he was hindered because he was not present for all of the guilt phase. (RT 11929.)

Even if this error is viewed as nothing more than state law error, there is ample reason to find reversible error under the standard of People v. Watson. It is reasonably probable that, with the prompt appointment of unconflicted counsel, this case would have been presented much differently; some counts might have ended in not guilty verdicts and the jury may well have rejected one or more of the special circumstance allegations.

For these reasons, it was an abuse of discretion and a denial of the Sixth Amendment right to counsel, reversible error on the present record, to deny the September 29, 1993, and October 8, 1993, Marsden motions. Furthermore, in a capital case, conflicted counsel reduces the necessary heightened reliability of the conviction and judgment and therefore is a violation of Eighth and Fourteenth Amendment protections. (Beck v. Alabama (1980) 447 U.S. 625, 637.) Appellant was deprived of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (Zant v. Stephens (1983) 462 U.S. 862, 879; Woodson v. North Carolina (1976) 428 U.S. 280, 304; Johnson v. Mississippi (1988) 486 U.S. 578, 584.) Reversal of the verdicts and sentence is required.

VIII

THE TRIAL COURT ACTED IN EXCESS OF ITS JURISDICTION WHEN IT AGREED TO APPOINT AN INDEPENDENT ATTORNEY TO REPRESENT APPELLANT FOR A MARSDEN MOTION ON OCTOBER 12, 1993, AND THEN CONTINUED TAKING TRIAL TESTIMONY DURING THE ENTIRE WEEK THAT APPELLANT'S MOTION WAS PENDING.

A. Whether the trial court properly continued to take trial testimony while waiting for resolution of a pending Marsden motion:

Respondent concedes that a pending Marsden motion must be resolved on the merits before the case goes forward. (RB, p. 102; citing Schell v. Witek (9th Cir. 2000) 218 F.3d 1017.) Instead, respondent argues that it was proper for the court to continue with the trial from October 12th until October 19th,

1993, because there "was no Marsden motion pending" during this time frame. (RB, p. 100.) Respondent asserts that Roy made a Marsden motion on October 12, 1993, which the Court immediately and properly denied, and another completely separate Marsden motion on October 19, 1993, which was also denied. (RB, p. 100-101; see also, Argument IX, p. 107.) It is suggested that no motion was pending while the trial was in progress.

This construction of the facts is not supported by the appellate record. In the morning on October 12, 1993, Roy related to the court that he wanted to make another Marsden motion on — in the court's words — a "completely different ground" than he had advanced previously on October 8th. (RT 3498.) Roy also asked the trial court to reconsider its prior refusal to appoint independent counsel to represent him at this Marsden motion. (RT 3498.) The court refused to appoint independent counsel and Roy, in turn, declined to articulate his reasons for wanting to discharge counsel. The court summarily denied the motion, but then changed its mind after the noon recess. (RT 3498, 3575.)

After lunch on October 12th, the trial court announced at an *in camera* hearing that he had reconsidered, and would appoint independent counsel to represent Roy in a Marsden motion. (RT 3575-3670.) Trial testimony resumed while efforts were being made by the court to find counsel for this purpose. The firm of Barker & Associates accepted an appointment to represent Roy on his Marsden motion on October 13th, but no particular attorney was immediately assigned to the case. (RT 3777-3778.) On October 14th and 15th, Roy unequivocally objected to continuing with the trial until he had an opportunity to consult with independent counsel about his pending motion, but the court still refused to interrupt the trial. (RT 3884-3886, 4037-4040.) The court did state for the record that the motion was untimely and that Roy had not yet shown any grounds for substituting counsel. (RT 3884.) However, the

court did not suggest that no motion was pending. Why else would the court have appointed counsel if there were no motion to discharge counsel pending?

Respondent appears to presume that a written Marsden motion is required before a motion is considered "pending." There is no such legal requirement. People v. Marsden (1970) 2 Cal.3d 118, involves an oral motion to discharge counsel.

In any event, contrary to respondent's description of events, the trial court allowed the trial to continue even after Mr. Ciummo and Mr. Rugendorf filed their written Marsden motion October 19th. After the Marsden hearing with Mr. Ciummo on October 19th, the trial resumed again with Ms. O'Neill and Ms. Martinez acting as counsel, although the trial court had not yet finally ruled. Trial testimony resumed also for most of the day on October 20th. (RT 4518; RT 4561; RT 4594.) It was not until the afternoon of October 20th, when the trial court finally learned that the Public Defender would not be furnishing Roy a male lawyer, that the motion filed by Barker & Associates was finally denied. (RT 4703-4708.)

Accordingly, regardless of whether one considers the motion brought on October 12th or October 19th, the trial court did not resolve the Marsden motion on the merits before continuing with the trial. To the contrary, trial proceedings continued as though no Marsden motion were pending.

B. Whether the trial court prejudicially erred by appointing an independent attorney to represent Roy for purposes of a Marsden motion:

Respondent concedes that the trial court had no obligation to appoint an independent counsel for the purpose of bringing a Marsden motion. (RB, p. 103.) Notably, footnote 54 of the RB includes citations to several of this Court's decisions which condemn the practice of appointing independent counsel for Marsden purposes. "[A] defendant is not entitled to simultaneous representation by two attorneys, one of whom is challenging the other's

competence." (People v. Barnett (1998) 17 Cal.4th 1044, 1112.) A defendant should not be "simultaneously represented by two attorneys, one of whom is challenging the other's competence." (People v. Hines (1997) 15 Cal.4th 997, 1024.)

Despite this, respondent argues that the appointment of counsel was not prejudicial error in appellant's case. Respondent theorizes that Barker & Associates' job was not to challenge the effectiveness of Ms. Martinez and Ms. O'Neill, but rather, just to explore whether there had been a total breakdown in communication. Therefore, the appointment of Mr. Ciummo and Mr. Rugendorf did not have the normal potential to "add fuel to the fire" or to "irreconcilably damage" the attorney-client relationship. (RB, p. 105.)

Respondent's premise is false. The role of independent counsel was not just to "explore" whether there had been a breakdown in attorney-client communications. Mr. Ciummo and Mr. Rugendorf were supposed to act as advocates for Roy in connection with the Marsden motion pending before the trial court. Roy had articulated a broad range of complaints against his attorneys, some of which implicated their effectiveness as counsel in the case. For example, in the written motion filed by Mr. Ciummo, Roy complained of a lack of communication with counsel. He complained that Ms. O'Neill did not visit him frequently enough, and had a practice of arguing with Roy, ignoring him, or just walking away when he spoke. (CT 657.) Tellingly, Ms. O'Neill defended her representation of Roy. (RT 3030-3024; 3466-3493.)

At the October 19th hearing, Mr. Ciummo argued as an additional ground for discharging the public defenders that Roy was being systematically excluded from sidebar conferences. This was true; the record shows that by the time the Marsden motion was denied on October 20th, Roy had been excluded from approximately 65 unreported bench or bar conferences. (See, AOB, p. 117.) This practice was a clear violation of California law for which counsel

and the court shared responsibility. (Pen. Code, §§ 977, 1043, 190.9; see AOB, Arguments XXXII-XXXIV.) The fact that independent counsel concluded, after investigation, that there had been a breakdown in communication but not incompetency (RT 4362) does not mean that it was not their duty to investigate the competency of trial counsel in the first instance.

To say that the appointment of independent counsel had no potential to damage the attorney-client relationship is simply unrealistic. Before the Marsden motion was finally denied, Roy was represented by Barker & Associates for six court days (October 13, 14, 15, 18, 19, and 20, 1993), during which significant portions of the guilt phase trial were held with Ms. O'Neill and Ms. Martinez serving as counsel. Witnesses who testified during the period of dual representation included: Deputy Sheriff James Angus (RT 3744; October 13, 1993), Investigator Louis Beard (RT 3779; October 13, 1993); Joel Suarez (RT 3798; October 13, 1993); Mark Peruch (RT 3824; October 13, 1993; RT 3843; October 14, 1993); Officer Todd Fraizer (RT 3852, 3953; October 14, 1993); Deputy S John Friend (RT 3887; October 14, 1993); Detective Melinda Ybarra (RT 3901; October 14, 1993); Investigator John Souza (RT 3934, 3959; October 14, 1993); Donald Kellogg (RT 3981; October 14, 1993); Crime Lab Technician William Brian Stones (RT 3991: October 14, 1993; RT 4035; October 15, 1993); Nurse Linda Bethell (RT 4192; October 18, 1993); Toxicologist Tim McClain (RT 4206; October 18, 1993); District Attorney Investigator William Lehman (RT 4226; October 18, 1993); Nurse Kenneth Rowe (RT 4228; October 18, 1993); Identification Technician Sherry Creger (RT 4249; October 18, 1993); Criminologist Jack Duty (RT 4253; October 18, 1993); District Attorney Investigator Walter Rube (RT 4268; October 18, 1993); Nurse Brenda Grainer (RT 4271; October 18, 1993); Criminologist Allen Boudreau (RT 4280; October 18, 1993; RT 4391; October 19, 1993); and last but not least, Criminologist Andrea DeBondt (RT 4489;

October 19, 1993; RT 4566; October 20, 1993).

To allow the trial to resume for six more days of testimony, while Mr. Ciummo and Mr. Rugendorf met with Roy and investigated his complaints against counsel was error of constitutional dimension. During the period from October 13th through October 20th, 1993, it is inconceivable that Roy was capable of meaningful communication and cooperation with Ms. O'Neill and Ms. Martinez, as testimony was being taken from 20 different prosecution witnesses. The record belies the possibility. At one point, Roy became so frustrated during the trial proceedings that he asked the court to handcuff him to keep him from hurting the trial lawyers. (RT 4091-4092.)

Application of an "abuse of discretion" standard to assess the trial court's errors is inappropriate in this circumstance. The trial court's refusal to interrupt proceedings while a Marsden motion was pending did not involve the exercise of any discretion. (See, Schell v. Witek, supra, 218 F.3d at p. 1025, fn. 7.) Roy, in effect, had no effective counsel at all during critical testimonial stages of the trial. At the most, he had grossly conflicted counsel – i.e., two legal teams competing at cross-purposes. Denial of counsel, or representation by conflicted counsel under such circumstances, is structural error which should require no demonstration of prejudice. (Arizona v. Fulminante, supra, 499 U.S. at p. 307; see also, Reply, Argument VIII.)

If not structural error, the appointment of independent counsel, and continuation of the trial during the pendency of a Marsden motion was error and an act in excess of the court's jurisdiction. (Chapman v. California, supra, 386 U.S. 18, 23-24; People v. Watson, supra, 46 Cal.2d 818.) The "beyond a reasonable doubt" standard of review for constitutional error must be applied, because the court's handling of the issue impinged on Roy's Sixth Amendment right to counsel. (Strickland v. Washington, supra, 466 U.S. at p. 685; United States v. Gouveia, supra, 467 U.S. at p.187; People v. Marsden, supra, 2 Cal.3d

at p. 126.) State interference with the right to counsel may violate the right to effective assistance of counsel to the same extent as an attorney's ineffective performance. (See, e.g., Geders v. United States, supra, 425 U.S. 80; Herring v. New York, supra, 422 U.S. 853.)

The state cannot show, beyond a reasonable doubt, that the error was harmless. As previously stated, the right to counsel "is not discharged by an assignment [of counsel] at such time or under such circumstances as to preclude the giving of effective aid in the preparation of the case." (Powell v. Alabama, supra, 287 U.S. at p. 71.) Numerous guilt phase witnesses testified while the status of Roy's legal representation and the outcome of his Marsden motions remained in limbo. This situation added fuel to the fire of an already strained relationship, as evidenced by Roy's request to be handcuffed. (RT 4091-4092; see, People v. Hines, supra, 15 Cal.4th at p. 1024.)

For these reasons, it was an abuse of discretion and a denial of the Sixth Amendment right to appoint independent counsel, to continue taking testimony pending resolution of the October 12, 1993, Marsden motion. In addition, because this is a capital case, the court's improper handling of the Marsden motion and hearings reduced the necessary heightened reliability of the conviction and judgment and therefore resulted in a violation of Eighth and Fourteenth Amendment protections. (Beck v. Alabama (1980) 447 U.S. 625, Zant v. Stephens (1983) 462 U.S. 862, 879; Woodson v. North Carolina (1976) 428 U.S. 280, 304; Johnson v. Mississippi (1988) 486 U.S. 578, 584.) Reversal of the verdicts and sentence is required.

IX

THE COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL BY DENYING APPELLANT'S OCTOBER 12-19, 1993, MARSDEN MOTIONS.

Respondent asserts that the trial court did not abuse its discretion in denying Roy's Marsden motion following the hearing on October 19, 1993. In

essence, respondent argues that the trial court's finding that Roy's inability to communicate was "contrived" is supported by the record. (RB, p. 113.) Appellant disagrees.

As respondent has aptly observed (RB, p. 115, fn. 58), earlier in the proceedings, at least one expert, Dr. Woods, found that Roy suffered from a *bona fide* major depressive order with psychotic features so severe that it prevented him from being able to rationally assist his attorneys. (RT II 245-290.) As early as October 8, 1993, Ms. O'Neill shared with the court the fact that Roy's treating psychologist, Dr. Seymour, had written a letter to counsel warning that the two female lawyers could be in some danger as a result of negative psychological dynamics produced as the consequence of his representation by two women. (RT 3476-3482.) During the October 19th Marsden hearing, the court additionally learned through independent counsel that Roy was having nightmares about his attorneys, and that his mind was so entirely occupied with his hatred, fear, disgust and disdain that he was incapable of cooperating with his defense. (RT 4364.)

In addressing the trial court on October 19th, Ms. O'Neill confirmed that communication with Roy had completely broken down. She reiterated again that Roy had even suffered from delusions that Ms. O'Neill was physically poisoning his food at the jail. (RT 4372.) In Ms. O'Neill's opinion, Roy was not being deliberately uncooperative; rather, he suffered from a mental disorder that made it impossible for him to trust and cooperate with his attorneys. (RT 4382.) O'Neill repeatedly expressed regret that she had not taken steps earlier to insure that Roy was assigned a male attorney. (RT 4373, 4378, 4381.) She opined that Roy could and would assist in his defense if a male attorney were appointed. (RT 4378-4380, 4381-4382.)

The trial court was charged with the duty to decide whether Roy had become so embroiled in conflict with his attorneys that it was unlikely effective

assistance would result in violation of the Sixth Amendment. (Brown v. Craven, supra, 424 F.2d at p. 1170.) As this Court wisely recognized in People v. Hardy (1992) 2 Cal.4th 86, 137, trial courts must rely on the good faith and good judgment of defense counsel, because it is they who are usually in the best position professionally and ethically to determine when a conflict of interest genuinely exists. (Accord: Cuyler v. Sullivan (1980) 446 U.S. 335, 347.) In this case, trial counsel strongly believed such a conflict existed and that Roy lacked the ability to assist counsel without a substitution. The fact that the court on October 20th had briefly observed Roy having inaudible conversations with his trial attorneys at counsel table hardly suffices as a justification to disbelieve counsel's assertion that meaningful communication was no longer occurring. (RT 4703-4705.) There was no real evidence to support the finding that Roy's communication problems with counsel were "contrived."

It is significant, too, that the trial court did not immediately deny Roy's request for substitute counsel immediately following the October 19th hearing. Instead, the trial judge took Ms. O'Neill and Ms. Martinez aside and requested that they explore the possibility of replacing Ms. Martinez with a male public defender. (RT 4516.) The court did not deny the Marsden motion until it became clear that the Public Defender had no intention of supplying a male attorney. Even then, the Court offered to appoint a third male attorney to serve as an "intermediary" between Roy and his female attorneys in lieu of granting the motion. (RT 4703-4705.)

If the trial court was so convinced that Roy was malingering his communication problems, there would have been no reason to explore the possibility of substituting a male public defender, or adding a male "intermediary" to the defense team. The court was obviously desperate not to have to start the trial anew with another attorney. This is not surprising given that more than 20 additional witnesses testified during the pendency of Roy's

Marsden motions. The record overwhelmingly suggests that the court did not really disbelieve that communication had broken down. Rather, the court's finding of "contrived" communication problems was simply a *post hoc* rationalization designed to avoid a mistrial at such a late stage of the trial, or reversal on appeal.

Respondent has cited only four cases to support his position. (People v. Kaiser, supra, 113 Cal.App.3d at p. 761 [RB, p. 114]]; People v. Smith, supra, 6 Cal.4th at p. 696 [RB, p. 114]; People v. Lucky, supra, 45 Cal.3d at pp. 282-283 [RB, p. 116]; People v. Shoals, supra, 8 Cal.App.4th at p. 496 [RB, p. 116].) These cases were also cited in Respondent's Argument VII, and were discussed in Argument VII of the Reply. It suffices to say that in People v. Lucky, supra, the defendant never moved to discharge or substitute his court-appointed counsel. In contrast, Roy repeatedly sought to discharge counsel. People v. Smith involved a *post-conviction* motion to appoint new counsel for purposes of arguing a motion for new trial. The case did not involve multiple mid-trial Marsden motions where attorney and client agreed that the relationship had hopelessly and irretrievably broken down.

People v. Kaiser, supra, and People v. Shoals, supra, are garden variety felony cases in which there was no risk – as there is here – that a breakdown in the attorney-client relationship might result in a wrongful death judgment in violation of the Eighth Amendment. Furthermore, in Kaiser, the defendant had waffled on several occasions prior to trial regarding his legal representation status. When the defendant finally made a mid-trial motion to discharge counsel, the court listened to the reasons offered and found them wanting. The defendant was then granted a several hour delay to seek private counsel. When proceedings resumed, the defendant indicated he had not found another attorney but was ready to proceed with his public defender. In Kaiser, the defendant's attorney did characterize his relationship with the defendant as "strained." (Id.,

at p. 760.) However, nothing in the court's decision suggests that the lawyer felt the client was suffering from severe mental illness-induced paranoia which would render him incapable of assisting in his defense. (Id., at p. 759-763.)

In People v. Shoals, supra, the defendant made a mid-trial motion for new counsel based on client's alleged lack of preparation and communication, and her months earlier advice to take a plea bargain. The attorney denied all accusations, but also asked to be relieved based on the client's erosion of confidence. Motions by the attorney and client were denied. In Shoals, there is a total absence of any facts suggesting a complete breakdown in the attorney-client relationship due to a serious mental illness.

There simply are no published appellate court decisions condoning anything like what the court did here. The court's October 20th ruling cannot be evaluated in a vacuum, ignoring that which preceded. When Roy first sought a change of counsel on September 29, 1993, jury *voir dire* was still in progress. (RT 2847.) His second motion, on October 8, 1993, was made before a single witness had taken the stand. (RT 3465.) Roy's third request to discharge counsel, on October 12, 1993, also preceded opening statements and the calling of the first witness. (RT 3497.) When on the afternoon of October 12, 1993, the court changed its mind and decided to appoint counsel for purposes of assisting Roy with his Marsden motion, only the two witnesses, the victims' mothers, had given brief testimony. (RT 3536, 3556, 3575.) By the time the court was faced with a final decision on the Marsden motion that was initiated on October 12th, more than 20 prosecution witnesses had taken the stand. On October 20th, faced with Ms. O'Neill's unequivocal opinion that Roy was no longer capable of assisting in his own defense and would be at greater risk to suffer the death penalty unless a different attorney were appointed (RT 4379-4380), it is no wonder that the trial court felt compelled to take actions, and make findings transparently designed to salvage the trial.

Nonetheless, by virtue of the court's actions, no less than in the case of Brown v. Craven, supra, 424 F.2d at p. 1170, Roy was charged with a grievous crime, and compelled "to undergo trial with the assistance of an attorney with whom he [had] become embroiled in irreconcilable conflict."

Respondent asserts otherwise, but this case shares many similarities with the Stankewitz cases. (People v. Stankewitz I, supra, 32 Cal.3d 80; People v. Stankewitz II, supra, 51 Cal.3d 72.) In Stankewitz I, the trial attorney requested a competency hearing pursuant to Penal Code section 1368. The attorney believed, based on his discussions with psychiatrists, that fundamental conflicts had arisen between lawyer and client as a product of the client's mental illness. (Id., at p. 88.) According to a mental health expert, the defendant suffered from alternating feelings of persecution and grandiosity, and delusions that his public defender was in collusion with the prosecutor. In preliminary proceedings under Penal Code section 1368, a mental health expert testified that Roy could not cooperate in a rational manner with the public defender, but might well be able to cooperate with counsel from the private bar. The trial court declined to find a doubt regarding the defendant's competency, and also denied his request for substitute counsel. This Court reversed.

On appeal in Stankewitz I, this Court found substantial evidence in the record of the defendant's inability to rationally assist the public defender. The Court stated: "In the particular circumstances of this case, a substitution of counsel might have avoided altogether the necessity for ordering a full competency hearing. . . . [¶] Counsel's own testimony – confirmed by Roy – explicitly indicated the existence of a 'fundamental dispute' between counsel and client which 'no amount of discussion . . . could resolve . . . .'" (Stankewitz at p. 93-94.)

After the judgment was reversed in Stankewitz I, the case was returned to Fresno County for retrial. The Public Defender was again appointed to

represent the defendant. The defendant's assigned attorney again declared a doubt regarding the client's competency and the court suspended proceedings for hearing pursuant to Penal Code section 1368. The defendant objected, and instead moved for substitution of counsel, citing a fundamental conflict of interest between himself and the Public Defender. The court held a hearing on the defendant's Marsden motion without first determining the competency issue. The trial court granted the defendant's motion for substitution of counsel, and found that this rendered the competency issue moot. (Id., at p. 87.) The trial court's decision was upheld.

In this case, a competency trial was held approximately three months prior to the trial, and resulted in a jury finding of competency. This is a distinction without a difference. The record shows that in June of 1993, when the competency proceedings were initiated, Ms. O'Neill still believed Roy to be legally competent, although admitted having concerns about his ability to cooperate with counsel. (RT 43-44.) Roy also believed himself to be competent. (RT II: 401 [testimony of Dr. Charles A. Davis].) It was the court who declared a doubt concerning Roy's competency, and referred the matter for a competency evaluation. (RT 50.)

At the competency trial, the defense expert, Dr. George Woods, testified that Roy was suffering from a major depressive disorder with psychotic features, including auditory hallucinations of a girl crying, and profound paranoid delusions. (RT II: 243, 249, 252-252.) According to Dr. Woods, the paranoia made it impossible for Roy to assist counsel in a rational way, in part because he believed that his attorneys were responsible for poisoning his food. (RT II: 261-264, 272, 284.) . Dr. Woods performed testing to screen for malingering and concluded that Roy's inability to communicate with counsel was not volitional, but rather caused by psychosis. (RT II: 289.)

Three prosecution experts offered somewhat contrary opinions. Dr. Charles Davis testified that Roy did not communicate anything to him during his interview suggesting that he suffered from abnormal phobias or obsessions. According to Dr. Davis, even if Roy did suffer from frequent hallucinations of a girl crying, this would not necessarily keep him from cooperating with his attorneys. (RT II: 424-428.) Roy did tell Dr. Davis that he disliked his attorneys, and that the judges and lawyers all acting in concert to kill him. (RT 438.) However, Dr. Davis felt that Roy was malingering his paranoid thinking to manipulate the system. (RT II 446.) Given that Roy behaved in a friendly, outgoing and cooperative manner during the competency evaluation, and opined that he was competent to stand trial, one might rhetorically ask why Roy would "malinger" symptoms of paranoia. (RT II: 399-400.) In any event, available tests to detect malingering were not performed by Dr. Davis. (RT II: 475.) Dr. Davis acknowledged that it could alter his professional opinion if Roy really had believed his attorneys were poisoning his food. (RT II: 471-472.)

Another prosecution expert, Dr. Frank Powell, also testified at the competency trial. Dr. Powell acknowledged that Roy believed people in the jail were trying to kill him, and that he experienced fear in the courtroom when people were looking at him. (RT 570.) Dr. Powell nonetheless concluded that Roy suffered from no psychosis or mental deficiency that would render him incompetent to stand trial. (RT 574-575.) A third expert, Dr. Richard King, also testified that Roy suffered from mild paranoia but was not psychotic. (RT 655, 666.) Dr. King concluded that Roy seemed "comfortable" with his attorney (RT 667) – Roy only mentioned having one attorney – and was able to assist her. (RT 655.)

From Ms. O'Neill's numerous statements to the court during Marsden proceedings, it is clear that Roy's relationship with his attorneys continued to deteriorate after the July 1993 competency evaluations and verdict. (RT 4372-

4374, 4378-4382, 4386.) "Logic alone dictates that the greater the hostility between the defendant and his counsel, the longer the duration of the rupture in relations between the two, the less communication there is between them, and he more ineffective the counsel's performance appears, the more likely it is that the case will be analyzed in terms of whether the defendant was represented by counsel." (Hudson v. Rushen (9th Cir. 1982) 686 F.2d 826, 832.) A complete denial of effective counsel violates the Sixth Amendment and principles of Gideon v. Wainwright (1963) 372 U.S. 335. (Ibid.)

Even if the relationship had not deteriorated in the intervening period, serious errors committed during the competency trial deprived the jury's finding of legal competency of its reliability. To cite just one example, during the competency trial, the trial court permitted the jury to hear completely irrelevant testimony that Roy had entered a plea of not guilty by reason of insanity against his public defenders' advice. (AOB, Argument L, p. 463.) This evidence was roughly the equivalent of telling the jury that Roy's own lawyers did not believe there was any merit to Roy's claims of mental illness.

In a footnote (RB, p. 115, fn. 58), respondent argues that the trial court asked defense counsel to produce an expert to testify regarding the Marsden issue. The implication is that the trial court's ruling was proper because of the absence of expert testimony. In fact, the cited page of the record does not establish that Roy's Marsden counsel – Mr. Ciummo and Mr. Rugendorf – received a request from the court to bring in a mental health expert. What the record establishes is that sometime after the October 19th hearing, Judge Fitch took Ms. Martinez and Ms. O'Neill into his office and discussed with them the possibility of getting an expert to testify concerning "strictly Marsden matters." (RT 4516.) Since this discussion apparently occurred off the record, the precise nature of the conversation cannot be told. It is nonetheless clear that the attorneys from Barker & Associates were not there. If this passage proves

anything, it is that Ms. O'Neill and Ms. Martinez continued their practice of meeting with the trial court outside the presence of their client even after Roy had complained – through his independent Marsden counsel – that he was dissatisfied with his trial attorneys in part due to his exclusion from numerous at-bench proceedings.

In any event, a defendant does not bear the burden of producing a mental health expert to support a motion to discharge counsel.[2] To impose such a burden would be unworkable. As respondent has conceded, this Court's view is that independent counsel should not be appointed to assist a defendant making a mid-trial Marsden motion. (RB, p. 103, fn. 54; see also, People v. Barnett (1998) 17 Cal.4th 1044, 1112; People v. Hines (1997) 15 Cal.4th 997, 1024-1025.) Since most defendants will not have independent counsel at a Marsden proceeding, the burden should fall on the trial court to appoint an expert if the court harbors a doubt about the defendant's competency, or his ability to assist and communicate with counsel.

Ms. O'Neill consulted with mental health experts, including Dr. Seymour and Dr. Woods, and based thereon made a good faith representation to the court that in their opinion, Roy was no longer capable of cooperating because of his intransigent paranoia, and thus was likely to receive ineffective counsel. There was no reason to believe her statements were made to avoid duty, or were not true. "'Attorneys at law are, in a sense, officers of the court, and are under oath; and, when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'" (State v. Brazile (La. 1954) 226 La. 254, 265; 75 So.2d 856; citation omitted; cited with

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[2]Roy's trial attorneys may have had any number of sound reasons for not wanting to use Dr. Seymour, Roy's treating therapist, in connection with the Marsden proceeding. Among other concerns, counsel may not have felt it wise to jeopardize the longstanding treatment relationship by using Dr. Seymour as a witness in a courtroom setting. Dr. Woods had already testified at the competency trial, and he had consulted with Dr. Seymour.

approval in Holloway v. Arkansas (1978) 435 U.S. 475, 486.)

When Ms. O'Neill admitted she could no longer effectively communicate with Roy, the court had available the two options discussed in Stankewitz I and Stankewitz II. The trial court could have referred the matter for another competency evaluation to determine whether Roy was presently able to assist counsel; alternatively, the trial court was free to moot the competency issue by appointing a different attorney to represent Roy at his capital trial – one about whom Roy harbored no paranoid delusions. As in the Stankewitz cases, the trial court committed reversible error by choosing neither course of action.

The denial of the October 12-19, 1993, Marsden motion constituted structural error, not because of a total denial of counsel as in Arizona v. Fulminante, supra, but because Roy and his female public defenders had a longstanding, irreconcilable conflict which made communication a virtual impossibility. For reasons already discussed in Argument VII of the Reply, it is impossible in hindsight to assess the impact unconflicted counsel could have had on the case. As such, there is no alternative to finding error reversible per se. (Arizona v. Fulminante (1991) 499 U.S. 279, 307.)

At the very least, as demonstrated in Arguments VII and VIII of the Reply, denial of the Marsden motion was more than an abuse of discretion. Because the denial of the motion followed the appointment of independent counsel, and continuation of the trial testimony for six days while the Marsden motion was pending, this resulted in a profound interference with Roy's Sixth Amendment right to counsel. (Strickland v. Washington, supra, 466 U.S. 668; United States v. Gouveia, supra 467 U.S. 180.) Hence, the applicable standard of review is dictated by Chapman v. California, supra, 386 U.S. 18, 23-24. Under Chapman, reversal is required unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained."

The state cannot show, beyond a reasonable doubt, that the same dire result – conviction on all counts, enhancements and special circumstances, and imposition of a death judgment – result would have been reached had Roy not been forced to proceed to the testimonial portion of the trial with lawyers with whom he could not communicate. As appellant has previously pointed out, obvious indications of prejudice can be found in the record of the penalty trial. Ms. O'Neill was eventually discharged due to illness and replaced by Mr. Kinney, over his objection that he had not been present for much of the guilt phase evidence. Had Roy's Marsden motions been granted earlier, counsel would have been more effective at the penalty trial. Instead, penalty phase counsel was forced to undertake belated representation, and complained on the record that he was hindered because he was not present for all of the guilt phase evidence. (RT 11929.)

Even if this error is viewed as nothing more than state law error, there is ample reason to find reversible error under the standard of People v. Watson, supra, 46 Cal.2d 818. (See, Reply, Argument VII.) Under the circumstances, it is reasonably probable that, with the prompt appointment of unconflicted counsel, a more favorable result would have been obtained.

Furthermore, denial of Roy's Marsden motion under the circumstances at bench reduce the reliability of the conviction and death judgment in violation of Eighth and Fourteenth Amendment protections. (Beck v. Alabama, supra, 447 U.S. 625, Zant v. Stephens, supra, 462 U.S. 862; Woodson v. North Carolina, supra, 428 U.S. 280; Johnson v. Mississippi, supra, 486 U.S. 578.) Reversal of the verdicts and sentence is required.

X

IT WAS REVERSIBLE ERROR TO APPOINT ERNEST KINNEY TO SERVE AS AN "INTERMEDIARY" BETWEEN APPELLANT AND HIS PUBLIC DEFENDERS.

During the trial, Mr. Kinney served in an exclusively "intermediary" capacity from October 25, 1993, until November 8, 1993. (RT 4790, 5583.) On the latter date, a request by Mr. Kinney to be elevated to the status co-counsel was granted. (RT 5583.) Respondent argues that it was completely proper for the trial court to appoint Mr. Kinney to facilitate communication between Roy and his attorneys. (RB, p. 119.)

Respondent cites three cases in support of the proposition that a court may appoint a person to facilitate communication between a defendant and his attorneys. (RB, p. 119; People v. Tamayo (Ill. 1978) 383 N.E.2d 227, 229; In re Sara D. (2001) 87 Cal.App.4th 661, 667; State v. Davenport (N.J. 2003) 827 A.2d 1063, 1071.) None of these cases involves the appointment of an "intermediary" attorney to help a criminal defendant communicate with court-appointed counsel in the wake of charges by the defendant *and* his attorney that communication has completely broken down. In Tamayo, the issue was not whether the court erred by appointing a Spanish-speaking attorney to assist with communication, but rather whether the trial court erred by finding the defendant fit to stand trial. In In re Sara D., the issue at bench was whether it violated due process for a trial court to appoint a guardian *ad litem* for a parent in a Welfare and Institutions Code section 300 proceeding, without giving the parent an opportunity to contest the need. In State v. Davenport, the question was whether a defendant's Faretta right of self-representation was infringed by his exclusion from sidebar conferences at which he was represented by a "standby" counsel.

Appellant's case falls squarely within the rule of cases previously cited: People v. Smith, supra, 6 Cal.4th at p. 695; People v. Barnett, supra, 17 Cal.4th

at p. 1112; and People v. Hines, supra, 15 Cal.4th at p. 1024. Appointing a third attorney to act as an intermediary posed just as much risk of harm to the primary attorney-client relationship as it did to appoint independent counsel to represent Roy at the Marsden motion. In fact, since the trial court in this case did both, the error is compounded.

Furthermore, the record suggests there may have been a tug-of-war between the public defenders and Mr. Kinney over control of the case during the period from October 25th through November 1, 1993. On November 1, 1993, just less than a week after Mr. Kinney was recruited, the trial prosecutor wrote a letter to the court protesting that the public defenders and Mr. Kinney were functioning as two different defense teams with divergent tactics. He stated: ""For example, one team is planning to call the defendant as a witness and one team is not. Also, one team is calling a psychologist and the other team is not." (SCT #2: Vol. 7: 1849.) There is also evidence in the record of acrimony between Mr. Kinney and Ms. Martinez. (RT 10396.)

Respondent argues that the fact that Mr. Kinney gradually assumed a more active role, and eventually became designated third co-counsel, is "of no consequence." (RB, p. 120.) The case cited for this proposition, People v. Clemmons (1990) 224 Cal.App.3d 1500, is completely irrelevant. The Clemmons case involved a defendant who was represented by two separate attorneys in two separate criminal cases that had been consolidated for trial. The issue in that case was whether the defendant's confrontation rights were denied because the court imposed a restriction, without any objection by the defendant or counsel, that limited the opportunity for cross-examination to one attorney for each prosecution witness.

The significance of Mr. Kinney's evolving role cannot be evaluated without reference to the events that preceded his appointment. By October 25, 1993, Roy had been fighting for more than two weeks to discharge the public

defenders and have a different attorney appointed. While his Marsden motion was still actively pending, and independent counsel were hastily working to investigate the situation, for many more days Roy was forced to endure continued representation by Ms. O'Neill and Ms. Martinez, as witness after witness testified. Yet Ms. O'Neill's statements make it clear that during this entire period, meaningful communication with the client was virtually impossible.

Respondent, in effect, seeks to make a silk purse out of a sow's ear by quoting at length from portions of the record wherein Mr. Kinney extols the virtues of his involvement in the case. (RB, p. 118.) Assuming *arguendo* Roy was appeased or even happy to have Mr. Kinney's companionship and assistance, this does not necessarily negate the possibility that his involvement further damaged the primary attorney-client relationship. If anything, public defenders' willing relinquishment of additional authority to Mr. Kinney reinforces Roy's claim that the Marsden motion should have been granted in the first instance. Mr. Kinney's statement to the court on November 8, 1993, underscores the problem. "Part of the reason is, in working with Royal Clark and talking to him, he desires that I ask him questions on the stand." (RT 5582.) The trial court, having denied the Marsden motion, left the public defenders little choice in the matter. They could accept Mr. Kinney as part of the legal team or cause an even bigger rift with the client by refusing to accede to Roy's demands to have Mr. Kinney perform his direct-examination. Hence, not only was Mr. Kinney's increasing involvement in the case significant, it was virtually a foregone conclusion that it would occur, once the trial court erroneously denied Roy's request to discharge his public defenders, and offered the solution of a male intermediary who also happened to be an attorney.

Furthermore, Mr. Kinney's appointment to the legal team on November 8, 1993, does not magically reverse the violation of Roy's fundamental right to

the meaningful assistance of counsel in violation of the Sixth Amendment at all critical stages of the case. By the time Mr. Kinney joined the legal team, all 46 prosecution witnesses had testified; only John Souza remained to be briefly recalled. (See, RT Master Index; May 24, 1993-February 3, 1995.) Consequently, even if Mr. Kinney's addition to the legal team was a solution to Roy's inability to cooperate with the public defenders, the solution came far too late. Roy was for all intents and purposes deprived of the assistance of counsel for the lion's share of the guilt phase case.

The trial court's error so fundamentally impaired the attorney-client relationship in violation of the Sixth Amendment right to counsel that it must be considered structural, requiring per se reversal of the judgment. (See Reply, Argument VII; Arizona v. Fulminante, supra, 499 U.S. 279.) There is absolutely no way that a reviewing court can in hindsight determine in what manner the vacillations in the attorneys' roles impacted the overall process of the trial.

Even if this Court declines to find structural error, because the court's appointment of an "intermediary" impinged on the Sixth Amendment right to counsel, the state should be required to demonstrate that the error was harmless beyond a reasonable doubt consistent with the Chapman standard. (Chapman v. California, supra, 386 U.S. 18; see also Geders v. United States, supra, 425 U.S. 80; Herring v. New York, supra, 422 U.S. 853.) This, respondent cannot do. The record contains numerous instances which demonstrate that Mr. Kinney's gradually increasing authority in the guilt and sanity phases placed additional strains on the primary attorney-client relationship which continued to have an impact during penalty phase, even after Mr. Kinney had replaced Ms. O'Neill as lead counsel. For example, during the guilt phase, Roy agreed to take the stand, but only if Mr. Kinney was the one to question him. (RT 5582.) Prior to penalty phase, when the court announced its intention to allow Ms.

O'Neill to proceed without Mr. Kinney at "Phillips" hearings, Roy objected. (RT 5654.) Mr. Kinney and Ms. O'Neill sometimes disagreed in the presence of the court or the prosecutor on legal and tactical issues, such as proper use of evidence (RT 6878), and whom to call as witnesses. (SCT #2: Vol. 7 1849.) About the time Ms. O'Neill was discharged from the case, Mr. Kinney and Ms. Martinez sparred on the record over whether the Public Defender had been at fault for the delays due to the Public Defender's contempt litigation. (RT 10396.) On the eve of the penalty trial, Ms. Martinez objected that Mr. Kinney was so unprepared to proceed that he could not even remember the names of witnesses; Mr. Kinney disagreed and the penalty trial commenced over co-counsel's objection. (CT 1480-1482; RT 10962-10965.)

Respondent cannot show that the appointment of an "intermediary" attorney, and the resulting disharmony, was harmless beyond a reasonable doubt. Furthermore, because the error occurred in the context of a death penalty case, the court's unprecedented interference with Roy's Sixth Amendment right to counsel also resulted in a violation of his right to a reliable, individualized capital sentencing determination. (Zant v. Stephens, supra, 462 U.S. 862; Woodson v. North Carolina, supra, 428 U.S. 280; Johnson v. Mississippi, supra, 486 U.S. 578; Beck v. Alabama, supra, 447 U.S. 625.) Reversal of the guilt, sanity and death judgments is required.

XI

THE COURT MISHANDLED THE MOTIONS RELATING TO THE PUBLIC DEFENDER'S DECLARATION OF A CONFLICT.

As a preliminary matter, it bears mentioning that respondent addresses components of appellant's Argument XI in a way that never really gets to the heart of the claim: that the trial court badly mishandled the situation when the Public Defender discovered its conflict of interest, both by relieving the Public Defender, then reinstating Ms. O'Neill and later Ms. Martinez as counsel, and

also by denying Roy's Marsden motion and motion for a new jury or new trial. Appellant asserts that when the conflict of interest presented itself, the trial court should have granted the motion to relieve the public defender, appointed new counsel, and immediately granted a mistrial. Furthermore, after a two-month delay during which members of Roy's so-called legal *team* took opposing positions in litigation with respect to who should represent Roy, the trial court should have granted Roy's motion for new attorneys and ordered a new trial.

A. The discharge and reinstatement of the public defenders:

Following the declaration of a conflict of interest over Margarita Martinez's representation of potential prosecution witness James Anthony Scott (RT 9977-9981), the trial court discharged the Public Defender from representing Roy on January 25, 1994. In the place of Ms. O'Neill and Ms. Martinez, the court appointed Mr. Kinney lead counsel, overruling his adamant objections that he was engaged in another death penalty trial, and had missed most of guilt phase in Roy's case. (RT 10070-10093.) While Assistant Public Defender Dreiling's contempt writs were still winding their through the appeals courts, on January 27, 1994, the trial court changed its mind and vacated the prior order relieving the Public Defender of its duties. (RT 10260, 10332-10333.) Eventually, on March 25, 1994, after failing to obtain relief from the appellate courts, the Public Defender withdrew as counsel for Mr. Scott and conceded that the conflict of interest no longer existed with respect to Roy. (RT 10245SCT #2 1732.) The above series of events began immediately following the sanity trial and resulted in the delay of the penalty phase trial for several months.[3]

Respondent argues that the trial court did not err in reinstating Ms. O'Neill as lead counsel. (RB, p. 121.) Respondent asserts that there was no

[3]The penalty phase was delayed further when Ms. O'Neill developed cancer and had to be relieved as counsel.

conflict of interest and/or that the conflict issue is now moot, since the prosecutor eventually decided not to present any evidence of the October 15, 1992, altercation between Roy and Mr. Scott and the Public Defender agreed to resume representation. (RB, p. 127.)

Respondent paints a simple picture but ignores many salient facts. Elimination of the conflict did not occur until a full two months after the conflict was first announced, on March 25, 1994. (RT 10246.) Furthermore, a number of events contributed to the change. First, during appellate court proceedings before the Fifth District Court of Appeal, the District Attorney agreed on the record that the Public Defender would be free to argue the penalty phase of Roy's case as though the altercation with Mr. Scott had not occurred. (RT 10247, 10254-10257.) This was a change in position. Previously, the prosecutor had taken the position that he would not introduce evidence of the Scott incident in his case-in-chief, but the defense would then be precluded from presenting evidence of Roy's lack of future dangerousness, or risk having the prosecutor use the Scott incident in rebuttal. (RT 10038-10039.) Moreover, to eradicate the conflict, the Public Defender declared a conflict in Mr. Scott's pending probation violation case and (temporarily) removed Scott's former lawyer, Margarita Martinez, as second chair counsel in Roy's case to avoid any appearance of a conflict. (RT 10249.)[4]

These subsequent events do nothing to change the fact that Roy was represented by counsel who had an actual conflict of interest from January 13-20, 1994, the week the conflict was first discovered (RT 9979) until March 25, 1994, when the contempt litigation ended and affirmative steps were taken by the Public Defender to avoid the conflict. The trial court acted properly on January 25, 1994, when it relieved the Public Defender's office, but erred by prematurely reinstating the Public Defender as counsel on January 27, 1994,

[4]Ms. Martinez was reinstated later, after Roy requested it. (RT 10282-10283.)

approximately *two months* before the dual representation that had caused the conflict was terminated. (See AOB, Argument XI, p. 128.)

The case of People v. Carpenter (1997) 15 Cal.4th 312, cited by respondent as precedent for the mootness argument, presents vastly different circumstances. There, a conflict arose during a rape-murder trial when the daughter of one of the defendant's two public defenders was kidnapped and sexually molested. The trial continued with the remaining public defender, after the defendant expressly waived any potential conflict of interest that might result the former co-counsel's plight. The issue on appeal was whether the trial court erred by failing to appoint independent counsel to advise the defendant about the conflict of interest. This Court found the issue moot only as to the defender with the kidnapped daughter, whose representation of the defendant had ceased. (Id., at p. 374.)

The question of whether the trial court erred in reinstating the Public defender is not moot. Although Ms. O'Neill did not represent Roy at the penalty trial for reasons having nothing to do with the conflict of interest, Ms. Martinez did. Although Roy later requested that Ms. Martinez be reinstated, and waived any conflict of interest, he did so at a time when his only other option would have been to continue the trial with an attorney – Mr. Kinney – who had been absent during significant portions of the guilt phase trial. Consequently, his later request to reinstate Ms. Martinez does not mean the trial court acted properly when it reinstated the Public Defender's office as counsel on January 27, 1994.

B. Denial of the March 25, 1994, motions to discharge counsel and grant a new jury or mistrial:

On March 25, 1994, after a two month delay that resulted from the conflict litigation, Roy asked for all new attorneys and a new jury. (RT 10273.) When asked to explain his dissatisfaction with counsel, Roy voiced concern

that his public defenders had abandoned him and that Mr. Kinney "wasn't here at the beginning." (RT 10273.) Respondent argues that it was not an abuse of discretion to deny Roy's March 25, 1994, Marsden motion. (RB, p. 130.)[5]

Respondent asserts that Public Defender's actions did not constitute abandonment because litigation over the contempt citations was undertaken to promote the best interests of Roy. (RB 131.) This is contrary to facts in the record as well as the Court of Appeals' opinion. During the course of the conflict litigation, Ms. O'Neill and Ms. Martinez *did* abandon Roy's case. Both attorneys ceased working on the case altogether and became engaged representing other Public Defender clients. (RT 10318, 10329.) Furthermore, the Court of Appeal, in denying the Public Defender's writ, clearly implied that the Public Defender was using his representation of Mr. Scott as a subterfuge to get Ms. O'Neill and Ms. Martinez off the case. (RT 1173.)

However, whether the Public Defender "abandoned" Roy or had his best interests at heart is largely beside the point. Roy, during the two-month litigation period, was represented by both Mr. Kinney, who actively opposed the discharge of Ms. O'Neill and Ms. Martinez for his own personal health reasons, and Ms. O'Neill and Mr. Dreiling, who both vehemently opposed being forced to remain on the case. Mr. Kinney was effectively taking legal positions on issues that were contrary to the positions advanced by the Public Defender. Under such circumstances, Roy's loss of confidence in all counsel was certainly not manufactured.

Moreover, Mr. Kinney was absent for much of the guilt phase trial. Although respondent argues that this should not matter because Mr. Kinney was present, at least as an observer, for "almost" every witness who testified after his appointment (RB, p. 132), the fact is that Mr. Kinney was entirely

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[5]Of course, appellant takes the position that the court should have discharged the two deputy public defenders and appointed new counsel back in October of 1993.

absent during the testimony of the first 29 guilt phase witnesses. (RT 4790.) Sixteen more guilt phase witnesses testified while Mr. Kinney was acting as an intermediary, before he assumed the role of third chair counsel. (RT 5579-5583.) When on March 25, 1994, the trial court first drafted Mr. Kinney to act as second chair counsel with Ms. O'Neill, Mr. Kinney objected that his earlier participation in the case had been so limited, that he would be about as useful to Ms. O'Neill as a "potted plant." (RT 10265.) Faced with these circumstances, it was an abuse of discretion for the court to deny Roy new counsel, and to refuse to empanel a new jury.

Respondent argues the trial court's failure to declare a mistrial was not an abuse of discretion because "there was no March 25, 1994 motion for mistrial." (RB, p. 130.) The trial court should have granted a mistrial and empanelled a new jury without the necessity of a motion. The court was on notice that a mistrial was necessity. At the hearing on March 25, 1994, Mr. Kinney made a rambling statement to the court indicating he would make a motion for mistrial if he were lead counsel. Mr. Kinney argued the motion as if the motion were pending. The grounds offered for the "nonexistent" mistrial motion were the problems caused by long delays in the trial and lack of continuity of counsel. Mr. Kinney averred that he had no right to make a motion for mistrial because he was "second counsel" but recommended that lead counsel should move for mistrial on such grounds. (RT 10261-10265.) Then Mr. Kinney further implied that he was concerned that Roy might not be receiving adequate representation. (RT 10265.) The very unique circumstances of this case demanded a mistrial at that point.

For reasons previously articulated in Argument VII of the Reply, denial of unconflicted counsel is structural error (Arizona v. Fulminante, supra, 499 U.S. 279) and failure to declare a mistrial should be treated as reversible per se. (See also, Mickens v. Taylor (2002) 535 U.S. 162, 167; Holloway v. Arkansas,

supra, 435 U.S. at pp. 485-486.) By March 25, 1993, when Mr. Kinney gave his rambling discourse on why he would move for mistrial if he had the authority, Roy had been without the meaningful assistance of counsel during a significant portion of the guilt phase trial because the trial court erroneously allowed the trial to proceed while independent counsel was still investigating what grounds to assert in support of Roy's motion to discharge counsel. Mr. Kinney's belated appointment as intermediary, and later full-fledged counsel, may have appeased Roy but it obviously increased rather than decreased the breach between Roy and his female attorneys, and even forced lead counsel to relinquish some control to Mr. Kinney to in order to insure client cooperation. (See, Reply, Argument X.) Given the historical context, it is impossible to quantify the additional damage to the fundamental attorney-client relationship that must have occurred as the consequence of two months of conflict litigation in which the Public Defender bitterly fought to remove themselves from Roy's case while Mr. Kinney fought to retain them. The interference with appellant's Sixth Amendment right to counsel was so profound by this stage of the proceedings that it was wrong to continue with the trial, and there is no way to assess the prejudice that resulted from doing so in hindsight.

Alternatively, for reasons previously articulated in Argument VII of the Reply, including the fact that the court's error impaired Roy's Sixth Amendment right to counsel, it is incumbent on the state to establish that the error was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18.) The Attorney General cannot meet this burden. The prejudice is readily apparent from the face of the appellate record. The jurors' loss of memory due to passage of time is well established. (See, AOB , pp. 246-248.) For example, after the penalty trial, jurors explained that they had imposed death because Roy had expressed no remorse and never said he was sorry. In fact, at the guilt phase trial, Roy testified that he was deeply remorseful and

sometimes suffered from hallucinations of Laurie crying. (CT 1752; RT 5799-5800, 5897, 6061-6062, 6993.) The prosecutor, too, must have suffered from memory lapses because he argued facts that do not appear anywhere in the guilt phase testimony. (See, AOB, p. 247; RT 11839; RT 3406, 3661, 3747, 5029.) Of course, such errors went uncorrected by Mr. Kinney, who was not there when contrary testimony was given. Evidence of the continuing disintegration of the primary attorney-client relationship has previously been described in Argument X of the Reply.

Needless to say, because these errors occurred during the course of a death penalty trial, the reliability of the death penalty was irrevocably compromised in violation of the Eighth and Fourteenth Amendment protections. (Beck v. Alabama, supra, 447 U.S. at p. 637; Zant v. Stephens, supra, 462 U.S. at p. 879; Woodson v. North Carolina, supra, 428 U.S. at p. 584; Johnson v. Mississippi, supra, 486 U.S. at p. 584.) Hence the guilt, sanity and penalty phase judgments must be reversed.

XII

THE TRIAL COURT ERRED BY DENYING THE MAY 25, 1994, MOTION FOR MISTRIAL, AND BY APPOINTING MR. KINNEY LEAD COUNSEL AFTER MS. O'NEILL DEVELOPED CANCER.

A. The May 25, 1994, motions for mistrial:

Before Ms. O'Neill got sick, Mr. Kinney filed two motions for mistrial. The first motion alleged that the trial court had erroneously appointed Mr. Kinney facilitator of communication in lieu of granting a Marsden motion. The second argued that the four-month delay since the conclusion of the sanity trial, and the jury's probable exposure to unfavorable publicity regarding the Public Defender's efforts to withdraw from the case. Exhibits to the motion documented the press coverage on June 17, 1994, after Ms. O'Neill's cancer was diagnosed. (CT 1244-1251.) The motions were heard and denied on June 17, 1994, after Ms. O'Neill's cancer was diagnosed.

Respondent argues that the trial court did not abuse its discretion in denying the motions for mistrial. (RB, p. 134.) Appellant respectfully submits that trial court should have granted Mr. Kinney's mistrial motions for the same reason the court should have granted each of Roy's successive motions to discharge counsel, and the March 25, 1994, motion for all new counsel and to impanel a new jury. The cumulative effect of everything that had previously occurred resulted in such degradation of the attorney-client relationships in this case that a constructive denial of counsel occurred in violation of the Sixth Amendment. (Holloway v. Arkansas, supra, 435 U.S. at p. 490.) Because this occurred in the context of a capital trial, the reliability of the death judgment was undermined in violation of the Eighth Amendment. (Beck v. Alabama, supra, 447 U.S. at p. 637; Zant v. Stephens, supra, 462 U.S. at p. 879; Johnson v. Mississippi, supra, 486 U.S. at p. 584; Woodson v. North Carolina, 428 U.S. at p. 304.) The only difference is that the abuse of discretion was proportionately greater because two more months had passed since the sanity phase trial.

As respondent has reserved the remainder of his arguments to be addressed in Argument XXV, appellant also does so. (RB, p. 136.)

B. The appointment of Mr. Kinney after Ms. O'Neill developed cancer:

Respondent argues, in essence, that it was proper to appoint Mr. Kinney to replace Ms. O'Neill because Kinney was adequately prepared; he had reportedly been present for all of Angie's testimony, had read the trial transcript and had been present for the testimony of rebuttal witnesses, including Michael Hall. (RB, p. 137.) Respondent's argument relies on the following evidence of readiness, a quote from Mr. Kinney: "I have read the whole transcript. I've been here for all of Angie's testimony. And I've in depth, been following it." (RB, p. 127.) The quotation is taken completely out of context. The statement

was made on November 1, 1993, when Mr. Kinney was trying to persuade the court that he should be granted the status of co-counsel, but solely for the limited purpose of handling defense psychiatric testimony at the guilt phase trial. (RT 5521.)

The record shows that Mr. Kinney consistently opposed being appointed lead counsel to replace Ms. O'Neill, both when the Public Defender declared a conflict, and later, when Ms. O'Neill developed cancer. He did so because felt unprepared; he believed it would be a hindrance to competent representation that he had missed most of the guilt phase trial. In addition, Mr. Kinney felt justifiable concern that acting as lead counsel would jeopardize his poor health.

The first time the trial court tried to appoint Mr. Kinney lead counsel, on January 24, 1994, Mr. Kinney said he had a conflict because he was already engaged in another death penalty trial. In addition, he said:

> "But a more drastic problem is that I missed almost all of the guilt phase trial as it relates to the testimony in the guilt phase. In other words, when I came in, I believe Angie was on the stand. That was after several months. So I was not personally present for any of that testimony. [¶]And I really wonder if the Court were to have me proceed or order me to proceed in this case, having not been present for that testimony, I really believe it's a built-in problem on appeal. And it also presents a tremendous problem that I wasn't here, didn't see the witnesses, didn't get to evaluate them. And I think there is really a tremendous problem there because I wasn't present. [¶] When I came here shortly thereafter, I was here for about a week as facilitator of communication, and I got involved with the doctors, and that was my primary role. . . . [¶] The problem is I have, I've gone back to read most of the stuff, but reading gives nothing of the flavor and seeing it and seeing how it affected the jury. And I think there is a potential problem there with me continuing with this jury at this time. . . ." (RT 10054-10055.)

On January 25, 1994, Mr. Kinney again argued – somewhat incoherently – against appointing him lead counsel:

"One of the big problems I have is that, as you know, I came into this case right near the end of the guilt phase, and so I missed I don't know how many days, but roughly a month of testimony. And that was kind of evidenced by the fact that during my argument that even the sanity phase counsel would hand me slips of papers that I might be in the area the shoes were found in the trunk or the clothes found here [sic]." (RT 10083.)

Mr. Kinney further reminded the court of his limited role in the case:

"I am concerned with the penalty phase since I'm not to do that phase. That was to be done by other counsel. I haven't talked to anybody. . . ." (RT 10084.)
"As the Court is aware, I came in a special capacity to facilitate communication and came on as co-counsel to put him on as a witness and also did the doctors. And even in argument I was to cover the doctors and Royal and not get into the general part of the case if at all possible since it that wasn't my area." (RT 10085.)

On March 25, 1994, when the Ms. O'Neill was reinstated as counsel, but not Ms. Martinez, Mr. Kinney argued that he was not competent to serve as second chair counsel in Ms. Martinez's stead:

"And, also, that I couldn't be the attorney because I had not continuously represented him throughout, that I came in after the close of the DA's case. . . .[¶] . . . . My concern is this: I was originally appointed, as the Court is aware, as facilitator of communication. At the close of the DA's case, I came on as second counsel to put the defendant on the stand and to do doctors. I also argued the case and put on the sanity phase. [¶] As the Court is aware, Margarita Martinez and Barbara O'Neill were present and it was on the record, that I would not be doing the penalty phase. In fact, I've never done anything on the penalty phase; never talked to anybody or read a report. Of course I still haven't done it, because when I didn't get the case, I didn't review it. I've never done anything on the penalty phase." (RT 10262.)

Mr. Kinney further argued in anticipation of being appointed to serve as second chair counsel:

> "Here's the problem: If you're about ready to make me second counsel on the penalty phase, which I'd never contemplated that I would be, for liability aspects and time and ability to prepare, to cover myself and also cover my client, because he can't have a potted plant as second counsel, I'm going to be in my other capital case for three to five weeks, so I can't be preparing on this case. He really needs a second counsel that will be preparing on this case." (RT 10264.)

On June 6, 1994, the trial court received a letter from Ms. O'Neill notifying the court of her medical problem. On June 9, 1994, Mr. Kinney wrote a letter to the court explaining why he would be unable to replace Ms. O'Neill as lead counsel in Roy's case. (SCT #2, p. 1941.) Mr. Kinney reiterated that he was disabled from acting as lead counsel by his absence during the guilt phase of trial. He also expressed concern about potential malpractice liability resulting from his incompetence due to his absence at the guilt phase trial. In addition, he wrote:

> "Unfortunately, on a personal level, I have two factors that would preclude me from beginning July 6th as lead counsel on Royal Clark. As the Court is aware, I had a workup done on a blood pressure problem and I have recently undergone new blood pressure medication. The doctors are allowing me to work but do not want me to be in a high stress situation. Being second counsel with the responsibilities assigned by Barbara O'Neill would not be a problem. [¶] A further problem developed last week when my son was admitted into a hospital and this is a constant source of concern to my wife and I and I have been spending long hours at the hospital and this is affecting my ability to properly represent someone as lead counsel."

On June 16, 1994, Mr. Kinney gave the trial court a letter from his doctor, Ildefonso Cruz, M.D.:

> "Mr. Kinney has been on medication for hypertension for less than one month. His blood pressure is not yet under control. Due to drug interactions, titration of his medication dosage over the next six to eight weeks will require extra caution. He should avoid being involved in trials at least until August 1, 1994. (SCT

#2 1943.)

At the June 17th hearing of Roy's mistrial motion, Mr. Kinney explained further that he had been on the drug Lithium for years for his "bipolar tendency." (RT 10420.) The Lithium was causing his blood pressure to "surge" in both arms. Doctors had lowered his Lithium, but were telling him he should not get involved in any trials at all. (RT 10420.) Mr. Kinney said that did not want to have a stroke, and felt that it would be detrimental to his health to have to "get up to pace and be ready for a death case. . . ." (RT 10421.)

On the same date, the prosecutor, Mr. Cooper, objected to appointing Mr. Kinney lead counsel. He argued that Ms. Martinez should be appointed lead counsel due to Mr. Kinney's health problems, and Mr. Kinney should be assigned the role of second counsel. (RT 10437, 10442.) Mr. Kinney argued that he would be handicapped by his lack of energy even if he were acting as second chair.[6] He suggested they should wait 75 days to see of Ms. O'Neill could return to work. (RT 10446.)

Given the foregoing events, it is misleading to imply from Mr. Kinney's statements made back in November of 1993, that he felt himself competent to assume the role of lead counsel for the penalty trial. The trial court was well aware, and admitted for the record, that he was appointing Mr. Kinney lead counsel over his "strenuous objection." (RT 10473.)

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[6]Ms. Martinez remarked of Mr. Kinney's condition: "Just watching Mr. Kinney today, he's red and sweating. He looks like he's sleeping. I know he's not sleeping, but earlier he didn't respond to something the court asked and that's what concerns me." (RT 10454.) Later the trial judge also observed: "You know, I've had a chance to observe Mr. Kinney throughout the day, and also I've seen him in and out on some other occasions. And it's true I would be less than candid if I didn't admit that he doesn't have the same vigor and energy we usually associate with Mr. Kinney." (RT 10468.)

Respondent also seeks to distinguish People v. Manson (1976) 61 Cal.App.3d 102, and People v. Gibbs (1986) 177 Cal.App.3d 763, cases cited in the AOB, on the theory that Ms. Martinez was present during all guilt phase testimony, whereas the defendants in Manson and Gibbs were represented by attorneys who did not have assistance from second chair attorneys who were present at the guilt phase.

Ms. Martinez's presence during the guilt phase of the trial does not make up for the fact that Mr Kinney was completely absent during the first 29 guilt phase witnesses, and not acting as counsel until the end of the prosecution's case-in-chief. Ms. Martinez did not act as lead counsel during the penalty phase, nor was she qualified to do so. At the time of Roy's trial, she had never even handled a murder case, or an attempted murder case, much less a death penalty case. (RT 10450, 10453.) She had tried fewer than a dozen non-homicide felony cases before a jury. (RT 10453.) The Public Defender did not consider her qualified to handle a death penalty case; she was assigned a role in Roy's case to gain experience from acting as an assistant to Ms. O'Neill. (RT 10450.) Ms. Martinez opined that Roy would be denied effective assistance of counsel if she were assigned the role of lead counsel. (RT 10467.)

C. Conflict of interest:

More importantly, the issue before this Court is not just whether Roy was deprived of the effective assistance of penalty phase counsel because Mr. Kinney missed the guilt phase testimony. (Cf. People v. Carpenter (1997) 15 Cal.4th 312, 373-378.) Mr. Kinney's objections to appointment also establish a clear conflict of interest. Mr. Kinney did not want to be Roy's lead attorney. He suffered from both high blood pressure and bipolar disorder. Symptom of bipolar disorder, if not successfully treated, had the potential to impair Mr. Kinney's energy level, as well as his planning, concentration and judgment. (See, AOB, p. 101, fn. 25.)

Dicta from a disciplinary decision of the District of Columbia Court of Appeals, which quotes from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3d rev. ed. 1987) [DSM-III-R], vividly describes the behavioral symptoms often experienced by one diagnosed as bipolar.

> "The essential feature of a Manic Episode is a distinct period during which the predominant mood is either elevated, expansive or irritable, and there are associated symptoms of the Manic Syndrome. The disturbance is sufficiently severe to cause marked impairment in occupational functioning or in usual social activities or relationships with others or to require hospitalization to prevent harm to self or others. . . ."

(In re William D. Appler (1995) 669 A.2d 731, 734.)

In the Appler case, the disciplined bipolar attorney's doctor submitted an affidavit which explained:

> "The hypomanic attorney may approach his case with an extremely high level of energy, confidence and/or aggression. However, the aggression and risk-taking which may serve the hypomanic attorney well in one area, may be destructive in other areas . . . . In either instance of 'good' or 'bad' conduct, the hypomanic rarely pauses, of his own volition, to reflect on his judgment. Rather he impulsively acts and, typically, does so – whether the conduct reflects good or bad judgment – with the skill consistent with his inflated sense that he can accomplish anything."

(Ibid.)

Quoting from a Board of Professional Responsibility Committee Report, the Appler court writes:

> "Bipolar illness, apparently caused by a chemical imbalance in the brain, is often treated with lithium carbonate tablets. In the right dose, the lithium can rectify the imbalance. Generally, it takes time before the correct dosage of lithium can be ascertained. Even after the right dosage is found, the patient must be continually monitored."

(Ibid.)

The stress likely to result from Mr. Kinney's involvement in another death penalty case posed a clear danger to his health in the form of an increased risk of stroke and mental disturbance caused by reduced medication to control bipolar disorder. The doctors had decreased Mr. Kinney's dose of Lithium in an attempt to stop dangerous fluctuations in his blood pressure. The reduced dosage was causing him to experience symptoms of his bipolar mental disorder, including fatigue. It was error for the trial court to appoint Mr. Kinney lead counsel for the penalty phase despite his health problems and work overload.

A conflict of interest exists in any situation in which an attorney's loyalty to, or on behalf of a client are threatened by his or her responsibilities to another client, or by the attorney's own interests. (People v. Bonin (1989) 47 Cal.3d 808, 833.) Death penalty trials are extraordinarily stressful under the best of circumstances. A serious actual conflict of interest existed when Mr. Kinney, suffering from bipolar disorder, dangerously fluctuating high blood pressure, and drug interaction side effects, was nonetheless forced to assume the role of lead counsel in a death penalty case against the sound medical advice of his own doctors.

Although a defendant alleging denial of the Sixth Amendment right to counsel must ordinarily make the showing required by Strickland v. Washington (1984) 466 U.S. 668, an exception to that rule *presumes* a probable effect on the outcome of a criminal trial when the assistance of counsel has been denied entirely, or during a critical stage of the proceedings. (Mickens v. Taylor (2002) 535 U.S. 162, 166.) In addition, the United States Supreme Court has suggested that individual inquiry into prejudice may be also be foregone when an actual conflict of interest exists, the defendant's objections have gone unheeded, and the nature of the conflict is such that the risk that the verdict is unreliable is so high that case-by-case inquiry is unnecessary. (Ibid;

see also, Smith v. Ylst (9th Cir. 1987) 826 F.2d 872, 875; United States v. Cronic (1984) 466 U.S. 648, 659, fn. 26.)

This is a case in which prejudice should be presumed. The conflict was serious and known by the court. All counsel, the public defenders and Mr. Kinney moved for mistrial when Ms. O'Neill got sick. Both Mr. Kinney and Roy objected to proceeding without Ms. O'Neill. (RT 10383.) Faced with Mr. Kinney's severe health-based concerns, Ms. Martinez's confessed inexperience, and the trial court's refusal to grant a mistrial, Roy objected and asked the court to delay the trial pending Ms. O'Neill's return to work. (RT 10464, 10475,10494.) Given the nature of the conflict, Roy was constructively denied any counsel at all by the trial court's order appointing Mr. Kinney over objection. This error alone should entitle Roy to *per se* reversal of the penalty phase judgment because there is no way to assess the full detrimental impact that Mr. Kinney's drug interaction problems may have had on the conduct of the penalty phase defense. (Mickens v. Taylor, supra; United States v. Cronic, supra.

> ". . . [P]roof that a criminal defendant's attorney was mentally incapacitated and of unsound mind may constitute the deprivation of the effective assistance of counsel. [Citation omitted.] Furthermore, the acts of incompetence may be of a form which will not be readily apparent to the trial judge, and need not be acts which the trial court has a duty to correct."

(United States ex rel. Pugach v. Mancusi (S.D.N.Y. 1970) 310 F.Supp. 691.)

D. Due process violation:

The court should have granted a mistrial. Alternatively, however, the court should at the very least have delayed further action in the case to await the outcome of Ms. O'Neill's surgery.[7] Ms. O'Neill had advised the court that she would be away from work for surgery and recovery for two to three months,

[7]Ms. O'Neill was has returned to the private practice of law. She participated fully in record correction proceedings in this case.

until mid-August or mid-September, assuming she did recover. (RT 10413.) When directly asked by the court about his desire for a speedy trial, Roy wanted to wait for Ms. O'Neill and declined to assert his speedy trial rights. (RT 10470.) Furthermore, Mr. Kinney was going to be unavailable to work on Roy's case for almost as long as Ms. O'Neill. He was going to be precluded from doing any trials for health reasons until at least August 1, 1994, possibly longer. In addition, Mr. Kinney had significant conflicting obligations in several other murder and capital cases that were also set for trial. (RT 10419, 10423.)

As a result of Mr. Kinney's own case conflicts and health problems, Phillips motion hearings in Roy's case did not commence until October 19, 1994. Furthermore, Roy's penalty trial began on October 25, 1994, even though Mr. Kinney had been completely occupied in another murder trial for 37 days, and had no intervening time to prepare. (RT 10916.) The penalty trial was begun over co-counsel Martinez's objection that Mr. Kinney thought he was "Superman," but was really unprepared to begin the trial. (RT 10965.) Hence, even if the penalty trial is not reversed based on an actual conflict of interest, it violated Roy's substantive due process and dignity interests to appoint Mr. Kinney lead counsel, rather than to grant a mistrial or delay proceedings to await the outcome of Ms. O'Neill's surgery. (People v. Crovedi (1966) 65 Cal.2d 199, 206-209; cf. Maniscalco v. Superior Court (1991) 234 Cal.App.3d 846 [No error to discharge counsel with ongoing health problems where defendant had been in custody without trial for seven years].)

E. Conclusion:

For reasons previously stated, Roy is entitled to *per se* reversal of the penalty phase judgment because there is no way to assess the impact Mr. Kinney's drug interaction problems and other errors may have had on the penalty phase defense. (Mickens v. Taylor, supra, 535 U.S. at p. 166; United

States v. Cronic, supra, 466 U.S. at p. 659.) Should this Court disagree that the error is reversible per se, because constitutional error is involved – the denial of the Sixth Amendment right to counsel – appellant submits that the burden falls on respondent to establish that the error was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. at p. 24.) This is a burden that cannot be met on the record of this case.

By the time Mr. Kinney was appointed to replace Ms. O'Neill, on nothing short of a remarkable cumulation of errors had occurred, completely undermining Roy's Sixth Amendment right to an effective and conflict-free counsel, and his rights to a fair trial and reliable penalty determination, guaranteed by the Eighth and Fourteenth Amendments. Roy's representational problems had been ongoing since September of 1993, when the first motion to discharge the Public Defenders was made. (See, AOB & Appellant's Reply Brief [hereafter, ARB], Argument VII.) In October of 1993, for nearly six days, the trial court, shockingly, continued taking trial testimony with Ms. O'Neill and Ms. Martinez acting as counsel, while Roy was independently represented by Marsden counsel, charged with the duty to investigate the competency of the public defenders, and a Marsden motion was actively pending. (AOB & ARB, Arguments VIII & IX.) Roy's problems with the public defender did not abate, eventually resulting in the completely unprecedented appointment of Mr. Kinney as an "intermediary" attorney in lieu of the granting of Roy's meritorious Marsden motions. The roles of counsel remained blurred until Mr. Kinney's participation as counsel was "officially" sanctioned by the court. (AOB & ARB, Argument X.) On the heels of the sanity phase, a declaration of conflict by the Public Defender's office took many months to resolve, during which time Roy's divided legal *team* took opposing sides in the controversy, placing further pressure on already strained relationships among counsel, and between Roy and counsel. (AOB & ARB,

Argument XI.)

The errors affecting Roy's right to counsel were compounded, meanwhile, by highly charged political atmosphere in which Roy's entire proceeding was conducted, and the trial court's total failure to take reasonable protective measures, such as jury polling and the giving of proper admonitions, to ensure the fairness of the jury. The constant barrage of newspaper articles included not only stories about Roy's case and his lawyers; there were also countless articles about other high publicity murder cases involving young girls, the extremely severe murder problem in Fresno, and the proposed cure for the crime problem – highly controversial Three Strikes Initiative. (See, AOB, & ARB, post, Arguments XVII-XXVII.)

The fairness of the trial had already been severely compromised long before Mr. Kinney was appointed to finish the trial, more than nine months after the conclusion of the sanity trial, and nearly ten months following the conclusion of the guilt phase trial. Jurors had been separated for this entire period, without the benefit of polling, to determine actual exposure to publicity, or even proper admonitions by the court to avoid the press. (See, AOB ., & ARB, post, Arguments XVII-XXVII.) Under such extreme circumstances, it is simply not possible to say "beyond a reasonable doubt" that no prejudice resulted from the erroneous appointment of Mr. Kinney in lieu of a mistrial.

Mr. Kinney was not present at most of the guilt phase testimony. Mr. Kinney's relationship with co-counsel, Ms. Martinez, was already strained, as evidence by their acrimonious exchanges on the record. (RT 10396.) Mr. Kinney's health problems including high blood pressure and bipolar disorder were serious enough to be life-threatening if not managed correctly. (SCT #2 1943; RT 10418-10421.) Mr. Kinney was already lead counsel in several other high profile murder cases with trial schedules in direct conflict with Roy's case. (RT 10418-10421, 10508.) These factors manifestly conflicted with Roy's

need for counsel who could meet the tremendous challenge of reviewing the record of the guilt phase trial, and Phillips hearings on aggravating evidence, and preparing the penalty phase defense. (See, The Interrelated Facts section of Argument Section 2, of the AOB, pp. 84-106.)

It is obvious from what happened at later proceedings that such preparation did *not* occur. Mr. Kinney obtained a verdict following a lengthy murder trial in another case just days before Roy's penalty trial started. (See, RT 10508, 10965; AOB, p. 104, fn. 27.) Ms. Martinez objected to starting the penalty trial on the ground that Mr. Kinney had not spent the necessary time to prepare for Roy's case. (CT 1480-1482; RT 10964-10965.) The trial court denied Ms. Martinez's request for a continuance, but in the middle of the penalty trial, Mr. Kinney required a week-long recess to recover from depression and exhaustion – a consequence of bringing Mr. Kinney's "manic phase" of Bipolar Disorder under control. (RT 11496-11498.) During final arguments, Mr. Kinney moved for mistrial because he was having difficulty responding to the prosecutor's arguments due to his absence from guilt phase testimony. (RT 11929.)

Application of the Chapman standard clearly compels reversible of the judgment. Indeed, even if this Court were to treat this as mere state law error, applying the lesser Watson standard of review (People v. Watson, supra, 46 Cal.2d 818), the record establishes nothing less than a serious miscarriage of justice, necessitating reversal. Last but not least, the appointment of Mr. Kinney impinges upon Roy's fundamental rights to a fair trial and the effective assistance of unconflicted counsel in the context of a death penalty trial, where the constitutional rights to reliability and individualized sentencing are paramount. (U.S. Const., Amendments VIII & XIV; Beck v. Alabama, supra, 447 U.S. at p. 637; Zant v. Stephens, supra, 462 U.S. at p. 879; Johnson v. Mississippi, supra, 486 U.S. at p. 584; Woodson v. North Carolina, 428 U.S.

at p. 304.) Consequently, the death judgment must be reversed on this ground as well.

XIII

NONDISCLOSURE OF VENUS FARKAS' WELFARE FRAUD CONVICTION VIOLATED BRADY V. MARYLAND.

Respondent concedes that prosecutor violated a duty to disclose the misdemeanor welfare fraud conviction of Venus Farkas, and that the conviction would have been admissible for impeachment. (RB, p. 142.) Respondent argues, however, that the suppressed evidence was not "material". (RB, p. 142.) Generally, respondent avers, suppression of impeachment evidence only results in a constitutional violation under Brady v. Maryland (1963) 373 U.S. 83, if the witness has supplied the only evidence linking the defendant to the crime. (RB, p. 144.)

Respondent ignores the fact that the prosecutor's failure to disclose Ms. Farkas' welfare fraud conviction was only one of a long laundry list of errors which contributed to the breakdown of the attorney-client relationship, and interfered with the fairness of the trial and counsels' effectiveness. (See, AOB, Argument Section 2, Arguments VII-XVI.)

Furthermore, respondent reads the "materiality" component of Brady far too narrowly. Suppressed evidence of even a minor conviction may be "material" if it renders the testimony of one witness "biased and unconvincing," and thereby casts the testimony of other witnesses in "an entirely different light." (People v. Martinez (2002) 103 Cal.App.4th 1071, 1081-1082.) Mrs. Farkas was convicted of fraud for dishonestly accepting welfare money for Laurie after her death. The testimony of Venus Farkas established Roy's prior relationship and attitude toward Laurie, his behavior on the evening preceding the offense, and the amount of money carried by Laurie when she left the house for the movies. (See, AOB, p. 160.) While several other witnesses gave

overlapping testimony on these subjects, most were immediate family members who would have benefited equally from the wrongful collection of Laurie's welfare benefits after her death. (RT 3590 [Angelique Farkas]; RT 3616 [William Farkas Jr.]; RT 3632 [William Farkas, Sr.].) One was an aunt who did not live in the household. For example, Laurie's aunt, Helene Painter gave relatively innocuous testimony regarding the frequency of Roy's visits to the Farkas' household, and the fact that he taught Laurie to drive, and on at least one occasion picked her up from school. (RT 5299-5304.)

Michael Hall was the only unrelated person to testify, and only in rebuttal, that Roy had an inappropriate sexual interest in Laurie. (RT 8834-8912.) Hall had credibility problems himself, as a convicted felon with a substantial criminal record. (RT 8836-8871.)

As the United States Supreme Court has stated:

> "Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal."

(Kyles v. Whitley (1995) 514 U.S. 416, 1565-1566.)

This Court, too, has recognized that the materiality of suppressed evidence is not assessed according to a sufficiency of evidence test.

> "'A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"

(In re Brown (1998) 17 Cal.4th 873, 876-877; quoting Kyles v. Whitley, supra; accord: Banks v. Dretke (2004) 540 U.S. 668. 698.)

Using Venus Farkas' misdemeanor welfare fraud conviction would have impeached the credibility of Ms. Farkas and impugned the credibility and integrity of all family member witnesses who benefited from the fruits of her crime. Since the testimony of family member witnesses, including Mrs. Farkas, was relied upon by the prosecution to prove that Roy, on the evening before the murder, had a pre-existing intent to commit rape and robbery, the suppressed evidence was "material" for purposes of Brady analysis. Such evidence could have affected the jury's assessment of guilt of robbery and attempted rape, and the rape-murder and robbery-murder special circumstance allegations. Reversal of the convictions, special circumstance findings and sentence is therefore required.

XIV

THE PROSECUTOR'S FAILURE TO DISCLOSE VENUS FARKAS' WELFARE FRAUD CONVICTION VIOLATED APPELLANT'S RIGHTS UNDER THE CONFRONTATION AND COMPULSORY PROCESS CLAUSES.

Respondent argues that withholding Mrs. Farkas' welfare fraud conviction did not violate appellant's Sixth Amendment rights to confrontation and compulsory process. Appellant rests on the substantial briefing of United Supreme Court case law that was submitted with the AOB . (See, AOB, Argument XIV, p. 145.)

Since the filing of the opening brief, the United States Supreme Court has decided only one case containing substantial discussion of the federal confrontation clause: Crawford v. Washington (2004) 541 U.S. 36. Crawford is not a discovery case but its dicta is nevertheless instructive.

> "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure

> reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."

(Id., at p. 61.)

Mrs. Farkas was a crucial witness to facts relied upon to convict Roy of robbery and attempted rape and to establish Roy's eligibility for the death penalty. Defense counsel was substantially handicapped during cross-examination of the witness by her ignorance of the witness's prior conviction of welfare fraud. Appellant respectfully submits that the Confrontation Clause was violated because he was, in essence, denied the right to test the witness's credibility by "the crucible of cross-examination." (Ibid.)

Because the nondisclosure of the conviction impinges upon fundamental constitutional rights, including rights guaranteed by the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's guarantee of Due Process, the state should bear the burden of showing that the error did not infect the guilt or penalty judgments beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18; United States v. Schoneberg (9th Cir. 2004) 388 F.3d 1275, 1281; United States v. Blanco (9th Cir. 2004) 293 F.3d 382, 393 [remand to determine whether Brady violation violated Confrontation Clause]; United States v. Dupuy (9th Cir. 1985) 760 F.2d 1492, 1503 [Ferguson, J., concurring: ["On remand the district court must further ascertain whether any disclosure the prosecutor should have made constitutes harmless error under Chapman v. California . . . ."]; cf. In re Sassounian (1995) 9 Cal.4th 535, 545.) The error does not survive review under the Chapman standard because Mrs. Farkas was a material witness on the elements of robbery, and furnished much of the evidence relied upon by the prosecutor to establish Roy's supposed intent

to rape Laurie that evening. Evidence of robbery, attempted rape, and the robbery and attempted rape-murder special circumstances was so extraordinarily weak (see, AOB, & ARB, Arguments I-IV), that it cannot be said that the same verdicts would have resulted had impeachment evidence not been withheld.

Because the error occurred during the guilt phase trial, but was not revealed until much later, after it was too late to rectify the error, the reliability of the death judgment is also undermined, in violation of the Eighth and Fourteenth Amendments. (Beck v. Alabama, supra, 447 U.S. at p. 637; Zant v. Stephens, supra, 462 U.S. at p. 879; Johnson v. Mississippi, supra, 486 U.S. at p. 584; Woodson v. North Carolina, 428 U.S. at p. 304.) Accordingly, the entire judgment must be reversed, not just the guilt phase judgment.

XV

THE PUBLIC DEFENDER'S REPRESENTATION OF MRS. FARKAS CONSTITUTED AN ACTUAL CONFLICT OF INTEREST IN VIOLATION OF THE SIXTH AMENDMENT, WHICH MANDATED A MISTRIAL.

Respondent asserts that automatic reversal is not warranted because this is not a case where a court mandated conflicted representation after timely objection, as in Holloway v. Arkansas (1978) 435 U.S. 475, 488. (RB, p. 153.) The record belies this contention. There was an objection as soon as the Brady violation and conflicting representation were discovered; the trial court mandated conflicted representation despite the Public Defender's objection. (CT 1437-1457, 1467-1473; RT 10544-10551, 10763, et seq.)

The facts are, or all intents and purposes, indistinguishable from the situation presented in Holloway v. Arkansas, supra; here, as there, the court forced counsel to go forward with the trial despite objections regarding an actual conflict of interest caused by the public defender's dual representation of Roy and a material witness. Furthermore, it was not a simple matter of Mr. Kinney calling the witness to the stand for impeachment purposes at the penalty

phase trial and Ms. Martinez stepping aside. Mr. Kinney was not yet counsel when Mrs. Farkas testified for the first time. Ms. Martinez was present but would have been impeded by her office's conflict from participating in cross-examination. Furthermore, Ms. Martinez refrained from testifying for purposes of contradicting Mrs. Farkas at the evidentiary hearing of Roy's Brady claim. Hence, in this case, the record supports more than informed speculation that Ms. Martinez's participation in the case was affected by the conflict because the record shows that she actually "pulled [her] punches." (People v. Easley (1988) 46 Cal.3d 712, 725; see also, Cuyler v. Sullivan, supra, 446 U.S. at p. 347; Mickens v. Taylor (2002) 535 U.S. 162;)

Respondent cites People v. Jones (1991) 53 Cal.3d 1115, 1134 (RB, p. 150), for the proposition that a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. (RB, p. 150.) An objection was interjected by defense counsel as soon as they became aware of Mrs. Farkas' conviction and Ms. Martinez's conflicted representation. Roy did not waive the conflict, once it was discovered. Furthermore, given that he began making motions to discharge his public defenders on September 29, 1993, during jury selection (see RT 2847 et seq.), it is highly unlikely he would have waived the conflict had he known about it sooner.[8]

Respondent argues that the public defender had no actual or potential conflict of interest because Ms. O'Neill and Ms. Martinez had no confidential information relating to the representation of Mrs. Farkas at the time she testified during the guilt phase. (RB, p. 153.) Respondent ignore the fact that it was a Brady violation that led to the late discovery of the conflict had not occurred. Respondent also conveniently ignores the fact that the public defenders' guilt phase cross-examination of Mrs. Farkas was ineffective, or less effective,

[8]Mrs. Farkas testified on October 12, 1993. (RT 3556 et seq.)

because they remained ignorant of Mrs. Farkas' conviction, as well as the Public Defender's attorney-client relationship with the witness.

Furthermore, the public defenders' knowledge of the conflict at the time Mrs. Farkas testified is largely irrelevant to the determination of the conflict issue for purposes of subsequent proceedings, including the Brady motion itself and the penalty phase. At the hearing of Roy's mistrial motion, Mr. Kinney tried to call Ms. Martinez as a corroborating witness. (RT 10845.) Ms. Martinez was a material witness on the Brady issue because she had been present when investigator David Schiavon interviewed Mrs. Farkas about her dealings with deputy district attorney Dennis Cooper. Mrs. Farkas had admitted to Mr. Schiavon in Ms. Martinez's presence, that she had told Mr. Cooper about her welfare fraud case prior to Roy's preliminary hearing, in September of 1991. (RT 10777.) The trial court discouraged Ms. Martinez from testifying at the Brady hearing, suggesting her testimony was not really "necessary" so long as everyone would agree that she would corroborate the testimony of Mr. Schiavon. (RT 10845.) Mr. Cooper also objected that the public defender's office had declared a conflict of interest as the result of its representation of Mrs. Farkas, and Ms. Martinez would be taking the stand against a former client. (RT 10847.) Consequently, Ms. Martinez did not testify at the hearing; the trial court weighed the testimony of the witnesses who did testify – Mrs. Farkas, Mr. Cooper and Mr. Schiavon – and denied the motion for mistrial. (RT 10926.) This record establishes an actual conflict of interest of the kind condemned in Holloway, supra.

Other cases cited by respondent likewise have little application to the facts of this case. For example, in People v. Kirkpatrick (1994) 7 Cal.4th 988, 1009 (RB, p. 151), this Court found nothing in the record to support a defendant's claim that his court-appointed attorney who had successfully opposed the client's motion for self-representation was motivated, in part, by

a financial stake in continuing to act as counsel. The facts of the instant case are entirely different, as explained above.

In People v. Lawley (2002) 27 Cal.4th 102, 146 (RB, p. 151, 152), the defendant represented himself; hence, the issue was whether the lawyer serving in the "narrow scope of advisory counsel" had a conflict of interest. (Id., at p. 145.) In that case, the advisory attorney denied that his brief past representation of a former client amounted to a conflict since he had no substantive discussions with the witness about her cases before his representation was interrupted. In this case, Ms. Martinez did not deny the conflict.

In People v. Belmontes (1988) 45 Cal.3d 744, 776 (RB, p. 151, 152), the defendant's trial attorney was the named partner in a law firm that been under contract to act as the conflict public defender for the county. Several years earlier, another attorney from the firm had represented a prosecution witness on murder charge that had been dismissed without a trial. The defendant's attorney denied having any confidential information stemming from the firm's representation, or an actual conflict of interest. (Id., at p. 775.) In addition, the defendant in Belmontes *waived* the conflict. (Ibid.) In this case, defense counsel and Roy objected to the conflict.

In People v. Pennington (1991) 228 Cal.App.3d 959, 965-966 (RB, p. 152), the Court of Appeals reversed a trial court order granting a Penal Code section 995 motion based on a conflict of interest. In that case, the trial attorney was unaware of the conflict of interest at the time of the preliminary examination. He was *relieved* as counsel later, as soon as the conflict was discovered. Furthermore, the trial court in Belmontes found only an "appearance" of a conflict but no actual conflict, yet granted the defendant's motion to dismiss. (Id., at p. 965.)

In People v. Clark (1993) 5 Cal.4th 950, 1000-1002 (RB, p. 152), the defendant's lawyer or members of his office had previously represented four

different prosecution witnesses. As to three witnesses, counsel assured the court he had no confidential information and no actual conflict of interest. (Id., at p. 1001.) In rejecting the conflict claim on appeal, this Court gave great weight to the word of trial counsel; it observed that the attorney "was in the best position to assess whether a conflict of interest existed or was likely to arise." (Ibid.)

With respect to a fourth former client-witness, the lead attorney in Clark, Mr. Brown, withdrew from representing the witness, and did not participate in or assist co-counsel with cross-examination of his former client during the defendant's trial. (Id., at p. 1002.) The trial court first received assurances from co-counsel that his colleague's conflict would not impair cross-examination. (Ibid.) On appeal, this Court reiterated the sentiment that co-counsel was in the best position to know whether Mr. Brown's conflict would interfere with effective cross-examination. (Ibid.) Moreover, this Court tacitly acknowledged that Mr. Brown would have breached his ethical duties had he aided in cross-examination of the former client. (Id., at p. 1002, fn. 23.) As in the Clark case, Roy's attorneys were in a better position than the trial court to assess whether there was an actual conflict of interest. Instead of deferring to counsel, as did the trial court in Clark, the trial court forced Ms. Martinez to proceed. Furthermore, the trial court received no assurance from co-counsel in this case, that Ms. Martinez's conflict would not interfere with effective cross-examination. To the contrary, Mr. Kinney asserted that he had not been present at Ms. Farkas' guilt phase testimony, and averred that he would be handicapped by his absence should he decide to call Mrs. Farkas at the penalty phase to get impeaching information before the jury. (RT 10932-10936.)

In United States v. Weiner (9th Cir. 1978) 578 F.2d 757, 767 (RB, p. 151), a securities fraud case, the issue was whether the court should have disqualified the United States Attorney's office from prosecuting the

defendants. In Weiner, the alleged conflict was that an attorney, employed by a particular law firm had represented the defendants in connection with matters arising out of the securities fraud, had left the law firm to work for the SEC. The federal court declined to impute close cooperation between the SEC and the Department of Justice in the management of the prosecution.

Respondent quotes People v. Cox (2003) 30 Cal.4th 916, 949 (RB, p. 151) for the proposition that, if the attorney possesses no confidential information from a former client, no actual or potential conflict of interest exists. In Cox, a different attorney from the public defender's office had once represented a state's witness. The witness agreed in open court to *waive* any privilege and be cross-examined about any discussions she had with her former public defender. (Id., at p. 947.) No such waiver occurred here.

A second potential conflict in Cox stemmed from the fact that the attorney appointed to act as the defendant's second chair counsel, Stephen Tapson, had been appointed to represent a potential witness, but he had been relieved as counsel before ever speaking to the witness in anticipation of having a role in the defendant's case. A third potential witness in the Cox case had once been represented by a different attorney in Mr. Tapson's law firm. However, Mr. Tapson had no contact with this particular witness and the defendant waived any potential conflict of interest in open court. (Id., at p. 948.) A fourth prosecution witness, Lisa D., had also once been represented by a member of Tapson's law firm. When this witness testified, Tapson informed the court of his intention to impeach the witness with a prior grand theft conviction. Instead, the prosecutor agreed to elicit the conviction on direct examination. The court ruled there was no conflict of interest. In Cox, the defendant never objected to any of the four potential conflicts of interest. (Id., at p. 948.)

Neither the Cox case, nor any other authority cited by respondent,

involves circumstances comparable to the case at bench. Here, the public defender was former counsel for the deceased victim's mother – also a trial witness – who subsequently became a potential material witness at an evidentiary hearing on the issue of whether the prosecutor had wrongfully withheld from the defense information pertaining to Mrs. Farkas' conviction of an offense involving dishonesty. None of the attorneys represented to the trial court that their representation of Roy would not be impaired. To the contrary, the public defender declared a conflict and sought to have Ms. Martinez removed from Roy's case. (RT 10847, 10927.) Ms. Martinez asserted personal feelings of conflict, an actual conflict, and the appearance of a conflict of interest. (RT 10898, 10929.) Mr. Kinney also asserted the conflict on Roy's behalf. (RT 10930-10932.) Last but not least, Roy never waived the conflict.

There is no dispute that a conflict of interest is reversible if the conflict adversely affected the attorney's performance; a showing of outcome-determinative prejudice is not required. Under our State Constitution, "'even a potential conflict may require reversal if the record supports "an informed speculation" that [defendant's] right to effective representation was prejudicially affected.'" (People v. Cox (1991) 53 Cal.3d 618, 654.) This informed speculation must be "grounded on a factual basis" in the record. (People v. Cook (1975) 13 Cal.3d 663, 671.)

In evaluating whether an actual conflict of interest exists, this Court inquires whether the conflicted attorney has "pulled his punches," i.e., failed to represent defendant as vigorously as he or she might have had there been no conflict. (People v. Easley (1988) 46 Cal.3d 712, 725; People v. Cox (2003) 30 Cal.4th 916, 948-949.) In this case, Ms. Martinez's failure to testify was the "pulled punch."

Under federal law, an actual conflict of interest requires reversal in every case where the defendant objected to the conflict at trial. (Holloway v.

Arkansas, supra, 435 U.S. at p. 488.) In this case, objections to the conflict were clearly raised prior to the penalty phase trial. In addition, however, a motion for mistrial of the guilt phase was made, based on the prosecutor's Brady error, which had kept the Public Defender ignorant of the conflict throughout the guilt phase proceedings.

In any event, if a conflict is raised for the first time on appeal, the defendant is still entitled to reversal if the conflict adversely affected his attorney's performance. (Cuyler v. Sullivan, supra, 446 U.S. 335, 348; Mickens v. Taylor, supra, 535 U.S. at p. 172, fn. 5.) An "adverse effect" is shown when "the attorney's behavior seems to have been influenced" by the conflict. (Sanders v. Ratelle (9th Cir. 1994) 21 F.3d at p. 1452.) "This showing need not rise to the level of actual prejudice." (Maiden v. Bunnell (9th Cir. 1994) 35 F.3d 477, 481; see Strickland v. Washington, supra, 466 U.S. at pp. 692-693 [defendant not required to show prejudice in conflict of interest case].)

For reasons previously explained, appellant has more than sustained his burden of showing conflict of interest adversely affecting his attorney's performance. Accordingly, the trial court's refusal to grant a mistrial – particularly given all that had transpired earlier in the proceedings (see, ARB, Argument XII, E) – violated Roy's Sixth Amendment right to the assistance of conflict-free counsel, as well as his rights guaranteed by the Confrontation and Due Process Clauses, and the Eighth Amendment. (ARB, Arguments XIII & XIV). Automatic reversal of the penalty phase is therefore compelled.

XVI

THE ERRORS ASSERTED IN ARGUMENTS VII THROUGH XV OF THE APPELLANT'S OPENING BRIEF INDIVIDUALLY AND CUMULATIVELY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant has adequately addressed this argument in Argument XVI of the AOB , pp. 180-183.

ARGUMENT SECTION 3
(RE JURY ADMONITIONS, POLLING, PUBLICITY AND DELAYS)

XVII

THE TRIAL COURT'S ADMONITIONS WERE INSUFFICIENT TO GUARANTEE APPELLANT A FAIR TRIAL REGARDLESS OF THE VERSION OF PENAL CODE SECTION 1122 IN EFFECT AT THE TIME OF TRIAL.

Respondent argues (1) that the mandatory admonition against reading media and newspaper accounts was not added to Penal Code section 1122(a) until 1994, after Roy's guilt phase trial[9]; (2) that the trial court's instructions not to read media accounts of the trial sufficed under the version of Penal Code section 1122 in effect in 1993; and (3) that it must be presumed absent affirmative evidence to the contrary that jurors obeyed the court's admonitions not to expose themselves to any media reports of the trial while the case was pending. (RB, p. 155-161.)

Appellant does not contest respondent's first point. Penal Code section 1122 was not amended to include the relevant passage of subdivision (a) until 1994. Jury selection commenced in Roy's case on August 31, 1993.

Appellant respectfully submits that 1994 effective date of Penal Code section 1122(a) is immaterial. The trial court's pre- and guilt phase admonitions are deficient when measured against constitutional requirements imposed by judicial fiat long before the commencement of Roy's trial. The AOB , Argument XVII, includes citations to many federal and state cases; yet, with the exception of two cases (People v. Majors (1998) 18 Cal.4th 385, 425-426, and In re Carpenter (1995) 9 Cal.4th 634, 641) all authorities pre-date the year 1994. (See, AOB, p. 202-209.)

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[9]Subdivision (a) of Penal Code section 1122 now states in relevant part: ". . . The instructions shall include, among other matters, admonitions that the jurors . . . shall not read or listen to any accounts or discussions of the case reported by newspapers or other news media . . . ."

As respondent points out, in People v. Lambright (1964) 61 Cal.2d 482 (RB, p. 160), this Court reversed a conviction where the court had advised jurors they had a right to read articles about the trial. Judge Fitch's combined admonitions to the jury, while not as explicit as the one given in Lambright, would have left the distinct impression that jurors were *not* under any absolute prohibition against reading newspapers, listening to radio broadcasts and watching television.

Respondent inaccurately argues that the trial court on at least two occasions "explicitly noted for the jurors that they were not permitted to read about the case." (RB, p. 158-159.) The advice given fell far short of an explicit admonition. Respondent's first citation to the record refers to a discussion occurring almost a week before the jury was seated, on October 6, 1993. At this point, the trial court mentioned to some panelists who had survived Hovey *voir dire* that he was "going to ask" them not to read newspaper accounts of the trial. The court at the same time remarked that jurors who were excused could "do whatever you want." (RT 3054.) These remarks were ambiguous at best. They could easily have been interpreted as a warning that panelists selected to sit on the jury would be asked to avoid newspaper accounts of the trial once the trial started. (RT 3054.) More importantly, the statutory admonishments required by Penal Code section 1122 apply only after a jury is sworn. (People v. Horton (1995) 11 Cal.4th 1068, 1094; People v. Weaver (2001) 26 Cal.4th 876, 908.) The court's comment came too early to satisfy the requirements of Penal Code section 1122 or the Due Process Clauses of the California and United States Constitutions. (Cf. People v. Carter (2003) 30 Cal.4th 1166, 1200.)

Respondent's second citation to the record refers to the court's remarks to the newly selected jury, on October 12, 1993. The court did give the long rambling exposition which is contained in quotes on pages 186-188 of the RB.

During this speech, the trial court gave much advice, including a "recommended" approach to take when friends inevitably approached jurors, wanting to talk about the case. In the quoted passage, the court recommended that jurors tell friends and family: "I can't read anything during the case." (RT 3333-3334.) The court also warned jurors that newspapers "aren't ever 100 percent accurate." (RT 3333-3334.) At no time before trial commenced, did the court explicitly instruct jurors they were prohibited from reading, *viewing* or *listening* to newspaper, radio, television or other media reports of the trial.[10]

Most of the authorities cited by respondent are either inapt, or helpful to appellant. The United States Supreme Court's decision in Smith v. Phillips (1982) 455 U.S. 209, 217 (RB, p. 155, 159), for example, has nothing to do with admonishing jurors to avoid potentially harmful trial publicity. It is a prosecutorial misconduct case involving a prosecutor's failure to disclose the fact that a sitting juror had applied for a job as an investigator at the district attorney's office during the trial.

Respondent also quotes from many largely irrelevant *juror misconduct* cases. In re Hitchings (1993) 6 Cal.4th 97 (RB, p. 159), for example, is a noncapital murder case involving an allegation of concealment of juror bias. Dicta quoted by respondent is helpful to appellant: "The right of unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (Id., at p. 110.) (See, also, People v.

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[10]Moreover, no fewer than nine newspaper articles about Roy's case had appeared in the Fresno Bee by the time jury selection began. (Appellant's Motion for Judicial Notice, Appendix A.) This Court has not ruled on Appellant's Motion for Judicial Notice. Respondent has, however, has filed no opposition, and has responded on the merits to arguments referring to articles contained in the Motion for Judicial Notice. (RB, p. 193.) Furthermore, during *voir dire*, all but two sitting jurors and one alternate reported frequently or occasionally reading the Fresno Bee. (See, AOB, p. 184, fn. 34) Even so, nine of the jurors and alternates were asked no questions whatever about their exposure to pretrial publicity during sequestered *voir dire*. (See, AOB, p. 185.)

Honeycutt (1977) 20 Cal.3d 150, 156 (RB, p. 160) [jury foreman's misconduct in contacting an outside attorney during deliberations was sufficient to warrant reversal]; People v. Nesler (1997) 16 Cal.4th 561, 579-580 (RB, p. 161) [new trial granted because a juror acquired extrajudicial information about the defendant from a woman sitting in a bar]; People v. Lucas (1995) 12 Cal.4th 415, 486 (RB, p. 161) [tactical decision not to object to known juror misconduct was not ineffective assistance of counsel]; People v. Zapien (1993) 4 Cal.4th 929, 994 (RB, p. 161) [reversal unnecessary where juror reported exposure to a television news report but also stated it would not affect his ability to be impartial]; see also, People v. Ramos (2004) 34 Cal.4th 494, 516-518, 531-533 [reversal not warranted in case where juror who read newspaper during trial supplied declaration on motion for new trial].)

Several cases cited by respondent discuss remedies available to the trial courts to prevent prejudice due to pre- and mid-trial publicity; they do not address either the need for, or sufficiency of, jury admonitions to avoid media coverage of a trial. United States v. Abbot Laboratories (4th Cir. 1974) 505 F.2d 565 (RB, p. 159), for example, involves the erroneous dismissal of a federal indictment by a district court. In that case, both the prosecutor and the Food and Drug Administration issued public statements blaming the defendants' contaminated pharmaceutical products for numerous deaths. The trial judge dismissed the indictment, finding that a fair trial was no longer possible. The Fourth Circuit reversed. The court reasoned that the district court had failed to conduct any *voir dire* of potential jurors to determine exposure, and had dismissed without exploring other recognized devices for overcoming prejudicial pretrial publicity, such as a change of venue. (Id., at pp. 571-573.)

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal.4th 1178 (RB, p. 160), addresses the propriety of a state trial court order excluding

the media from a celebrity *civil* trial. This Court reversed, holding that the parties' interests in a fair trial could be adequately protected by regular and specific cautionary jury instructions to avoid media exposure, which it was presumed the jurors would follow. (Id., at p. 1223.) Neither of these cases has much relevance to the issues presented in the case at bench. If anything they underscore the absence of proper admonitions in this case.

In People v. Ladd (1982) 129 Cal.App.3d 257 (RB, p. 158), the very limited issue was whether the trial court erred by failing to caution the jury not to watch broadcasts or read newspapers immediately following the granting of a motion to suppress evidence. However, in Ladd, immediately before the suppression hearing, the court had admonished the newly sworn jurors not to "inform yourself about any subject matter brought up during the trial by reading articles or books . . . ." (Ibid.) Furthermore, the newspaper reporter who had attended the suppression-of-evidence hearing promised to report that the motion had been granted, but not disclose the nature of the evidence suppressed. Significantly, in Ladd, the Court of Appeal recognized that it would be "misconduct for jurors to read newspaper accounts of a trial for which they are sitting as jurors." (Id., at p. 264; accord: People v. Honeycutt, supra, 20 Cal.3d at p. 156 (RB, p. 160).) The inadequacy of the court's admonitions in this case make it impossible to assume that jurors did not commit such misconduct here.

People v. Linden (1959) 52 Cal.2d 1 (RB, p. 159), is one of the few cases that even addresses a defendant's claim that a trial court did not comply with former Penal Code section 1122. In Linden, however, there is no discussion at all of the duty to admonish jurors to avoid media exposure about a trial, and no indication that publicity was a potential problem. Furthermore, in Linden, the jury was given statutory admonitions at each regular recess. The only time the admonishment was omitted was during brief recesses taken to discuss legal points outside the jury's presence. In those circumstances, this

Court concluded: "After the jury have been repeatedly admonished in the full substance of Penal Code section 1122, it is not prejudicial error to give the admonition in abbreviated form . . . ." (Id., at p. 29.) In the instant case, an inadequate admonition to avoid media was given in the first place, and not repeated during most of the trial, even in abbreviated form.

In People v. Morales (1989) 48 Cal.3d 527, 565 (RB, p. 160), the jury was "carefully told to avoid any media attention of the case, and to divert their attention if they inadvertently became so exposed." (Id., at p. 565.) The issue was whether the trial court's failure to "readmonish" the jury to avoid media reports was reversible error. This Court stated: "A more accurate statement of the rule[11] would be that both an objection and proof of prejudice are required before a failure to readmonish would be deemed reversible error." (Id., at p. 565.) In the instant case, the trial court failed to give an adequate admonition in the first instance.

People v. Heishman (1988) 45 Cal.3d 147, 175 (RB, p. 160), unlike this case, is likewise a *readmonishment* case. In Heishman, the jury panel on two different dates was explicitly told to disregard media publicity about the case. (Id., at p. 174.) This Court held that the trial court's subsequent use of abbreviated reminders to the jury to obey previous admonishments was not reversible error.

In People v. Terry (1970) 2 Cal.3d 362, 397 (RB, p. 160), the sole issue was whether the trial court erred in denying a new trial because a newspaper article had been published during the trial, misreporting a witness's testimony. This Court found no reversible error, in part because the trial judge had carefully, fully, and repeatedly admonished jurors not to read any newspaper articles about the case. (Id., at p. 397.) Clearly, such admonishments were not given here.

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[11]This Court was referring to the "rule" as articulated in People v. Linden, supra, 52 Cal.2d 1, 29.

In People v. Hawkins (1968) 268 Cal.App.2d 99, 104-105 (RB, p. 160), a newspaper was published during the trial which identified the defendants by name, and referred to their conviction of another crime. None of the jurors, on inquiry by the court, indicated they had read the article. The Court of Appeals rejected the defendants argument that reversal was necessary merely because the court had asked jurors, *en masse*, but not individually, about their exposure to the article. The court relied, in part, on the fact that jurors had been explicitly admonished not to read any newspaper articles about the trial. (Id., at p. 105; accord: Halko v. Anderson (D.C. Delaware) 244 F.Supp. 696, 701-703 (RB, p. 160) [jury received and was told to read superior court handbook containing instructions not to read newspapers, and to avoid radio and television broadcasts mentioning the case].) Roy's jurors were given no such explicit instruction.

If respondent's citations to authority are useful at all, it is because they confirm that long before 1994, a juror's intentional or even inadvertent exposure to media coverage of a trial was considered presumptive misconduct. (People v. Lambright, supra, 61 Cal.2d at p. 486; People v. Ladd, supra, 129 Cal.App.3d at p. 264; People v. Honeycutt, supra, 20 Cal.3d at p. 156.) Furthermore, they confirm that long before 1994, the courts recognized the need to give jurors complete and frequent reminders to avoid media coverage of case, particularly when prejudicial publicity is likely. (People v. Terry, supra, 2 Cal.3d at p. 397.) Furthermore, the rule of People v. Linden, supra, 52 Cal.2d 1, as interpreted by this Court in People v. Morales, supra, 48 Cal.3d at p. 565, in the year 1989, requires proof of prejudice on appeal only when a trial court fails to "readmonish" jurors about media exposure. If the trial court does not adequately admonish jurors in the first place, proof of actual prejudice is not required. (See, People v. Lambright, supra, 61 Cal.2d 482 [reversal without proof of prejudice where trial court told jurors they could read or watch media

reports, but must not consider them in reaching a verdict].)

Here, the court's cumulative admonitions to the jury before and during the guilt phase trial failed to communicate that jurors were prohibited from reading newspapers, or listening to radio or television coverage of the trial. Instructions about the media were so vague, in fact, that some jurors may have been left with the impression that no absolute prohibition applied. As such, for reasons previously stated, these admonitions were inadequate to protect Roy's rights to a fair trial, guaranteed by the Fourteenth Amendment, an impartial jury, guaranteed by the Sixth Amendment, and to a reliable death judgment, guaranteed by the Eighth and Fourteenth Amendments. (Cal. Const., Art. I, §§ 7, 15, 16, 17.) The error is reversible *per se*, without any showing of prejudice.

XVIII

THE TRIAL COURT'S REFUSAL TO POLL JURORS ABOUT INFLAMMATORY MEDIA COVERAGE DURING THE GUILT PHASE TRIAL WAS REVERSIBLE ERROR.

Citing a plethora of California Supreme Court decisions as authority, respondent asserts that appellant failed to interpose sufficiently specific objections in the trial court to preserve the issue of the court's refusal to poll jurors about exposure to media prior to the sanity trial portion of the case. (RB, p. 163.) The "failure to object" argument borders on specious.

On January 7, 1994, prior to commencement of the sanity trial, Roy's trial lawyers moved to have a new jury impaneled for the sanity and penalty trials; counsel felt that the fairness of jurors had been irrevocably compromised by a barrage of extremely negative publicity not limited to coverage of the trial. The attorneys specifically mentioned recent newspaper and television stories about two young female murder victims, Kimber Reynolds and Polly Klaas, as well as press coverage of a flurry of anti-crime legislation, including the Three Strikes law. (RT 9452-9454.) Counsel also pointed out that on January 4,

1994, the very morning of the day the guilt phase verdicts were returned, the Fresno Bee had published highly inflammatory article, "*The Killers: Many of Those Who Committed Homicides in Fresno in 1993 Were Young Male Minorities.*" (See, AOB, p. 211; Motion for Judicial Notice, Appendix B, Article No. 37.) Counsel also mentioned another article that had appeared in the Fresno Bee a few days earlier, on January 5, 1994, featuring a photo of several of Laurie's family members, both of whom had testified at Roy's trial, dancing on Laurie's grave. (Motion for Judicial Notice, Appendix B, No. 39; RT 9455-9456; see, AOB, p. 192, fn. 40.) Roy's lawyers also requested that jurors be polled to determine whether all of the adverse publicity had caused any jurors to prejudge the case for the next phase. (RT 9452-9464.)

The lengthy arguments of defense counsel were more than adequate to impart notice to the trial judge that the defense was asking for a new jury, or alternatively, to have jurors polled about their possible exposure to potentially inflammatory news media. The trial court obviously had no difficult making an informed ruling on the motion. The court expressed empathy with the concerns of defense counsel about some of the more negative publicity, including "this macabre media event of dancing on the grave of the deceased girl." (RT 9462.) However, the court still denied the request for a separate trial *and* the separate request for jury polling, expressing the belief that he still had "a fair and impartial jury" comprised of "highly intelligent people." (RT 9463-9464.) Lack of objection is not a waiver where an objection would have been futile. (People v. Hamilton (1989) 48 Cal.3d 1142, 1189, fn. 27.) Moreover, an objection is sufficient if the record shows that the trial judge understood the issue presented. (People v. Scott (1978) 21 Cal.3d 284, 290.)

Cases cited by respondent do not compel a finding of waiver. In People v. Hill (1992) 3 Cal.4th 959, 994-995 (RB, p. 163), and People v. Mitcham (1992) 1 Cal.4th 1027, 1044 (RB, p. 163), defendants waived objections based

on Aranda[12] and Bruton[13] principles by failing to move to exclude witnesses' testimony on that ground at trial. In re Avena (1996) 12 Cal.4th 694, 721 (RB, p. 163) is an ineffective assistance of counsel case in which the respondent prosecuting attorneys failed to preserve relevance objections to the testimony of the petitioner's Strickland[14] experts at an evidentiary hearing. Here, counsel sufficiently voiced the bases of their objections.

People v. Crittenden (1994) 9 Cal.4th 83, 126 (RB, p. 162), is a case in which this Court found that the defendant did *not* waive a Miranda[15] objection even though the defense failed to renew the motion to suppress following a change of venue to the court of another county. The record was clear in that case that the new judge believed the earlier judge's ruling was binding. (Id., at p. 127.) If Roy's case is like any of the cases cited, it is more like Crittenden, because further articulation of grounds to poll the jury would likewise have been futile in the face of the trial judge's insistence that the jury was both "impartial" and "highly intelligent."

Respondent also argues for rejection of appellant's argument on the merits, asserting that a trial court has no duty to make inquiry of jurors unless the defense "alerts the court to facts suggestive of potential misconduct." (RB, p. 163.) Cases cited by respondent do not really stand for the proposition stated. For example, in People v. Ray (1996) 13 Cal.4th 313, 343 (RB, p. 163), a juror wrote a note to the court indicating that the daughter of the victim was a senior at the high school where the juror worked; the juror denied that he had ever talked with the daughter about the case. The defense attorney expressed satisfaction with the juror's note and told the court he saw "no 'reason to inquire.'" (Id., at p. 343.) This Court found no *sua sponte* duty on the part of

[12]People v. Aranda (1965) 63 Cal.2d 518.
[13]Bruton v. United States (1968) 391 U.S. 123.
[14]Strickland v. Washington (1984) 466 U.S. 668, 687-688.
[15]Miranda v. Arizona (1966) 384 U.S. 436.

the court to inquire further. This case does not involve known jury misconduct. Furthermore, Roy's counsel never expressed satisfaction with the manner in which the trial court was handling the problem of possible jury exposure to inflammatory news coverage.

In People v. DeSantis (1992) 2 Cal.4th 1198, 1234 (RB, p. 163), an issue arose during the trial regarding whether some jurors might be dozing off. The court had observed the jurors in question and concluded that the jurors whose eyes were closed were not sleeping. Other than alerting the court to the problem, defense counsel "did not pursue the matter further, and never asked the court to *voir dire* the jury." (Id., at p. 1233.) This Court held that in that circumstance, the trial court did not err by failing to conduct a "formal hearing." (Id., at p. 1234; accord: People v. Espinoza (1992) 3 Cal.4th 806, 821 (RB, p. 164); cf. People v. Burgener (1986) 41 Cal.3d 505, 520; overruled on another ground by People v. Reyes (1998) 19 Cal.4th 743, 756 [error, but not reversible to fail to hold a hearing on possible juror intoxication] (RB, p. 164).) In this case, counsel were not acquiescent when the trial court refused to make inquiry.

In People v. Adcox (1988) 47 Cal.3d 207, 252-254 (RB, p. 164), this Court rejected a defendant's argument that the trial court should have questioned the jury, *sua sponte*, regarding exposure to newspaper articles published during the trial. However, even Adcox is substantially distinguishable from this case. In that case, there was no concern with the inflammatory character of the articles. Rather, counsel's objection was that "rather innocuous" quotes by the prosecutor had violated a gag order. (Id., at p. 252.) In rejecting the defendant's claims of error on appeal, this Court observed: "In the present case the court was not furnished with affirmative evidence of any sort – indeed the allegation was never even made – that any of the jurors had actually read any of the newspaper articles in question." (Id., at p. 253.) Even so, this Court opined that "the better and proper course of action

here would have been for the court 'to make whatever inquiry is reasonably necessary' to determine if there was in fact any misconduct, and if such be found, whether 'the [offending] juror should be discharged and whether the impartiality of the other jurors has been affected.'" (Id., at p. 253; internal citation omitted.) In Roy's case, defense counsel were extremely concerned about the danger of highly prejudicial media exposure; yet the trial court refused even to make the briefest inquiry.

Respondent cites People v. Lambright, supra, 61 Cal.2d at pp. 486-487, and NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra, 20 Cal.4th at p. 1223, discussed in ARB, Argument XVII, ante, for the proposition that courts must presume that jurors have followed instructions to avoid media coverage. (RB, p. 164-165.) Roy's attorneys requested polling about juror exposure to a firestorm of potentially prejudicial media coverage about murders and murderers in Fresno, and controversial anti-crime legislation – Three Strikes – vociferously supported by the father of a local college girl. These articles did not necessarily mention Roy's case, but they nonetheless had great potential to bias the jury. Roy's jurors were *never* admonished to avoid such stories. So there is no reason to presume they would have avoided them. Furthermore, "*The Killers*" story was not about Roy's trial and jurors would have had no reason to avoid reading it.

In People v. Lanphear (1980) 26 Cal.3d 814, 836 (RB 165), a trial court denied a defendant's motion to *voir dire* jurors during trial after a newspaper published an article about the crime. This Court affirmed the judgment. However, in Lanphear, in contrast to what occurred in this case, the court "took special pains to warn the jury not to read the press or listen to the radio." (Id., at p. 835.) More importantly, in Lanphear, the only newspaper article in question regarded the *same trial* about which the jurors *had* been admonished.

Equally distinguishable is the case of People v. Gates (1987) 43 Cal.3d

1168, 1198-1199 (RB, p. 165). In that case, the defense attorneys requested a new jury for the penalty phase, and alternatively, asked to "revoir dire" the jury. (Id., at p. 1199.) Roy's lawyers did not ask for permission to "revoir dire" the jury. They asked that the Court *poll* jurors for the limited and very specific purpose of determining whether any juror had become prejudiced by the barrage of media coverage of the Klaas and Reynolds murders, the pending Three Strikes legislation, and most importantly, "*The Killers*" article, which featured a quote by Mr. Kinney, and the article about Roy's trial with the photograph of Roy's trial witnesses dancing on Laurie's grave. (See, AOB, pp. 190-192; see, Motion for Judicial Notice, article nos. 27-40.) Given the fact that prior to, and during the guilt phase of Roy's case, the trial court had *never* clearly advised jurors to avoid media coverage of the trial, much less other kinds of stories like "*The Killers*," the court erred by refusing take a few minutes to insure that no juror had been adversely influenced by the negative press.

People v. Melton (1988) 44 Cal.3d 713, 748-750 (RB, p. 165), is distinguishable for similar reasons. In Melton, counsel wanted to *voir dire* jurors about "*The Executioner's Song,*" a television movie about Gary Gilmore, which the trial judge characterized as "emphasizing the 'human aspects' of anyone facing the death penalty." (Id., at p. 749.) In this case, the request was to poll jurors about a broad panoply of inflammatory news stories, including one article with a headline declaring that many who committed murder in Fresno in the year 1993 were people just like Roy, young male minorities, and also quoting Roy's own lawyer as saying that the killers of today "act like small children who want candy." (Motion for Judicial Notice, article no. 37.)

Other cases among respondent's string cites involve requests for pre-penalty phase *voir dire* in cases even more unlike the instant case. (See, People v. Fauber (1992) 2 Cal.4th 792, 46 (RB, p. 166) [denial of motion to revoir dire

regarding an unanticipated prosecution witness]; People v. Bradford (1997) 15 Cal.4th 1229, 1354 (RB, p. 166) [denial of motion to revoir dire about jurors difficulties during guilt phase deliberations]; People v. Williams (1997) 16 Cal.4th 153, 229 (RB, p. 166) [denial of motion to revoir dire a jury that took fewer than two hours to reach guilt phase verdict in a case with many exhibits].)

Respondent has not mentioned, much less discussed or attempted to distinguish, the many federal cases cited by appellant in the AOB, Argument XVIII. (See, e.g., United States v. Polizzi (9th Cir. 1974) 500 F.2d 856, 880; Silverthorne v. United States (9th Cir. 1968) 400 F.2d 627, 642; United States v. Williams (5th Cir. 1978) 568 F.2d 464, 468; United States v. Aragon (5th Cir. 1992) 962 F.2d 439, 442; Mares v. United States (10th Cir. 1967) 383 F.2d 805, 807-808; United States v. Thompson (10th Cir. 1990) 908 F.2d 648, 649.) The cases previously cited collectively demonstrate that a trial court has an affirmative duty to poll jurors to determine whether exposure has occurred when potentially prejudicial news coverage arises during a criminal trial. Failure to do so is error of constitutional dimension *unless* the trial judge has given sufficiently frequent or emphatic orders to jurors not to watch, listen to, or read media coverage, exposure is unlikely, or the publicity is not of an inherently prejudicial character. Reversal is required without any showing of prejudice if the trial court fails to undertake sufficient polling to insure that exposure has not occurred, or jurors were not influenced. (See, cases above and AOB, Argument XVIII, pp. 213-217.)

In this case, the court did not give either frequent or emphatic orders not to watch, listen to, or read media coverage about the trial. Numerous articles of an extremely inflammatory character were published during the course of the trial, including "*The Killers*" article and the story on the guilty verdicts featuring Laurie's relatives dancing on her grave. The court baldly declared the jury to be fair and impartial without any polling whatsoever. The result was a violation

of Roy's rights to an impartial jury under the 6th Amendment, and a reliable capital conviction and sentence, guaranteed by the 8th Amendment and 14th Amendment Due Process Clause.

Under the United States Constitution, use of the "harmless error" test presupposes that the defendant in a criminal case has had a trial before an impartial jury. (Rose v. Roy (1986) 478 U.S. 570, 578; In re Carpenter, supra, 9 Cal.4th at p. 680 [Dissenting Op., Mosk, J.].) The same is true under the California Constitution. (People v. Cahill (1993) 5 Cal.4th 478, 501, 501-502; In re Carpenter, supra.) When a defendant is tried by a jury comprised of one or more members "wanting in that regard," harmless error analysis is unavailable. (Rose v. Roy, supra, 478 U.S. at p. 577; People v. Cahill, supra, 5 Cal.4th at pp. 501-502; U.S. Const., Amendment XIV; Cal. Const., Art. VI, § 13; Arizona v. Fulminante, supra, 499 U.S. at p. 307; Johnson v. Armontrout (8th Cir. 1992) 961 F.2d 748, 756.)

In this case the trial court's failure to properly admonish jurors about avoiding prejudicial trial publicity in the first place, followed by the inexplicable refusal to poll jurors when extremely inflammatory articles appeared in the Fresno Bee, constitutes structural error, requiring reversal of the guilt phase judgment without any showing of actual prejudice. Reversal of the penalty phase judgment is also required because any significant error which occurs during any phase of a capital trial necessarily deprives the jury's penalty phase judgment of its reliability in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. (Satterwhite v. Texas (1988) 486 U.S. at pp. 262-263.) In addition, the error resulted in a biased the jurors for the penalty phase, which violated appellant's right to an impartial jury under the 6th Amendment.

XIX

THE SANITY PHASE VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO GIVE ADEQUATE ADMONITIONS TO INSURE THAT APPELLANT RECEIVED A FAIR TRIAL.

In Argument XIX of the AOB (p. 220), appellant argues that the trial court's failure to properly admonish jurors to avoid exposure to media reports, as well as the refusal to poll jurors to determine whether any had been prejudiced by negative publicity, are errors requiring reversal of the sanity phase verdicts. Argument XIX of the RB (p. 170-172), largely reiterates the arguments advanced by respondent in Arguments XVII and XVIII.

Respondent cites one additional case of note: People v. French (1939) 12 Cal.2d 720, 764 (RB, p. 168). In French, this Court in the year 1939 rejected a defendant's claim on appeal that the denial of a new jury for the sanity trial, and the failure to give a Penal Code section 1122 admonishment before a four day recess required reversal of the sanity judgment. The situation presented in French is distinguishable from Roy's case. French contains no discussion whatsoever of adverse publicity during the trial warranting a new jury, jury polling, or even cautionary instructions about exposure to the press. Furthermore, in French, the question of prejudice resulting from alleged jury misconduct was thoroughly explored by the trial court on the defendant's motion for new trial, and resolved adversely. Not surprisingly, under those circumstances, this Court declined to find prejudice was caused by the trial court's mere technical failure to give the admonition required by the 1939 version of Penal Code section 1122, and declined to disturb the trial court's discretion denying a new jury for the sanity phase trial. (Id., at pp. 764-765.)

Accordingly, the French decision is not helpful to respondent's position. The sanity phase judgment must be reversed for the reasons previously articulated in Arguments XVII, XVIII, and XXVII [cumulative error] of the

AOB. The error deprived Roy of his rights to an unbiased jury under the 6th Amendment, a reliable capital sentencing proceeding under the 8th Amendment, and due process guaranteed by the 14th Amendment.

XX

THE SANITY AND PENALTY PHASE VERDICTS MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO IMPANEL A NEW JURY TO HEAR THE SANITY AND PENALTY PHASES OF THE TRIAL DESPITE THE IRREMEDIABLE EFFECTS OF PREJUDICIAL MEDIA COVERAGE.

Respondent argues that the refusal to impanel a new jury for the sanity and penalty phases was not error because of the "legislative preference" for a single jury to decide guilt and penalty phases of a trial. (RB, p. 170; citing People v. Bradford, supra, 15 Cal.4th at p. 1353.) Appellant does not dispute that such a legislative preference exists, only that the extant circumstances made it constitutionally necessary to impanel a new jury, or at least to poll the jury *in this case*, in order to insure that Roy would receive a fair trial. (See, AOB, p. 221; Pen. Code, § 190.4(c).)

Furthermore, the primary case relied upon by respondent, People v. Bradford, involved markedly different facts. There, the trial court had *made inquiry* of the jurors regarding reasons for the jury's guilt phase deadlock – a disagreement that had arisen as the result of comments made by several strongly opinionated jurors. The trial judge had also given supplemental admonishments which cured the problem. (Id., at p. 1351.) Here the court refused to inquire at all into jurors' exposure to publicity even though exposure and resulting prejudice were highly probable.

Respondent also argues that appellant has not borne the burden of showing that the jury was unable to perform its function as a "demonstrable reality." (RB, p. 171.) It is argued that "more than the speculation or desire of defense counsel" is necessary to show that a jury is unfair. (RB, p. 171.) The

fact is that Roy's attorneys were denied any opportunity to demonstrate that jurors had been poisoned by midtrial publicity. Counsel had no right to contact jurors while the trial was in progress; it would have been professional misconduct to do so. If counsel were unable to make a stronger showing that jurors had been "poisoned," it was because the trial court wrongfully refused counsels' request to poll jurors to determine the extent of, and possible prejudice, caused by media exposure.

Furthermore, more than a "speculative possibility" of juror exposure was established. In argument, defense counsel discussed the numerous potentially inflammatory articles that had appeared in the Fresno Bee, a paper frequently or occasionally read by all but two of Roy's jurors. (See citations to the record at AOB, p. 184, fn. 35, pp. 189-193.) Ms. O'Neill mentioned publicity over the Polly Klaas kidnapping and killing, controversy over the Three Strikes initiative, and the article about "*The Killers*" of Fresno in the year 1993 – published the day the guilt phase verdicts were returned.

In support of the above argument, respondent cites numerous cases including People v. Earp (1999) 20 Cal.4th 826, 891, People v. Weaver (2001) 26 Cal.4th 876, 947, People v. Melton, supra, 44 Cal.3d at p. 74-750, People v. Bradford, supra, 15 Cal.4th at p. 1353, People v. Fauber, supra, 2 Cal.4th at p. 846; People v. Gates, supra, 43 Cal.3d at p. 1198-1199; and People v. Williams, supra, 16 Cal.4th at p. 229. (RB, pp. 171-172.) All of these cases except Earp and Weaver have been discussed previously in the ARB, and further discussion would therefore be redundant. (See, ARB, Argument XVIII.) It suffices to say that the facts of each are distinguishable from the case at bench in significant ways.

People v. Earp, supra, is not particularly supportive of respondent's position. In that case the motion to impanel a new jury was predicated on comments and questions by the prosecutor at the guilt phase trial that allegedly

undermined the credibility of members of the defense team. (Id., at p. 890.) This Court merely upheld the trial court's finding that the prosecutor's misconduct had not poisoned the guilt phase jury. (Id., at p. 891.) Some of the media exposure in this case, on the other hand, concerned Roy's case. "*The Killers*" article inferentially concerned Roy, and quoted his attorney.

People v. Weaver, supra, is equally dissimilar. In that case, a defendant requested a new sanity phase jury in anticipation of advancing an inconsistent theory of defense. The trial court denied a separate jury, noting that mental health experts testifying at the sanity trial would be subject to cross-examination anyway, based on the defendant's earlier testimony at the guilt phase. This Court affirmed the trial court's exercise of discretion. (Id., at p. 947.) The holdings in these cases do not compel denial of relief in this case.

Respondent argues that the inordinate delay between the sanity and penalty phases was an insufficient ground to impanel a new jury for the penalty phase. (RB, p. 172.) It is also argued that no error occurred because the trial court had no way of predicting that a long delay would precede the penalty phase at the time the request for a new jury was made. (RB, p. 172.)

The denial of a new jury for penalty phase was no less prejudicial merely because the court could not have anticipated the ensuing inordinate delays. It was incumbent on the court to insure that Roy received a fair trial. By the time the penalty trial started on October 25, 1994, the jurors had been subject to their indentured servitude for nearly *fourteen* months, rather than the *three-and-a-half months* originally projected at the time of *voir dire*. (RT 89 et seq., 134.) One juror had lost his job. (RT 10120-10122.) Several jurors were teachers whose school employment was being disrupted on a continual basis. (RT 10498.) A fourth juror was forced to use his personal leave time to survive during his protracted service. (RT 10531-10537.) The prejudicial effect of the delay was intangible and irremediable. The court should have convened a new

jury for the penalty phase whether or not a new jury was thought to be warranted for the sanity phase. Although it is true that an appellate court will usually "review the correctness of the trial court's ruling at the time made" (People v. Welch (1999) 20 Cal.4th 701, 739; People v. Gutierrez (2002) 28 Cal.4th 1083, 1120; cited at RB, p. 172), in this case, the trial court had every opportunity to reconsider its ruling in the face of circumstances making it increasingly unlikely if not impossible for Roy to obtain a fair trial from the original 12 jurors. A new jury for the penalty phase should have been empanelled.

In People v. Taylor (2001) 26 Cal.4th 1155, 1169-1170 (RB, p. 172.), this Court held that a delay of the penalty phase did not warrant a new jury, but did so under vastly different circumstances. In Taylor, newly appointed counsel wanted a new jury just so they could participate in *voir dire*. In this case, a new trial was sought because of the barrage of adverse publicity about the trial, local murder victims and their killers, and highly controversial anti-crime legislation supported by victims' families. In addition, the delay was extremely protracted and it is a matter of record on appeal that a number of jurors suffered significant economic detriment as the result of the unanticipated delays.

Respondent has failed to address altogether the numerous federal authorities cited by appellant in support of reversal of his sanity and penalty phase judgments. (See, AOB, pp. 225-227.) As such, there is no necessity for additional reply and appellant thus submits without further argument based on prior briefing.

For reasons previously articulated in the ARB, Argument XVIII, the denial of a new jury should be deemed structural error. Application of the "harmless error" test is inappropriate because it presupposes that the defendant has had a trial before an impartial jury. (Rose v. Roy, supra, 478 U.S. 570, 578; In re Carpenter, supra, 9 Cal.4th at p. 680 [Dissenting Op., Mosk, J.].) In this

case, the trial court failed and refused to take the steps necessary to insure juror impartiality. In addition, it is impossible to quantify in "harmless error" terms the biasing effect of forcing jurors, many of whom were suffering employment and financial hardship, to continue sitting on Roy's case after a nine-month hiatus in the proceedings. (Rose v. Roy, supra, 478 U.S. at p. 577; People v. Cahill, supra, 5 Cal.4th at pp. 501-502; U.S. Const., Amendment XIV; Cal. Const., Art. VI, § 13; Arizona v. Fulminante (1991) 499 U.S. 279, 307; Johnson v. Armontrout (8th Cir. 1992) 961 F.2d 748, 756.) The refusal to impanel a new jury therefore requires reversal of the sanity and penalty judgments without any showing of actual prejudice. At minimum, the penalty judgment should be reversed because the refusal to impanel a new penalty jury after a nine-month separation of the jury, deprived the judgment of any semblance of reliability in violation of the Eighth Amendment, and Article I, section 17, of the California Constitution.

XXI

THE SANITY AND PENALTY PHASE JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO POLL JURORS ABOUT NEWS COVERAGE PRIOR TO THE SANITY PHASE TRIAL.

This argument has been largely addressed by both respondent and appellant in the context of Argument XVIII of the RB and the corresponding argument in this ARB. A few additional points warrant discussion, however.

Respondent quotes the trial court as stating, on January 7, 1994: "I see no reason to again *voir dire* the jury on something we've actually spent more time on that particular aspect of the case than any other in our general *voir dire* at the beginning." (RB, p. 173; RT 9464.)

The trial court's statement is not supported by the evidence in the appellate record. The court may have had the *impression* that much time was spent questioning, or screening jurors about their exposure to publicity; the

impression was, however, mistaken. Very little *voir dire* was conducted on the subject of media exposure. And of course, there was no questioning concerning midtrial publicity.

The trial court initially ruled that pretrial publicity would not be covered at all during sequestered individual *voir dire*. (RT 156.) Consequently, during Hovey *voir dire*, nine of panelists who were subsequently selected to serve as Roy's jurors and alternates were not questioned at all about their exposure to the press. (RT 48-498, 663-679, 895-905, 1105-1115, 1132-1143, 1144-1153, 1391-1402, 1518-1529, 1687-1695: see AOB, p. 185.) After the judge changed his mind on this point, the five remaining panelists who were sworn as jurors and alternates were very briefly questioned about their exposure to the media. (RT 1905-1923, 1973-1992, 2523-2531, 2771-2790, 2797-2809, 2986-2988.) Only three of the panelists eventually selected to serve as jurors or alternates were directly admonished during *voir dire* not to watch TV and/or to read newspaper coverage of the trial. Two of these jurors, Sylvester and Stoller, did not end up participating in the verdicts. (RT 1983, 2773, 2988.)

Following Hovey *voir dire*, but before the final jury was impaneled, the court touched only briefly on the subject of media coverage, asking panelists as a group what they had heard, if anything, about the case. (RT 3053.) At this time, the court also gave a very short admonition telling prospective jurors he was going to be asking them not to "read any newspaper accounts of this trial." (RT 3054.) Other types of media, such as television and radio, were not even mentioned. Subsequent admonitions to the jury before and during the guilt phase did not include any clear directive from the court not to read newspapers, watch television, or listen to radio coverage of the trial. (RT 3334-3335: see also, ABO, pp. 186-187.)

Consequently, Roy's jury was never "correctly admonished" not to avoid newspaper, television and radio accounts of the trial. (See, RB, p. 174.) So the

presumption that a correctly admonished jury will heed the court's admonishment does not apply to this case.

Furthermore, as has been pointed out previously in Argument XVIII, much of the most inflammatory press coverage was not about Roy's trial at all. Probably the worst kind of coverage is exemplified by Fresno Bee's story, discussing the rampant problem in Fresno of murders committed by young non-Caucasian men, and featuring a disparaging quote from Roy's lawyer, Ernest Kinney. So even if a thorough admonition had been given, telling jurors to avoid reading stories about the Clark trial, it still would have been wholly ineffective to prevent the kind of prejudice that was produced here.

For reasons previously articulated in the AOB, the refusal to poll jurors was error requiring reversal of the sanity and penalty judgments.

XXII

THE SANITY AND PENALTY JUDGMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO PRESERVE JUROR SCHMIDT'S NOTEBOOK AND REFUSED TO POLL JURORS, OR TO ADEQUATELY QUESTION JUROR SCHMIDT, ABOUT HER PREJUDGMENT OF ROY'S SANITY.

A. The duty to inquire about prejudgment:

Respondent argues that the evidence of possible juror bias at the sanity trial was so "highly speculative" that the trial court had no duty to inquire. (RB, pp. 180-181.) The so-called "speculative" evidence was a statement in a juror's notebook, written *prior* to the receipt of any sanity phase evidence: "Was he aware of the crimes. Yes." (RT 9614-9615.) It does not require a great deal of "speculation" to conclude that this juror, Ms. Schmidt, had a formed a preconceived belief regarding the Royal Clark's sanity prior to hearing any testimony.

Respondent concedes that prejudgment of a case constitutes serious juror misconduct. (RB, p. 181.) In fact, in the case cited for this proposition,

Clemens v. Regents of the University of California (1971) 20 Cal.App.3d 356, 361, a medical malpractice jury verdict was reversed based on a juror's concealment of a bias against people who would prosecute medical malpractice claims. In that case, there was a hearing on the plaintiff's motion for new trial. The juror in question, a dentist, signed an affidavit denying prejudice or prejudgment of the issues. (Id., at p. 365.) The appellate court found that the juror's prejudgment and bias were clearly inferable from other evidence presented at the hearing. (Ibid.) In this case, the court refused to do more than give the juror an opportunity claim that she had an open mind. The defense was denied any opportunity to explore the juror's bias.

Citing People v. Ray, supra, 13 Cal.4th at p. 343, as authority, respondent argues that a judicial decision not to investigate juror bias rests with the sound discretion of the trial court. (RB, p. 181.) In Ray, discussed previously, a juror came forward to disclose his superficial acquaintance with the daughter of the victim; the defense attorney saw no reason to inquire further. In contrast, Roy's attorneys pressed for an inquiry because the juror's note to herself strongly suggested prejudgment on the sanity issue. The trial court should have conducted further inquiry in this case. (Id., at p. 343.)

Respondent cites a number of cases in support of the assertion that the trial court had no duty to inquire further. All are distinguishable from appellant's case. In People v. Williams (1997) 16 Cal.4th 153, 230-231 (RB, p. 181), for example, the motion to remove a juror was based on nothing more than the defense counsel's observation of the juror's body language during the trial. The request to question Juror Schmidt was not based on mere body language.

In People v. Kaurish (1990) 52 Cal.3d 648 (RB, p. 181), the defense unsuccessfully asserted that the court had a *sua sponte* duty without request to examine a juror who became exasperated and said, "'Oh, you son-of-a . . .'"

when the court excused the jury to discuss the scope of cross-examination of a defense witness. (Id., at p. 694.) People v. Espinoza (RB, p. 181) similarly rejected a defense assertion that the court had a *sua sponte* duty to investigate further after defense counsel merely mentioned, without pressing the matter, that a certain juror appeared to be asleep. (Id., at p. 821. Finally, the case of People v. Adcox (1988) 47 Cal.3d 207 (RB, p. 181), likewise involves a court's failure, *without a request*, to investigate the jury's exposure to mid-trial newspaper articles featuring quotes from the prosecutor. (Id., at p. 252.)[16] Appellant does not assert that the trial court had a *sua sponte* duty to investigate; rather, it is asserted that the court wrongfully denied counsel's request for further questioning. Such errors violated appellant's rights to an impartial jury (6th Amendment), a reliable capital proceeding (8th Amendment), and due process and a fair trial (14th Amendment).

B. The duty to preserve the notebook page:

Respondent argues that appellant's reliance on the case of People v. Zapien (1993) 4 Cal.4th 929, is not well taken. (RB, pp. 182-184.) The Zapien case was cited by appellant for the proposition that United States Constitution imposes a duty to preserve evidence relevant to proving prosecutorial misconduct. (AOB, p. 233.) Zapien involved the wrongful destruction of evidence relevant to prove prosecutorial misconduct. By analogy, it is appellant's assertion that the federal constitution imposes a duty on courts to preserve evidence potentially relevant to prove *juror misconduct.* (See, AOB, p. 233.)

Respondent argues that the court's failure to preserve the notebook was *not* error because the page had little value, if any, in proving juror bias. (RB,

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[16]In Adcox, the attorney raised the issue on a motion for mistrial. He did not offer any evidence of actual juror exposure and also failed to move the newspaper articles in question into evidence. Counsel never requested that the jury be voir dired to investigate the potential claim of misconduct. (Id., at p. 252.)

p. 182.) Respondent apparently reasons that relevancy has been lost because the trial court "assumed Mr. Kinney's description of what he saw was accurate." (RB, p. 182.) Assuming Mr. Kinney accurately described the note – "Was he aware of his crimes? Yes." – it clearly had relevance to prove that Juror Schmidt had prejudged Roy's sanity without hearing the evidence. Not preserving the notebook effectively deprived Royal Clark of evidence that could have, and no doubt would have, been used to investigate and raise a claim of juror misconduct in post-judgment proceedings. For example, the notebook could have been used to refresh the juror's memory in post-conviction proceedings.

Moreover, the failure to preserve the notebook was not innocent or inadvertent, but rather in bad faith. The trial court was aware of the evidentiary value of the notebook to the defense yet refused to prevent its destruction, effectively impeding further appellate court review. (Arizona v. Youngblood (1988) 488 U.S. 51, 58.) Such destruction of relevant evidence thus deprived the defendant of his rights to a fair trial and impartial jury, as well as a reliable death judgment, and requires reversal of the sanity and penalty judgments on direct appeal. (U.S. Const., Amendments VI, VIII, XIV; Cal. Const., Art. I, §§ 7, 13, 15, 16, 17.)

C. Failure to poll jurors.

Respondent argues that appellant's claim of error based on the court's refusal to poll jurors after the juror's notebook entry was observed is waived. (RB, p. 184.) "During the discussion on whether Juror Schmidt should have been called in and examined, the defense never expressly requested to have the jurors polled." (RB, p. 184.)

Respondent is mistaken. Ms. O'Neill argued that Ms. Schmidt's notebook entry tended to support the earlier claim by defense counsel that jurors had been poisoned by pretrial publicity and had prejudged the case. (RT 9616-

9617.) The deputy district attorney obviously understood this to be a request for jury polling, since he responded by arguing *against* either polling the jury or questioning Ms. Schmidt. (RT 9617.) The court also understood that polling was being requested. At one point, the judge commented that Mr. Cooper had made a request to argue "on whether or not to poll the jury." (RT 9620.) In fact, the record shows that the court denied the request: "My inclination is not to [poll the jury], as it was before with Ms. O'Neill's request." (RT 9620.) The record does not support respondent's assertion that the issue of jury polling was waived. (Cf. People v. Esayian (2003) 112 Cal.App.4th 1031, 1041-1042 [failure to challenge manner of blood draw].)

Moreover, the trial court did not fail to act because counsel failed to ask. To the contrary, the trial court chastised Mr. Kinney for looking at the juror's open notebook, and declared that the notebook had "almost no value" to the court. (RT 9618.) The court ruled no polling would be conducted because Mr. Kinney had "no business looking at the notebook in the first place."

Respondent alternatively argues that the trial court did not abuse its discretion by refusing to poll the jury. "Any cause for concern arising from the writing in Juror Schmidt's notebook . . . was entirely speculative." (RB, p. 185.) Appellant disagrees; there was nothing speculative about the juror's notebook entry: the juror flatly answered the only relevant question in the sanity phase, and the answer was contrary to Roy's position. Furthermore, none of the string-cited cases supports the Attorney General's position. (See, RB, p. 185.) Almost all have already been distinguished from this case elsewhere in this brief and need not be discussed again here. (People v. Lanphear, supra, 26 Cal.3d 814 (see, p. 123); People v. Melton, supra, 44 Cal.3d 713 (see ARB, p. 124); People v. Adcox, supra, 47 Cal.3d 207 (see ARB, p. 135); People v. Espinoza, supra, 3 Cal.4th 806 (see ARB, p. 121, 135); People v. Gates, supra, 43 Cal.3d

1168 (see ARB, p. 123); People v. Kaurish, supra, 52 Cal.3d 648 (see ARB, p. 135).)

People v. Davis (1995) 10 Cal.4th 463, a case not previously addressed, is likewise distinguishable. In Davis, the court received a note from the jury foreman during penalty phase deliberations. The note included a number of questions regarding whether a death judgment would actually be imposed, and whether life without parole really meant life without parole, and also asking about the relative expense to the public of each potential penalty. The defense requested that the court question jurors to determine whether these subjects had been discussed during deliberations. The court did not question jurors, but gave responsive supplemental instructions. The trial court advised jurors of the Governor's power of commutation in both life and death cases. The court also instructed jurors to assume that the penalty would be carried out, and that it would be a violation of duty to consider the cost to taxpayers or impacts on the legal system of the sentencing alternatives. (Id., at p. 547.) In this case, the court did not give the jury any supplemental instruction at all. Only juror Schmidt was questioned, but not adequately. (See, AOB, p. 234.) The error deprived Roy of his right to an impartial jury (6th Amendment), the right to a reliable capital trial (8th Amendment), as well as due process and a fair trial (14th Amendment).

D. The adequacy of the court's questioning of Juror Schmidt.

Respondent argues that the court's questioning of Juror Schmidt was adequate. (RB, p. 185-188.) Respondent concedes that a more direct and detailed inquiry might have been "preferable" but argues it was not required under the circumstances. (RB, p. 188.) The Attorney General reiterates that there was only "pure speculation" that Juror Schmidt had prejudged the case. (RB, p. 188.) Again, the plain language of the juror's notation indicated she prejudged the case.

Respondent's Argument XXII, B (4) contains a general discussion of hornbook legal principles with which appellant generally agrees. (RB, pp. 186-187.) Appellant does not, however, agree with respondent's conclusion: that the trial court conducted adequate questioning of Juror Schmidt.

In a footnote, respondent seeks to discredit appellant's reliance on the cases of United States v. Thompson (10th Cir. 1990) 908 F.2d 648, 650, and Silverthorne v. United States (9th Cir. 1968) 400 F.2d 627. (RB, p. 188, fn. 70.) To the contrary, these cases are directly on point for the propositions asserted. The trial court in this case generally inquired of Juror Schmidt whether she could keep an "open mind," whether she could listen to both sides and decide the case based on the evidence, whether her mind "would be closed because of something [she had] already heard" and whether she would give Royal Clark "a fair trial." (RT 9635-9636.) This is precisely the type of inquiry that was found inadequate in the Thompson and Silverthorne cases, because it merely called upon Ms. Schmidt to assess her own impartiality for the court's benefit, nothing more. (Thompson at p. 650; Silverthorne at p. 638.)

Respondent argues that the trial court went beyond Juror Schmidt's opinion of her own impartiality and made findings based on the demeanor of the juror. (RB, p. 187.) The court commented that Ms. Schmidt had been "a very attentive juror" who had "clearly paid attention in terms of her eye contact throughout this case." (RT 9618.) Respondent fails to articulate how the court's observations of the juror's "attentiveness" in prior phases of the case had any bearing on whether Ms. Schmidt had prejudged Roy's sanity prior to hearing any evidence at the sanity phase of the trial.

Respondent seeks to distinguish Thompson and Silverthorne based on the purportedly more prejudicial nature of the news coverage in those cases in comparison to Roy's case. (RB, p. 188, fn. 70.) Notably, respondent elects not to discuss any of the 61 newspaper articles set forth in the Appellant's Motion

for Judicial Notice, all of which were published during the course of Roy's trial proceedings. Perhaps this is because it would be difficult to credibly argue with any specificity that the Fresno Bee's coverage of the trial and other crime stories was any less inflammatory than news coverage involved in the Thompson and Silverthorne cases. Consider the specific Fresno Bee articles that gave rise to trial counsels' concerns: article no. 37, entitled, "*The Killers: Many of Those Who Committed Homicides in Fresno in 1993 Were Young Male Minorities*" and article no. 39, featuring Laurie's relatives celebrating the guilty verdicts on her grave. (Motion for Judicial Notice, Appendix B.)

Accordingly, appellant's argument XXII does not fail on the merits. The errors violated Roy's rights to an unbiased jury (6th Amendment), a reliable capital trial (8th Amendment), and to due process and a fair trial (14th Amendment). Reversal is required.

XXIII

THE TRIAL COURT DID NOT PROPERLY ADMONISH THE JUROR AFTER THE SANITY PHASE VERDICTS WERE RETURNED, AND PRIOR TO THE PRE-PENALTY PHASE RECESS.

Respondent has incorporated by reference responses to Appellant's Argument XVII [failure to admonish jurors prior to commencement of trial]. Accordingly, appellant refers this Court to arguments made in reply, in Argument XVII, in lieu of restating the same arguments at this point. All but one of the cases cited by respondent in Argument XXIII (RB, pp. 189-191) have been cited previously and addressed by appellant in the context of the ARB, Argument XVII. (People v. Lambright, supra, 61 Cal.2d 482; In re Hitchings, supra, 6 Cal.4th 97; Smith v. Phillips, supra, 455 U.S. 209; People v. Honeycutt, supra, 20 Cal.3d 150; NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra, 20 Cal.4th 1178; People v. Ladd, supra, 129 Cal.App.3d 257; People v. Linden, supra, 52 Cal.2d 1; People v. Morales, supra, 48 Cal.3d

527; People v. Heishman, supra, 45 Cal.3d 147; Halko v. Anderson, supra, 244 F.Supp. 696; see, ARB, pp. 111-118.)

Respondent cites People v. Santamaria (1991) 229 Cal.App.3d 269, for the proposition that "there is no presumption of prejudice from every post-submission separation of the jury, and defendant seeking reversal because the jury has been separated must establish prejudice." (RB, p. 191.) Appellant repeatedly cited the Santamaria case in the AOB and for good reason. (AOB, pp. 138, 142, 223, 239, 244.) In that case, the Court of Appeal found that a trial judge had exceeded the bounds of reason by suspending jury deliberations for 11 days. The Court of Appeal stated:

> "To summarize, appellant was faced with a serious charge, a special circumstances first degree murder. The risk of prejudice inherent in suspending deliberations for 11 days was considerable, from the prolonged exposure of the jurors to outside influences, from the strong probability that their recollections of the evidence and the instructions would fade or become confused, and from the subversion of the pattern of orderly deliberation."

(Id., at p. 279.)

The Santamaria decision did, as respondent contends, declare that, when a court has discretion to allow separation of a jury, "*usually* the burden is on the defendant to prove actual prejudice." (Id., at p. 280; emphasis added.) However, the court pointed out that "at times a procedure used by the state is so inherently suspect that a showing of actual prejudice is not a prerequisite to reversal." (Id., at p. 280, citing Estes v. Texas (1965) 381 U.S. 532, 543-544 [televising of trial required reversal even if the defendant could not prove with particularity that he was prejudiced].) The reviewing court in Santamaria also noted that this Court had acknowledged as a "fundamental principle" that the character of certain procedures sometimes makes it impractical to establish the degree to which prejudice has resulted. (Ibid.) Guided by these principles, the

Court of Appeal found a denial of due process:

> "Due process implies an adherence by the trial court to established mode of trial. Extreme variations from that practice, especially without established necessity, subvert the integrity of the legal process."

(Santamaria at p. 283.)

In this case, extreme variations from established modes of trial included not only the frequent shuffling of lead and second-chair defense attorneys and an extraordinarily long delay of nine months between the sanity and penalty phases of the trial; in addition, variations included a near total failure on the part of the trial court before, during, or after guilt and sanity phases of the trial, to admonish jurors to avoid the barrage of highly prejudicial media coverage of the trial. Consequently, even more so than in the Santamaria case, the integrity of the legal process was completely destroyed.

XIV

THE DEATH PENALTY MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE POLLING OF THE JURY REGARDING PREJUDICIAL MIDTRIAL PUBLICITY PRIOR TO THE PENALTY PHASE.

Although respondent does not clearly argue waiver,[17] the factual discussion in Argument XIV of the RB implies that defense counsel, Mr. Kinney, concurred with the manner in which the trial court handled the questioning of jurors prior to the penalty phase. (RB, p. 192-193; see, "A. The Record.") Respondent's factual summary is highly misleading.

The record speaks for itself:

On June 3, 1994, Ms. O'Neill and Ms. Martinez filed a written motion seeking individual polling of the jury due to the passage of time, to insure that all jurors remained fair and impartial. The motion specifically alleged that there had been much prejudicial publicity regarding Roy's case, the highly publicized Polly Klaas murder case, and the Three Strikes Initiative during the intervening period. (CT 1323-1325.) Shortly thereafter, Ms. O'Neill was diagnosed with cancer and Mr. Kinney was substituted as lead counsel in her place.

On June 17, 1994, the court deferred ruling on the foregoing motion until such time as the jury was reconvened. (RT 10405.)

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[17]See, page 196, and footnotes 73 and 74 of the RB, in which respondent seems to be arguing that this Court need only evaluate whether there was prejudice caused by the trial judge's *variance* from the query to the jury that the Court proposed to give on October 4, 1995, but never gave: "Anything any of you have read in favor of the attorneys about any cases that they might have tried, about me or anything else or heard on television or seen on television that would make it difficult to be fair and impartial. If so, please raise you raise your hand and we'll talk to you about it." (RT 10525.) In fact, Mr. Kinney criticized the language proposed by the court as "rather general." (RT 10526.) Respondent's prejudice analysis also disregards the written motion for jury polling filed June 3, 1994, and the renewal of that motion on October 25, 1994, by Mr. Kinney. The waiver argument makes no sense because, even assuming Mr. Kinney acquiesced with or did not object to the above query, that query was *not* given.

On October 4, 1994, the jury was finally reconvened for pre-penalty phase motions after a hiatus of more than eight months. The trial court asked the jurors collectively if anything they had seen or read in the media would make it difficult to be fair and impartial. (RT 10527.) The jurors responded with silence, and according to the trial judge, negative shakes of the head. (RT 10528.)

Three weeks later, just prior to commencement of the evidentiary portion of the penalty phase, on October 25th, Mr. Kinney renewed the prior request for individual polling of jurors, and referred to additional recent adverse publicity about the trial. The trial court denied the request for further questioning, and found that the October 4, 1994, inquiry had sufficed. (RT 10961-10963.)

Conveniently ignoring all on-the-record debate about the pre-penalty phase jury polling issue except that discussion which occurred on October 4, 1995, respondent argues that the trial court had no duty to question jurors further about exposure to publicity prior to the commencement of the penalty phase trial. The argument does not hold water. By October 25, 1994, when the penalty phase began, more than nine months had elapsed since the jury's return of a sanity phase verdict, during which jurors had more or less resumed their normal lives. During this period, the Fresno Bee had reported on the progress of Roy's case, and in addition, stories about violent crime were constantly at the forefront of the news. (See, Motion for Judicial Notice, Appendices A and B.) Moreover, even before the sanity trial, jurors had *not* been unequivocally advised by the trial judge not to read newspapers, watch television news, or listen to radio coverage of Roy's trial, *much less* to avoid exposure to stories about Mr. Kinney, his other clients accused of murder, other heinous murders in Fresno and the public outcry and debate over the proposed Three Strikes initiative.

Relying on an incomplete quotation, respondent mischaracterizes the

record by suggesting that Mr. Kinney acknowledged or agreed with the court that published newspaper articles did not relate to the Clark case. (RB, p. 196, fn. 74; RT 10524.) This is what Mr. Kinney said on October 4, 1994:

> "Your Honor, I don't know if it is important or not, but I know there have been articles in the media regarding Mr. – the D.A. in other cases and myself in other cases. In fact, the one that you are handling now with rather substantial coverage. And I don't know they relate to this case unless by any of those articles they thought either one of us was a jerk or a good guy or whatever. I'm throwing it out that there has been coverage on both of us on other cases of somewhat of a substantial nature."

(RT 10524.)

This statement by Mr. Kinney merely highlights the fact that Mr. Kinney and prosecuting attorneys in other cases had been mentioned or quoted in numerous newspaper articles during the period in question.[18] For example, not

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[18]See, Motion for Judicial Notice. (See, e.g., Article no. 25: *November 9, 1993, Malarkey and Sister Ordered to Stand Trial*; by Pablo Lopez; Edition: Home; Section: Metro; Page B1.); Article no. 36: January 4, 1994; *The Killers No Charges Filed in Massacre Case After Six Months* Police Say There Isn't Quite Enough Evidence to Persuade Prosecutors*; by Royal Calkins; Edition: Home; Section: Telegraph; Page: A7); Article No. 37: January 4, 1994, *The Killers* Many of Those Who Committed Homicides in Fresno in 1993 Were Young Male Minorities*; by Royal Calkins and Pablo Lopez; Edition: Home; Section: Telegraph; Page: A1); Article no. 43: *Jury Selection Begins for Trial of Harris, Reed*; by Pablo Lopez; Edition: Home; Section: Metro; Page: B2); Article No. 48: February 4, 1994; *Malarkey, Denn, Will Face Death Penalty*; by Pablo Lopez; Edition: Home; Section: Metro; Page: B4); Article no. 53: May 5, 1994; *1 Convicted in Student's Killing * Judge Declares Mistrial When Jury Deadlocks on Co-Defendant's Role in 1991 Robbery, Murder;* by Pablo Lopez; Edition: Home; Section: Metro; Page B2); Article no. 56: August 19, 1994; *Prosecutor Accused of Excluding Blacks * Jury Process Halted After Dismissal of Second African-American Angers Defense Lawyer;* by Louis Galvan; Edition: Home; Section: Metro; Page: B1); Article No. 57; August 24, 1994; *Jury Selection Starts Over in Reed Trial * Of 80 in Panel, Only Two Are African* American; by Pablo Lopez; Edition: Home; Section: Metro; Page: B2); Article no. 58; *Jury Selected for Second Reed Trial * Proceedings Are Scheduled to Resume Friday With Opening Remarks*; by Fresno Bee; Edition:

(continued...)

long before the October 4, 1994, hearing, there were several articles discussing the fact that Mr. Kinney had charged prosecutor Steve Polacek with racial discrimination during jury selection in the highly publicized Terrell Reed case. (See, Motion for Judicial Notice: Article nos. 56 & 57, cited in footnote 18.) Mr. Kinney accurately surmised that some of these articles could have caused the jurors in Roy's case to conclude that he was either a "good guy" or a "jerk." The quoted statement does not mention the publicity in Roy's case; hence, it cannot be taken as an implied concession that Roy's case was *not* the subject of any publicity in the months preceding resumption of penalty phase proceedings.

Furthermore, regardless of what Mr. Kinney did or said on October 4, 1994, on October 25, 1994, in advance of the taking of any penalty phase evidence, Mr. Kinney renewed the previous written motion for individual jury polling based on concerns about passage of time and prejudicial midtrial publicity. (RT 10961.) There was certainly no waiver of the jury polling issue.

Respondent relies on an assortment of cases, none of which compel affirmance of the judgment in a case involving an extraordinarily long interruption in a death penalty trial paired with an almost total failure on the part of the trial court to admonish jurors about avoiding the media. In People v. Pinholster (1992) 1 Cal.4th 865 (RB, p. 194), for example, during jury selection one venireman who read an article about another criminal case shared the article with one other panelist. Neither of the men who read the article served on the jury. Those jurors who did sit on the jury were admonished to disregard the article. (Id., at p. 925.) Later on, during closing guilt phase articles, two jurors and an alternate read a newspaper article purportedly "lionizing" the prosecutor

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(...continued)
Home; Section: Metro; Page: B4); Article No. 59: October 21, 1994; *Defendant Thanks Jury for Acquittal * Emotions Overflow After Verdict in Murder of University Student*; by Tom Kertscher; Edition: Home; Section: Metro; Page: B1).)

in Mr. Pinholster's case. (Id., at p. 926.) These jurors were questioned by the court as a group and either volunteered nothing, or denied that the article had affected their ability to be fair. Although jurors had clearly committed misconduct by reading the article, the trial court found that the presumption of prejudice had been satisfactorily rebutted, particularly in light of the substance of the article which negatively characterized the prosecutor as a "'master of overkill'" and an "'actress'". (Ibid.) More importantly, in Pinholster, the request for individual jury polling did not follow a 10-month midtrial delay.

In People v. Beeler (1995) 9 Cal.4th 953 (RB, p. 194), the issue on appeal was whether the trial court erred by allowing a jury to continue to deliberate for several hours after a juror reported that his father had died; the court intended to recess early to permit the juror to fly out of state on a 2 p.m. flight. The juror did not request immediate discharge, nor did he object to the order to continue deliberations. Defense counsel objected, but before the deliberating jury could be questioned, a guilty verdict was reached. Afterward, the court questioned jurors, who indicated they were not pressured or coerced by the bereaved juror's imminent departure. In that context, this Court affirmed the trial court's exercise of discretion. (Id., at p. 989.) The facts of Beeler bear no resemblance to this case.

The ruling in NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra, 20 Cal.4th 1178, has even less relevance to the issue before this Court; it addresses the propriety of a state trial court order excluding the media from a celebrity trial. (Id., at p. 1223.)

Respondent argues based on appellant's Motion for Judicial Notice that none of the articles published were "exceptionally prejudicial." (RB, p. 195.) For reasons previously stated, the articles themselves betray this suggestion.

Citing People v. Stanley (1995) 10 Cal.4th 764, and People v. Erno (1925) 195 Cal. 272 (RB, p. 195) as authority, respondent asserts that the length

of the hiatus in this case does not raise any presumption that the jurors were exposed to improper material, thus obviating the need for a specific showing of juror misconduct. (RB, p. 195.) The Stanley case involved an interruption in the trial of only *three* months. In addition, what respondent fails to point out is that the jury in Stanley was admonished against "reading or listening to anything connected with the case that might appear in the news media." (Id., at p. 836; emphasis added.) Just before the hiatus, the trial court gave "a particularly strong admonition," (id., at p. 837) advising jurors to immediately refrain from reading, viewing, or listening to anything in the news media, including newspaper, radio, or television news concerning the trial. (Stanley at p. 837, fn. 39.) No such admonition was given here so no presumption applies.

The Erno case, too, involved a midtrial recess of only 10 days with the full consent of all counsel. (195 Cal. at p. 282.)

In footnote 72, respondent reiterates the same argument advanced in the context of Argument XXII, that appellant's reliance on United States v. Thompson, supra, 908 F.2d at p. 650, and Silverthorne v. United States, supra, 400 F.2d at pp. 640-644, is not well taken. (RB, p. 195, fn. 72.) This argument has been adequately addressed in Argument XXII of the ARB; appellant will refrain from restating the same arguments here.

The remaining cases cited by respondent stand for general propositions that are not contested (People v. Bolin (1998) 18 Cal.4th 297, 326), are generally favorable to appellant (i.e., People v. Lambright, supra, 61 Cal.2d at pp. 486-4870); or they have been adequately addressed, discussed or distinguished elsewhere in the ARB. (People v. Lanphear, supra, 26 Cal.3d at p. 836; People v. Melton, supra, 44 Cal.3d at pp. 748-750; People v. Gates, supra, 43 Cal.3d at pp. 1198-1199; see, ARB, Argument XVIII, ante.). Failure to poll the jury denied Roy his rights to an unbiased jury (6th Amendment), a

reliable penalty determination (8th Amendment), and to due process and a fair trial (14th Amendment).

XXV

THE DEATH PENALTY MUST BE REVERSED DUE TO THE IRREMEDIABLE LONG DELAY BETWEEN THE GUILT AND PENALTY PHASES OF THE TRIAL.

Respondent argues, in essence, that all delays between the sanity and penalty phases of the trial were supported by good cause, were for Roy's benefit, and therefore did not raise a presumption of prejudice as in People v. Santamaria, supra, 229 Cal.App.3d 269. Respondent would apparently condone a three year delay, or one even longer. Respondent's analysis is inherently contradictory. By focusing on whether there was "good cause" to justify each incremental delay of the case, the Attorney General avoids addressing the real issue: whether the delay between sanity and penalty phases was so long, and so inherently prejudicial under the circumstances that the fairness and reliability of the penalty phase trial was irrevocably compromised.

Appellant will reply to the Attorney General's arguments with reference to chart set forth below, which illustrates the chronology of postponements between January 20, 1994, the date of the sanity verdict, and October 25, 1994, the date the penalty trial began. Manifestly, the 10-month delay between sanity and penalty phases cannot readily be characterized as caused "to promote the best interests of appellant." (RB, p. 198.)

Delays Between January 20, 1994 and October 25, 1994

Proceeding:	Continuance Date:	Counsel:	Parties' positions:
January 20, 1994 **Sanity verdicts**	To: January 24, 1994	O'Neill, Martinez	PD declares conflict. (James Anthony Scott) No express time waiver.
January 24, 1994	To: January 25, 1994	O'Neill, Martinez, Kinney	PD asserts Clark cannot waive conflict. No express time waiver.
January 25, 1994	To: January 27, 1994	O'Neill, Martinez, Kinney	Martinez & O'Neill are relieved as counsel. PD Dreiling is held in contempt. Kinney is appointed lead counsel over objections. No express time waiver.
January 27, 1994	To: January 31, 1994	Kinney, Criego	Kinney moves for mistrial. Order discharging O'Neill and Martinez is vacated. No express time waiver.
January 31, 1994	To: February 1, 1994	Kinney, Shinaver, Dreiling, Criego	PD is litigating contempt/conflict. No express time waiver.
February 1, 1994	To: February 2, 1994	Kinney, Dreiling, Criego	PD is litigating contempt/conflict. No express time waiver.
February 2, 1994	To: February 8, 1994	Kinney	No express time waiver.
February 8, 1994	To: March 25, 1994	Kinney, Merritt, Shinaver, Criego	No express time waiver.

March 25, 1994	To: April 15, 1994	Kinney, Shinaver, Criego, Dreiling, O'Neill	PD conflict issue is settled with DA by stipulation. Dreiling's contempt is purged. O'Neill resumes representation of Clark. Martinez is not reinstated. Kinney objects to delays, to removal of Martinez, & argues against his taking position of second chair for penalty phase. Clark objects to Public Defender representation and requests new jury because current jury has been "sitting out too long." No express time waiver.
April 15, 1994	To: April 29, 1994	O'Neill, Kinney	Court vacates order removing Martinez from case over PD's objection. No express time waiver.
April 29, 1994	To: May 13, 1994	O'Neill, Martinez, Kinney	First express time waiver: Clark "waives any statutory constitutional rights". O'Neill concurs.
May 13, 1994	Upon finding of "good cause," **first penalty trial date is set for June 27, 1994.**	O'Neill, Martinez, Kinney	O'Neill indicates motions will be filed for individual jury polling, for new jury panel, and mistrial. Time waived to this date by Clark and counsel.

May 25, 1994	[Motions for mistrial, etc. filed.]		
May 27, 1994	Juror Schmidt will be on vacation until July 4, 1994. **Trial date vacated and reset for July 5, 1994.**	O'Neill, Martinez, Kinney	Counsel concur with July 5, 1994, trial date.
June 7, 1994	**Court says trial will start on July 6, not July 5, 1994.**	O'Neill, Martinez	O'Neill notifies court of health problem and unavailability on June 17, 1994.
June 14, 1994	[Motions for mistrial, etc. filed.]		
June 17, 1994	O'Neill is relieved as counsel due to her illness and unavailability for at least 3 months. **Trial date is vacated and reset for September 13, 1994.**	Martinez, Kinney	Clark objects to discharge of O'Neill & indicates willingness to waive time. Mistrial motions are denied. Kinney is appointed lead counsel over objections as to health, caseload, and absence during part of trial. No express time waiver.
June 30, 1994	Juror has prepaid vacation from September 21st to October 3rd. **Trial date is vacated and reset for October 4, 1994.**	Martinez, Kinney	Kinney concurs with delay to accommodate juror.
July 29, 1994	No change in dates.	Martinez, Kinney	
September 23, 1994	Kinney is engaged in Reed trial. **Trial date is vacated and reset for October 25, 1994.**	Martinez, Kinney	Clark waives time to October 25, 1994, with concurrence of counsel.
October 4, 1994	Jurors are ordered back for October 25, 1994	Martinez, Kinney	

October 19, 1994	Phillips hearings are held despite Public Defender declaration of conflict.	Martinez, Kinney	Martinez notifies court of another conflict of interest (Farkas). Clark objects to Martinez acting as counsel at Phillips hearings without resolution of conflict. Martinez joins in objections.
October 21, 1994	Hearing is held on Martinez's conflict of interest.	Martinez, Kinney	
October 25, 1994	**Trial begins**	Martinez, Kinney	

The delay from January 20, 1994, until March 25, 1994, was precipitated by declaration of a conflict of interest that resulted from the prosecutor's untimely disclosure of the name of prospective penalty phase witness, James Anthony Scott, a Public Defender client. (See, AOB and ARB, Argument XI.) During the course of protracted contempt litigation against Assistant Public Defender Dreiling, no trial date was even set, and Mr. Kinney's role as counsel was in perpetual limbo. Mr. Kinney repeatedly expressed grave reservations about his ability to represent Roy if the public defenders were to prevail in their quest to withdraw from the case, and even made a conditional motion for mistrial. (RT 10083,10084, 10086, 10099-10100, 10107.)

Although the Public Defender resumed its representation of Roy on March 25, 1994, a date to start the penalty trial was not selected for nearly two months because the matter of Ms. Martinez's disqualification remained unresolved, and both public defenders were completely unprepared for trial, having discontinued all work on Roy's case and turned their attention to other clients while contempt litigation was ongoing. (RT 10318, 10329.) Mr. Kinney, who viewed himself as playing the role of "technically . . .second

counsel" during the period of contempt litigation (see, RT 10127), was also too busy with other capital cases to be actively preparing for Roy's trial. (RT 10264, 10276.) The record indicates that Kinney was slated to begin trials in the Reed and Malarkey cases in February and May, 2004, preventing trial preparation in Roy's case. (RT 10084-10086.) High caseloads of court-appointed counsel without the consent of the client generally do not establish good cause for trial delays. (People v. Johnson (1980) 26 Cal.3d 557, 570-572, cited in RB, at p. 197, 198.)

Furthermore, the Court of Appeal in its written decision suggested none too subtly that the Public Defender had not acted in good faith and had been using its representation of Mr. Scott as a subterfuge to get Ms. O'Neill and Ms. Martinez off of Roy's case: "These facts support a reasonable inference that [Assistant Public Dreiling's] excuse for the delay in asserting this conflict was disingenuous." (CT 1173.) Appellant maintains the trial court should have accepted the Public Defender's assessment of the conflict. However, *if* the Public Defender's declaration of a conflict was "disingenuous," the delay in the penalty trial proceedings from January 20 through June 27, 2004, was clearly not for Royal Clark's benefit, but rather for the benefit of his attorneys.

Respondent cites several cases finding good cause where continuances were granted to accommodate the litigation of defense motions on a defendant's behalf. The facts of these cases bear little resemblance to the circumstances to Roy's case. For example, People v. Rutkowsky (1975) 53 Cal.App.3d 1069, 1072 (RB, p. 199), involves a *two-day delay* to litigate a judicial disqualification motion, not a *10-month delay* produced by numerous cumulative errors of the trial court and counsel. People v. Tahtinen (1958) 50 Cal.2d 127 (RB, p. 199), rejects a statutory speedy trial claim where the source of the delay was the defense attorney's litigation of a motion to set aside the information.

Respondent also argues that accommodation of juror vacation schedules constituted good cause for some of the delays. (RB, p. 199.) Under ordinary circumstances, when the duration of a capital trial threatens to encroach upon a juror's vacation plans, the more appropriate remedy appears to be replacement of the vacationing juror with an alternate rather than a long midtrial separation of the jury. (People v. Lucas (1995) 12 Cal.4th 415, at pp. 487-488.)

In this case, three relatively short postponements of the penalty trial date were to accommodate juror vacations. (RT 10359-10360, 10492-10493, 10498-10499.) The protracted proceedings also caused serious employment and financial hardship for some jurors, without necessarily causing any further delays. (RT 10121-10122, 10498, 10531-10537, 10499.) Under the circumstances, jurors' personal hardships, including the development of vacation conflicts, were a *consequence* of the many postponements in the case, not the cause of them. Jurors had been led to believe their service would last three to four months – not fifteen! (RT 134.) The fact that the case was taking such a great toll on jurors' personal lives was good cause to declare a mistrial and start the trial anew. (See, AOB , Argument XXV, pp. 248-249.)

Cases cited by respondent do not by any stretch of the imagination condone the more than nine-month separation of the jury in this case. (People v. Johnson (1993) 19 Cal.App.4th 778, 793, and Hamilton v. Vasquez (9th Cir. 1994) 17 F.3d 1149, 1159; RB, pp. 199-200.) In Johnson and Hamilton, the defendants were precluded from complaining about the denial of speedy trial rights because they had agreed in advance of trial to a separation of the jury over the traditional winter holidays. In Roy's case, the long delays were never contemplated or agreed upon in advance by the court, counsel or the jurors.

Respondent predictably asserts that Ms. O'Neill's withdrawal from the case due to illness, and Mr. Kinney's caseload and poor health also justified the postponement to October 25, 1994. (RB, p. 201.) It is argued that an

"unforeseen or exceptional circumstances such as illness of counsel . . . . constitutes good cause for a continuance." (RB, p. 203, citing People v. Superior Court (Alexander) (1995) 31 Cal.App.4th 1119, 1135.)

Delays in the penalty phase caused by Ms. O'Neill's illness, and Mr. Kinney's health problems and case conflicts did not occur in a vacuum. Long before the onset of Ms. O'Neill's illness, the trial court had made numerous errors, which had caused delays, contributed to an overall breakdown in the attorney-client relationship, and severely compromised the effectiveness and continuity of Roy's legal representation. (See, AOB and ARB, Section 2, Arguments VII - XVI.)

More importantly, the delays that resulted from the appointment of Mr. Kinney as Ms. O'Neill's replacement in June of 1994 were completely foreseeable. Mr. Kinney had made it clear from the inception of litigation over the public defender's conflict of interest that he was ill-prepared to take on the role of lead counsel in Roy's case because he was not present during the lion's share of the guilt phase evidence, he had conflicting obligations in other high profile murder cases, and had played only a limited role during the guilt and sanity phase trials. (January 25, 1994: RT 10083-10086; January 27, 1994: RT 10100-10101, 10106-10108; see, AOB , Argument XII, p. 140.) Mr. Kinney had even objected to assuming an official role as "second" counsel for the penalty phase trial when it appeared that Ms. Martinez might not be resuming that role in the case. (March 25, 1994; RT 10264-10265, 10267-10269.)

By the time Ms. O'Neill was discharged, Mr. Kinney's inability to provide competent representation had worsened. Not only was Mr. Kinney still tied up with other high profile murder cases (RT 10916, 10964-10965); in addition, he strenuously objected to his appointment as lead counsel based on health problems of a serious and chronic nature including Bipolar Disorder, high blood pressure, and side effects that had been produced by the interaction

of the drugs used to treat the two conditions. (SCT #2 1943; RT 10379, 10418-10421.) Mr. Kinney's health problems resurfaced again, causing a one-week separation of the jury during the penalty phase trial. (RT 11476-11477, 11495-11498.) The trial court's order appointing Mr. Kinney lead counsel was error. Consequently, the delays to accommodate his illness and conflicting case obligations were not supported by legal good cause.

Respondent posits the waiver of speedy trial rights and manipulation of the trial court as reasons to deny Roy any penalty phase relief based on delays in the penalty phase trial. As evidence of waiver, respondent points to the colloquy between the trial court and Roy on June17, 1994, in which the court asked Roy whether it was true that he had "no concern about a speedy trial." (RB, pp. 201-202; RT 20469-10470.) Roy's response, "Yeah," was made in the context of his objection to the proposed discharge of Ms. O'Neill as lead counsel in the case.

Respondent compares the circumstances with People v. Floyd (1970) 1 Cal.3d 694. (RB, p. 202, fn. 75). The comparison is not well taken. In Floyd, continuances were sought by a defense attorney because of his client's "obdurateness in refusing to talk" to counsel. In that circumstance, the granting of continuances over the defendant's objection was found not to violate the his speedy trial rights. In the case at bench, the delays from June through October of 1994 were not caused by Roy's obdurate refusal to cooperate with counsel. Bad faith is not evinced by the fact that Roy, on June 17, 1994, expressed a preference to continue with Ms. O'Neill acting as lead counsel – even if this necessitated a substantial continuance – over the uncertain prospects of a speedier trial with an attorney who had not been present for all of the guilt phase trial. Moreover, the trial court discharged Ms. O'Neill against Roy's wishes; yet clearly the implied promise of a speedier penalty trial did not come to fruition.

Respondent also offers as evidence of waiver Roy's consent to continue the trial date from October 4, 1994, to October 25, 1994. (RB, p. 202, fn. 76.) This continuance was necessitated because Mr. Kinney was engaged in trial in the Reed case. Roy had little choice but to consent to a continuance at this point and had no incentive not to do so. The trial court had overruled the objections of both Roy and Mr. Kinney in appointing Mr. Kinney to act as lead counsel. Had Roy successfully objected to Mr. Kinney's request for a three-week continuance – an objection that had little chance of success – the consequence would have been an even *longer* continuance to allow yet another lead attorney to prepare. Given that Mr. Kinney's engagement in another murder trial was foreseeable, the state should not be permitted to "rely upon the obligations which an appointed counsel owes to other clients to excuse its denial of a speedy trial to the instant defendant." (People v. Superior Court (Alexander), supra, 31 Cal.App.4th 1119, 1130.)

In any event, the broader question is still whether, under the totality of the circumstances, the long separation of the jury rendered the penalty phase proceedings fundamentally unreliable and unfair. Roy neither expressly nor impliedly waived the right to complain about the nine-month delay. To the contrary, he personally objected to the separation of the jury, and requested a new jury for the penalty phase trial during a hearing on March 25, 1994. (RT 10273.) That objection was overruled by the trial court. (RT 10279-10287.)

Respondent argues that prejudice will not be presumed based solely on the length of the jury's separation during trial. (RB, p. 203; citing People v. Stanley, supra, 10 Cal.4th at p. 836 and People v. Taylor, supra, 26 Cal.4th at p. 1170.) Appellant does not dispute this proposition as a general statement of the law. However, in the Stanley case, the separation of the jury lasted only three months, while the defendant's competency was being litigated, not more than nine months as occurred here. In Stanley, this Court refused to presume

that the jurors had been prejudiced through their exposure to media because jurors had been regularly admonished, each evening of the trial as well as on the eve of the continuance, *to avoid reading or listening to anything connected with the case that might appear in the news.* In this case, no such admonitions were given and the trial court refused to rectify the error by polling jurors about possible exposure to the media. (See, AOB & ARB, Arguments XVII-XXIV.)

In People v. Taylor, this Court rejected the defendant's assertion that the trial court had improperly denied a new jury panel for the penalty trial. The justifications asserted for a new jury panel included that the prosecutor had prejudiced the jury by engaging in misconduct, and that newly appointed counsel had not participated in the *voir dire* of the jury. (26 Cal.4th at p. 1169-1170.) This Court rejected the prosecutorial misconduct claim on the merits, and also found that trial counsel's mere desire to participate in jury *voir dire* did not provide sufficient grounds to impanel a new jury. (Id., at p. 1170.) Without discussing the length of the delay involved, this Court commented that a "mere delay" between guilt and penalty phases would not necessarily have impaired the jury's ability to perform its function. (Ibid.) There is no suggestion in the Taylor decision that the trial in that case was plagued by highly inflammatory publicity, or that the penalty phase attorneys were forced to proceed over objections regarding their health, competency, and conflicts with other cases.

This case bears greater resemblance to People v. Santamaria, supra, 229 Cal.App.3d 269, and Estes v. Texas, supra, 381 U.S. at pp. 543-544, because the mode of the trial became so aberrant that the integrity of the process was entirely subverted, rendering it impractical to establish the precise degree to which prejudice was produced. (Id., at p. 280.)[19]

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[19]Respondent's last point addresses appellant's arguments regarding the fading of jurors' memories. The point is more appropriately addressed in the context of Argument XVI.

XXVI

THE COURT UNCONSTITUTIONALLY REFUSED TO POLL JURORS ABOUT THEIR LOSS OF MEMORY REGARDING GUILT PHASE EVIDENCE PRIOR TO THE PENALTY PHASE OF THE TRIAL.

Respondent in Arguments XXV and XXVI argues that the trial court committed no error in refusing to poll jurors about loss of memory when asked to do so by Ms. Martinez and Mr. Kinney on November 7, 1994. (RT 11500-11503.) People v. Ray, supra,13 Cal.4th at p. 343, and People v. Beeler, supra, 9 Cal.4th at p. 989 are cited for the general rule, that a court need not investigate the possibility of juror misconduct without good cause to doubt the juror's ability to perform his duties in the case. (RB, p. 206.) The distinguishing features of the Ray and Beeler cases have been adequately set forth elsewhere in the ARB. (See, ARB, pp. 126, 151-152.)

Respondent also cites People v. Hawthorne (1992) 4 Cal.4th 43, 74, as indicia that this Court has rejected the as a general principle that the lapse of time between guilt and penalty phases may impair jurors' memories or otherwise undermine the reliability of their deliberations. (RB, pp. 204, 207.) No such sweeping rule is established by the Hawthorne decision. In that case, there is no indication of a substantial delay between the guilt and penalty phases of the trial, much less a gap of nearly*10* months. The limited question for review was whether the trial court's failure before the penalty phase to repeat jury instructions on evaluating witnesses' credibility was error. That is not the issue here.

Respondent argues that a confused memory due to receipt of post-event information acquired from other sources – i.e., the phenomenon of confabulation – should not be presumed absent evidence that jurors violated the admonition to avoid media coverage of the trial. (RB, p. 207; see, AOB , p. 245 [discussing the phenomenon of confabulation].) Part of the problem with this argument is that

jurors did *not* receive regular and unequivocal admonitions to avoid media coverage during the Roy's trial. Moreover, jurors certainly received no instruction to avoid the kind of publicity that had the greatest potential to bias the jury – such as articles discussing the heinous killings of Polly Klaas and Kimber Reynolds and the high percentage of murders in Fresno committed by men of Roy's ilk. (See, AOB and ARB, Arguments XVII, XIX, XXIII.)

It is also argued counsel had the ability to cure any lapse of memory on the part of jurors by reviewing in detail the guilt phase evidence. (RB, p. 207; citing, People v. Padilla (1995) 11 Cal.4th 891.) The record shows that this did not occur.

Mr. Kinney, lead counsel, was completely absent during the testimony of the first 29 guilt phase witnesses, and not acting as counsel at all until the end of the prosecution's case-in-chief. The penalty phase trial commenced over objections by Ms. Martinez that Mr. Kinney was completely unprepared, that he had not read numerous important documents, had not consulted with her, had been unable to focus on anything but the Reed case, and was still getting the names of the witnesses wrong. (RT 10964-10965.) At one point the penalty trial had to be recessed for a week because Mr. Kinney was too depressed and exhausted to function. (RT 11497-11498.) Later, during closing arguments, Mr. Kinney moved for mistrial on the ground that his absence during substantial portions of the guilt phase were hindering his ability to respond to the prosecutor's arguments. (RT 11929.)

Furthermore, in the case cited by respondent, Padilla, the issue was *not* whether the defendant was denied a fair trial or a reliable death judgment by a year-long lapse between the guilt and penalty phases of the trial. The case does not stand for propositions not decided.

The issue in Padilla was whether the trial attorney was constitutionally ineffective at the penalty phase because he made a "perfunctory" argument on lingering doubt and did not request a lingering doubt instruction. (Id., at p. 951.)

This Court observed that lingering doubt arguments were often unwise because they ran the risk of antagonizing a jury that had unanimously rejected the guilt phase defense. This Court also concluded that the defendant would have derived no benefit from a lingering doubt instruction had one been given. (Ibid.) Neither holding has any relevance to the issues in Roy's case.

Respondent finally reiterates the argument that the trial court had no obligation to reopen "*voir dire*" the jury without a showing of good cause. (RB, p. 208.) All cases cited to support this argument have been cited previously by respondent and are addressed elsewhere in this brief. (People v. Fauber, supra, 2 Cal.4th at p. 846 [ARB, p. 129]; People v. Bradford, supra, 15 Cal.4th at p. 1354 [ARB, p. 129, 132-133]; People v. Williams, supra, 16 Cal.4th at p . 229 [ARB, p. 129, 134].) In addition, defense counsel did not ask the Court to reopen *voir dire*. They asked the court to poll the jurors for the limited purpose of determining whether jurors were impaired by the loss of memory regarding guilt phase evidence. (RT 11500-11503.) Good cause for such polling was provided by the cumulative effect of the extraordinarily long delay between the guilt and penalty phase trials, and the fact that lead counsel for the guilt phase had not participated in a substantial portion of the guilt phase trial.

XXVII

THE CUMULATIVE ERRORS DESCRIBED IN SECTION 3 OF THE APPELLANT'S OPENING BRIEF (ARGUMENTS XVII-XXVI) DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS, AN IMPARTIAL JURY, COMPETENT COUNSEL, AND A RELIABLE DEATH JUDGMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Respondent argues that since no individual errors occurred, cumulative error likewise did not occur. (RB, p. 209.) Appellant obviously asserts that many individual errors cumulated to infect the guilt, sanity and penalty phase judgments. (See, AOB , Argument XVII.)

ARGUMENT SECTION 4
(CONSTITUTIONAL ERRORS IN THE SELECTION OF THE JURY)

XXVIII

THE DEATH PENALTY MUST BE REVERSED BECAUSE THE 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 THE WITT STANDARD.

A. General Standard and Principles.

Respondent summarizes the general principles governing the process of jury selection in a death penalty case. Appellant does not dispute the principles, only the application of such principles to the facts of this case.

B. Discussion:

1. Prospective Jurors Costa, Keller, and Young, were excused in violation of the Witt standard.

a. Prospective Juror Costa:

The Attorney General portrays the examination of Mr. Costa in a way that seeks to make it appear that he expressed doubt about whether he could ever impose the death penalty. (RB, pp. 212-213.) Respondent emphasizes that the prosecutor asked Mr. Costa to explain what he meant by "I probably could" [impose the death penalty] and also claims that "Mr. Costa admitted that he 'probably would have a doubt' as to his ability to impose the death penalty." (RB, p. 214, fn. 77.) No citation to the record is found for this alleged confession of doubt, and the partial quotation is lifted out of context. A reading of the entire colloquy in fact shows that, despite redundant questioning by the prosecutor and the trial court, Mr. Costa consistently denied that he held any personal beliefs that would prevent him from considering the death penalty in an appropriate case.

In his written questionnaire, Mr. Costa stated: "Not really for the DP but c[ou]ld consider it." (SCT 6: 1654.) Asked by Mr. Cooper to explain his answer

during oral *voir dire*, he said: "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 would probably vote yes because of some of the things I've been reading in the papers lately." (RT 645.)

Mr. Costa was asked if it were up to him to decide for the State of California whether there should be a death penalty law, he would "probably vote for it." (RT 645.) He also responded affirmatively when he was asked a fact-specific question regarding whether a case involving a murder during the attempted commission of a rape would be the kind of case seriously enough to warrant consideration of the death penalty. (RT 646.)

Mr. Costa was repeatedly asked by the prosecutor if he could "actually cast the vote to impose the death penalty on another human being." (RT 646.) On the first occasion, he said, "I probably could." He was asked to explain the "probably" aspect of this response, and replied: "I probably could [impose the death penalty] because a man's life is in our hands. That's a heavy responsibility. I mean, it really would be. I mean, I've got to be really sure like that. The guy's life hanging in all the jurors' hands." (RT 647.) The prosecutor asked again if Mr. Costa could "ever cast a vote to impose the death penalty on someone, he responded: "Probably could. I know. It's kind of hard." (RT 647-648.) He then said: "I know. I could vote for it. The words don't come out like I want." (RT 648.)

The prosecutor asked again what Mr. Costa meant when he said, "I probably could." (RT 648.) "When you say it – when you say it as you have, 'I probably could,' does that mean you have a doubt that you could?" (RT 648.) Mr. Costa replied: "I probably would have a doubt. I mean you know, before, you know, like I said, it's just coming out like that and I want to be sure." (RT 648.) This response was not completely clear, so Mr. Cooper asked for

clarification again: "When you mention having a doubt or probably having a doubt, does that mean that there's something about you, about your own personal beliefs that makes you think that you would probably have a doubt about being able to do it? In other words, something separate from the evidence, about you?" (RT 648.) In response to this question, Mr. Costa replied: "Oh, no. Not about me, no." (RT 648.) Mr. Cooper then asked: "Okay. So when you say you have a doubt or probably have a doubt about whether you could do it, can you help me understand what you mean?" (RT 648.) Mr. Costa explained his hesitation this way: " . . . It's just that I've never – never been involved in any, you know, violence or anything like that, you know. I've never been in a fight in my life, you know. I've gotten involved in arguments, yes, but never a fight. I've never had hatred come out against anybody. Oh, man." (RT 648-649.) Mr. Cooper then asked how this related to his "doubts" about imposing the death penalty. (RT 649.) Mr. Costa explained that "It's just that, man, like I said, the life of a human being is in my hands and it would scare me, you know. But I know in some cases it has, you know, the death penalty has to be enforced sometimes. But it just scares me when I've got to be – if I've got to be the one to do it, you know." (RT 649.)

The court once again asked Mr. Costa whether despite his fears he "could . . . ever cast that vote to impose the death penalty." (RT 649.) Mr. Costa asked, "If all the facts came out and everything?" (RT 650.) The Court said, "yes." Mr. Costa then explained: "I mean, all the evidence, you know, everything came out, like I said, if all the evidence probably – you know, I probably could. God, there's that word again. Oh, man." (RT 650.)

The court then asked Mr. Costa another very long question regarding whether, assuming he had determined in his own mind and under the law that the death penalty was appropriate, would his "personal beliefs then get in the way of . . .voting for the death penalty?" (RT 650.) To this, Mr. Costa started to respond but was *interrupted* before he could finish: Before I came in here – now I'm not

so sure. My beliefs? Like I said – " (RT 650.) Interrupting, the court asked again: "Could you temporarily set a side your own personal beliefs and, as a sworn juror, having tremendous responsibility to follow only the law of the state of California as I give it to you, the evidence, and not let your personal beliefs interfere with this very, very important task, could you set those aside temporarily and do your duty whether it was death or life without the possibility of parole?" (RT 651.) Prospective Juror Costa queried: "My feelings aside and everything?" The Court reiterated its question again, asking Mr. Costa if the evidence were very substantial that death was deserved, he personally felt that death was deserved, "would you vote for it?" Mr. Costa replied, "Yeah."

The trial court then inquired whether Mr. Costa would be capable of imposing a sentence of life without parole, if he found it appropriate. Mr. Costa replied, "Yes." (RT 652.) The trial court also asked Mr. Costa if he understood why the prosecutor might be concerned that he "would have the ability to follow your convictions in this case, and if you felt that the death penalty was appropriate that, by golly, you could render that vote." (RT 652.) Mr. Costa acknowledged that he understood. The Court asked in relevant part, "So you promise us at this time that you could do that; is that right, sir?" Mr. Costa responded: "Yes, sir." (RT 652.)

Mr. Cooper resumed questioning Mr. Costa at this point: "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 unequivocally replied: "Yes." (RT 653.) The trial court concluded by remarking to Mr. Costa that he hoped they had not "upset" him, and that "[t]hese kinds of things are very – well, they concern life and death; don't they?" (RT 653.) Thereafter, the court granted the prosecutor's for-cause challenge to Mr. Costa over defense objection. (RT 654.)

For the general principles governing the death qualification process, respondent refers to, or quotes from People v. Cunningham (2001) 25 Cal.4th

926, 975,[20] Wainwright v. Witt (1985) 469 U.S. 412, 424, People v. Mincey (1992) 2 Cal.4th 408, 456, People v. Bradford, supra, 15 Cal.4th at p. 1218, Morgan v. Illinois (1992) 504 U.S. 719, 726-728,[21] People v. Ochoa (2001) 26 Cal.4th 398, 431, and People v. Kirkpatrick, supra, 7 Cal.4th at p. 1005.[22] (RB, pp. 210-211.) Appellant does not dispute the general principles governing death penalty *voir dire*. Those cases cited by respondent that actually address the correctness of trial court rulings disqualifying panelists with scruples against the death penalty, however, are more helpful to appellant than respondent.

For example, the Witt case itself (RB, p. 210) furnishes an example of a *supportable* for-cause disqualification. In that case, the prospective juror was repeatedly asked if her personal views against the death penalty would "interfere" with her ability to judge the guilt or innocence of the defendant in that case. Her answers, in sequence, included: "I am afraid it would."; "I think so."; and last but not least, "I think it would." (Id., at pp. 415-415.) In contrast, Juror Costa *denied* that he had any personal or religious opposition to the death penalty, and he repeatedly indicated his belief that he *could* obey the court's instructions and *could* impose the death penalty in an appropriate case, depending on the circumstances.

In Witt, the Supreme Court discussed Adams v. Texas (1980) 448 U.S. 38, which is *not* cited anywhere in the RB. (Wainwright v. Witt, supra, at pp. 420-421.) In Adams, the U.S. Supreme Court *reversed* a death judgment based on an erroneous for-cause dismissal. There, one of the dismissed prospective jurors said during *voir dire*: "'Well, I think it probably would [affect my deliberations] because afterall [sic] you're talking about a man's life here. You definitely don't want to take it lightly.'" Adams v. Texas, supra, at p. 49, fn. 7.) The U.S.

[20]People v. Cunningham addresses *voir dire* issues other than specific disqualifications for-cause of anti-death penalty jurors.

[21]Morgan v. Illinois addresses the adequacy of questioning during Witt *voir dire*.

[22]People v. Kirkpatrick addresses *voir dire* issues other than the specific disqualifications for cause of anti-death penalty jurors.

Supreme Court declared that the test for disqualification applied by the Texas courts improperly excluded jurors

> "who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally."

(Id., at p. 49.)

> The U.S. Supreme Court further declared of the dismissed jurors:
>
> "Others were excluded only because they were unable to positively state whether or not their deliberations would in any way be 'affected.' [Footnote omitted.] But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments."

(Adams v. Texas, supra 448 U.S. at p. 50.)

In this case, the trial court violated the 6th, 8th, and 14th Amendments in precisely the same way. The court excluded Mr. Costa, not because he was unable or unwilling to follow the court's instructions and follow the oath of a juror, but rather, because he appeared nervous, and emotional about the death penalty, and was inclined to invest his penalty phase deliberations with great seriousness.

In People v. Crittenden, supra, 9 Cal.4th 83 (RB, p. 210, 215), the issue was whether the trial court erred by denying a defense challenge based on pro-death penalty bias. The prospective juror in Crittenden initially made numerous strong statements reflecting a pro-death penalty bias. This Court affirmed the trial court's denial of a defense for-cause challenge because the panelist had indicated he could set aside his personal views concerning the death penalty, conduct the required weighing process, and vote for life imprisonment without parole if that

were the appropriate penalty in light of the evidence. (Id., at p. 122.) Of course, this is exactly the opposite of what the trial court did here – excuse Mr. Costa *despite* his ability to weigh the evidence, obey the instructions, and vote for death in the appropriate case.

People v. Bradford, supra, 15 Cal.4th 1229 (RB, p. 211) presents facts vastly different from this case. There, two prospective jurors, Stewart and McCanlies, gave answers indicating very strong personal opposition to the death penalty; both also indicated that they could impose the death penalty, but only in the most rare and extreme case.

In Bradford, prospective juror Stewart said she would vote *against* the death penalty as a member of the electorate. In contrast, in this case, Mr. Costa said he would probably vote *for* it. (RT 645.) Prospective juror Stewart also admitted, "I rather doubt it," when asked if she could vote in favor of the death penalty if the circumstances warranted it. (Id., at p. 1319.) She said she would "attempt" to follow the court's instructions but would not know until the decision had to be made whether she could ever render a death verdict. (Id., at p. 1319.) Mr. Costa said that he *could* impose the death penalty if the facts and circumstances warranted it. (RT 646, 647, 648, 651.)

Unlike Mr. Costa, prospective juror McCanlies stated that he could conceive of imposing the death penalty "only if that would bring the victims back to life." He said he could not inform the defendant that he had voted for death unless "'something like espionage'" were involved, or if it were a case in which the defendant was "'grinding out victims by the thousands on a monthly basis,'" or perhaps the "'premeditated mass murder of schoolchildren.'" (People v. Bradford, supra, 15 Cal.4th at p. 1320.) Mr. Costa imposed no limits on the types of cases in which he could impose death; to the contrary, while being questioned to determine his eligibility to sit on an attempted-rape murder case, Mr. Costa indicated that an attempted rape-murder case *was* sufficiently serious type of case to possibly warrant a death judgment. (RT 646.)

People v. Mincey, supra, 2 Cal.4th 408 (RB, p. 210), is likewise distinguishable. In that case, the excluded juror "said that there were no conceivable circumstances under which she could vote to impose the death penalty." (Id., at p. 457.) Mr. Costa never voiced such unequivocal opposition to imposing death.

In People v. Cunningham, supra, 25 Cal.4th 926 (RB, p. 211), this Court upheld five trial court grants of prosecutorial challenges. However, the answers of prospective jurors in that case bespoke profoundly more anti-death penalty sentiments than the answers of Mr. Costa in this case.

The first excused panelist, Prospective Juror K. indicated he "could not cope with voting in favor of the death penalty." (Id., at p. 980.) He also responded, "no," he could *not* "look at the defendant and inform him that he had decided defendant should die." (Ibid.)

The second excused panelist, Prospective Juror G, could *not* think of any circumstances in which someone would deserve the death penalty. (Id., at p. 980.) He also did *not* think he could impose the death penalty "presuming defendant had been found guilty of murder and the evidence demonstrated defendant's bad life . . . ." (Ibid.)

The third excused panelist, Prospective Juror Ni expressed *uncertainty* regarding whether she could ever vote for the death penalty. She said she probably could *not* carry out her duty as juror, "would *not* 'be good on the jury at all,' and *would* have a problem being impartial." (People v. Cunningham, supra, 25 Cal.4th at p. 981.)

The fourth excused panelist, Prospective Juror Sp., told the court he would *disregard* any special circumstance that was based on the status of the victim, such as a police officer. He said he "possibly" had opinions that *would prevent* his being fair and impartial, and applying the law. Under questioning by the defense, he said he could *not* vote for death if a defendant "had broken into a residence, killed the husband, raped the wife, and repeated those offenses against

five or six additional families." (Id., at p. 982.)

The fifth excused panelist, Prospective Juror B., indicated she would *refuse* to find the defendant guilty of first degree murder and would *refuse* to find any special circumstance true in order to avoid having to discuss the death penalty with other jurors. (People v. Cunningham, supra, at p. 982.) She also said she was so *against* the death penalty that she would probably not pay attention to any evidence and *would automatically vote in favor of life without parole*. This juror agreed with the prosecutor that she was substantially impaired. (Ibid.)

In contrast to all five excused jurors in the Cunningham case, Mr. Costa *denied* having any personal or philosophical objections to the death penalty as a form of punishment. He said he *would* vote for having a death penalty in California. More importantly, he consistently answered questions by the prosecutor and court, indicating that he *could* listen to the evidence and *probably could* impose a death judgment if the evidence warranted it.

People v. Ochoa, supra, 26 Cal.4th 398 (RB, p. 211), involved a number of challenges for cause, many of which were granted without a defense objection. It is also distinguishable. A brief description of the excused jurors' responses in Ochoa follows.

Prospective Juror Gertrude W. told the court she did not think she "would consider voting for death" in a case involving the felony-murder doctrine. (Id., at p. 428.)

Prospective Juror Patrice V. noted on her questionnaire her belief that "the death penalty was state sanctioned murder." (Id., at p. 429.) During oral *voir dire*, she indicated she "'would not consider the death penalty'" in a felony-murder case. (Id., at p. 429.)

Prospective Juror Alicia B. told the court that she would not consider death as a possible penalty, and this was not "'the right kind of case for her.'" (Id., at p. 429.) In follow-up questioning, Alicia B. indicated that she would not

impose the death penalty no matter what evidence the state presented during the penalty phase. (Ibid.)

Prospective Juror Linda H. announced that she was "'against the death penalty.'" (People v. Ochoa, supra, 26 Cal.4th at p. 430. She also wrote in her questionnaire that "'when a jury sentences someone to death, it's murder.'" (Ibid.) Linda H. admitted that she could not vote for death "'in any case.'" (Ibid.)

Prospective Juror Martha C. told the court she could not "envision any set of circumstances that would prompt her to vote for death." (Id., at p. 430.) She also said she would feel "guilty for the rest of her life" if she sentenced someone to death. (Ibid.) Later, she said she could not vote for death "'in any case.'" (Ibid.)

After hearing an explanation of aider and abettor liability, Prospective Juror Arthur R. admitted he would have a difficult time finding an aider and abettor liable for first degree murder. He also said that he would be "inclined not [to impose a death sentence]" and "would 'not [be] able to follow through.'" (Id., at p. 430.)

Prospective Juror Lynn J. opined that it would be best to limit capital punishment to premeditated, deliberate murders. Mr. J. also confirmed a statement in his questionnaire, that he felt the death penalty should be limited to cases of mass murder, unusual cruelty, torture, or murder in prison. Mr. J. later indicated that robbery-murder and murder by aiding and abetting did not meet his standards for imposing death; hence he could not consider voting for death in Mr. Ochoa's case. (Id., at p. 430.)

The excused jurors in Ochoa all made statements at some point during *voir dire* indicating staunch opposition to capital punishment. Several voiced unwavering opposition. Those excused panelists who did falter, only did so briefly before re-affirming their unwillingness to impose a death judgment, regardless of the facts. Mr. Costa was not opposed to capital punishment in all cases and he explicitly agreed that it might be an appropriate penalty in the type

of case before the court, an attempted-rape murder.

Respondent argues that, despite Mr. Costa's consistently *qualifying* answers, this court should defer to the trial court's determination that Mr. Costa's true state of mind was actually *disqualifying*. (RB, p. 214-215.) Respondent relies on the oft-stated principle that a trial court may consider a prospective juror's demeanor where conflicting or ambiguous answers are given during *voir dire*. (RB, p. 214, fn. 78.

In support of affirmance of the trial court's specific decision to excuse Mr. Costa, respondent additionally relies on this Court's decisions in People v. Millwee (1998) 18 Cal.4th 96, 146, and People v. Bolden (2002) 29 Cal.4th 515, 535-536.) Neither of these cases provides any factual support for the court's dismissal of Mr. Costa.

In Millwee (RB, p. 214, fn. 78), this Court upheld three for-cause dismissals, including one dismissal on the court's own motion, which drew no objection from either side. (Id., at p. 126.) Regarding the prospective jurors, this Court stated:

> "Although he equivocated to some extent, Mr. Coleman clearly favored life imprisonment and suggested he would never vote for death. Upon questioning by the defense, Coleman initially maintained he was 'open-minded' and would choose between life imprisonment and death 'based upon the facts.' However, towards the close of defense counsel's examination, Coleman acknowledged that he might 'life to regret' a death sentence and that such a decision could 'haunt' him in the future. Obviously concerned about these remarks, the prosecutor asked a series of questions directed at whether Coleman could vote for death if such extreme punishment was warranted by the evidence. Coleman's first answer was equivocal ('I don't know what I could do'). However, all remaining responses left little doubt that he would have a 'problem' imposing death and that life imprisonment was the 'maximum' punishment he would consider.
> "Ms. Lopez's examination, though brief, revealed that she could not impose a death sentence under any circumstances. She announced at the start of the defense examination that she was 'philosophically opposed' to capital punishment. She explained

> that while she might not 'lose sleep over' the execution of certain notorious multiple murderers such as Richard Ramirez and Ted Bundy, she did not believe the state had the 'right' to take a life. When asked whether she could conceive of voting for death in a case involving only one murder victim, she said, 'No, I can't.'
> "Mr. Gillis demonstrated that he would have difficulty following the court's instructions and that his unconventional views would probably prevent him from imposing a death sentence. Gillis explained that he was not philosophically opposed to capital punishment, but that he would not vote for death because life imprisonment is 'much more stringent' and serves 'justice' better in an aggravated case. Gillis also said that he would impose life imprisonment 'regardless' of any instructions stating that he should impose death because it is the most severe punishment. Gillis never wavered in these views during extensive questioning from the court and counsel."

(People v. Millwee, supra, at pp. 146-147.)

Mr. Costa's answers were nothing like those of the excused panelists in the Millwee case. Nowhere in the record did Mr. Costa ever express any religious, political, or philosophical objections to the death penalty as punishment, as did Mrs. Lopez. Nor did Mr. Costa ever express any reluctance to impose death merely because the case involved a single murder victim. Unlike Mr. Gillis, Mr. Costa did *not* harbor the belief that life without parole was the "much more stringent" punishment. Furthermore, in contrast to Mr. Coleman, Mr. Costa did not equivocate about whether life without parole was the most serious punishment he could consider. The only real variation in Mr. Costa's answers related to the *degree* of certainty with which he expressed his willingness impose the death penalty in an appropriate case. He said: he "probably would vote yes" (RT 645); attempted-rape murder "would" be serious enough to warrant the death penalty (RT 646); he "probably could" impose the death penalty on another human being (RT 646); he "probably could" impose death (RT 647); he "probably could" impose death (RT 648); he "could vote for it" (RT 648); he "probably could" impose death if "all the facts came out and everything" (RT 650); "Yeah," he could impose the death penalty and put his "feelings aside and

everything" (RT 651); "Yeah," he "would vote for it" (RT 651); and finally, "yes," he could really put aside his personal beliefs and impose the death penalty on another human being." (RT 653.)

In People v. Bolden, supra, 29 Cal.4th 515, this Court affirmed four for-cause dismissals. This is what this Court said about each of the excused panelists:

> "Prospective Juror G.R. said she was philosophically opposed to the death penalty. Asked by the court whether she would always vote for life without the possibility of parole, regardless of the evidence presented, she at first said she did not know the answer to that question. 'Whether or not in good conscience I could vote for the death penalty, I truly can't tell you at this point.' Asked by defense counsel whether she could consider both penalties, she said: 'I think I could do that. I cannot tell for sure until I'm in that situation.' ADDRESSING THE COURT, SHE SAID: 'What I'm trying to say is I truly don't know what I would do faced in a situation . . . . I truly don't know, and I've tried to say that I really do have a gut level reaction against the death penalty.' 'I can tell you I have a gut reaction against the death penalty. I really do.' Asked by the court if she could vote for the death penalty if the evidence indicated it was appropriate, she said: 'I think I would have to say in that situation, that I can't – I don't know what I would do, but I cannot in good conscience tell you that I know that I could impose it because I don't know that I could impose it at this point. . . .
> "On examination by the court, Prospective Juror D.H. said: "I couldn't vote for the death penalty.' On further question[ing] by the court, she said: 'I would not impose the death penalty.' On *voir dire* by the prosecutor, she said: 'It would be a very difficult thing for me to do. I perhaps would be biased against the death penalty.' SHE ADDED: 'Naturally, the evidence is what I would go on, but, the death penalty, it's very questionable whether I could vote for it. . . .
> "On examination by the court, Prospective Juror M.W. said: 'I have mixed feelings about the death penalty, Your Honor. Asked by the court if she could vote for the death penalty if she felt it appropriate, she answered: 'I don't think so.' Asked by the prosecutor if she could vote for the death penalty if convinced it was appropriate, she said: 'I don't know. I have to hear all the evidence.'

> "On examination by the court, Prospective Juror R.R. said: 'I am opposed to the death penalty.' On *voir dire* by defense counsel, she said: 'I don't think I could find the death penalty ever appropriate.'"

(People v. Bolden, supra, 29 Cal.4th at pp. 535-536.)

In Bolden, two of the four excused jurors (G.R. and R.R.) expressed philosophical or personal opposition to the death penalty as a form of punishment. At some point in *voir dire*, all four jurors indicated they could *not* vote for the death penalty regardless of the evidence. In contrast, Mr. Costa voiced *no* firm opposition to the death penalty generally, and he consistently answered questions about the death penalty in a *positive* manner, indicating he *could*, or *probably could* impose the death penalty in an appropriate case.

Cases decided more recently, and *not* discussed by respondent, generally support appellant's position, that juror Costa was excused in violation of the federal Witt standard. In People v. Heard (2003) 31 Cal.4th 946[23]:

In the Heard case, the defendant asserted on direct appeal that two prospective jurors, H. and Q. had been erroneously challenged for cause based on anti-death penalty bias. Without reaching the propriety of the second juror's dismissal, this court reversed the death judgment based on the erroneous dismissal of Prospective Juror H., whose colloquy with the trial court and defense counsel is quoted in full in the Heard decision at pages 959-962, and set forth in relevant part below, with internal quotations omitted:

> "The court: Mr. [H.], . . . [a]re you of any position right now where you would automatically vote life without possibility of parole and no matter what evidence showed?

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[23]People v. Heard was decided in August of 2003, and is cited once by respondent on page 262 of the RB, in the context of a discussion of Argument XXX, discussing Batson-Wheeler error. The respondent's Table of Authorities indicates numerous citations to Heard, using "passim." Appellant assumes this was caused by a software malfunction, which may have caused a table-creating mechanism to count the word "heard," when looking for citations to Heard. In any event, respondent did not cite Heard in discussing appellant's Witt arguments.

"Prospective Juror [H.]: No
"The court: Or would you vote death automatically no matter what the evidence showed?
"Prospective Juror [H.]: No.
"The court: Would you characterize yourself as a person who would listen to the evidence and make a decision thereafter?
"Prospective Juror [H.]: Yes.
"The court: Would you be reluctant to get to the guilt [sic: read penalty] phase by either finding a defendant not guilty of first degree murder or finding the special circumstances not true so as to avoid having to face the issue of the death penalty?
"Prospective Juror [H.]: No.
"The court: Would you decide the case based upon the evidence without fear of having to reach the next stage in deciding this case?
"Prospective Juror [H.]: No
"The court: [I] think I phrased the question badly. [I refer to juror written questionnaire] number 46. It says, 'If a defendant is convicted of first degree murder and the special circumstances [are found] to be true, the law provides that the only possible verdicts are death or life without the possibility of parole. Overall, which do you think [is] worse for a defendant?' [P [P refers to the prosecutor]] You have indicated life without the possibility of parole. And under explanation of your answer, you said[,] 'Perhaps the special circumstances are due to past psychological experiences and I would consider prison.' [P] Assuming there were past psychological experiences, bad childhood or abuse or something else, I don't know whether any of that is going to come out, but assuming that thing occurred, would you be automatically in favor of life without the possibility of parole as opposed to the death penalty because of those factors?
"Prospective Juror [H.]: Well, whatever the law states.
"The court: The law is not going to help you a whole lot in weighing the evidence and deciding the penalty. That is, the law is going to give you the two options. And the law is going to tell you that you must consider all the evidence that's in. And then you must look at the aggravating and mitigating factors.
"Prospective Juror [H.]: Uh-huh.
"The court: And you can only impose death if the aggravating factors are so substantial in comparison to the mitigating factors that death is warranted. [P] Now that's pretty much it. You are going to have to decide for yourself what those factors are and decide wh[ich] penalty is appropriate. So we are not going to tell you how to weight the psychological factors. We are just not

going to. You are going to have to weigh it yourself in your decisions with the other jurors. You feel comfortable doing that?
"Prospective Juror [H.]: Yes.
"The court: Do you think that if there were past psychological factors that they would weigh heavily enough that you probably wouldn't impose the death penalty? [P] [*Long period of silence.*] Is your answer you just don't know or what?
"Prospective Juror [H]: Yes, I think they might.
"The court: You think they might auger toward life without the possibility of parole?
"Prospective Juror [H]: Yes.
"The court: Are you absolutely committed to that position?
"Prospective Juror [H.]: Yes.
"The court: Are you saying that if there were psychological factors, without naming what they might be, you would automatically vote for life without possibility of parole?
"Prospective Juror [H.]: Without naming them, I don't think so.
"The court: All right. [P] I am not trying to force anybody into an answer, believe me. I just want to know how you think. As I have told you earlier, if you are irrevocably committed to life without possibility of parole, you can't sit [on the jury in this case]. If the opposite is true, you can't sit. There are a number of reasons for that. I am just trying to find out whether you are going to be in a position to be able to choose or that you feel so strongly about something that you are really not going to consider anything else. That's the intent of my question. That's for all of you, too. [P] any questions, [Ms.] Gray?
"[Defense counsel] Ms. Gray: Yes. [P] Good morning, Mr. [H]. [P] On [juror written questionnaire] number 46, and I know his honor has already asked you about this, but you had basically said that you felt that life without the possibility of parole is worse than death. [P] Do you understand now that after hearing this honor's questions that it might not necessarily be so [?] In other words, when you hear bad things about say, a person accused of crime, those are aggravating factors. And when you hear good things, those are the mitigating factors. And it's only when the aggravating factors, those are the bad things, so substantially outweigh those mitigating factors, that you give death. If it doesn't so substantially, you give life. [P] So you see that death is like the worst of the worst?
"Juror [H.]: Yeah.
"Ms. Gray: When you look at it, in terms of whether or not the

aggravating factors or bad things about the person accused of a crime[, that] is what you look at it to determine life or death?
"Prospective Juror [H.]: Yeah
"Ms. Gray: All right. And do you also not understand, and I guess all of you understand that you are going to be given certain things that you can consider in determining or making that choice as to whether to give life or death?
"Prospective Juror [H.]: Yeah.
"Ms. Gray: And one of those things that you can consider is maybe a psychological background. Would you consider that?
"Prospective Juror [H.]: Yeah. . . ."

In Heard, this Court held that the prospective juror's "responses to the questions posed by the court and counsel on *voir dire* did not support a finding that his views regarding the death penalty 'would prevent or substantially impair performance of his duties as a juror' so as to justify his excusal for cause under the governing precedent of United States Supreme Court decisions." (Id., at p. 964.) This Court explained in relevant part:

> "The circumstance of the existence of 'psychological factors' might influence H.'s determination whether or not the death penalty would be appropriate in a particular case certainly does not suggest that H. would not properly be exercising the role that California law assigns to jurors in a death penalty case."

(People v. Heard, supra, 31 Cal.4th at p. 965.)

In footnote 10 of the opinion, at page 967, this Court elaborated:

> "We reject the People's contention that the "[l]ong period of silence" noted by the court reporter is supportive of the court's excusal of Prospective Juror H. As the transcript reveals, the lengthy period of silence to which the People refer followed a question by the court that asked, 'Do you think that if there were past psychological factors that they would weigh heavily enough that you probably wouldn't impose the death penalty?' . .., and to which the prospective juror ultimately responded, 'Yes, I think they might.' . . . Reflection at this point was appropriate. The circumstance that unspecified psychological factors 'probably' or 'might' lead a prospective juror not to impose the death penalty certainly does not provide a basis for excusing the prospective juror for cause. The law permits consideration of such factors.

> Had he answered in the negative, defendant could have challenged him. . . .In our view, the circumstance that Juror H. took some time to think about and respond to the court's imprecise questioning as to whether he thought that 'if there were past psychological factors' he 'probably wouldn't impose the death penalty,' provides no legitimate basis for concluding that the prospective juror's views would prevent or substantially impair him in performing his duties."
>
> (Id., at p. 967.)

The Court went on to say:

> "The colloquy set forth above shows that, in response to a series of awkward questions posited by the trial court, Prospective Juror H. indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty. Prospective Juror H. generally was clear in his declarations that he would attempt to fulfill his responsibilities as a juror in accordance with the court's instructions and his oath. To the extent H.'s responses were less than definitive, such vagueness must reasonably viewed as a product of the court's own unclear inquiries."

(Id., at p. 967.)

More importantly, this Court *declined to defer to the trial court*, because the trial court had "provided us with virtually nothing of substance to which we might properly defer." (Id., at p. 968.) This Court held that automatic reversal of the death judgment was mandated "regardless of whether the prosecutor may have had remaining peremptory challenges and could have excused Prospective Juror H." (Id., at p. 966.)

Mr. Costa's responses to questioning were no more disqualifying than were the responses of the excused juror in People v. Heard. In Heard, Prospective Juror H. responded in writing, and orally, that he felt life without the possibility of parole was the more punitive of the two available sentences. (People v. Heard, supra, 31 Cal.4th at p. 960. Mr. Costa voiced *no* such opinion about life sentencing. Prospective Juror H., in Heard, admitted that "past psychological factors" would "weigh heavily enough" that he "probably wouldn't

impose the death penalty" and "might auger toward life without the possibility of parole." (Id., at p. 961.) Like the panelist in Heard, Mr. Costa's responses demonstrate "reflection" about the gravity of the death penalty that was completely "appropriate" under the circumstances, but show nothing to indicate his unwillingness or inability to perform the function of a juror in a capital case. (People v. Heard, supra, 31 Cal.4th at p. 967, fn. 10.)

In People v. Stewart (2004) 33 Cal.4th 425, the issue was whether the trial court had improperly granted for-cause challenges to five prospective jurors, based on their responses to questions on a written juror questionnaire. Although Stewart, unlike this case, involves a for-cause excusals granted without any oral *voir dire*, the case is nevertheless instructive and quite relevant to the case at bench.

In Stewart, the juror questionnaire included these "yes-no" questions soliciting panelists' views on the death penalty:

> "'(1) Do you have a conscientious opinion or belief about the death penalty which would prevent or make it very difficult for you:
> "'(a) To find the defendant guilty of first degree murder regardless of what the evidence might prove? . . . .
> "'(b) To find a special circumstance to be true, regardless of what the evidence might prove? . . . .
> "'(c) To ever vote to impose the death penalty? . . . .
> "'(d) If your answer to (a), (b), or (c) is "Yes," please explain [in the space provided]. . . .'"

Prospective Juror Nos. 8, 53, 59, 93, and 122, all answered "no" to (1)(a) and (b), but yes to (1)(c). Juror no. 8 had written in the blank space provided for explanatory comment: "'I do not believe a person should take a person's life. I do believe in life without parole.'" Prospective Juror No. 53 had written: "'I am opposed to the death penalty.'" Prospective Juror number 59 had written: "'"I do not believe in capit[a]l punishment.'" Prospective Juror No. 93 had written: "'In the past, I supported legislation banning the death penalty.'" Prospective Juror No. 122 had written: "'I don't believe in irrevers[i]ble penalties. A prisoner can

be released if new information is found.'" (People v. Stewart, supra, 33 Cal.4th at p. 445.)

In reversing the penalty judgment in the Stewart case, this Court explained the reasons for its ruling, in relevant part:

> "The prosecution, as the moving party, *bore the burden of demonstrating to the trial court* that the standard was satisfied as to each of the challenged jurors . . . .
> " . . . [H]owever, a prospective juror who simply would find it 'very difficult' ever to impose the death penalty is entitled – indeed, duty bound, to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as juror. . . .
> " . . . A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict. . . . .
> "[People v. Kaurish, supra, 52 Cal.3d 648], recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult to even impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' . . . ."

(Id., at pp. 446-447; emphasis added.)

Prospective Juror Costa, in this case said, "that would be a tough vote . . . . . a tough issue to vote on . . . ." (RT 645.) He also explained, "That's a heavy responsibility. I mean, it really would be. I mean, I've got to really sure like that.

The guy's life is hanging in the balance." (RT 647.) Later, he gave this response: "It's just that, man, the life if a human being is in my hands and it would scare me, you know. But I know in some cases it has, you know, the death penalty has to be enforced sometimes. But it just scares me when I've got to be – if I've got to be the one to do it, you know." (RT 649.)

Explaining the reasons for excusing Mr. Costa, the trial court commented that he "needed water," "had difficulty swallowing, "a mouth that was dry" and was "visibly upset and nervous." (RT 655.) But "neither nervousness, emotional involvement, nor the inability to deny or confirm any effect whatsoever is equivalent to an unwillingness on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (Adams v. Texas, supra, 448 U.S. at p. 49.)

The trial court further stated, "I had the definite impression that [Mr. Costa] *would find it difficult*, if not impossible, to impartially to apply the law." (RT 655; emphasis added.) Hence, the trial court's own findings show that Juror Costa was excused because his answers suggested that he would find it "*very difficult*" to impose the death penalty. Excusing a potential juror merely because he or she would find it "*very difficult*" to actually impose a death judgment violates Witt. (People v. Stewart, supra, at pp. 446-447.)

Several other recent decisions of this court helpful because they are exemplary of situations, unlike the case at bench, in which juror responses to Witt questioning were sufficiently "equivocal" about the death penalty to justify excusal. For example, in People v. Griffin (2004) 33 Cal.4th 536, this Court rejected a defendant's Witt claim on direct appeal. This Court described the prospective jurors' responses to death qualification questions in the following manner:

> "Prospective Juror E.B. stated, alternately, that she could, and could not, vote to impose the death penalty. Although she stated that earlier in her life she strongly had supported the death penalty, she admitted that she presently entertained mixed feelings and was

> at a crossroads in her thinking, further revealing that she believed that it was wrong to impose the death penalty and that life imprisonment without the possibility of parole was sufficient punishment. She added that she had been affected by the recent deaths of her father and her mother, which occurred on the same day; that she had been unsettled by the execution of Robert Alton Harris, placing herself in his place in the gas chamber in her thoughts; and, lastly, she had been unable even to have a gravely ill dog put down just three weeks earlier.
> "Prospective Juror M.C. indicated that she would not want to take responsibility for voting for the death penalty and, upon further questioning, stated and reiterated that she did not know whether she ever could vote to impose the death penalty, regardless of the state of the evidence in a case. [Footnote omitted.] In similar fashion, Prospective Juror J.D., although stating that she supported the death penalty generally, also stated she did not know whether she actually vote to impose the death penalty– even in a case in which she had concluded that the defendant deserved the death penalty."

(Id., at pp. 559-560.)

A fourth prospective juror's responses were described this way:

> "Lastly, Prospective Juror C.F. was the warden of a state prison at which women condemned to death are incarcerated pending execution. C.F. stated that in light of her professional responsibilities as warden and the potential adverse effect on conditions in her institution that might result if it became known she had voted to impose the death penalty, she would have difficulty imposing that punishment and did not know whether her employment would affect her choice of penalty."

(Id., at p. 560.)

On this record, this Court deferred to the trial court's impression that each of these four jurors would be unable to faithfully and impartially follow the law. In contrast with the excused panelists in the Griffin case, Mr. Costa described no recent personal experiences, such as an execution, or the death of a pet or family member, that caused him to doubt his ability to impose a death judgment if the facts and circumstances warranted it. Mr. Costa did not work in a prison that

housed death penalty inmates, and there was is no suggestion in the record that he felt his vote for death would have adverse consequences to his employment. Most importantly, Mr. Costa consistently indicated that he could, or at least believed he *could* follow the court's instructions and select death if justified by the evidence.

People v. Samuels (2005) 2005 Cal. LEXIS 6865 [filed June 27, 2005] provides a another example of a panelist who truly *equivocated* about whether he could follow the court's instructions and impose a death judgment. In Samuels, the prospective juror's responses to death qualification questions were described as follows:

> "In his juror questionnaire Robert P. provided a series of contradictory answers to questions regarding his views on the death penalty. For example, although he indicated that the state should impose the death penalty on everyone who kills another person, Robert P. admitted that he might be tempted to find special circumstances to be false, no matter the evidence presented, in order to avoid the death penalty question. Robert P. was also uncertain if he could set aside his own feelings regarding what the law ought to be and follow the law as set forth by the court. When asked how he would address a conflict between an instruction of law and his own belief or opinion, Robert P. wrote, 'Certain beliefs I hold strongly. For those I would have to talk to him. I may not be willing to bend.' Finally, on the final page of his questionnaire, Robert P. wrote: 'I feel the death penalty should be used in certain cases. I do not think I could be the one to pull the switch. I have thought much about how I would handle evidence that pointed to the death penalty. I would vote for it, but I would not feel good about it. I cannot say until actually faced with the situation, but I might become hesitant as the issue turns from abstract discussion to reality.'"

(Id., at pp. 23-24.)

> "During oral *voir dire*, Prospective Juror Robert P. also made contradictory statements about his ability to follow the law. He initially stated he was willing to set aside his own views and follow the law. However, when asked further about putting aside his personal feelings and following the law as explained by the court, Robert P. admitted that 'there's certain things that I wouldn't be

> willing to bend on . . . . I don't know if any of those things are going to come up in this case, but I just wanted to leave the door open just in case to say that some things might happen. Mostly this has to do with my religious beliefs.' Further, when the prosecutor asked if there were any situations where he would be unwilling to follow the court's instructions, Robert P. stated, "yes. And I don't know of an example to bring up, but . . . maybe something might.'"

(Id., at p. 24.)

This Court agreed with the trial court that Robert P. was impaired from performing the duties of juror pursuant to the United States Supreme Court's standard in Wainwright v. Witt (1985) 469 U.S. 412.

In this case, Mr. Costa *never* said he would be tempted to reach a verdict *not* supported by the evidence in order to avoid consideration of a death verdict. To the contrary, he emphasized that it was his duty to apply the death penalty in an appropriate case – "the death penalty has to be enforced sometimes." (RT 649.) Furthermore, Mr. Costa, unlike Prospective Juror Robert P., did *not* indicate that there were situations in which he would be *unwilling* to set aside his personal views and religious beliefs and obey the court's instructions. He answered *unequivocally*, "*yeah*," and "*yes*," when the trial court asked Mr. Costa: "Could you temporarily set aside your own personal beliefs as a sworn juror, having tremendous responsibility to follow only the law of the state of California as I give it to you, the evidence, and not let your personal beliefs interfere with this very important task, could you set aside those temporarily and do your duty whether it was death or life without the possibility of parole?" (RT 652; emphasis added.)[24]

Accordingly, Mr. Costa was not "impaired" within the meaning of Witt and the trial court's "finding" of disqualification is not fairly supported by the

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[24]Contrast the trial court's handling of prospective juror Kolstad. This panelist repeatedly expressed doubt that she could ever fairly consider life imprisonment without parole for a person convicted of premeditated murder during the commission of the attempted rape of a child. Yet she was permitted to remain on the jury venire. (See, RB, Argument XXIX, A, 3, post.)

appellate record. The erroneous disqualification of this single prospective juror requires "automatic reversal of the defendant's death sentence." (People v. Heard, supra, 31 Cal.4th at p. 966; Gray v. Mississippi (1987) 481 U.S. 648, 666-668.)

b. Prospective Juror Young:

Viewed was a whole, the record does not support the trial court's for-cause dismissal of Mr. Young. Mr. Young's questionnaire and oral responses suggest an intelligent, but loquacious and somewhat eccentric juror. He anticipated that his jury service would be "interesting, involved and intense, emotionally difficult – a soul searching experience when we're dealing w/murder charges." (SCT #6 XXXII 9362.) He indicated it was "too serious to be automatic," and should be used by the state only "if it brings a greater good." (SCT #6 XXXII 9373, 9374.) He gave one example of an appropriate case for application of the death penalty, Clarence Ray Allen, who commissioned a murder for hire from prison, but Mr. Young did *not* suggest in any way that this was the *only* type of case in which the death penalty would be appropriate. (SCT 36 XXXII 9373; RT 2152.) To the contrary, Mr. Young was directly asked by the court if "that kind of case" – referring to the first degree murder of a 14-year-old girl during an attempted rape or robbery, or to eliminate a witness – "[was] serious enough for [him] to consider the death penalty as the appropriate remedy." (RT 2152-2153.) Mr. Young replied, unequivocally: "It's serious enough. Yeah." (RT 2153.)

Mr. Young frankly admitted that his general philosophical and religious views would affect the death penalty decision: "What person could decide a question of this magnitude without profound examination of one's thoughts?" (SCT #6 XXXII 9376.) However, he identified no particular philosophical or religious objection to the death penalty generally. He did express objections to execution of the mentally retarded,[25] and felt that blacks received the death

[25]Of course, execution of the mentally retarded has since been held to violate the Eighth Amendment. (Atkins v. Virginia (2002) 122 S.Ct. 2242.)

penalty disproportionately.[26] (SCT #6 XXXII 9375, 9378.) He was unsure whether he would vote for a death penalty law in California; it would "depend[] on how it was written." (SCT #6 XXXII 9377.)

The trial court in dismissing Mr. Young gave great weight to Mr. Young's answer to question 100, which asked: "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?" He responded: "Anybody who answers yes to this 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, XXXII 9379.)[27] Mr. Young never got to finish explaining his response to question 100 because he was *interrupted* by the court. He stated in relevant part: "Without knowing exactly the details of what would be taking place three weeks -- three months in the future and specifying what I can, all I can do is I would say I would view the death penalty in terms of what is the best thing for the public good, if necessary to protect the public. I think it's a damned serious thing. I also think that putting somebody in prison for life will generally take care of the problem if someone is a threat to society. However . . ." At this point Mr. Young was interrupted. (RT 2154.)

Given the interruption, consideration of Mr. Young's other answers is essential to understanding his state of mind. In response to question 101, Mr. Young wrote: "I am also 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. . . ." (SCT #6 XXXII 9379.) During *voir dire*, Mr. Young indicated he

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[26]Mr. Young's perception was completely accurate. It is well documented that the death penalty is disproportionately applied to blacks. (See, Death Penalty Information Center, Race of Death Row Inmates Executed Since 1976), http://www.deathpenaltyinfo.org/article.php?scid=5&did=184.)

[27]This remark is much like the statement of prospective juror Sam Lopez, whom the court *refused* to excuse for cause. (See, Argument XXIX, A, 8, infra.) He admitted favoritism for the death penalty and brushed it off, saying that "everybody . . . would have to lean one way or another." (RT 2681.)

could follow the court's instructions: "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 2154.)

At one point, the trial court indicated he was "wondering" if Mr. Young could set his thoughts on the death penalty aside and base his decision as juror "on the evidence and the law that I give to you and not on your own personal views about this matter." (RT 2155.) Mr. Young asked for clarification of the question: "If the crime is Penal Code 2121 [sic] and it says, 'If declared guilty, you must impose the death penalty,' is that what you're trying to ask me?" The Court offered an explanation of the law in California but failed to clarify the question: "No. What I'm trying to ask you, the only law in the state of California is if you commit first-degree murder and one of the three special circumstances that I mentioned to you, then the death penalty is a possibility." (RT 2155.) Juror Young asked for clarification again: "Can be imposed but not mandatory?" The court made a statement in response, yet failed to pose a clarifying question: "A lot of power rests with jurors. A lot of discretion. I won't give you any instructions that say, 'Look. If you find this to be true and that to be true, then impose the death penalty.' I'll give you some guidelines to go by.'" (RT 2155.) Juror Young offered further thoughts on the subject, even though no question was pending:

> "I've already got in my mind's eye – I haven't give this a lot of thought because I got a new job. But I wondered what it would be like to be in a jury room with 12 people and the amount of logic there. And to be honest, I don't hold a real high opinion of my fellow human being as far as – look who we put in public office over and over again. Eleven more of those together, actually how many folks will follow the letter of the law and won't bring in their own personal prejudices whether they're Rush Limbaugh fans or Ralph Nader or any point in between."

(RT 2156.) At this point, the court turned questioning over to counsel, but

neither counsel chose to ask any questions.

The trial court, in dismissing Mr. Young, made the following revealing remarks.

> "Well, I found his answers to my questions to be basically incomprehensible and illogical. . . . I consider his views on capital punishment, certainly, to be, as you mentioned, Ms. O'Neill, apparently against the death penalty.[28] However, he never would give me a straight answer with regard to setting aside his own opinions and being fair and impartial. And his answers to questions – his answer to question 100 make it very clear that he has no intent to set aside his personal opinion. Apparently, under question 32,[29] he's having some personal problems that he's going through. The fact that he's hired as a teacher by the Fresno Unified School District does not qualify him as a juror."

(RT 2159.)

The court continued:

> "He's certainly different than the person that we had that had a learning handicap, because this gentleman is articulate. He says he'll do his best if called, but he does, in 102, say that he's good at expressing himself on paper. And then he comes back with 100 and says that, 'Anybody who says they can set aside their own feelings is a liar.' Then under whether he can be a completely fair and impartial juror, his answer is, 'Well, what's impartial in today's society. We live in a vacuum.[30] [sic] I'll do my best to be

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[28]Other than this statement by the judge, the appellate record is devoid of evidence that Ms. O'Neill had characterized this juror as apparently against the death penalty. An unreported conference occurred during the midst of Mr. Young's *voir dire*. However, the settled statement for this conference reveals only that there was a discussion about whether either party intended to stipulate or move for dismissal of Mr. Young. (SCT #7 160.) Obviously, defense counsel did not concede that the juror was disqualified within the meaning of Witt since Ms. O'Neill argued against granting the prosecutor's motion to excuse. (RT 2157-2158.)

[29]Mr. Young wrote that he had just completed an "anger management" program after having a conflict with his fiancé over her affair with someone else. (SCT #6 XXXII 9353.)

[30]Mr. Young is misquoted. He wrote: "What's impartial in today's society? We don't live in a vacuum [sic]. I will do my best to be fair." (SCT

(continued...)

> fair.' Accordingly, the totality of the evidence is that his views on his responsibilities and his views on his ability to be a fair and impartial juror will substantially impair the performance of his duty as a juror in accordance with my instructions on the law and his oath."

(RT 2159.)

The trial court granted the prosecutor's challenge, then as an afterthought added:

> "The record will reflect that he was a good 35 minutes late coming in here, too. And then I don't know if the record reflected his kind of talking and jabbering away about his classroom and the rest."

(RT 2160.) In response to Ms. O'Neill's objection, the court stated: "I think when a person says, that, under question 100, that he's telling you that in no way can he set aside his personal feelings, I have a real problem with that." (RT 2161.)

Citing several cases as authority, respondent argues that the this Court must defer to the trial court's assessment of Mr. Young's true feelings about the death penalty, and affirm the excusal. (RB, pp. 216-218.) People v. Ochoa, supra, 26 Cal.4th 398 (RB, p. 217), previously discussed, is easily distinguishable. The seven excused jurors in Ochoa all made relatively clear statements indicating their opposition to capital punishment and/or declared themselves unable to impose the death penalty regardless of whether the evidence supported it.

No such statements were made by prospective juror Young. Mr. Young's view was that, in most cases, a sentence of life without parole would be an "equally good alternative" to death; the death penalty should be used only to advance "a greater good." (SCT #6 XXXII 9373.) This is not a disqualifying attitude according to Witt. A person is not disqualified pursuant to the Witt standard just because his views "may predispose him to assign greater than

(...continued)
#6 XXXII 9380.)

average weight to the mitigating factors" or "because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate." (People v. Stewart, supra, 33 Cal.4th at p. 446-447.)

More importantly, in contrast to *all* cases cited by respondent in this and previous jury selection arguments, in this case the trial court did *not* find Mr. Young disqualified by his *views on capital punishment.* To the contrary, the court's "finding" was that Mr. Young's "views on his responsibilities" and "views on his ability to be a fair and impartial juror" were disqualifying. (RT 2159.) This so-called "finding" is not fairly supported by the record. (Wainwright v. Witt, supra, 469 U.S. at p. 434.)

Apparently, the trial court was concerned with Mr. Young's answers to questions dealing with his willingness to set aside his "personal beliefs," and obey the court's instructions. It is true that both orally, and in his questionnaire, Mr. Young expressed healthy skepticism about the human nature and the ability of people, including himself, to disregard personal beliefs in the jury room. (SCT #6 XXXII 9379; RT 2156.) This is beside the point, however. Mr. Young voiced no opinions that were strongly pro- or anti-death penalty. Hence, Mr. Young's philosophical musings about human nature did not disqualify him to serve as a juror under the Witt standard, so long as he remained willing to listen to the court's instructions and do his best to apply the law. (People v. Stewart, supra, 33 Cal.4th at p. 447.) Mr. Young clearly affirmed that he would try his best to be fair and "examine and hear all sides" (SCT #6 XXXII 9379, 9380) and "could follow and get the directions of the court." (RT 2154.) Mr. Young was as at *least* as clear as excused Prospective Juror H. in the Heard case that "he would attempt to fulfill his responsibilities as a juror in accordance with the court's instructions and his oath." (People v. Heard, supra, 31 Cal.4th at p. 967.)

The trial court also characterized Mr. Young's answers to questions as "incomprehensible and illogical" and stated that he "never would give [the court]

a straight answer with regarding to setting aside his own opinions." (RT 2159.) In this respect, the instant case is a lot like the Heard case. In People v. Heard, supra, 31 Cal.4th at p. 967, fn. 10, this Court, while discussing the answers of Prospective Juror H., partially blamed the "imprecise" and "awkward" nature of the questioning by the trial judge. (Id., at p. 967, & fn. 10.) Judge Fitch's questioning of Mr. Young was equally awkward and imprecise. Many of the court's "questions" were not questions at all, but rather statements that did not demand precise answers. As in Heard, to the extent Mr. Young's answers were "less than definitive, such vagueness must reasonably be viewed as a product of the court's own unclear inquiries." (Heard at p. 967.)

Moreover, in part due to the vagueness of the court's questions, in this case it is not even clear from the record which "personal beliefs" were in danger of following Mr. Young into the jury room. As the U.S. Supreme Court stated in another context: "Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." (Beck v. Alabama (1980) 447 U.S. 625, 642.) Even assuming the trial court was trying to rule out any possible "effect" of Mr. Young's views about the death penalty on his deliberations, Adams v. Texas, supra, 448 U.S. 38, holds that a person may not be excluded from jury service merely because he or she will be "affected" by the possibility of the death penalty, meaning that "the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." (Id., at p. 49.) Furthermore, the "inability to deny or confirm any effect whatsoever is [not] equivalent to an unwillingness or inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (Adams v. Texas, supra, 448 U.S. at p. 50.)

In People v. Heard, supra, this Court rejected as a disqualifier the fact that the presence of unspecified "psychological factors" in the defendant's background "probably" or "might" cause prospective juror H. *not* to vote for the

death penalty. (Id., at p. 964.) By analogy, the fact that Mr. Young's "religious or philosophical principle[s]" might "affect" his consideration of a "question of this magnitude" (SCT #6 XXXII 9376) did not furnish a "legitimate basis for concluding that [his] views would prevent or substantially impair him in performing his duties." (People v. Heard, supra, at p. 967, fn. 10.)

Mr. Young was additionally excused from jury service in Roy's case based on entirely *irrelevant* factors, including his tardiness to court, his "jabbering away" about work, and the fact that he had some personal problems. (RT 2159.) While such factors might properly be considered by counsel in exercising peremptory challenges, they do not support a trial court's finding of disqualifying bias to sit in a death penalty case. A juror is only disqualified under Witt if he or she is "unwilling or unable to follow the court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (People v. Stewart, supra, 33 Cal.4th at p. 447.)

Respondent cites few additional cases in support of the trial court's excusal of Mr. Young – only Witherspoon v. Illinois (1968) 391 U.S. 510 (RB, p. 217), Wainwright v. Witt, supra, 469 U.S. 412 (RB, p. 218), and Lockett v. Ohio (1978) 438 U.S. 586 (RB, p. 218). However, these cases are only relevant to the extent they summarize general legal principles. In Witherspoon, a state court erroneously excused 47 death-scrupled jury panelists in rapid succession, without determining in all cases whether the prospective jurors' scruples would invariably compel them to vote against capital punishment. (Witherspoon v. Illinois, supra, 391 U.S. at p. 514.) In Witt, a juror was held properly disqualified based on his statement that he was "afraid" his personal belief against the death penalty "*would*" interfere with him sitting as a juror in the case. (Wainwright v. Witt, supra, 469 U.S. at p. 416; emphasis added.) In Lockett, four properly excused veniremen had each repeatedly stated that their convictions against the death penalty were so strong that they would not "'take the oath'" so long as

capital punishment was a possibility. (Id., at p. 596.)

The facts of Witherspoon, Witt, and Lockett are clearly distinguishable from this case. The record does not suggest, nor did the court find, that Mr. Young's scruples would invariably cause him to vote against the death penalty. Nor did Mr. Young ever refuse to take the oath of a juror, or claim that his personal opposition to the death penalty would interfere with his ability to select the death penalty in an appropriate case. Accordingly, dismissal of Mr. Young violated appellant's rights guaranteed by the Sixth, Eighth and Fourteenth Amendment. A penalty reversal is automatic.

c. Prospective juror Keller:

Unlike Mr. Costa and Mr. Young, prospective juror Keller, after giving a series of *unequivocal* responses indicating she strongly favored the death penalty, could consider the death penalty in an appropriate case, and would follow the court's instructions on the law (RT 2163-2167), gave several slightly more *equivocal* responses. Finally, she acknowledged she "probably would not" set aside her feelings on the death penalty," and admitted her feelings *might* "substantially impair [her] ability to ever select the death penalty in the case." (RT 2180-2181.) She was excused over defense objection. (RT 2182.)

Ms. Keller was not a "scrupled" juror in the sense of having any predisposition to impose life without parole. To the contrary, she strongly believed in the death penalty (RT 2172) and felt it would be "selfish" to refuse to impose it if supported by the facts. (RT 2180.) The "personal beliefs" the court was referring to in questioning Ms. Keller (RT 2180) were her feelings that she "would not like" (RT 2177) imposing the death penalty, would have a "hard time" (RT 2174) doing it, would "rather probably have someone else make that decision" (RT 2177), and could not be certain what verdict she would reach when the time came. (RT 2174.) The fact that Ms. Keller would find it "very difficult" to impose a death judgment despite her strong *support* of the death penalty did not disqualify her as juror, so long as she remained willing to do her best to

follow the instructions of the court. (People v. Stewart, supra, 33 Cal.4th at pp. 446-447; People v. Heard, supra, 31 Cal.4th at p. 959-962; Adams v. Texas, supra, 448 U.S. at p. 49.)

Like the excused juror in Farina v. State (Fla. 1996) 680 So.2d 392, 396-397, a case cited in the AOB and not addressed by respondent, Ms. Kelly made it clear she would "try to do what's right." (RT 2172.) Her mere inability to predict whether she would actually choose the death penalty when she had not heard the evidence (RT 2173, 2179, 2180) did not disqualify her. (Gall v. Parker (6th Cir. 2000) 231 F.3d 265, 331 ["Correll's uncertainty as to how the option of a death sentence would affect his decision should not have led to his exclusion."]; cited in AOB, at p. 303.) The trial court's finding that she was disqualified according to the Witt standard is not "fairly supported by the record as a whole." (Wainwright v. Witt, supra, 469 U.S. at p. 426-431.)

2. Declining to give deferential review is consistent with Ross v. Oklahoma (1988) 487 U.S. 81, 90, and not inconsistent with Wainwright v. Witt, supra.

In a footnote, respondent argues that appellant has waived his claim that the trial court engaged in a discriminatory pattern of rulings on challenges for cause, favoring the prosecution, because he did not raise an objection of judicial bias in the trial court. (RB, p. 219, fn. 79.) Yet Roy's attorneys could not have been much clearer in objecting that the trial court was systematically including pro-death penalty jurors and excluding those with scruples about capital punishment.

> "Your Honor, the defense at this time would object to the panel as constituted under constitutional ground, Sixth, Eighth and Fourteenth Amendment. We feel that the defense – the defense feels that there's been erroneous exclusion of life prone jurors and erroneous inclusion of pro death jurors. . . . I think about 100 people have been death qualified and of them I believe that 15 or 20 percent we strongly objected to. And we feel that because of that, we cannot pick a fair and impartial jury from the panel that's been death qualified."

(RT 3015.)[31] This issue was, accordingly, not waived.

Cases cited by respondent in support of finding waiver are inapt. In People v. Hines (1997) 15 Cal.4th 997, 1040-1041 (RB, p. 219, fn. 79), the claim was that the judge evinced a "'readily apparent pro-prosecution bias,'" not that the judge engaged in a pattern of excluding death-scrupled jurors, while overruling objections to clearly pro-death penalty jurors. In that case, the defendant "made no objection to any of the trial court's allegedly improper actions." (Id., at p. 1041.) In this case, the defense consistently objected to the court's adverse rulings during jury selection.

In People v. Downey (2000) 82 Cal.App.4th 899, 910 (RB, p. 219, fn. 79), the issue was whether the trial court abused its discretion by refusing to reinstate probation, and sentencing the defendant to prison. The defendant did *not* attack the judge's impartiality in the trial court, and a belated claim of judicial bias was made and rejected in connection with the sentencing decision on direct appeal. (Id., at p. 910.)

Respondent argues that dicta in Ross v. Oklahoma (1988) 487 U.S. 81, 91, fn. 5, which suggests that deferential review does *not* apply when a court repeatedly and deliberately misapplies Witt, is "contrary to Witt." (RB, p. 219.) Appellant disagrees. In Witt, the U.S. Supreme Court decided the *degree* of deference that a federal habeas corpus court should pay to a state trial judge's determination that a juror is disqualified by pro- or anti-death penalty bias. (Wainwright v. Witt, supra, 469 U.S. at p. 417, 426.) Deferential review is not *always* applied; there are exceptions. Deference is *not* given to a trial court's assessment of a prospective juror's death penalty bias if (1) the state court fails

[31]Furthermore, in point of fact, the defense also later filed a midtrial motion to disqualify Judge Fitch for actual bias, alleging prejudice against Roy's public defenders. That motion was denied. (Pen. Code, § 170.1; CT 1262-1378, 1428-1430.) Even if this Court should find the "discriminatory ruling" issue waived, the trial court's discriminatory pattern of ruling should be considered as a ground for declining to accord deferential review.

to resolve a factual dispute on the merits; (2) the factfinding procedure was inadequate to afford a full and fair hearing; (3) the material facts were not adequately developed in state court; (4) the state court lacked jurisdiction over the subject matter; (5) the defendant, who was indigent, was denied counsel; (6) the defendant did not receive a full or fair hearing in state court; (7) the defendant was "otherwise denied due process" by the state; and (8) the trial court's "factual determination is not fairly supported by the record." (Witt at p. 427.) This Court adopted the Witt standard in People v. Ghent (1987) 43 Cal.3d 739, 767.)

Ross v. Oklahoma, supra, is completely consistent with (6), (7), and (8), above, three of Witt's *exceptions* to deferential review. A trial court's systematic misinterpretation of Witt to exclude all death penalty-scrupled jurors, and to pack the jury with citizens expressing strong pro-death penalty bias, violates due process and denies the defendant a fair hearing. Denial of an impartial judge denies due process and is a "structural defect affecting the framework within the trial proceeds." (Arizona v. Fulminante, supra, 499 U.S. at p. 309-310; Tumey v. Ohio (1927) 273 U.S. 510; see also, Vasquez v. Hillary (1986) 474 U.S. 254.)

In effect, respondent seems to be arguing that deferential review is always required, regardless of the strength of the inference that the trial judge engaged in a pattern of discriminatory rulings on "for-cause" challenges. However, it is clear that reviewing courts do not always defer to trial courts where the constitutional guarantee of an impartial jury is concerned. The U.S. Supreme Court's recent decisions in Miller-El v. Dretke (2005) 125 S.Ct. 2317, and Johnson v. California (2005) 125 S.Ct. 2410, are cases in point.

In Miller-El, the U.S. high court recently reversed a federal district court's rejection of a defendant's claim that a prosecutor's peremptory strikes of potential jurors were based on race. The trial court criticized the federal appeals court's readiness to accept the trial court's conclusions regarding the prosecutor's so-called race-neutral explanations for its disqualification of black jurors, and its

disregard of other factors in the record suggesting a "'sham and a pretext for discrimination.'" Miller-El v. Dretke, supra, at p. 2328.) Applying comparative analysis of the prosecutor's use of peremptory challenges against similar non-black panelists, the high court concluded that the state court's disposition of the defendant's motions pursuant to Batson v. Kentucky (1986) 476 U.S. 79, were unreasonable and erroneous. By analogy, appellant's comparative analysis of the trial court's rulings on the parties' for- cause challenges provides strong evidentiary support to find that the trial court's "findings" of bias were applied in a discriminatory fashion, to benefit the prosecution.

In Johnson v. California, supra, decided the same day as Miller-El, the U.S. Supreme Court reversed this Court's decision in People v. Johnson (2003) 30 Cal.4th 1302, and held that a defendant may satisfy his burden of establishing a *prima facie* case that a prosecutor is using peremptory challenges to remove panelists from a cognizable racial group by "offering a wide variety of evidence [footnote omitted], so long as the sum of the proffered fact gives 'rise to an inference of discriminatory purpose.'" The Supreme Court explained:

> "The constitutional interests Batson sought to vindicate are not limited to the rights possessed by the defendant on trial [citations omitted], nor to those citizens who desire to participate 'in the administration of the law, as jurors,' [citation omitted]. . . . 'Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our justice system.'"

(Johnson v. California, 125 S.Ct. at p. 2418; internal citations omitted.)

By analogy, allowing a *judicial officer* to engage in a pattern of discriminatory rulings on for-cause challenges not only violates the Sixth, Eighth and Fourteenth Amendment; it undermines public confidence in the fairness of the justice system to the same degree as does racial discrimination. When the sum of the proffered facts, including comparative analysis of judicial rulings on the parties' for-cause challenges, reveals a discriminatory pattern of rulings on the parties' for-cause challenges in a death penalty case, deferential review is neither

inappropriate, nor is it required by Witt.

Cases cited by respondent do not compel application of a contrary rule. People v. Coleman (1988) 46 Cal.3d 749, 768, fn. 10 (RB, p. 220), challenges the trial court's denial of four challenges for cause of pro-death penalty veniremen. The case does not even address a defendant's claim that the trial court's differential pattern of rulings on defense and prosecution motions revealed a discriminatory pattern.

In Gray v. Mississippi (1987) 481 U.S. 648 (RB, p. 220), the issue was whether harmless error analysis could be applied to the trial court's single erroneous ruling, excusing for cause a qualified juror, on the theory that the court also erred by refusing to grant motions to excuse a number of venire members, after they stated unequivocally that they could not vote to impose the death penalty. The case is most often cited for the proposition that "[t]he nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless." (Id., at p. 665.) In other words, Gray compels automatic reversal when such error is found. Gray does not address the standard of review. There is nothing in Gray's analysis that would preclude appellate court review of a defendant's claim that the trial judge purposefully discriminated against the defense in granting and denying the parties' motions to excuse panelists for death penalty bias. (See, also, Davis v. Georgia (1976) 429 U.S. 122, 123 [per curiam opinion reversing a death judgment under authority of Witherspoon v. Illinois, supra, 391 U.S. 510, where a single juror was excluded for expressing mere death penalty scruples]; RB, p. 220.)

Kreling v. Superior Court (1944) 25 Cal.2d 305, 312, and Moulten Niguel Water District v. Colombo (2003) 111 Cal.App.4th 1210 (RB, p. 221), are civil cases – not criminal cases – cited in support of the general proposition:

> "when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it

> does not amount to that prejudice against a litigant which disqualifies him in the trial of the action."

(Kreling, supra, at p. 312; Niguel Water District, supra, at p. 1219.)

The situation in Kreling is clearly distinguishable from this case. There, the trial judge who had listened to a civil trial directed judgment for the plaintiffs. He made several disparaging remarks about the defendant at the time of ruling. The defendant's Code of Civil Procedure section 170 motion to disqualify the judge was denied, and the denial upheld on appeal. In contrast, this case does not involve a trial judge's rulings against a losing defendant after listening to a trial.

The Niguel Water District case is equally far afield. In that case, the defendants in a civil case never raised the issue of judicial bias at the trial level. On appeal from the jury's condemnation award, they argued that the trial judge had evinced prejudice against the defendants – immigrants from Italy – by giving the jurors an historical overview of the adoption of the United States Constitution. (Id., at pp. 1218-1219.) The defendants also argued that the judge was biased because he ruled against them on some of their evidentiary objections. The appellate court found these claims waived. (Id., at p. 1219.) In this case, defense counsel consistently objected to the trial court's rulings, *and* argued for a new jury venire based on the impossibility of obtaining an impartial jury. More importantly, the above civil disqualification cases are largely irrelevant to determining whether a judge presiding over a capital trial engaged in a discriminatory pattern of rulings during the selection of the jury.

People v. Jenkins (2000) 22 Cal.4th 900, 989-990 (RB, p. 222), also fails to provide support for respondent's position. In that case, the defendant challenged the trial court's rejection of four challenges directed toward death-prone jurors. This court found that the trial court had reasonably concluded based on panelists' responses that each would consider voting for life imprisonment if the evidence warranted it. (Id., at p. 989.) In this case, of

course, at least *three* jurors who indicated the same thing – that they would consider death as well as life imprisonment and follow the court's instructions – were excused for cause on motion of the prosecution.

In People v. Jenkins, this Court also rejected a claim that the trial judge was not "evenhanded" in ruling on motions to exclude for cause. (Ibid.) The defendant argued that "the court excused 'death-doubtful' jurors who gave ambiguous answers but refused to excuse 'death-favorable' jurors who gave equally ambiguous answers." (Ibid.) Using conclusory language, this Court found that the record demonstrated "that the death-favorable jurors of whom defendant complains clearly indicated their ability to consider circumstances in mitigation, to withhold judgment upon question of penalty until the evidence was before them, and seriously to entertain the option of imposing a sentence of life without possibility of parole," and that the one excluded "death-doubtful" juror "demonstrated an inability to put aside preconceptions and opinions regarding the death penalty and to consider all of the sentencing options." (Ibid.) Since this Court did not discuss the specific responses of the "death-favorable" and "death-doubtful" panelists in Jenkins, it is not possible to engage in comparative analysis with this case.

Respondent in part argues the absence of any discriminatory pattern of rulings because the court *granted* 46 of 56 defense challenges for cause. (RB, p. 221.) As can be seen from footnote 61 of the AOB , however, the *excused* pro-death penalty panelists all gave unambiguous, unequivocal answers admitting that they could not be impartial. (AOB , pp. 326-328, fn. 61.) These defense motions were correctly granted.

Respondent also argues, in part, that the trial court was not biased since it granted 24 of the prosecutor's challenges for cause, but denied at least 10. (RB, p. 221.) Respondent specifically points to the denial of for-cause challenges against Ms. Barnes (RT 484) and Dr. Masters (RT 1600-1601), as examples of the court's fair, i.e., comparable, handling of death qualification where pro-death

penalty panelists were concerned. (RB, pp. 221-222.) These are not good examples. Although both Barnes and Masters expressed the desire to see the death penalty abolished, both also unequivocally indicated they would set aside their beliefs and follow the law as given by the court. (RB, p. 222.) The same is true of the five other scrupled jurors that the court allowed to remain on the panel, overruling the prosecutor's motions to excuse, based on anti-death penalty bias.[32] Each of these panelists also unequivocally stated that they could set aside their personal views about the death penalty and *actually impose it* if warranted by the evidence. The fact that the trial court *properly* denied several of the

[32]Appellant has identified a total of 5 prosecutorial motions to excuse for anti-death penalty bias that were denied by the trial court (other than Barnes and Masters). They include: (1) Prospective Juror Arriola [Q: "But you could make that decision, you could go back to the jury room and depending on what the evidence showed, if you felt it was appropriate, you could vote for a death sentence. Is this correct?" A: "Yes." (RT 454); (2) Prospective Juror Garcia [Q: And that means even after you found that he was involved in a first degree murder of a 14-year-old girl that – and one of the special circumstances is true, say, attempted rape, you would still look at either life without the possibility of parole or death as – as being perfectly possible reasonable alternatives to each other. Is that right? A: "Yes." Q: And if you felt it was correct – for example, if you felt it was proper under the evidence and the law you'd vote the death penalty. Is that right? A: "Yes." (RT 1030-1031); (3) Prospective Juror Grewal: Q: "And so the question would be then, if you were chosen to be a juror on a case such as this and the jury found the defendant guilty beyond a reasonable doubt of first degree murder and found one or more special circumstances to be true, for example, that the murder happened during the commission of an attempted rape or a robbery or both, do you think that the death penalty could ever be an appropriate punishment for someone convicted of those crimes?" A: "Yes." Q: "And you as a juror in a case such as that, could you be the juror to ever vote for the death penalty if you were sitting on a case such as that? A: "Yes." (RT 1216-1217); (4) Prospective Juror Levan: [Q: "Do I understand correctly that if you felt that the – or if you believe that my instruction of law and the evidence pointed in the direction of the death penalty, then you would be able to vote for the death penalty. Is that correct?" A: "Yes. I would." (RT 1453-1454); and (5) Prospective Juror Zarasua: Q: "Maybe it's hard to understand, but I think what [Mr. Cooper] is asking is, depending on the evidence, as you say, depending on the evidence, could you in that kind of case vote for the death penalty?" A: "If he or she is guilty, I said, yes." ". . . . But I will have to hear the evidence." (RT 2306-2307).

prosecutor's motions to excuse does not necessarily prove that the court's overall pattern of rulings was evenhanded.

Respondent has reserved his discussion of specific claims involving the erroneous denial of defense motions to excuse eight prospective jurors for cause for Argument XXIX of the RB. Appellant will do likewise.

It suffices to say that in this case, the trial judge declared that the specific responses of a certain number of panelists to death qualification questions were "ambiguous" and therefore required interpretation. When this occurred, *pro-death* penalty panelists who gave responses comparable to those given by Costa, Young and Keller were consistently allowed to remain on the jury panel over defense objection. (See, Argument XXIX, infra.) In contrast, Costa, Young and Keller – panelists who expressed scruples about the death penalty, yet who promised to consider the death penalty and obey the court's instructions – were excused.

Because the trial court's pattern of rulings during death qualification *voir dire* consistently favored the prosecution, the trial court's credibility findings as to prospective jurors Costa, Young, and Keller should be disregarded as disingenuous, and not fairly supported by the record. (Wainwright v. Witt, supra, 469 U.S. at p. 431.) A jury culled of persons with conscientious scruples about the death penalty violates the Sixth, Eighth and Fourteenth Amendments. (Ibid.; Adams v. Texas, supra, 44 U.S. at p. 43; People v. Ghent, supra, 43 Cal.3d at pp. 767-768.) If this Court finds that even one juror was improperly excused in violation of Witt, reversal of the death penalty is mandatory. (Gray v. Mississippi, supra, 481 U.S. at p. 668.)

XXIX

THE TRIAL COURT ERRONEOUSLY DENIED DEFENSE FOR-CAUSE CHALLENGES TO EIGHT JURORS WITH DISQUALIFYING BIASES.

A. The defense challenges for cause to prospective jurors Fletcher, Kolstad, Madden, M. Lopez, S. Lopez, Wiginton, Donovan and McDaniel.

Respondent argues that the trial court did not "abuse its discretion" in denying defense challenges for cause to the above jurors. Because the written and oral responses to death qualification questioning for prospective jurors Fletcher, Kolstad, Madden, M. Lopez, S. Lopez, Wiginton, Donovan and McDaniel are summarized in great detail in the AOB from on pages 268-296, a much briefer synopsis is included – only what is necessary to rebut respondent's own summaries. (RB, pp. 226-237.)

1. Vincent Donovan:

Mr. Donovan wrote that the death penalty should be automatic for cases of pre-meditated murder, and that the death penalty was "too seldom" used. He also felt that "too many people [were] getting away with murder." (SCT #6 2186, 2187; RT 799.) Mr. Donovan thought that life without parole did not really mean life without parole; prison officials often intervened to release people. (SCT #6 2187; RT 799.) He said he would definitely vote for a death penalty law, if it were on the ballot. (SCT #6 2189.) He felt that the death penalty should be applied to killings, except for "accidental death." (SCT #6 2189.) He voiced the opinion that a sentence of life without parole would *not* be an appropriate sentence for a first degree murder committed during a robbery because there were "too many chances that in years to come the judge, or whoever it is, may change their mind and think he's a pretty good prisoner so let them go and go out on the street and do the same thing again." (RT 798.) He had read many newspaper stories about cases in which he felt the death penalty should have been imposed but was not. (RT 799.) He "doubted very much" that he could vote for life

without the possibility of parole for someone convicted of first degree murder with one or more special circumstances. (RT 802.)

2. Stephanie Fletcher:

Ms. Fletcher was of the opinion that the death penalty should be automatic for the killing of government officials, the killing of law enforcement officers, and for premeditated murder. (SCT #6 2832; RT 929.) She believed in the adage, "an eye for an eye," meaning "equal punishment for the injury inflicted." (SCT #6 2833.) She believed the death penalty should be imposed for killing, with the exception of self-defense or accidental killing. (SCT #6 2835; RT 932.) She also felt the death penalty should be imposed for first degree murder if the person had planned to rape and kill his victim. (RT 929.) According to Ms. Fletcher, the penalty of life without parole was too costly for taxpayers. She opined that people sentenced to life in prison "live better than a lot of the people who have lost their jobs and living on the street." (RT 930.) According to the court as well as counsel, Ms. Fletcher exhibited "hostility toward Ms. O'Neill during the questioning process," and "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.)

3. Martha Kolstad:

Ms. Kolstad believed that the death penalty should be automatic for "molestation (child)/murder." (SCT #6 4810; RT 1413.) At the very least, she felt she would "definitely lean" toward imposition of the death penalty if someone committed murder during an attempted rape. (RT 1421-1422.) Ms. Kolstad indicated that her feelings in support of the death penalty had "become more intense" over the last few years. (SCT #6 4810.) She felt that life without the possibility of parole was a "waste of time, resources & taxpayer dollars." (SCT #6 4811.) In addition, she felt that there would always be "loopholes, activist groups, etc., that can or will sway parole boards or bring up new evidence 20 years later." (SCT #6 4811.) Ms. Kolstad also felt that judicial review of

death penalty cases after the passage of too much time caused "a lot of wasted resources & tax money." (SCT #6 4815.)

Ms. Kolstad felt "if you kill someone you should be prepared to pay w/your life if caught and convicted." (SCT #6 4812.) She would carve out exceptions to the death penalty for euthanasia, and "a crazed family member who shoots and kills the perpetrator who was witnessed committing the crime." (SCT #6 4813.) Ms. Kolstad called it "ridiculous" that minors were not eligible for the death penalty; this made her "very angry." (SCT #6 4814; RT 1409.)

Ms. Kolstad would definitely vote for the death penalty if it were on the ballot. (SCT #6 4813.) She was critical of the "liberal" press for reporting demonstrations against the death penalty, when everyone she knew supported it. (RT 1420.) Ms. Kolstad repeatedly expressed doubt that she could completely set aside her strong pro-death penalty views, and averred that if she had to consider life without parole, she "wouldn't be happy" about doing that. (RT 1408.) She also admitted that maybe this case "wouldn't be a good one" for her. (RT 1423.)

4. David Madden:

Mr. Madden was of the opinion that law enforcement officers were "handcuffed from doing their job thanks to judicial gridlock manufactured by lawyers." (SCT #6 5590.) He felt this had "overloaded" the judicial system. (SCT #6 5593.) He was attracted to radio and television programming that "blasts lawyers for becoming obstacles to justice," such as an episode on "60 Minutes" that regarding "low-life attorneys milking the system." (SCT #6 5597.) He had a bumper sticker on his car that read, "Have you kicked your lawyer today?" (SCT #6 5598.) He admitted a "pronounced aversion" to lawyers. (RT 1533.) Mr. Madden viewed psychiatric testimony as "a lawyer's ace-in-the-hole (to get his client back on the street)." (SCT #6 5600.) He was inclined to give credit to a court-appointed psychiatric or psychological evaluator, but not someone hired by prosecution or defense. (RT 1545.)

Mr. Madden favored the death penalty, not only for murder and felonies, but also for those habitual criminals of lesser crimes. (SCT #6 5607; RT 1531, 1535.) He felt the death penalty was imposed "far too seldom" and should be automatic for "any crime of violence." (SCT #6 5609, 5607.) He would make an exception for self-defense, or "a wife who shoots her husband because he beats her up again." (RT 1535, 1540.) Mr. Madden felt "generally speaking, yes," that someone convicted of first degree murder during a robbery should receive the death penalty. (RT 1540.) He also felt appeals should be limited to only one which could "only be overturned by the Governor." (SCT #6 5607.)

Mr. Madden viewed death penalty opponents as "social scientist-bleeding heart-liberals who must share in the responsibility for today's high crime rate." (SCT #6 5612.) Mr. Madden characterized life imprisonment without parole as "free room & board, free medical/dental, conjugal visits, recreation rooms and exercise facilities all at public expense." (SCT #6 5609.) He did not believe in life without parole because parole boards would "insure that such felons will always have a way to escape." (SCT #6 5609.) He was critical of the "endless appellate process for career criminals" because it overloaded the prison and judicial systems. (RT 1536.)

Mr. Madden said he would set aside his personal views and follow the law. He also admitted that his questionnaire had been "completed in total honesty." (RT 1534, 1548 [indicating he was "brutally honest" on the questionnaire].)

The court found Mr. Madden "extremely opinionated," but nevertheless qualified to serve. (RT 1551-1552.)

5. Lindall McDaniel:

Rev. McDaniel believed the criminal justice system was making it hard for police and prosecutors to get convictions, and that there were too many legal restrictions and "too many protections & delays." (SCT #6 5974.) He considered psychiatric or psychological testimony in court to be of little value. (SCT #6

5981.) He felt the death penalty was appropriate for "the most serious of premeditated crimes," including "premeditated murder with malice," and "probably" for all persons convicted of first degree murder during an attempted rape. (SCT #6 5989, 5992; RT 1619, 1620.) He wrote: "The shame of America is that we have not inforced [sic] the death penalty." (SCT #6 5990; RT 1632.)

The trial court also refused to excuse Reverend McDaniel, despite a letter from his congregation claiming financial hardship to the church. The defense offered to stipulate to hardship excusal but the prosecutor objected. (RT 3050.)

6. Colleen Wiginton:

Ms. Wiginton wrote that she supported the death penalty, and considered life without parole to be too "expensive." (SCT #6 9145, 9147.) During oral *voir dire*, she said that she had read a newspaper article about the case, and if the allegations were true "that would be the ultimate awful crime." (RT 2105.) Ms. Wiginton also admitted the facts of the case would make her think of her own daughters, who were age 15 and 12, and she would "waiver in favor of a child." (RT 2102, 2103.) This panelist was visibly emotional during questioning – as was excused panelist Costa – and defense counsel felt she evinced more hostility during their questioning than when she was questioned by the court and Mr. Cooper. (RT 2105-2106, 2110.)

The court also rejected a request by the defense to excuse Ms. Wiginton for hardship. During general *voir dire*, Ms. Wiginton stated that her family business would suffer if she could not find a replacement secretary, and have her trained in time for the trial. (RT 3170-3171, 3182.)

7. Mary Lopez:

Ms. Lopez articulated opinions and beliefs included: that the death penalty should be imposed on "everyone who, for whatever reason, kills another human being" (SCT #6 5383); that the death penalty was too seldom imposed (SCT #6, 5381); that the death penalty should *always* be imposed – "Oh, gosh. Yes" – once someone is convicted of first degree murder during an attempted rape (RT 2661,

2446 ["You know, I actually think, yes, if he's found guilty, he should get the death penalty."]); that attorneys often helped criminals "get away with murder . . . ." (SCT #6 5365); that psychiatric and psychological testimony was often used to help people "get away with crimes" (SCT #6 5372); and finally, that sometimes people are guilty but their lawyers "have a way of covering up" (RT 2657.) Ms. Lopez also evinced hostility toward the defense attorneys during questioning. (RT 2664, 2670-2671.)

8. Samuel Lopez:

Mr. Lopez, a former law enforcement officer, felt that "in a case like this [he would] go toward [the death penalty]." (SCT #6 5457; RT 2678-2679.) He felt the death penalty was used too seldom. (SCT #6 5457.) When he was first asked whether he could consider life without parole for a person convicted of murder during an attempted rape, he said, "No, I think the death penalty would be appropriate for that." (RT 2680.) Asked if he could consider a life without parole sentence for someone convicted of first degree murder during a robbery, he responded, "I don't think so. . . . I'd go toward the death penalty." (RT 2680.) Although he considered death the appropriate punishment for murder during an attempted rape or robbery, Mr. Lopez assured the court he would "consider both" penalties and "be fair." (RT 2681-2682.) Like excused juror Young, Mr. Lopez avoided answering a question about whether he would have a "favorite choice" of penalty and said he assumed "everybody . . . would have to lean one way or another" on the penalty issue. (RT 2681.)

The trial court also refused to excuse Mr. Lopez for hardship despite a letter from his doctor indicating he suffered from lower back pain, and could not sit for long periods of time. Defense counsel offered to stipulate to the dismissal but the prosecutor objected. (RT 3049-3050.)

B. Deferential review is not required in the face of the trial court's discriminatory pattern of rulings.

Respondent once again asks this Court to engage in deferential review of

the trial court's rulings on for-cause challenges.[33] Appellant maintains that deferential review is undeserved on the record of this case. As will be more fully explained below, the trial court's pattern of discriminatory rulings against death-scrupled jurors becomes even *more* obvious when one analyzes how differently the trial court approached its task when faced with strongly *pro-death penalty* jurors.

Respondent seeks to distinguish the case of People v. Boyette (2002) 29 Cal.4th 381, 416-418 (discussed in the AOB, at p. 322), from this case. (RB, p. 225.) In Boyette, this court held that the trial court erred by refusing to dismiss an obviously unqualified venireman. The panelist at issue in Boyette strongly favored the death penalty and felt that it should be automatically imposed on those defendants convicted of multiple murder. He said he would return a sentence of life without the possibility of parole but "would probably have to be convinced" and would only do so "if there was enough to make it seem appropriate. . . ." (Id., at p. 417.) Given an "honest choice" between the death penalty and life sentencing, he admitted he "'would be more inclined to go with the death penalty.'" (Ibid.) The panelist in Boyette assumed, contrary to what the law required, that "[g]iven some of the political leaders in this state," life without parole was not, in fact, life without parole. (Ibid.) This Court said:

> "Although we pay great deference to the decisions of our trial courts in their determinations of whether a prospective juror can remain impartial, we conclude that the trial court should have sustained defendant's challenge for cause against this juror. This was not a case in which the juror gave equivocal answers: He was strongly in favor of the death penalty and was not shy about expressing his view. He indicated he would apply a stronger standard ('I probably would have to be convinced') to a life

[33]Respondent generally incorporates by reference the arguments previously made in Argument XXVIII, and argues the *absence* any evidence of a discriminatory pattern of rulings by the trial court. (RB, p. 224.) Appellant's arguments in reply regarding the inappropriateness of deferential review will not be repeated to the extent they have been covered in Argument XXVIII of the ARB.

> sentence than to one of death, and that an offender (such as defendant) who killed more than one victim should automatically receive the death penalty. Finally, he admitted he would *not* follow an instruction to assume that a sentence of life in prison with no possibility of parole meant the prisoner would never be released."

(People v. Boyette, supra, 29 Cal.4th at p. 418; emphasis added.)

The *similarities* between this case and Boyette are remarkable. The only difference is that, in this case, the trial judge refused to excused *eight* panelists, not just *one*, with extremely strong pro-death penalty views.

At least *seven* of the eight unexcused panelists in this case, including Donovan, Fletcher, Kolstad, Madden, McDaniel, M. Lopez, and S. Lopez, strongly favored the death penalty *and* felt the death penalty should be *automatically*, or *always* imposed for the type of crime alleged in this case, premeditated murder during an attempted rape and/or robbery. (See, RB, A, 1-8, above.) A substantial number of the panelists, just like the pro-death penalty juror in Boyette, expressed a lack of belief, or even cynicism, that life without the possibility of parole *really meant* prison for life; a number were overtly *antagonistic* to life imprisonment as an alternative to the death penalty. Mr. Donovan opposed life without parole because he believed it left "too many chances" that the person in years to come be released "and do the same thing again." (RT 798.) Ms. Fletcher believed that life without the possibility of parole was more of a reward than punishment, and too costly for taxpayers. (RT 930.) Mr. Madden characterized anyone opposed to the death penalty as "social scientist-bleeding heart liberals who must share responsibility for today's high crime rate." (SCT #6 5612.) Like Ms. Fletcher, Mr. Madden felt that life without parole was not really punishment – "free room & board, free medical/dental, conjugal visits, recreation rooms and exercise facilities all at public expense." (SCT #6 5609.) Ms. Kolstad dismissed life without the possibility of parole was a "waste of time, resources & taxpayer dollars," and also said it ran the risk of "loopholes" or that "activist groups" would "sway parole boards" or "bring up

new evidence 20 years later." (SCT #6 4811.) Reverend McDaniel called the failure to *enforce* the death penalty the "shame of America." (SCT #6 5990.) Ms. Wiginton thought the death penalty was very "expensive" for the public. (SCT #6 9145, 9147.) These are not the kind of views that can magically be erased from jurors' minds.

In addition, a sizable number of the unexcused panelists in *this* case also expressed disapproval of the judicial system, or worse, outright disrespect or abhorrence of defense lawyers. Ms. Kolstad felt time-consuming judicial review of death cases was "a lot of wasted resources & tax money." (SCT #6 4815.) Reverend McDaniel was critical that "legal restrictions" and "too many protections & delays" were making it hard for prosecutors and police to get convictions. (SCT #6 5974.) Mr. Madden made his antagonism toward gridlock manufacturing, "low-life" lawyers abundantly clear. He was also critical of "the endless appeal process for career criminals." (SCT #6 5590, 5593, 5597, 5598; RT 1533, 1536.) Ms. Lopez believed that attorneys often helped criminals get away with murder, and had "a way of covering up" for their clients. (SCT #6 5372; RT 2657.) Ms. Fletcher exhibited enough hostility toward the defense lawyers that even the court noticed it. (RT 939.)

Finally, several of the unexcused panelists expressed views about psychiatric or psychological testimony that made it likely – especially given their strong pro-death penalty stances – they would automatically discount the value of such evidence in determining Roy's guilt, sanity, and the appropriate punishment. (Madden: SCT #6 5607; RT 1531, 1535, 1546; McDaniel: SCT #6 5980, 5981; M. Lopez: SCT #6 5371, 5372; RT 2657: RT 1618.)

Respondent incredibly seeks to distinguish these panelists on the basis that, unlike the juror in Boyette, none "indicated that he would apply a higher standard to a life sentence to one of death." (RB, p. 225.) This argument finds no support in the record. The eight unexcused panelists made it abundantly clear, either expressly or impliedly, that they would impose a proportionately greater

burden on the defense to persuade them that the presumptively appropriate death penalty should not apply.

Mr. Madden said there would have to be "some *strong* evidence" to show that life without parole was appropriate. (RT 1537.) In addition, he would "have to *know*" that the term without possibility of parole was genuine. (RT 1537.) He felt that everyone convicted of first degree murder during an attempted rape should receive the death penalty "[u]nless there's some *extraordinary* mitigating circumstances." He could not "think of any" such circumstances to give as examples to the court. (RT 1540.)

Reverend McDaniel – who felt that the failure to enforce the death penalty was the "shame of America" – was very strongly predisposed to impose the death penalty, and said he could only consider life imprisonment if there were "extenuating circumstances." (SCT #6 5990; RT 1622.) He also *explicitly* admitted he would be inclined to put the burden on the defense to prove that the death penalty should not be imposed. (RT 1622, 1624.)

Mr. Donovan "doubted very much" that he could ever vote for life without the possibility of parole as an appropriate punishment for someone convicted of first-degree murder with one or more special circumstances found true. (RT 798, 802.) He allowed for that possibly, only if there were "extenuating circumstances." (RT 798.)

Ms. Lopez, who strongly felt *anyone* convicted of premeditated murder committed during an attempted murder should receive the death penalty conceded that "*maybe*" she could consider life without parole if there were "*special circumstances*." (RT 2664.)

Asked if she might be biased against the defense, Ms. Wiginton said that having two young daughters might make her "waver" toward the children in the case. (RT 2103.)

Ms. Kolstad, Ms. Fletcher and Mr. Lopez did not make similar statements indicating the defense would have to "convince" them of the appropriateness of

life imprisonment. However, the overall *voir dire* of each made it unmistakably clear that these panelists had a strong biases favoring the death penalty that the defense would be forced to overcome.

Ms. Kolstad was *so* pro-death that she was angry about the ineligibility of juvenile offenders for the death penalty (RT 1409; SCT #6 4814), and felt that "liberal" news coverage of anti-death penalty demonstrations was "a lot of poppycock." (RT 1419.) She *repeatedly* admitted uncertainty about whether she could ever give life without the possibility of parole serious consideration in a case involving premeditated murder during the commission of an attempted rape. (RT 1410, 1411, 1413, 1417, 1418, 1419, 1422, 1423.) She characterized her written beliefs (i.e., the death penalty should be automatic for "molestation (child)/murder" and life without parole is "a waste of time, resources & taxpayer dollars") as "very dogmatic[ally]" held (RT 1417; SCT #6 4810-4811), and frankly admitted that her leaning toward the death penalty was "substantial." (RT 1420, 1422.)

Mr. Lopez did not deny that death was his "favorite choice" of penalty for premeditated murder – he simply averred that everyone else leaned one way or another too. (RT 2681.) Moreover, Mr. Lopez's *voir dire* was so peppered with statements indicating an entrenched belief that the death penalty was *the* appropriate penalty for premeditated murder (RT 2678, 2679, 2680, 2686-2687) that the court's finding of qualification under Witt strains credulity.

Ms. Fletcher's belief that life without the possibility of parole[34] was more of a reward for criminals than a punishment made it highly unlikely she could set aside her views. (RT 939.) This is especially true given her visible hostility toward the defense attorneys (RT 939), and her conviction that any person found

[34]Ms. Fletcher elaborated: "A lot of them live better than a lot of people that have lost their jobs and living on the street. They have a roof on 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.)

guilty of premeditated murder during an attempted rape should automatically receive the death penalty. (RT 929.)

Like the panelist in Boyette, none of the eight panelists gave responses that were at all "equivocal." Each was "strongly in favor of the death penalty" and "not shy about expressing his [or her] view." (People v. Boyette, supra, 29 Cal.4th at p. 418. In addition, in this case, the appearance of judicial bias is reinforced by the trial court's denial of what would appear to be valid hardship excuses in the case of three very pro-death penalty panelists – S. Lopez, Fletcher and McDaniel – merely because the prosecutor objected. Respondent's attempt to distinguish Boyette should be rejected.

Respondent also seeks to distinguish this case from United States v. Nelson (2nd Cir. 2002) 277 F.3d 164, 199-202 (erroneously cited in AOB, pp. 320-321 as United States v. Price, the co-defendant's name). (RB, p. 225.) It is argued that the Nelson panelist is distinguishable because he "expressed grave doubts about his ability to be objective concerning the case," and said he "would like to think" of himself as objective, but honestly did not know if he could do so. (RB, p. 226.)

This is *exactly* what prospective juror Kolstad did in this case – express *grave* doubts about her ability to be objective – yet that did not stop the trial court from finding her qualified. She said she "*wouldn't be happy*" about having to consider life imprisonment, if the law called for it. (RT 1408.) Asked if her personal beliefs might impair her ability to vote for life without parole in a case like this one, she responded, "*It might. It might.*" (RT 1410.) When the court asked if she could assure him that she would not let her own personal beliefs interfere with her ability to consider life without parole, at first she said, "*no.*" (RT 1411.) When the judge asked *again* whether her feelings would interfere, she said, "*I don't know.*" (RT 1411.) Pressed to commit to objectivity, she said, "I think I could be objective, but *I don't know.*" (RT 1412.)

Under questioning by counsel, she was asked if she could *ever* consider

life without parole for a person convicted of first degree murder during the attempted rape of a child. (RT 1413.) She said twice: "*My first feeling would be no, ... my first reaction would be no.*" (RT 1414.) The court asked again whether in a case involving murder during an attempted rape of a child, could Ms. Kolstad honestly consider life without the possibility of parole. (RT 1415.) Like the panelist in the Nelson case, she responded: "*I'd like to consider myself a fair and sensible person. And I'd have to say, yes, I could. I'd like to think I could, even though I might not like it. Okay?*" (RT 1416.)

The court inquired further: "You're giving us little warning signs that maybe the facts will be such that you won't be fair and you 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?" Ms. Kolstad replied: "*Well, I hear warning signs myself, actually. . . .*" (RT 1417.) After that, she said she *thought* she could be a "fair person." (RT 1417.)

The district attorney asked: "I'm not asking you to speculate or guess what the evidence might be in the case, but as you sit there right now, do you have a belief that everyone who commits murder during an attempted rape should get the death penalty?" Ms. Kolstad said: "*I would say I definitely lean that way.*" (RT 1422.) Mr. Cooper followed up by asking if she could put her belief "over hereon the side" and make a decision "based on the evidence rather than your belief." (RT 1422.) To this, Ms. Kolstad answered, ". . . .I'm saying that I *think* I could put that aside and make a decision but I don't know. . . . *But I don't know. . . .I don't know* if I could, you know, if I could totally put it aside and listen to the facts and come to a conclusion based on – I think I could. I mean, I really think I could, but *I don't know for sure.*" (RT 1422.) Later, she said, "I don't know. Maybe this wouldn't be a good one [case] for me. . . .Maybe this just wouldn't be a good one for me." (RT 1423.)

The trial court's "rehabilitation" of pro-death penalty venire members – particularly, but not only, Ms. Kolstad -- provides a classic illustration of how

jury panelists will often yield to the "subconscious pressures to respond to the authority figure – the judge – by replying in conformity to what they get the sense their answer 'should' be." (John H. Blume, Sheri Lynn Johnson, A. Brian Threlkeld, *Symposium: Probing "Life Qualification" Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209, 1233-1234 (Summer 2001).) Faced with the kind of pressure used by Judge Fitch, it would be very rare for a juror to volunteer, "'No, I can't promise to be fair to both sides, and I can't promise to follow the law.'" (Id., at p. 1236.) "Venirepersons will frequently hide their true feelings . . . when asked about them publicly, particularly by the judge, who[,] robed and physically elevated, deferred to and addressed as 'Your Honor' is the most powerful figure in the courtroom. Jurors will . . . conceal prejudice in order to avoid embarrassment and disapproval by the judge." (Id., at n. 88; quoting from *Hirschhorn's Memorandum in Support of Motion to Submit Jury Questionnaire*, 13 Crim. Prac. Rep. (P & F) 318, note 81, pp. 319-320 (August 11-25, 1999).)

While Ms. Kolstad's *voir dire* presents the most glaring example of the trial court's overreaching to save a clearly biased panelist from disqualification, the import of the Nelson case goes beyond the specific responses of the unexcused panelist in that case. The federal circuit court explained in relevant part: "'[A] *voir dire* admission by the prospective juror of a state of mind prejudicial to a party's interest,' [citation omitted] is the most common and direct ground on the basis of which actual bias is found to exist. . . . [D]oubts 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. Nelson, supra, 277 F.3d at p. 202; emphasis added.)

In this case, the trial court should have resolved obvious doubts about the eight panelists' impartiality *against* permitting them to serve. Instead, the court did the opposite, "rehabilitating" jurors with leading questions that telegraphed what the judge wanted to hear. The court strained to make findings of

impartiality based on inherently incredible assurances that jurors could be fair, and denied apparently valid hardship excusals for three of the panelists.

Furthermore, comparing the responses given by Ms. Kolstad to the answers given by excused panelist Costa reveals the true depth of the trial court's *discriminatory* treatment of pro-death verses pro-life panelists. While Ms. Kolstad repeatedly expressed doubt about her neutrality, Mr. Costa said: he "probably would vote yes" (RT 645); attempted-rape murder "would" be serious enough to warrant the death penalty (RT 646); he "probably could" impose the death penalty on another human being (RT 646); he "probably could" impose death (RT 647); he "probably could" impose death (RT 648); he "could vote for it" (RT 648); he "probably could" impose death if "all the facts came out and everything" (RT 650); "Yeah," he could impose the death penalty and put his "feelings aside and everything" (RT 651); "Yeah," he "would vote for it" (RT 651); and finally, "yes," he could really put aside his personal beliefs and impose the death penalty on another human being." (RT 653.)

Side by side comparison of the court's other rulings on pro-death and death-scrupled jurors suggests a similar conclusion. Any death scrupled juror who expressed the slightest hesitation about imposing death was excused. Yet numerous jurors who felt death should be imposed automatically, or who expressed strong antagonism toward life imprisonment without parole were allowed to remain on the panel so long as they gave lip service to impartiality.

Respondent cites a plethora of cases in support of applying the deferential review standard to affirm the trial court's rulings, including People v. McDermott (2002) 28 Cal.4th 946, 982; People v. Farnam (2002) 28 Cal.4th 107, United States v. Ortiz (8th Cir. 2002) 315 F.3d 873, 892-895, and lastly, Sallahdin v. Gibson (10th Cir. 2002) 275 F.3d 1211, 1224-1225. (RB, pp. 224-225.) None of these cases compels granting deference to the trial court this kind of record.

People v. McDermott, supra, affirms a death sentence, overruling the

appellant's challenge to the trial court's dismissal of six pro-death penalty jurors, and rejecting a claim that two prosecutorial motions to dismiss for anti-death penalty bias had been improvidently granted. This Court's discussion includes only a brief, conclusory summary of the answers given by the eight prospective jurors. (Id., at pp. 982-983.) Any meaningful comparison between the McDermott panelists, and the pro- and anti-death penalty panelists in this case cannot be accomplished. In addition, the McDermott case does not present for consideration a claim that the court engaged in a discriminatory pattern of rulings on the parties' for cause motions. There is no hint in this Court's opinion that *any* of the rulings in McDermott were as transparently erroneous as *many* of the court's rulings in this case.

People v. Farnum, supra, *this* Court affirmed rulings by a trial court in a capital case, denying defense challenges to four pro-death penalty panelists. The Farnam case did not, however, dispose of any claim that the trial court had ruled on the parties' Witt challenges in a flagrantly discriminatory manner which favored the prosecution.

Furthermore, Farnam bears other important distinguishing features. In Farnam, this Court applied "harmless error" analysis to deny relief because the defense attorneys did *not* exhaust all of their peremptory challenges, did *not* express any dissatisfaction with the jury ultimately selected, and did *not* offer any explanation to the court why not. (Id., at p. 132.) In this case, the defense forewent only *one* peremptory challenge, and thoroughly explained their reasons for doing so to the trial court. Ms. O'Neill and Ms. Martinez deliberately chose *not* to use their last peremptory challenge in order to *avoid* seating a rabidly pro-death penalty, anti-defense lawyer panelist, Mary Lopez, on the jury. (RT 3308; see, subsection 7, above.) Had counsel used the last peremptory challenge, Ms. Lopez *would* have been on the jury. Furthermore, the lawyers were forced to use up six peremptory challenges to keep other extraordinarily biased panelists from

becoming jurors or alternates.[35] (Donovan: 3146; Madden: 3145; McDaniel: 3146; S. Lopez: 3145; Wiginton: 3186; Fletcher: 3309.) A full 30% of peremptories allocated to the defense for jurors and alternates were utilized or given up just to purge the panel of strongly pro-death penalty veniremen whose for-cause challenges were erroneously denied. The attorneys in *this* case repeatedly expressed dissatisfaction with the jury as constituted, and made demands for a new jury panel and more peremptory challenges, all of which were denied. (RT 3221, 3308-3309, 3014-3016, 3296-3297.) Consequently, in this case, in contrast to People v. Farnam, harmless error analysis should not apply.

In addition, in Farnam, this Court's analysis of the responses given by prospective jurors (Lucas D., Joseph O., Thomas V., and John S.), is far too truncated to permit meaningful comparison with the unexcused, pro-death panelists in this case. For example, regarding prospective juror Lucas D., this Court said only: "Although some of Lucas D.'s remarks during the *voir dire* process could be construed as suggesting he would automatically vote for death at the penalty phase, many other of his comments indicated an ability and a willingness to be fair and open-minded." (People v. Farnam, supra, 28 Cal.4th at p. 133.)

Of prospective juror Joseph O.'s written responses, this court highlighted only two: "if proven guilty, yes, the death penalty should be invoked," and "it would cut down on crime if more people were executed." With little embellishment, this Court concluded that Joseph O.'s responses during oral *voir dire* "negated the inference" of a bias. (Ibid.)

In Farnam, this Court described prospective juror Thomas V.'s death attitude toward the death penalty as "'if a defendant is guilty, so be it.'" (Ibid.) Without elaborating, the Court found that the above statement had been before the panelist understood "that there might be options as to penalty," and that

[35]In the AOB , appellant mistakenly indicated that the defense used *five* peremptory challenges to remove the challenged jurors for whom for-cause challenges were denied. (AOB, p. 333.)

Thomas V. had subsequently "conveyed a willingness to be fair and impartial in the penalty phase." (Ibid.)

Finally, this Court described prospective juror John S. as indicating a "general philosophy that all first degree murderers should get the death penalty and nothing else." Referring generally to the record, this Court concluded that John S. "could set aside that philosophy and be open to both possible penalties," and "would vote for life without the possibility of parole if the evidence persuaded him it was proper." (Ibid.)

Significantly more information from the record in Farnam would be needed for appellant to meaningfully analyze the differences between the pro-death jurors in that case, and the eight pro-death penalty jurors who were not disqualified for cause by the trial court in this case. Nevertheless, one could reasonably infer from the *absence* of such descriptive material in the decision that the four "death-favored" panelists in Farnam expressed qualitatively less zealotry for capital punishment, and/or less venom against defense lawyers, "loopholes" in the criminal justice system, "bleeding heart liberals" and "free room and board" for killers, than did most of the unexcused pro-death panelists in this case.

Respondent also attempts to rely on People v. Weaver (2001) 26 Cal.4th 876, 911-912 (RB, pp. 228, 230, 235), in which the defendant asserted it was error for the trial court to fail to deny for-cause challenges to two panelists who expressed pro-death penalty views. This case is distinguishable because Mr. Weaver's trial attorneys – unlike Roy's attorneys – used peremptory challenges to excuse both of the biased jurors, and they did *not* thereafter express dissatisfaction with the jury, or request additional peremptory challenges. "Accordingly, the issue was not preserved for appeal, as it is possible that counsel, despite initial misgivings, was ultimately satisfied with the overall composition of the jury. Also possible is that, had counsel expressed dissatisfaction, the trial court would have allowed him to exercise additional peremptory challenges." (Id., at p. 911.) No such possibilities exist in this case.

In addition, in Weaver, one juror, B.M., "initially expressed the view that he would automatically vote for the death penalty," but when he was informed of the penalty process "he retracted that rigid position and professed a willingness to follow the trial court's instructions . . . ." (People v. Weaver, supra, 26 Cal.4th at p. 912.) The second juror, F.M., also "initially asserted that he would automatically vote for the death penalty," but "modified his view when informed by the prosecutor of the penalty phase process." This Court found substantial evidence in the record to support the trial court's conclusion that these two panelists were qualified to serve. (Id., at pp. 912-913.)

In contrast, at least six of the eight challenged panelists in this case – including Donovan, Fletcher, Kolstad, Madden, and McDaniel, and M. Lopez – were not just "automatic" death jurors for the type of crime involved in this case. In addition, they all expressed negative feelings about life imprisonment without the possibility of parole, and/or lawyers that can only be characterized as extremely cynical and vitriolic. A seventh panelist, Mr. Lopez, consistently expressed the view that he would impose death for murder committed during an attempted rape or a robbery, and the last, Ms. Wiginton, admitted she would resolve any doubts in favor of the child victims in the case. Hence, the eight unexcused panelists in this case gave overall responses evincing much stronger bias for capital punishment and against life imprisonment without the possibility of parole than did the two panelists in Weaver.

United States v. Ortiz, supra, 315 F.3d 873 (RB, p. 225), is also distinguishable, and offers little support for according deference to the trial judge in this case. First and foremost, like most of the other cases cited by respondent, the Ortiz case does not involve a defendant's claim that the trial court engaged in a discriminatory pattern of granting or denying the parties' challenges for cause. In addition, the trial court's rulings in Ortiz do not so obviously favor the prosecution, as do the trial court's rulings here. For one thing, in Ortiz, the defense attorneys never moved to strike one of the panelists whose impartiality

was challenged on appeal. (Id., at p. 893 [Watson].) A second challenged juror (Craig) in the Ortiz case gave clearly qualifying responses that were nothing like the responses given by the eight challenged panelists in this case. (Ibid.) Although the trial court in Ortiz also refused to excuse several jurors whose responses evinced strong feelings in favor of the death penalty, the reviewing court found no abuse of discretion by the trial court. The federal court deferred to the trial court because each of the potential jurors had "ultimately stated that [they] could consider life imprisonment without parole as a possible punishment, and that [they] could follow the procedure instructed by the Court." (Id., at p. 895.)

The decision in Ortiz lacks sufficient detail to precisely compare the questions and answers in that case with what was done here. One can safely assume, however, that the federal court *would* have mentioned it had *any* of the pro-death penalty panelists in that case given responses anything like the extraordinarily biased written and verbal responses give by panelists in this case – especially Fletcher, Kolstad, Madden, Donovan and [Mary] Lopez. In addition, the federal circuit court in Ortiz was apparently *not* asked to reject deferential review based on an outrageous pattern of discriminatory rulings on for-cause challenges by the trial judge.

Sallahdin v. Gibson, supra, 275 F.3d 1211 (RB, p. 225), is similarly unhelpful. In that case, which arose on habeas corpus, the Tenth Circuit Court of Appeals deferred to the Oklahoma appeals court, which had rejected on the merits the petitioner's argument that the trial court had improperly refused to excuse the prospective juror for cause. (Id., at p. 1224.) The Sallahdin case offers no detailed description of the unexcused prospective juror's *voir dire*. The opinion states in conclusory fashion that the denial of the defense motion was proper, since the unexcused panelist had "unequivocally stated he would follow the instructions and would consider all punishments, and would base his decision on the evidence." (Id., at p. 1224.)

Accurate comparison to appellant's case is not possible. However, surely the federal appeals court would have mentioned it had any of the panelists expressed venomous views against defense attorneys, anti-death penalty advocacy, appellate court review of death judgments, and life imprisonment without the possibility of parole, as did the panelists in this case.[36] Absent such mention, it would appear that such extreme indicia of juror bias was absent in that case. The absence of such extreme bias renders the jurors' assurances of fairness more believable, unlike this case. Apparently, Sallahdin does *not* involve a claim that a trial court engaged in a pattern of discriminatory for-cause rulings.

In addition, Sallahdin was a habeas corpus case in which the petitioner failed to meet his burden in that proceeding of proving that his jury was not fair and impartial. The federal court held that any error was "cured" by the petitioner's use of a peremptory challenge to eliminate the biased juror.

This case arises on state direct appeal, and consequently a different standard apples – the test articulated in People v. Waidla (2000) 22 Cal.4th 690, 715. Roy's attorneys exhausted all but one peremptory challenge – including many to rid the panel of the biased panelists. They were *forced to relinquish* their last peremptory challenge in order to *prevent* one of the challenged pro-death penalty panelists, M. Lopez, from ending up on the jury. Counsel repeatedly expressed dissatisfaction with the jury panel, and their motions for a new panel, or more peremptory challenges were denied by the court. Consequently, the Waidla test is satisfied, and appellant is not precluded from asserting prejudicial error resulting from the trial court's rulings.

People v. Jenkins, supra, 22 Cal.4th 900 (RB, pp. 227, 233), likewise does not support respondent's position for the reasons amplified in Argument XXVIII,

[36]In Sallahdin, the Tenth Circuit also rejected the petitioner's claim that two prospective jurors had been wrongfully excused for anti-death penalty bias. However, the decision reveals little of *voir dire* of the excused jurors, and defers to the Oklahoma court's determination that "the bulk of their *voir dire* indicated they could not impose a death sentence." (Sallahdin v. Gibson, supra, 275 F.3d at p. 1225.)

ante. In addition, in Jenkins, this court did not discuss in detail the specific responses of "death-favorable" and "death-doubtful" prospective jurors, so it is not possible to engage in comparative analysis with this case.

In Miniel v. Cockrell (5th Cir. 2003) 339 F.3d 331, 339-340 (RB, pp. 230, 237), a federal habeas corpus case, the court refused to excuse a panelist (O'Rourke) who made statements favoring the death penalty over life imprisonment. Mr. O'Rourke made the following statements: "(1) he believed the 'justice system is just all drawn out' and that 'if you speeded up the process, a few innocent might die; but society, as a whole, might be better off'; (2) his 'personal feelings [are] that we're probably a little too lenient . . . [and] society has pretty much reined [in] its use'' (3) he did not feel 'inclined' to mitigate punishment [footnote] and thought that 'society has the obligation to remove persons who are a danger to society as a whole." (Id., at p. 339-340.) O'Rourke also *disagreed* that there could be no circumstances to mitigate a person's responsibility for murder, and he understood his obligation to operate "'within the laws.'" (Id., at p. 340.)

While the statements made by Mr. O'Rourke in the Miniel case bear some resemblance to a few of the statements made by several of the unexcused pro-death penalty jurors in this case, none of the quoted statements demonstrate the magnitude of bias expressed by panelists here. Mr. O'Rourke may have favored the death penalty; however, he did not view lawyers as criminals, or make disparaging or mocking statements about the adequacy of the alternative penalty, life without parole. Nor did he express the thought that psychological testimony was of little value, or that psychological testimony was were frequently used by lawyers to help clients get away with murder. Last but not least, the Miniel case does not involve a similar challenge to the neutrality of the trial judge based a comparison of numerous rulings on challenges for cause to pro- and anti-death penalty panelists. Miniel v. Cockrell, supra, therefore, does not require deferring to the trial court in this case.

C. The trial court improperly restricted the *voir dire* of Mr. Madden.

Respondent asserts that the trial court did not prevent defense counsel from making a reasonable inquiry into the fitness of Mr. Madden to serve on the jury. (RB, p. 237.) This is not a tenable argument. Mr. Madden had expressed the opinion that the death penalty should automatically be imposed not only on murderers, but "habitual offenders of lesser crimes," and any crime of violence. (SCT #6 5607, 5600; RT 1531, 1535, 1540.) Counsel was prevented from asking Mr. Madden whether he would automatically vote for the death penalty if he heard evidence that the defendant had suffered prior convictions, or committed prior bad acts. (RT 1539.)

Prior crimes evidence is well known to have an "'overstrong tendency'" to cause jurors to believe that the defendant is guilty of the charged crime, merely because he is a person who committed prior bad acts. (People v. Holt (1984) 37 Cal.3d 436, 450-451.) It is reversible error when a trial court fails to conduct *voir dire* sufficient to determine whether potential jurors would be influenced by knowledge of a defendant's prior offenses. (People v. Chapman (1993) 15 Cal.App.4th 136, 141.) The same rule applies to denial of *voir dire* directed at detecting penalty phase bias based on a defendant's prior criminal record. (People v. Cash (2002) 28 Cal.4th 703, 718-723 [refusal to *voir dire* on prior murder].)

Appellant was not, as respondent argues, seeking to improperly "preview" the specific evidence for the jury. (RB, p. 239.) As this Court stated in the Cash case:

> "Our decisions have explained that death-qualification *voir dire* must avoid two extremes. On one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented."

(People v. Cash, supra, at p. 721.)

Counsel were *not* asking Mr. Madden to prejudge the penalty issue based on specific summaries of mitigating and aggravating evidence. Roy had several convictions of prior violent crimes, including robberies involving great bodily injury or threatened bodily injury against the victims. Evidence of Roy's criminal record was certain to be presented to the jury during the guilt, sanity, and penalty phase trials, because the defense was not asserting mistaken identity, but rather, diminished actuality and insanity as defenses to the murder and attempted murder. Mr. Madden would have been *disqualified* had he answered the question posed by Ms. O'Neill, and admitted he could *not* consider the penalty of life imprisonment without the possibility of parole for a person convicted of first degree murder, who also had a prior record including several very violent crimes. The question posed by Ms. O'Neill was no different in substance, and no less proper, than questions asked by the prosecutor to ensure that panelists could consider the death penalty for felony-murder. (People v. Pinholster (1992) 1 Cal.4th 865, 916-917.)

Faced with a juror who has already indicated a belief that the death penalty should be automatically imposed for recidivist offenders, particularly of violent crimes, it was even more clearly error for the trial court to refuse to permit this line of inquiry by Ms. O'Neill. Numerous decisions of this Court compel this conclusion. (People v. Cash, supra; People v. Kirkpatrick (1994) 7 Cal.4th 988, 1005; People v. Ervin (2000) 22 Cal.4th 48, 70; People v. Earp (1999) 20 Cal.4th 826, 853.)

The cases relied on by respondent to support the trial court's curtailment of *voir dire* are easily distinguishable. None of the cases present for this Court's consideration a trial court's ruling, precluding a trial attorney from asking a prospective juror if he or she would automatically vote for the death penalty if the accused had prior violent felony convictions, in a case in which the defendant's prior violent behavior would play a major role in all phases of the trial.

In People v. Jennings, supra, 22 Cal.4th at p. 990 (RB, pp. 238, 239, 240), counsel were prohibited from asking questions of a rather general nature. In People v. Davenport (1995) 11 Cal.4th 1171, 1204 (RB, p. 238), the trial court curtailed questioning regarding whether panelists had experienced childhood sexual victimization, however, in a case in which *no* evidence of child sexual victimization was anticipated. In People v. Cleveland (2004) 32 Cal.4th 704 (RB, pp. 239), this Court rejected several general claims, including: (1) that the jury panel was tainted by a prospective jurors statement that the death penalty was seldom used due to "'legal obstructions'"; and (2) that the trial court conducted *voir dire* for purposes of rehabilitation of biased jurors, rather than to elicit bias and prejudice. (Id., at pp. 736-737.) Without going into detail, this Court found that the "jury selection . . . was far from fundamentally unfair." (Id., at p. 737.)

In People v. Medina (1995) 11 Cal.4th 694, 746 (RB, p. 238), the trial court initially denied *voir dire* on multiple murder, but changed its mind after three ultimate jurors had been questioned. The defendant was not precluded from attempting to show in subsequent general *voir dire* that these jurors harbored any specific bias that would cause them to vote for the death penalty without regard to mitigating evidence. Furthermore, since defense counsel did not reexamine any of the jurors on this topic, and failed to exhaust the defendant's peremptory challenges, the issue was not cognizable on appeal. In this case, of course, counsel forwent a peremptory strike in order to avoid placing a pro-death penalty panelist whom they had moved to strike on the jury, and the issue is cognizable on appeal.

In People v. Clark (1990) 50 Cal.3d 583, 596-597 (RB, pp. 238, 240), this Court rejected the defendant's claim of improperly restricted *voir dire* regarding the victim's particular injuries, finding "no attempt to restrict questioning on jurors' attitudes about arson and burn injuries." (Id., at p. 596, fn. 3.) Here, the record is clear. Counsel's question was precluded.

In People v. Sanders (1995) 11 Cal.4th 475, 539 (RB, p. 239, 240, 241), the defendant complained that he had been prevented from using *case-specific hypothetical questions* to explore possible challenges for cause. This Court concluded the defendant was not prevented from attempting to show that a juror harbored any specific bias that would cause him to vote for the death penalty without regard to mitigating evidence. (Id., at pp. 538-539.) In this case, counsel were not attempting to employ case-specific hypothetical questions.

In People v. Wright (1990) 52 Cal.3d 367, 419 (RB, p.240), the defendant's primary claim on appeal was that the trial court improperly restricted death-qualification questioning to three questions per side per prospective juror. This Court held that there was no error because the trial court's own questioning of prospective jurors was thorough and lengthy, and counsel were permitted to clarify any ambiguous responses by jurors. The court also rejected the defendant's claim that the court repeated sustained objections to proposed defense questions. However, this Court found that the objections were to questions that appeared to "educate the prospective jurors on the particular facts of this case." (Id., fn. 18.) In this case, Ms. O'Neill was not attempting to educate Mr. Madden; she was attempting to determine whether he could even consider a sentence of life imprisonment without parole if the defendant had a violent criminal record.

Respondent argues that the defense had an adequate opportunity to question Mr. Madden about his views toward habitual offenders and prior crimes. (RB, p. 240.) In his jury questionnaire, Mr. Madden stated he believed the death penalty should be imposed for "habitual offenders of lesser crimes," and should be "automatic" for "any crime of violence." (SCT #6 5607-5608.) During oral *voir dire*, Mr. Madden told the court and counsel he would probably impose the death penalty if someone was convicted of "a crime of violence." (RT 1531, 1535, 1536.)

Referring to reporter's transcript pages 1537-1538, respondent claims

defense counsel asked Mr. Madden if he could set aside his personal views regarding recidivists and violent prior crimes and consider a life sentence, and Mr. Madden responded that he could do so. Respondent mischaracterizes the record. During this portion of *voir dire*, Ms. O'Neill was questioning Mr. Madden regarding whether he could set aside his views *on life sentencing as inadequate, "seemingly pleasant," punishment* and give life without the possibility of parole serious consideration. (RT 1537-1538.) She did not ask Mr. Madden if he could set aside his views regarding violent prior offenses. When she did so, the prosecutor objected, "Calls for a judgment on assumed facts," and the court sustained the objection. (RT 1539.)

Respondent also points out that counsel was permitted to ask Mr. Madden whether he believed everyone convicted of first degree murder during the commission of an attempted rape should receive the death penalty. (RB, p. 241; referring to RT 1540.) Mr. Madden confirmed that yes, he would impose the death penalty for attempted rape-murder unless "there's some extraordinary mitigating circumstances." (RT 1540.) This is a largely irrelevant fact. Even assuming Mr. Madden could, under the most *extraordinary* mitigating circumstances, consider life without the possibility of parole, it does *not* necessarily follow that he could do so in the case of a murder committed by a prior violent offender. Ms. O'Neill should have been permitted to explore whether Mr. Madden could ever consider life imprisonment for someone who had committed violent acts in the past.

Lastly, respondent argues that there was no prejudice because Mr. Madden did not sit on the jury. People v. Ramos (1997) 15 Cal.4th 1133, 1155 (RB, p. 242), is cited as authority. In that case, the defendant asserted he was prejudiced when the trial judge excused a seated juror and replaced him with an alternate, Betty Dahlin. The defendant had *not* moved to exclude Ms. Dahlin for cause. The defendant also had *not* requested additional peremptory challenges, either after he exhausted all of his peremptory challenges, or at the point when Ms.

Dahlin replaced the juror who unexpectedly had to be excused. Last but not least, the defendant had accepted the alternate jurors, including Ms. Dahlin, with two peremptory challenges yet remaining. On this record, the issue was waived. (Id., at p. 1160.)

In this case, counsel moved to excuse Mr. Madden for cause. They even renewed their motion to excuse him, citing his answers in the questionnaire. (RT 3137.) When the for-cause challenge was denied, they exhausted a peremptory challenge to excuse him. (RT 3145.) The defense would have exhausted its last peremptory challenge had it not been for the fact that doing so would have ensured that another extremely biased juror whom the court also refused to excuse – M. Lopez – would be seated on the jury. Counsel expressed acute dissatisfaction with the jury as constituted, and requested additional peremptory challenges, which were denied. (RT 3014-3019.) More importantly, in subsection D of the RB, Argument XXIX, respondent *concedes* that this issue has been preserved for appeal. (RB, p. 242.)

D. Respondent concedes that appellant has preserved for appeal the denial of for-cause challenges of eight prospective jurors.

Since this issue has been conceded, no further argument appears necessary to establish appellant's right to raise the denial of for-cause challenges on appeal. (RB, p. 242-243.)

E. Appellant suffered actual prejudice as a consequence of the wrongful denial of for-cause challenges, and the court's discriminatory pattern of rulings on for-cause challenges.

Respondent asserts that no prejudice resulted because none of the eight unexcused panelists ended up sitting on appellant's jury. (RB, pp. 243-245.) The gist of the argument is that none of the seated jurors was biased.

The record belies this contention. Defense counsel made it clear that they were dissatisfied with the jury pool, and did not have enough peremptory

challenges to excuse those whom they considered very bad prospective jurors. Ms. O'Neill stated at one point:

> "Your Honor, for the record, the defense exercised 18 challenges. We had objected to the make up of the jury pool previously. The reason we did not exercise our remaining two challenges or ask for more is because the upcoming jurors, in our evaluation, were even worse than the ones we already had."

(RT 3221.)

At this point in time, the defense had declined the opportunity to excuse nine panelists who eventually were seated as jurors: Cregar (RT 3073); Bensch (RT 3076); Givens (RT 3111-3114); Lujan (RT 3146-3148, 3157); Perez (RT 3147, 3151-3152, 3155-3156); Murray (RT 3160, 3164-3165, 3168); Gleason (RT 3186, 3188, 3267-3168); Gosland (RT 3196, 3198, 3200); and Sylvester (RT 3198, 3200, 3202, 3205). The undesirability of these jurors from a defense perspective has been discussed in detail in the opening brief at pages 334-336; hence, that discussion will not be repeated here. It suffices to say many admitted a bias toward the death penalty, even though all claimed they could set their personal views aside. It also bears mentioning that juror Schmidt, who did not want to serve as a juror (RT 1907-1911), and gave very pro-death penalty, anti-life imprisonment without parole answers to questions during *voir dire* (RT 1911-1914), is the same juror who later prejudged Roy's sanity, without having heard any of the sanity phase evidence. (See, ARB, Argument XXII.) Appellant has suffered actual prejudice.

Respondent has cited the usual litany of cases which stand for the proposition that loss of peremptory challenges does not necessarily constitute a violation of the Sixth Amendment right to an impartial jury. Even these cases are distinguishable on their facts from the situation presented here. For example, in Ross v. Oklahoma (1988) 487 U.S. 81 (RB, p. 244), the petitioner "never suggested that any of the 12 [jurors] was not impartial." (Id., at p. 86.) The only claim pressed by the defense at the trial level was the absence of blacks from the

jury panel. (Ibid.) The petitioner in Ross did not explain how the absence of blacks was related in any way to the failure to remove a biased juror for cause.

Here, the attorneys *did* assert that the available jurors were biased, and they did not have a sufficient number of peremptory strikes to compensate for the court's erroneous pattern of denying defense for-cause challenges, and granting comparable challenges advanced by the prosecution. Moreover, the record as a whole supports the allegation. The jurors that sat were predominantly pro-death, or did not want to serve as jurors due to various work or personal hardships. (See, AOB, pp. 334-336.) A number had problems even before the trial began, and found their problems exacerbated by the protracted nature of the proceedings. (See, AOB and ARB, Argument XXV.)

Even assuming Roy did not suffer sufficient prejudice as the result of the seating of an obviously *death-prone* jury, including many jurors reluctant to serve, the guilt phase jury was also purged of all but one juror who shared Roy's racial characteristics. Moreover, even that *sole* black juror was excused and replaced by a white juror prior to the sanity and penalty phases of the trial. (See, AOB, pp. 296-297.)[37] As a result of the trial court's prejudicial pattern of rulings during *voir dire*, Roy – a black man charged with sexual assault and murder of a young white girl – was tried by a nearly all white jury, and found sane, and sentenced to die by a death-prone jury, completely devoid of black jurors. In this

[37]The trial court took judicial notice of the 1990 Census, which establishes that blacks comprised 33,423 people out of a total county population of 490,000, which equals about 7 percent. It is not clear how many of the approximately 250 panelists were black; it is known that only 7 of those who survived initial hardship *voir dire* were black. One panelist, M. Perry, was excused for cause based on pro-death penalty bias. (RT 1770, 3095.) One black juror was later excused for medical reasons. (RT 3105.) One black juror, Cregar, sat on the jury, but was excused following the guilt phase, and replaced with an alternate. The prosecutor's peremptory strikes were used to eliminate four of five qualified black jurors: Johnson, Blue, Cato and Mitchell. Yet when this was challenged on Batson grounds, the trial court declined to find a prima facie case of discrimination. (See, AOB and ARB, Argument XXX.)

case, in contrast to Ross, one can see from the record that the composition of the jury was actually adversely affected in a way that severely prejudiced the defense.

Respondent also cites United States v. Martinez-Salazar (2000) 528 U.S. 304. (RB, p. 244.) Martinez-Salazar holds that "a defendant's exercise of peremptory challenges pursuant to Rule 24(b) is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause." (Id., at p. 317.) However, unlike this case, in Martinez-Salazar, only one erroneous ruling was challenged. Furthermore, the defense in that case did *not* ask for additional peremptory challenges, or complain about the composition of the jury. (Id., at p. 318; Concurring Op., Souter, J.) In this case, counsel did complain about the pro-prosecution complexion of the available jurors, and asked for additional peremptory strikes. Furthermore, in Martinez-Salazar, the defendant did *not* assert that the court was misapplying the law to force the defendants to use their peremptories to cure the court's errors. Here, appellant *does* allege that the court's pattern of rulings was discriminatory, favored the prosecution, and resulted in a biased jury.

Respondent also cites People v. Boyette, supra, 29 Cal.4th at p. 419, and People v. Weaver, supra, 26 Cal.4th at p. 913. (RB, pp. 244, 245.) Both of these cases have been discussed previously. In Boyette, the court had erroneously denied a for-cause as to only one panelist, and the defense used a peremptory challenge to excuse him. There was no claim in that case that the court's pattern of rulings was discriminatory. In Weaver, two allegedly biased panelists were challenged. This Court rejected on the merits the defendant's claim that the trial court had erred. As an alternative ground for affirmance, this Court found the issue waived because the defense had used peremptory challenges to remove the allegedly biased jurors, and thereafter had not complained about the jury's composition. These cases stand in stark contrast to what occurred in this case. Here, the record supports the claim of actual prejudice.

F. Automatic reversal is appropriate because the record supports appellant's claim that the court engaged in a discriminatory pattern of rulings.

Respondent agrees that, *if* the trial court engaged in a discriminatory pattern of rulings on for-cause challenges, the proper remedy would be reversal of the death judgment. Respondent does not agree that the pattern was discriminatory. Nor does respondent agree that reversal of the sanity or guilt phases of the trial would be required. (RB, p. 245.)

Appellant has adequately demonstrated that the trial court disqualified for cause any juror expressing scruples about the death penalty, while at the same time bending over backwards to find qualified even the most venomously pro-death juror who simply claimed to be fair. (See, AOB, and ARB, Arguments XXVIII and XXIV, ante.) Those arguments will not be reiterated here.

Appellant disagrees that reversal of the penalty phase is all that is required. In this case, the court refused to excuse panelists who were not *only* strongly biased in favor of the death penalty, or opposed to life without the possibility of parole; in addition, a number of the jurors had expressed powerful sources of guilt phase bias. Mr. Madden, for example, viewed "low-life" lawyers as "obstacles to justice." He viewed psychiatric testimony as a "lawyer's ace-in-the-hole" to get clients back on the street. (SCT 5590, 5593, 5597, 5600: RT 1533, 1545.) Ms. Lopez also had a dim view of lawyers, and psychiatric testimony. She felt both helped criminals get away with their crimes. (SCT #65371, 5372; RT 2656-2657.) Reverend McDaniel also discounted the value of psychiatric or psychological testimony in court. (SCT #6 5981.) Appellant's entire guilt and sanity phase defenses revolved around psychiatric evidence, presented by his lawyers. In addition, Ms. Wiginton expressed a bias favoring the teenage victims, which would necessarily have predisposed her to convict appellant of all of the charged crimes, not just capital murder. (RT 2102-2103.) Hence, the trial court's discriminatory pattern of ruling infected the guilt and sanity phases of the

trial, not just the penalty determination.

As pointed out in the AOB (pp. 334-335), the composition of the jury was adversely affected even though none of the challenged panelists was actually seated. At least six of the seated jurors had pro-law enforcement, pro-death penalty, anti-criminal justice system, or anti-lawyer leanings, even if not to a disqualifying degree. (Cregar: SCT #6 2682-2683; Fees: RT 899; Givens: SCT #6 3236, 3250, 3252, 3253; Lujan: SCT #6 5517, RT 1520-1522; Murray: SCT #6 6316, 6330, 6335; Wakefield: RT 3265, 3273, 3274, 3266-3267, 3283-3284; Schmidt: RT 1911-1914, 3285, SCT #6 7724.) Roy's lawyers used exactly *five* of their peremptory challenges to remove obviously disqualified jurors whom the court refused to excuse; a *sixth* peremptory challenge was foregone because using it would have placed another unqualified juror – Mary Lopez – on the panel. Obviously, these peremptory challenges were not available to remove seated jurors with a pro-prosecution bias.

Furthermore, this case presents an unusually strong evidentiary record on which to find a discriminatory pattern of rulings. The trial court not only denied defense challenges for cause, and granted the prosecutor's challenges for cause in disproportionate numbers. In addition, as was pointed out in subsection E, ante, the Court repeatedly found that the defense had failed to prove a *prima facie* case of racial discrimination, even after the prosecutor used peremptory strikes to excuse four of five qualified black jurors from a disproportionately non-black jury venire. (See, ARB, Argument XXX.)

The jury occupies "a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." (Batson v. Kentucky (1986) 476 U.S. 79, 86.) The Sixth Amendment and Due Process Clause of the Fourteenth Amendment therefore demand a "fair trial in a fair tribunal." (In re Murchison (1955) 349 U.S. 133, 136; see, Lombardi v. California Street Railway Company (1899) 124 Cal. 311, 317 ["[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"].) These constitutional guarantees govern every criminal case "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station of life which he occupies." (Irwin v. Dowd (1961) 366 U.S. 717, 722.) The denial of an impartial tribunal denies due process. (Turney v. Ohio (1927) 273 U.S. 510.) Moreover, it is structural error, which requires automatic reversal of the entire judgment. (Arizona v. Fulminante, supra, 499 U.S. at p. 294 [Opinion of White, J., dissenting in part and concurring in part].) Last but not least, denial of a fair and impartial jury undermined the heightened reliability requirement of the 8th Amendment.

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; see also, Porter v. Singletary (11th Cir. 1995) 49 F.3d 1483, 1487-1488.) These principles apply with special force in capital cases. (California v. Ramos (1983) 463 U.S. 992, 998-999.)

In this case, the court's discriminatory pattern of rulings during jury selection created a biased pool of jurors from which the defense attorneys were forced to choose. The result was a jury predisposed to convict, and to impose a death judgment. Consequently, even if appellant cannot show "prejudice," because none of the challenged jurors ended up on his jury, reversal should be automatic.

XXX

THE ENTIRE JUDGMENT MUST BE REVERSED BASED ON BATSON-WHEELER-JOHNSON ERROR.

A. The Record:

Appellant has already summarized the record relevant to appellant's Batson-Wheeler claims on pages 296-298 of the AOB . Additional references to the record will be made as necessary to respond to particular arguments advanced by respondent in opposition to appellant's claims.

B. Discussion:

1. Batson error in finding no prima facie case of discrimination (step 1):

The RB was filed prior to the U.S. Supreme Court's decisions in Miller El v. Dretke, supra, 125 S.Ct. 2317 [Miller-El II], and Johnson v. California, supra, 125 S.Ct. 2410, which reversed this Court's decision in People v. Johnson, supra, 30 Cal.4th 1302. Both of these decisions have greatly undermined the strength of respondent's arguments. Johnson and Miller-El II make it clear that the trial court erred by failing to find that defense counsel had established a prima facie case of discrimination under Batson.

In People v. Johnson, supra, the district attorney exercised twelve peremptory challenges, three of them against the only three African-American panelists on the venire. (Id., at p. 1307.) The trial court in Johnson found that the defendant had *not* satisfied his burden of showing a "strong likelihood" that the prosecutor's strikes against blacks were based upon group identity rather than individual characteristics. (Id., at p. 1307.) The trial court stated for the record its own "concerns" about several of the challenged panelists, suggesting that this was why the prosecutor may have disqualified them. (Ibid.) The Court of Appeal reversed, finding that the "strong likelihood" standard applied by the trial court did not comply with Batson.

Reversing the Court of Appeal, this Court held that the terms "strong

likelihood" and "reasonable inference," as used in People v. Wheeler (1978) 22 Cal.3d 258, to describe the proponent's burden of making a *prima facie* showing of discrimination, was no different and no more stringent than the burden imposed by Batson v. Kentucky, supra, 476 U.S. 79. (People v. Johnson, supra, at p. 1313.) Batson held that a defendant may make out a *prima facie* case of purposeful discrimination by showing that the totality of relevant facts "gives rise to an inference of discriminatory purpose." (Batson, supra, at pp. 93-94.) This Court had interpreted Batson and Wheeler as imposing an initial burden on the defendant to show "that it is *more likely than not* the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (People v. Johnson, supra, at p. 1318; emphasis added.) This Court concluded Wheeler's burden on the proponent was no higher than Batson required. (People v. Johnson, supra, 30 Cal.4th at p. 1317.)

In Johnson v. California, supra, the U.S. Supreme Court sided with the Court of Appeal. The high court concluded that California's "more likely than not" standard was "an inappropriate yardstick by which to measure the sufficiency of a *prima facie* case." (Id., at p. 2416.) The U.S. Supreme Court held that a proponent of a Batson motion may make out a *prima facie* case of discriminatory purpose by "offering a wide variety of evidence, [footnote omitted] so long as the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" (Ibid.) The U.S. Supreme Court explained that it did *not* intend for a proponent's burden to be "so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." (Id., at p. 2417.) The Supreme Court found that the defendant had met his "*prima facie*" burden by showing that defendant was a black man accused of killing his white girlfriend's child, and the prosecutor had excused all three African-American prospective jurors. That is, a statistical showing alone was enough to make a *prima facie*

case. (See also, Batson v. Kentucky, supra, 476 U.S. at p. 95.)

The U.S. Supreme Court filed its decision in Miller-El II, supra, 125 S.Ct. 2317, the same day that Johnson v. California was filed. Miller-El II was the successor to Miller-El v. Cockrell (2003) 437 U.S. 322 [Miller-El I], which is discussed in the AOB . (See, AOB, pp. 344, 346, 348, 349, 352, 353-358, 360, 366, 370.) In Miller-El I, the petitioner pressed a Batson claim on habeas corpus, but the District Court in Texas and the Fifth Circuit Court of Appeals denied him any relief. The U.S. Supreme Court granted certiorari, and examined the extensive evidence of purposeful discrimination by the Dallas County District Attorney's Office before and during the trial. The case was remanded the Circuit Court with directions to grant a Certificate of Appealability [COA]. On appeal, the Circuit Court of Appeals denied the Batson claim on the merits. (Miller-El II, 125 S.Ct. at p. 2323.) The U.S. Supreme Court granted certiorari again, and reversed without remand. The U.S. high court found that the Fifth Circuit's determination of the facts in light of the evidence presented in the State court proceeding was unreasonable. The Supreme Court explained:

> "The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. [Citation omitted.] 'The prosecutors used their peremptory strikes to exclude 91 % of the eligible African-American venire members. . . .Happenstance is unlikely to produce this disparity.'"

(Miller-El II, supra, at p. 2325.) Whatever the merits of respondent's interpretation of Miller-El I as using statistical evidence only for the question of whether to issue the COA, and not for evaluating a *prima facie* case at step one (RB, p. 254, fn. 82), Miller-El II clearly allows statistical evidence alone to support a *prima facie* case.

In Argument XXX, B, 1, of the RB, which was written prior to Johnson v. California and Miller-El II, the Attorney General argues that the Wheeler and

Batson standards are the same, and that appellant failed to meet his burden of showing a "strong likelihood," or a "reasonable inference" that the strikes against black prospective jurors Johnson, Blue, Mitchell and Cato were racially motivated. (RB, pp. 252-258.) Johnson v. California and Miller-El II are controlling. Appellant need only show "'an inference of discriminatory purpose.'" (Johnson v. California, supra, 125 S.Ct. at p. 2416.) Roy is a black man; furthermore, he was accused of killing the 14-year-old white relative of his girlfriend, and attempting to kill her 15-year old white friend. The prosecutor used 4 of his first 15 peremptory strikes to rid the panel of 80 percent of the eligible *black* panelists. These circumstances were sufficient in and of themselves to suggest the absence of "happenstance" in the prosecutor's selection of *black* panelists for excusal. (Miller-El II, supra, 125 S.Ct. at p. 2325.) The trial court erred by finding no *prima facie* case of discrimination.

Respondent argues that the trial court's finding of no *prima facie* case of discriminatory purpose is subject to deferential review. (RB, pp. 252-253.) People v. Johnson, supra, 30 Cal.4th at p.1325, People v. Davenport, supra, 11 Cal.4th at p. 1200, and People v. Howard (1992) 1 Cal.4th 1132, 1153-1155, are cited as authority. (RB, p. 253.) In other words, *if* the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, respondent suggests this Court should affirm the judgment, without the necessity of evaluating the credibility of the reasons actually stated by the district attorney. (RB, p. 253.) This argument must be rejected.

In Johnson, the trial court found no *prima facie* case of discrimination despite a prosecutor's use of 3 of 12 peremptory challenges to remove black veniremen from the jury. This Court *engaged* in deferential review, searching the entire record for evidence to support the trial court's ruling, and concluded that the record "suggest[ed] grounds for the prosecutor to have reasonably challenged these jurors." (People v. Johnson, supra, at p. 1325.)

The U.S. Supreme Court *reversed* Johnson. (Johnson v. California, supra,

125 S.Ct. 4842.) The U.S. high court held that during the *first* step of the Batson process, a defendant is *not* required to persuade the judge – "on the basis of all of the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." (Johnson v. California, supra, at p. 2417.) The high court characterized the Batson "burden–shifting framework as essentially just 'a means of "arranging the presentation of evidence."'" (Johnson v. California, supra, at p. 2418, fn. 7.) It is not until the *third* step in the Batson process, after the prosecutor has spoken, that the trial court decides whether the opponent of the peremptory strike has carried his burden of proving purposeful discrimination. (Id., at p. 2418.)

It is undisputed that this case involved a black defendant and white victims. According to the 1990 Census, which was judicially noticed by the trial court (RT 3215), blacks comprised roughly 7 percent of the population of Fresno County. (See, AOB, p. 296, fn. 56.) Two of seven eligible black panelists were excused by agreement of both parties, one for medical reasons and one for bias. (RT 3105, 3035.) Of the 5 eligible black venire members, only *1* survived the prosecutor's peremptory challenges – a mere 20 percent. In other words, the prosecutor utilized a total of *20* percent of his peremptory strikes to remove *80* percent of the eligible black jurors. These numbers are equally remarkable and do not reasonably support a finding of happenstance. The fact that the prosecutor accepted one black person on the jury is not dispositive of appellant's Wheeler-Batson claim, and does not mitigate the effect of even one discriminatory peremptory challenge. (Turner v. Marshall (9th Cir. 1997) 121 F.3d 1248, 1254, fn. 3.)

Respondent cites a federal case, Tolbert v. Page (9th Cir. 1999) 182 F.3d 677, 689-690, in support of applying deferential review. Ironically, the pages cited by respondent lead to the dissenting opinion of Justices McKeown, joined by Justices Pregerson and Hawkins. Justice McKeown makes a persuasive

argument in Tolbert that Batson v. Kentucky, supra, 476 U.S. 79, and Hernandez v. New York (1991) 500 U.S. 352, require *de novo* review of a trial court's *prima facie* determination. Appellant agrees with the Tolbert dissent's analysis. Applying deferential review to a trial court's *prima facie* determination would undermine the purpose of the "burden-shifting" scheme described in Johnson v. California. (125 S.Ct. at p. at p. 2418, fn. 7.)

In any event, assuming deferential review means searching the record for any evidence to support the trial court's *prima facie* determination, the U.S. Supreme Court's decision in Miller-El II, supra, 125 S.Ct. 2317, is inconsistent with according that kind of deferential review. Batson, according to Miller-El II, "provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all the evidence with a bearing on it." (Miller-El II, at p. 2331.) In Miller-El II, the U.S. Supreme Court found that the "Court of Appeals's [sic] and the dissent's substitution of a reason for eliminating [the panelist] [did] nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions." (Miller-El II, at p. 2332.) In other words, during the first step of a Batson challenge, a court may not speculate about the prosecutor's possible justifications for the exercise of peremptory challenges and find that no *prima facie* case has been made on that basis.

In any event, even if this Court engages in *deferential* review of the trial court's finding of no *prima facie* showing, that finding is patently erroneous under Johnson v. California, supra, and Miller-El II for the reasons previously stated. This case involves a black defendant accused of crimes against white victims. At the time of the second Wheeler-Batson motion, the prosecutor had used more than 25 percent of his peremptory challenges (4 of 15) to excuse 80 percent of the total pool of eligible black members of the venire. Only one possible black juror remained. Although the trial judge never articulated what burden of persuasion he was imposing on the defense to prove a *prima facie* case

of discrimination, review of the entire record of *voir dire* tends to suggest that *whatever* burden it was, it *exceeded* that allowed by Batson, Miller-El II and Johnson. After all, the trial court's discriminatory pattern of rulings *against* the defense during death qualification *voir dire* is also well documented in the appellate record. (See, AOB and ARB, Arguments XXVIII and XXIX.) The trial court's steadfast refusal to see any inference of discrimination in the prosecutor's disproportionate exercise of peremptory challenges fits with this pattern. Accordingly, this Court should not defer to the trial court's *prima facie* determination, but rather should reach the merits of appellant's remaining arguments asserting error under Batson.

Respondent cites numerous cases which are supposed to support the finding of no *prima facie* case of discrimination in appellant's case. A vast majority of the cases have little precedential value because they rely on Batson jurisprudence, as erroneously interpreted by this Court prior to the U.S. Supreme Court's decisions in Miller-El II and Johnson. For example, People v. Turner (1994) 8 Cal.4th 137, 165, 167 (RB, pp. 251, 258), is cited in support of the trial court's finding of no *prima facie* case of discrimination. However, that case, like many others cited by respondent, applies the "strong likelihood" standard, and relies on the now discredited notion that reviewing courts are free to attribute valid reasons for excusal to a prosecutor when no valid reasons are otherwise stated. (People v. Turner, supra, 8 Cal.4th at p. 164.) This Court may *not* manufacture possible reasons for excusal; to the contrary, the prosecutor's own reasons must stand or fall based on a review of the record of *voir dire* as a whole. (Miller-El II at p. 2332.) In addition, Turner is distinguishable because the defendant used *more* peremptory challenges to excuse black panelists than the prosecutor did. Furthermore, *five* black jurors ended up sitting on Mr. Turner's jury, not just one. (People v. Turner, supra, at p. 164.)

Similarly, in People v. Rousseau (1982) 129 Cal.App.3d 526 (RB, p. 254), the Court of Appeal rejected a Wheeler claim, where the defendant's *prima facie*

showing was that the prosecutor used peremptory strikes to excuse the only two black panelists. This case provides little support to respondent since it, too, was decided before the U.S. Supreme Court's decisions in Johnson v. California and Miller-El II, *and* the wrong standard – the "strong likelihood" standard – was employed. (Id., at p. 536; see also, People v. Garceau (1993) 6 Cal.4th 140, 171 [applying the "strong likelihood" standard]; People v. Crittenden (1994) 9 Cal.4th 83, 115 [applying the "strong likelihood" standard].)

In People v. Arias (1996) 13 Cal.4th 92 (RB, p. 254), both sides exercised numerous peremptory challenges against persons of several racial and ethnic minorities. (Id., at pp. 133-134.) This Court reviewed the prosecutor's statement of reasons for disqualification on the merits, and concluded that a mere comparison of the number and order of minority excusals to the representation of minority groups on the panel was "not sufficient to establish a *prima facie* case of discriminatory exclusion . . . ." (Id., at pp. 135-136, fn. 15.) That premise is highly questionable after Johnson v. California and Miller-El II.

Furthermore, in Arias, this Court saw no reason to discount the trial court's findings because the trial court had made a "'sincere and reasoned'" effort to evaluate the nondiscriminatory justifications offered. (Id., at p. 136.) In this case, the trial court left the evaluation of the prosecutor's race-neutral justifications to "a higher authority." (RT 3217, 3294, 3296.)

Last but not least, contrary to what Miller-El II now requires, in People v. Arias, supra, 13 Cal.4th 92, this Court refused to "compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered." (Id., at p. 136, fn. 16.) This Court is no longer free to disregard a prosecuting attorney's disparate use of peremptory challenges to excuse comparable black and non-black prospective jurors in its evaluation of Wheeler-Batson claims. (See, subsection 2, post.)

People v. Box (2000) 23 Cal.4th 1153 (RB, p. 253, fn. 81, 254), and People v. Johnson (1989) 47 Cal.3d 1194 (RB, p. 253), have likewise lost any

strong precedential value for this case. In Box, this Court found that the mere fact that three black panelists had been discharged was *not* sufficient in and of itself to make a *prima facie* showing of discrimination. (Ibid.) Johnson v. California, supra, 125 S.Ct. 2410, makes it clear that suspicions prompted by a prosecutor's disproportionate exercise of peremptory challenges against an identifiable class of jurors *are* sufficient to establish a *prima facie* case under Batson, particularly if the excused jurors share the defendant's racial characteristics. (Id., at pp. 2416-2417.)

In addition, in People v. Box and People v. Johnson, supra, 47 Cal.3d at pp. 1217-1221, this Court refused to consider the defendant's argument that the prosecutor did not excuse many non-black jurors who had displayed similar characteristics. In *this* case, it would be unreasonable *not* to consider a comparative analysis of excused jurors because *the prosecutor* sought to support his own peremptory challenges by comparing disqualified black and non-black jurors during proceedings in the trial court. Furthermore, the Box and Johnson decisions are no longer viable as precedents, because it is now clear that the U.S. Supreme Court considers a prosecutor's racially disparate use of peremptory strikes to be extremely probative of purposeful discrimination. (Miller-El II, supra, at p. 2325.)

Respondent's reliance on People v. Farnam, supra, 28 Cal.4th 107 (RB, p. 254), is also inappropriate. In Farnam, the defendant was white (id., at p. 135), but his Wheeler motion was based on peremptory strikes against black prospective jurors. In this case, the Wheeler-Batson motion was based on the exclusion of people of Roy's same race. In Farnam, this Court rejected the notion that there was anything improper about the judge's consideration of the defendant's race as one factor supporting the denial of the defendant's Wheeler motion. (Id., at pp. 135-136.) In this case, too, this Court can and should consider Roy's race a "'highly relevant'" circumstance that weighs in *favor* of finding a *prima facie* case of discriminatory purpose. (Johnson v. California,

supra, 125 S.Ct. at p. 2415.)

In Farnam, this Court affirmed the trial court's determination of no *prima facie* showing of discrimination. However, at the time of Farnam's Wheeler motion, the prosecutor had exercised 4 peremptory challenges against black panelists, but 6 of the 11 remaining panelists – more than half – were black. (Id., at p. 137, fn. 10.) Moreover, Farnam's jury consisted of 4 blacks and 8 whites, and one-third of the alternate jurors in that case were also black. (Id., at p. 134.) In this case, the prosecutor used peremptory challenges to a much higher percentage of the eligible black panelists, and only *one* black juror survived to sit on the jury – and for the guilt phase only. Consistent with the U.S. Supreme Court's rulings in Johnson v. California, supra, and Miller-El II, the prosecutor's disproportionate use of peremptory challenges to remove black jurors, in a case involving a *black* defendant and *white* victims, sufficed to establish a *prima facie* showing of discrimination.

2. The trial court's erroneous refusal to assess the credibility of the prosecutor's reasons for peremptory challenges (step 3):

In Argument XXX, B, 3, of the RB, the Attorney General argues that there was also no error during the third step of Batson analysis because the prosecutor was invited to state, and did state, adequate race-neutral justifications for use of his peremptory challenges against the 4 black panelists. (See, Johnson v. California, supra, 125 S.Ct. at p. 2417.) This argument must also be rejected in the wake of Johnson v. California and Miller-El II.

Not anticipating the reversal of People v. Johnson, supra, 30 Cal.4th 1302, or the decision in Miller-El II, respondent argues that comparative juror analysis in the Batson-Wheeler context may not be conducted for the first time on appeal. In Johnson, supra, the lower appellate court had compared answers of challenged jurors with those of nonchallenged jurors, and overturned the trial court's finding of no *prima facie* case. (People v. Johnson, supra, at p. 1318.) This Court disapproved of the practice, declaring that "engaging in comparative jury analysis

for the first time on appeal [was] unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts . . . ." (Id., at p. 1319, 1324.) It also held that "requiring trial courts to engage in comparative juror analysis *sua sponte* in the middle of trial would be burdensome." (Id., at p. 1324.) The Court found that the record of *voir dire* suggested "grounds for the prosecutor to have reasonably challenged these jurors." (Id., at p. 1325.)

Although in reversing People v. Johnson, the U.S. Supreme Court did not discuss comparative juror analysis, in the companion case of Miller-El II, the issue was discussed. The high court concluded that the prosecutor's use of peremptory challenges was discriminatory, after looking at "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." (Miller-El v. Dretke, supra, 125 S.Ct. at p. 2326.) The high court weighed the prosecutor's credibility in this manner, *despite the fact that the trial judge did not do so*, being governed at the time of trial by Swain v. Alabama (1965) 380 U.S. 202, which did not require it. Ibid.; fn. 1.[38] The U.S. Supreme Court reasoned: "If a prosecutor's proffered reason for striking a *black* panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." (Ibid.) The U.S. Supreme Court also concluded that the state's "'failure to engage in any meaningful *voir dire* examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation [for using a peremptory challenge] is a sham and a pretext for discrimination.'" (Id., at p. 2328; internal citation omitted.)

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[38]Justice Thomas, a dissenter in Miller-El II, contended that the comparisons of black and non-black venire panelists were not properly before the U.S. Supreme Court because they had not been "'put before the Texas Courts.'" (Id., at p. 2347.) The U.S. Supreme Court's majority found that the transcript of *voir dire*, upon which Miller-El based his arguments, and the trial court based its result, was properly before the state courts. In appellant's case, the questionnaires of panelists and their *voir dire* are likewise properly before this Court.

Regarding the reasons given for one of the prosecutors' peremptories in Miller-El II, the U.S. Supreme Court explained:

> "It is true that peremptories are often the subjects of instinct, . . . and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall with on the plausibility of the reason he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating [prospective juror] Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not."

(125 S.Ct. at p. 2332.)

None of the cases respondent cites advance their position. For instance, respondent cites Hernandez v. New York (1991) 500 U.S. 352, 360 (RB, p. 251), for the proposition that, unless discriminatory intent is inherent in a prosecutor's explanation, his reasons will be deemed "race-neutral." (RB, pp. 251, 252.) Hernandez defines "race-neutral" as "an explanation based on something other than the race of the juror." (Hernandez, supra, at p. 360.) As defined, the prosecutor did offer "race-neutral" explanations in this case. That simply does not mean his explanations must be accepted at face value. Judicial assessment of whether the prosecutor's facially race-neutral explanations are *credible* occurs at the third step of Batson analysis. This may be done through comparative juror analysis. (Miller-El II, supra, at pp. 2325-2330.)

Respondent also cites Purkett v. Elem (1995) 514 U.S. 765, 768, for the proposition that a prosecutor's race-neutral explanation "need not be 'persuasive, or even plausible,'" or sufficient to support a challenge for cause. (RB, p. 251.) This language from the Purkett case has been lifted out of context. At the *second*

stage of Batson analysis, the prosecutor's explanation must merely be race-neutral, not persuasive or plausible. (Purkett at p. 768.) However, at the *third* step of the process, the courts must determine whether the prosecutor's "implausible or fantastic" justifications are pretexts for purposeful discrimination. Comparative juror analysis is one of the tools utilized for this purpose. (Miller-El II, supra, 125 S.Ct. at pp. 2325-2330.)

People v. Barber (1988) 200 Cal.App.3d 378 (RB, p. 255), also provides little support for respondent's position. In Barber, the prosecutor used of 4 of 6 peremptory challenges to excuse Spanish surnamed people from a jury. (Id., at pp. 390-391.) Several of the panelists were purportedly excused by the prosecutor for reasons relating to employment. The Court of Appeal found that there was *no* "disparate treatment of the four (or possibly only three) Hispanic prospective jurors excused by the prosecutor when compared to non-Hispanic members of the venire allowed to remain on the jury." (Id., at p. 399.) In addition, the trial court found that the prosecutor had "rebutted every reasonable inference that any Spanish surnamed juror was peremptorily challenged solely on the basis of group bias." (Ibid.) In this case, as demonstrated in the AOB at pages 350-365, had the trial court weighed the credibility of the prosecutor's explanations, and engaged in comparative juror analysis, he would have seen that the prosecutor was using his peremptory challenges in a discriminatory manner.

People v. Granillo (1987) 197 Cal.App.3d 110, although cited by respondent (RB, p. 255), actually supports appellant's position. In that case, the prosecutor used 5 of 23 peremptory challenges to excuse Spanish surnamed panelists. The prosecutor offered race-neutral reasons for his excusals. One panelist, Casarez, was excused because she "demonstrated her reluctance to deal with the subject of death; she appeared afraid of the case because it involved a murder," and "her eyes moved between the two attorneys tables and the bench during *voir dire*, indicating she was not being completely candid." (Id., at p. 117.) The prosecutor also averred that Casarez had shown difficulty dealing with

the subject matter of death in a murder case, and he had developed "'impressions'" by observing her rather than from the answers themselves. (Id., at p. 118.) The trial court found that the prosecutor had failed to meet his burden of providing race-neutral reasons for excusing Casarez, but still denied the defense's Wheeler motion. (Id., at pp. 117-119.)

In reversing the judgment, the Court of Appeal agreed with the trial court that "no specific bias was shown for Casarez." (Id., at p. 120.) It noted that there was absolutely nothing in the record supporting the district attorney's claim that Casarez would have difficulty dealing with murder or death. The appellate court noted that the prosecutor "did not elaborate upon what he saw in her responses that implied an inability to deal with the subject matter." (Id., at p. 121.) The appellate court found that the "disparate treatment of Casarez, alone, [was] suggestive of group bias," and reversed the judgment. (Id., at p. 121.)

In this case, the *voir dire* of prospective jurors Mitchell, Johnson, Blue and Cato are similar in many respects to the record in Granillo. Ms. Johnson was an administrative law judge with the Unemployment Appeals Board. During *voir dire*, Ms. Johnson expressed no opinions suggesting biases relevant to this case. (RT 3083, 3134.)

Mr. Cooper purportedly excused Ms. Johnson because she was a person who at one point in her life did not believe in the death penalty, and because she was an administrative law judge who might unconsciously or consciously control the deliberative process. (RT 3218.) However, Ms. Johnson *told* the prosecutor during oral *voir dire* that she had been *undecided* about capital punishment while in college, *20 years earlier*, but now favored it. (RT 1342-1345.) The prosecutor's concern over Ms. Johnson's possible anti-death penalty stance is "inherently implausible" in light of the entire record. (People v. Turner (1986) 42 Cal.3d 711, 720.) The prosecutor's reason is revealed as pretextual because he found it necessary to attribute beliefs to Ms. Johnson that she did not have. (McClain v. Prunty, supra, 217 F.3d at p. 1221 ["The prosecutor first justified

striking SR from the jury by attributing to SR beliefs that she did not hold."].)

Furthermore, Mr. Cooper's claim of an occupational disability is inherently incredible in light of the fact that the prosecutor conducted *no* general *voir dire* whatsoever of Ms. Johnson, and asked *no* questions concerning her professional status. A prosecutor's "desultory" *voir dire* of a prospective juror supports an inference that a challenge is based on group bias. (People v. Wheeler, supra, 22 Cal.3d at p. 281; accord: Miller-El II, supra, at 2328.) In addition, Mr. Cooper did not challenge Juror Cheryl Stollar, who was a law school graduate awaiting bar results, and therefore equally at risk to control the deliberative process. (RT 2986-2987.) Tellingly, during the trial, he also *objected* to the dismissal of Ms. Stollar for cause, when she was caught instructing the other jurors during trial. (RT 5046-5077.) Comparing this Ms. Johnson's strike with Mr. Cooper's treatment of Ms. Stollar supports the conclusion that race was significant in determining whom to challenge. (Miller-El II, supra, at p.2325; accord: McClain v. Prunty, supra, 217 F.3d at p. 1223 ["The prosecutor justified her peremptory strike against SR because she had no group decision-making experience. Yet the prosecutor failed to exercise a peremptory strike against MG, a non-black juror who also had no group decision-making experience."].) In addition, even assuming Ms. Johnson's status as an administrative judge would normally be an adequate race-neutral justification, if taken at face value, it "militates against" the prosecutor's credibility that one of two reasons stated for her excusal was clearly pretextual. (United States v. Chinchilla (9th Cir. 1989) 874 F.2d 695, 698.)

During regular *voir dire*, black panelist Mitchell indicated he had heard and understood all of the court's questions to other panelists, and felt he could be fair and impartial in this case. (RT 3199.) During death qualification *voir dire*, which had occurred earlier, Mr. Mitchell had expressed no favoritism toward the penalty of death verses life without parole. (RT 1654-1660.) In his written questionnaire, Mr. Mitchell answered a question about the death penalty,

indicating he had no problem with it "as long as there is no corruption." (RT 1664.) The prosecutor asked him to explain what he meant. He responded:

> "Once again, 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 that it's not been manipulated to manipulate jurors into giving the desired decision from the 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 1663-1665.)

The prosecutor asked Mr. Mitchell, in essence, how this absence of corruption could be guaranteed in a trial. Mr. Mitchell responded that it would require the "[i]ntegrity and honesty of the attorneys." (RT 1665.) Mr. Cooper then asked whether Mr. Mitchell believed he "could be hoodwinked somehow." (RT 1665.) Mr. Mitchell responded: "Not only me, sir, you and anyone else. I think you and anyone else. I think the system, in all its beauty and all its honesty and all, its intended purpose can be manipulated." (RT 1665.)

Mr. Cooper said he was "negatively impressed" with Mr. Mitchell, and disqualified him because he said jurors could be "hoodwinked" by the advocates in the case. (RT 3219-3220.) As in People v. Granillo, supra, 197 Cal.App.3d 110, Mr. Cooper's mere negative "'impressions'" of Mr. Mitchell do not constitute sufficient race-neutral grounds for excusal. (Id., at p. 118; see also, McClain v. Prunty, supra, 217 F.3d at p. 1223 [Reliance on a panelist's "body language," without more, "cannot be considered a reasoned explanation."].) In addition, Mr. Mitchell did not use the word "hoodwinked" – the prosecutor used those words. Furthermore, Mr. Cooper's reliance on Mr. Mitchell's concern about attorney manipulation of facts, or "hoodwinking" is at best disingenuous;

the prosecutor strongly *opposed* the dismissal of a number of other panelists whose aversion to lawyers and concern with manipulation of the legal system were palpably stronger. Prospective juror Madden viewed "low-life" lawyers as "roadblocks to finding and dispensing justice." (SCT #6 5613; RT 1533, 1534, 1551.) Prospective juror Mary Lopez believed that sometimes lawyers helped criminals "get away with murder" (SCT #6 5365), and that lawyers from both sides – not just defense attorneys – often "covered up" or "shaded over" the truth. (RT 2656-2657, 2671.) Mr. Cooper opposed dismissing both of these non-black panelists. Hence, as in Granillo, the prosecutor's "disparate treatment" of Mr. Mitchell was strongly suggestive of group bias. (People v. Granillo, supra, 197 Cal.App.3d at p. 121; accord: Miller-El II, supra, at p. 2325.)

The prosecutor's articulated bases for excusing prospective jurors Cato and Blue are similarly flawed under Granillo and Miller-El II. The prosecutor excused prospective juror Blue, ostensibly because of her view that there must be something mentally wrong with people who kill. (RT 3219.) Mr. Cooper did *not* excuse seated juror Perez, who expressed the nearly identical view that people who commit certain types of crimes must be mentally ill. (SCT #6 6779.) Prospective juror Cato was purportedly excused because of his training in psychology, and his counseling experience, as well as possible employment hardship. (RT 3294-3296.) Yet numerous non-black seated jurors had similar training or experience, or had voiced concerns their jobs; yet they were not peremptorily excused. (See, AOB , pp. 365.)

People v. McDermott (2002) 28 Cal.4th 946 (RB, p. 255), is also distinguishable from the situation here. In that case, the defense brought a Wheeler motion after the prosecutor had used 8 of its 20 peremptory challenges to excuse black jurors. The prosecutor had twice accepted a jury that included a black juror whom the defense later peremptorily challenged. (Id., at pp. 967-968.) A vast majority of the panelists in McDermott were peremptorily excused due to their unfavorable views on the death penalty. In addition, one was excused

by the prosecutor for being immature, and another was excused, in part, because she was "very stupid." (Id., at p. 970.) This Court reviewed the trial court's rulings for substantial evidence, and applied a deferential standard of review because the trial court had made a "sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (Id., at p. 971.) In this case, none of the peremptorily excused black jurors expressed views presently opposing capital punishment. Moreover, the trial court did *not* make a sincere or reasoned attempt to evaluate the prosecutor's reasons, expressly leaving that job to this Court.

In People v. Mendoza (2000) 24 Cal.4th 130, 169-170, People v. Pinholster, supra, 1 Cal.4th at p. 912-913, People v. Pride (1992) 3 Cal.4th 195, 229-230, and People v. Catlin (2001) 26 Cal.4th 81, 115-119 (cited at RB, pp. 255-256) are all similarly distinguishable. Each of these cases also involves prosecutors' use of peremptory challenges to remove jurors who expressed reservations about the death penalty. Yet the excused jurors, Blue, Mitchell, Cato and Johnson, did not express any reservations about the death penalty. (Cf. People v. Clair, supra, 2 Cal.4th at p. 653 (RB, p. 252); People v. Hayes, supra, 21 Cal.4th at p. 1285 (RB, p. 252); People v. Burgener, supra, 29 Cal.4th at p. 864.)

People v. Jenkins, supra, 22 Cal.4th 900, is distinguishable from this case, and does not provide support for respondent's argument. In that case, the prosecutor exercised two peremptory challenges against African-American panelists. The trial court declined to find a *prima facie* case of discrimination, but invited the prosecutor to explain each challenge. The first prospective juror, S., was, according to the court, "a death penalty skeptic who barely survived a challenge for cause because of his views regarding the death penalty, and the prosecutor explained that he had excused him because of the juror's reluctance to consider imposing the death penalty, and because the juror had been sleeping as he sat in the jury box during general *voir dire*." (Id., at p. 994.)

The prosecutor explained that he had excused the second black panelist, "Rt," because his employment as a reporter for a local newspaper might threaten the prospective juror's impartiality and ability to decide the case. In addition, it appeared this prospective juror would face a risk of losing his job if asked to serve as a juror. The trial court made detailed factual findings regarding "Rt's" employment jeopardy that supported the prosecutor's statement of reasons. (Id., at pp. 992-993.) This Court found ample support in the record for both of the trial court's rulings. Furthermore, the Court was apparently not asked to engage in comparative juror analysis of the prosecutor's other peremptory strikes.

Respondent cites People v. Landry (1996) 49 Cal.App.4th 785 (RB, p. 256, 257), in support of the prosecutor's excusal of Mr. Blue, Mr. Mitchell and Mr. Cato. Landry is no longer viable authority. In that case, the prosecutor excused one black prospective juror who claimed he would suffer financial hardship. He excused a second black prospective juror, a teacher, because he was on the board of a drug treatment program, and corresponded with a relative serving a prison sentence for a serious crime. (Id., at p. 789.) A third black panelist was peremptorily excused whose background was in psychology or psychiatry; this panelist had worked at a youth services agency, and the prosecutor believed she might make decisions based on pity or sympathy for the defendant. (Id., at pp. 789-790.)

In Landry, the record on appeal included the *voir dire* of the three challenged jurors. However, the Court of Appeal *refused* to augment the record to include the *voir dire* of members of the venire who were not challenged, so appellate counsel could use comparative juror analysis to support his claim that the excusal of prospective jurors was error under Wheeler. The Court of Appeal held that "under authority of [this Court], an appellate court is not allowed to compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered. (Id., at p. 791.)

The ruling in Landry is inconsistent with the U.S. Supreme Court's recent

pronouncements in Miller-El II, supra, 125 S.Ct. 2317. Moreover, *in this case*, the *district attorney* engaged in comparative analysis of excused jurors in arguing before the trial court, and the entire record of the *voir dire* is properly before this Court. The available record clearly suggests that the prosecutor's reasons for disqualifying prospective jurors Johnson, Mitchell, Cato and Blue were a sham and a pretext for discrimination. (Miller-El II, supra, at p. 2328; see, AOB, pp. 350-366.)

Respondent also cites People v. Reynoso (2003) 31 Cal.4th 903, 924, which relies on Purkett v. Elem, supra, for the proposition that the focus of a Wheeler-Batson inquiry is "on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons." Comparative juror analysis plays an important role in determining whether a prosecutor's explanations are *genuine*. If any facially race-neutral reason automatically sufficed to answer a Batson challenge, then Batson would provide little meaningful protection against racial discrimination. (Miller-El II, at p. 2325.)

Citing People v. Ervin (2000) 22 Cal.4th 48, 74 (RB, p. 252), as authority, respondent argues that this Court must evaluate the prosecutor's reasons for peremptory challenges "'with great restraint.'" (RB, p. 252; see also, People v. Clair (1992) 2 Cal.4th 629, 652;[39] People v. Hayes (1999) 21 Cal.4th 1211, 1285; People v. Burgener (2003) 29 Cal.4th 833, 864 (RB, p. 252).) It is further argued that this Court must presume that the prosecutor was exercising its peremptory challenges on constitutionally permissible grounds, and must give "'great deference'" to the "'trial court's ability to distinguish *bona fide* reasons for the exercise from sham excuses.'" (RB, p. 252; citing People v. Reynoso,

[39]In People v. Clair, supra, the defendant made a motion to require the prosecutor to state reasons for each peremptory strike against black prospective jurors, but did so in advance of any excusals. The defendant did not make a Wheeler-Batson motion after the prosecutor used peremptory strikes to excuse four black panelists. This Court held that the "presumption of constitutionality stands unrebutted." (2 Cal.4th at pp. 653-654.)

supra, 31 Cal.4th at p. 908.)

Respondent ignores the obvious. The instant case is distinguishable from the Ervin, Clair, Hayes, Burgener, and Reynoso cases because here, the trial court *never made any attempt to distinguish the prosecutor's bona fide reasons from sham excuses*. The trial court engaged in no analysis whatever. The court found that no *prima facie* case of discrimination had been shown, and mistakenly assumed that by having the district attorney state reasons, the record would be protected against challenge. (RT 3220, 3294-3296.) This Court cannot "defer" to a credibility assessment that was not conducted.

Furthermore, in People v. Ervin, supra, the trial court actually weighed the prosecutor's explanations, but on appeal, this Court refused to engage in "comparative analysis regarding persons the prosecutor accepted." (Id., at p. 76.) After Miller-El II, it is incumbent on this Court to review the record of *voir dire* de novo, and engage in comparative juror analysis to assess whether the prosecutor's reasons were pretextual. (Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, 814, fn. 4.)

Respondent concedes that the Ninth Circuit Court of Appeals already engages in comparative analysis when reviewing claims of Batson error. (RB, p. 263, fn. 83; citing McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209, 1220 ["A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge."]; Turner v. Marshall, 121 F.3d at p. 1251 ["We believe that the prosecutor's stated reasoning is revealed as pretextual in the light of a comparison between McCain and a nonminority juror who ultimately was empanelled."]; see also, United States v. Chinchilla (9th Cir. 1989) 874 F.2d 695.) Miller-El II erases any doubt that the U.S. Supreme Court considers comparative analysis of the record of *voir dire* to be an essential component of Batson's third step. (125 S.Ct. at pp. 2325-2330.) Hence, in order to properly determine appellant's Batson claims on appeal, this Court must review the

transcripts and juror questionnaires, and conduct a side-by-side comparison of prospective jurors Johnson, Mitchell, Blue and Cato, and similar non-black panelists whom the prosecutor did not excuse. (Ibid.) If the prosecutor's proffered reasons for striking any one of the black panelists applies equally to an otherwise similar non- black juror who was permitted to serve, it must be considered evidence probative of purposeful discrimination. (Ibid.)

In any event, in *this* case, the Attorney General should be *estopped* from arguing that comparative juror analysis is *unavailable* for the first time on appeal. (RB, p. 262.) Mr. Cooper relied upon comparative juror analysis of black and non-black panelists in the trial court, to support his use of peremptory strikes. For example, he argued that Mr. Cato was "like Dr. Gonzales and much like Mr. Bickley," non-black panelists who were also excused using peremptory challenges. (RT 3294, 3291, 3292.) He also compared Mr. Cato to Mr. Cordova, another non-black panelist who was peremptorily stricken. (RT 3295, 3292.) Accordingly, this court should decline respondent's invitation to shun the use of comparative juror analysis on appeal. (See, RB, p. 262.)

Respondent cites a series of cases, apparently for the proposition that the trial court need not "question the prosecutor or make detailed findings" if the reasons stated by the prosecutor are neither "inherently implausible" nor "contradicted by the record." (RB, p. 258.) Respondent misunderstands or misapplies the principles for which the cited cases stand.

In People v. Silva (2001) 25 Cal.4th 345, 384 (RB, p. 258), the prosecutor used 5 peremptory strikes against Hispanic prospective jurors. The trial court had erroneously allowed the prosecutor to state his reasons for exercising peremptory challenges of Hispanic jurors *ex parte*. After the jury returned a death judgment, the court unsealed the *in camera* hearing transcripts and the defense brought motion for new trial, arguing that the prosecutor's explanations were "unsupported by the record or implausible." (Id., at p. 384.)

This Court found that the prosecutor's explanations were *not* supported

by the transcripts of the *in camera* hearings. There was nothing in the trial court's remarks that revealed it was "aware of, or attached any significance to, the obvious gap between the prosecutor's claimed reasons for exercising a peremptory challenge against M. and the facts disclosed by the transcripts of M.'s voir dire responses." (Id., at p. 385.) Under the circumstances, this Court found that the trial court had *not* met its obligation to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation.'" (Id., at p. 385.) This Court criticized the trial court for failing to "point out inconsistencies and to ask probing questions" during the *ex parte* proceeding. (Id., at p. 385.) Moreover, this Court did not bother to determine whether the trial court had erred in denying the defendant's Wheeler-Batson challenge to the other 4 panelists because the discriminatory exclusion of 1 Hispanic juror was sufficient to require reversal of the penalty retrial.

In this case, in contrast to Silva, the trial judge made a *prima facie* determination against the defense, which was erroneous as a matter of law under Johnson v. California and Miller-El II. The court never considered whether the prosecutor's explanations were inherently implausible, or contradicted by the record; he left that up to a "higher authority." (RT 3220, 3294-3296.)

Respondent also cites People v. Hall (1983) 35 Cal.3d 161, 167-168, People v. Fuentes (1991) 54 Cal.3d 707, 720, People v. Sims (1993) 5 Cal.4th 405, and People v. Reynoso, supra, 31 Cal.4th at pp. 929-930, for this same general proposition: if a trial court makes a sincere and reasoned effort to evaluate the prosecutor's explanations, and the reasons stated are not inherently implausible or contradicted by the record, the court has no obligation to question the prosecutor or make detailed findings. (RB, pp. 258-260.) This misses the point. The record is clear that the trial judge in this case *never* evaluated the prosecutor's explanations for striking prospective jurors Johnson, Mitchell, Blue and Cato at all, much less sincerely. (RT 3220, 3294-3296.)

Furthermore, People v. Hall, supra, 35 Cal.3d 161, is helpful to appellant.

In Hall, this Court *reversed* the judgment because the trial judge "made no serious attempt to evaluate the explanation for the purpose of determining whether it was *bona fide*" (id., at p. 168), and the prosecutor's disparate treatment of black and non-black jurors during *voir dire* was "strongly suggestive of bias." (Id., at pp. 168-169.) In this case, the disparate treatment of black and non-black panelists during *voir dire* is equally suggestive of bias, and requires reversal. (See, AOB, pp. 350-366.)

People v. Fuentes, supra, 54 Cal.3d 707, is largely irrelevant. In that case, pursuant to a Wheeler motion, the trial court had examined the detailed reasons for the prosecutor's peremptory excusals of 15 black panelists, and declared that some of the reasons were "genuine" and some "spurious." The Court did not indicate which of the valid reasons applied to which jurors. (Id., at p. 719.) The Court then denied the motion for a new jury panel upon finding that the defendant had failed to establish a *prima facie* case of discrimination. This Court reversed the judgment because trial court had *not* followed proper Batson procedure, and further had *not* taken the necessary step of determining whether the asserted "genuine" and "spurious" reasons actually applied to the particular jurors whom the prosecutor had challenged. (Id., at p. 721.) In this case, the trial court never went farther than to ask the prosecutor to state reasons for the record.

In People v. Sims (1993) 5 Cal.4th 405, 431, the trial court properly performed its obligations under Wheeler by making a sincere and reasoned effort to evaluate whether the prosecutor's reasons for exercising peremptory challenges were *bona fide*. (Id., at p. 430.) Here, the trial court left the task of evaluating the prosecutor's reasons to this Court.

In People v. Fuentes, supra, 31 Cal.4th at pp. 929-930, this Court reversed the Court of Appeal's decision, which had reversed the trial court's denial of a Wheeler-Batson motion. This Court found that the Court of Appeal's reversal had been improperly based on the "objective *reasonableness*" of the prosecutor's race-neutral reasons for excusing an Hispanic venireman, rather than the

"subjective *genuineness*" of his reasons. (Id., at p. 924.) In this case, the trial court declined to decide whether the prosecutor's reasons for excusing Johnson, Mitchell, Blue and Cato were genuine or reasonable.

Respondent argues that a prosecutor's justification for a peremptory challenge need not rise to grounds for a challenge for cause. (RB, p. 260.) The case cited by respondent, People v. Martin (1998) 64 Cal.App.4th 378, 394 (RB, p. 260), is largely irrelevant because it upholds a prosecutor's challenge to a black prospective juror whose religious creed – that of Jehovah's Witnesses – made her uncomfortable sitting in judgment of others. Appellant does not quarrel with this general principle. In this case, however, it matters not whether the prosecutor's reasons would or would not have sufficed to support a for-cause challenge; here, the trial court made no serious attempt to examine the prosecutor's reasons in light of the entire record, and to determine whether they were *bona fide*, or mere pretexts for discrimination.

Respondent cites a number of cases purporting to support peremptory challenges based on prospective jurors' employment, attitudes toward mental illness, and/or antipathy toward the death penalty. (RB, p. 260, citing United States v. Thompson (9th Cir. 1987) 827 F.2d 1254, 1260 ["Excluding jurors because of their profession . . . is within the prosecutor's prerogative."]; People v. Trevino (1997) 55 Cal.App.4th 396, 411; disapproved in People v. Johnson, supra, 30 Cal.4th at p. 1319 [director of a social service agency]; People v. Granillo, supra, 197 Cal.App.3d at p. 120 [Spanish interpreter]; People v. Barber, supra, 200 Cal.App.3d at p. 294 [kindergarten teacher]; People v. Pinholster, supra, 1 Cal.4th at p. 913 [death-scrupled]; People v. Mendoza, supra, 24 Cal.4th at pp. 169-170 [death-scrupled]; People v. Gutierrez, supra, 28 Cal.4th at p. 1124 [inability to disregard opinion testimony of a psychologist]; People v. Johnson, supra, 47 Cal.3d at p. 1217-1218 [death-scrupled]; People v. Pride, supra, 3 Cal.4th at p. 230 [death-scrupled]; People v. Landry, supra, 49 Cal.App.4th at pp. 790-791 [background in psychology or psychiatry; work with youth services]; People v.

Howard, supra, 1 Cal.4th at p. 1155 [housewife; registered nurse with degree in sociology; nurse's aide]; People v. Jenkins, supra, 22 Cal.4th at p. 994 [newspaper reporter]; Although several cases are of questionable precedential value, following the U.S. Supreme Court's decisions in Johnson v. California and Miller-El II, appellant does not dispute as a general principle that it is within a prosecutor's prerogative to exclude a prospective juror because of *genuine* reservations about his or her profession, views about mental illness, or pro- or anti-death penalty sentiments. A prosecutor may *not*, however, rely on these attributes insincerely, merely to cloak a racially motivated excusal. That is what the prosecutor did in this case.

Respondent argues that prosecutor stated valid, race-neutral reasons to disqualify Ms. Johnson – "an administrative law judge . . . who had expressed reservations about the death penalty." (RB, p. 260.) Respondent refers this court to page 1344 of the reporter's transcript; however, on that page, Ms. Johnson stated she was "not against capital punishment." Ms. Johnson also said that there had been a time when she was "undecided" about the death penalty, when she was in college 20 years earlier. (RT 1344.) She had since changed her mind, and favored the death penalty for reasons which she articulated for the prosecutor. (RT 1344.) The prosecutor's reliance on a facially spurious reason for disqualification is enough reason to consider his explanations insincere and incredible. (Lewis v. Lewis (9th Cir. 2003) 321 F.3d 824, 833; United States v. Chinchilla, supra, 784 F.2d at pp. 698-699.)

In addition, as appellant has previously pointed out, the prosecutor's concern about this panelist's administrative judge job was ostensibly founded on the danger that Ms. Johnson would control the deliberative process. (RT 3218.) Yet no objection was made to seating juror Cheryl Stollar – a law graduate awaiting bar results – not even after she was caught red-handed, instructing the other jurors on the hearsay rule. (RT 5046-5077.) Hence, the district attorney's concern with Ms. Johnson's administrative law judge status appears disingenuous

at best. (McClain v. Prunty, supra, 217 F.3d at p. 1223; see also AOB, pp. 350-355, discussing the strike against Ms. Mitchell.)

Respondent makes similar arguments respecting the prosecutor's reasons for striking prospective jurors Mitchell, Blue and Cato. Appellant has previously debunked the suggestion that the prosecutor's *real* reasons for excusing Mr. Mitchell were his attitude toward fear of being "hoodwinked" by the "advocate" in the case, and his "demeanor" which negatively impressed Mr. Cooper in some unspecified manner. (See, AOB, pp. 355-358.) The panelist's unimpressive "demeanor" was insufficient as a matter of law to explain a peremptory challenge under Batson. (Turner v. Marshall, supra, 121 F.3d at p. 1254; People v. Turner, supra, 42 Cal.3d at p. 726.) Furthermore, the "hoodwinked" explanation is transparently pretextual when one considers the prosecutor's strident and successful objections to the dismissal of other non-black prospective jurors who voiced much stronger dislike and distrust of lawyers, and/or his failure to excuse several similar non-black panelists who later sat on appellant's jury. (Madden: SCT #6 5613; RT 1533, 1534, 1551; M. Lopez: SCT #6 5365; RT 2656-2657, 2671; Juror Fees: SCT #6 2676; Juror Gleason: SCT #6 3323.)

Respondent argues that a sufficient race-neutral justification was offered for the excusal of Ms. Blue – her inclination to "presume the presence of a mental illness." (RB, p. 260.) While this might have discharged the prosecutor's obligation to state a race-neutral reason in the ordinary case, the entire record of *voir dire* makes it clear that the justification was a mere pretext to hide the prosecutor's racially discriminatory motives. (See, AOB, pp. 358-360, discussing prospective juror Blue.) At least one non-black seated juror, Mr. Perez, also felt that the commission of certain heinous crimes was an indicator of mental illness. (SCT #6 6779; RT 2782-2783.) Both Mr. Perez and Ms. Blue were questioned about their views during *voir dire*. Both acknowledged that serious crimes could be committed by people who were not mentally ill. (Perez: RT 2782-2783; Blue: 3139-3141.) The prosecutor struck Ms. Blue, but not Mr. Perez.

Similarly, respondent argues that the prosecutor's reasons for disqualifying Mr. Cato were race-neutral and not pretextual. Mr. Cooper explained that Mr. Cato "had specific training and experience in issues that bear on this case." (RT 3294.) He expressed concern that Mr. Cato would be receptive to "social factors, environmental factors of the defendant." (RT 3295.) The prosecutor also mentioned Mr. Cato's concerns regarding opportunities for advancement in his career. (RT 3295-3296.) These explanations *appear* to be race-neutral. It is only upon examination of Mr. Cooper's very different treatment of similar non-black panelists that it becomes clear that the prosecutor's reasons were pretextual. (See, AOB, pp. 360-366.)

For example, non-black jurors Gosland, Stollar, and Behnsch-Hill had similar training in psychology. (SCT #6 3469, 8261, 375, 384, 392.) Juror Belk and Juror Perez had similar training *and* work experience. Belk taught high school to women in prison, and did counseling for pre-release inmates. (SCT #6 411, 414, 415, 424.) Juror Perez was trained in psychology and psychiatry and did counseling for soldiers in the military. (SCT #6 6777-6779; RT 2782-2783.)

Mr. Cooper *objected* to excusing non-black panelists McDaniel and Wiginton, despite their expression of employment-related concerns. (RT 1632, 3170-3171, 3182.) The prosecutor also did *not* use peremptory challenges to excuse jurors Givens and Gleason – teachers by profession who had doubts about being able to fulfill their school-year teaching obligations. (RT 1112-1113, 2528-2530.) Juror Schmidt was *not* excused even though she felt jury service would interfere with out-of-state job training. (RT 1907-1911.) Juror Wakefield was *not* excused, even though he felt his jury service would work a hardship on his business partner. (RT 2798-2802.)

Respondent argues that this Court should defer to the trial court, which "must have found these reasons credible and legitimate." (RB, p. 261.) Respondent contends there is "nothing in the record indicating the trial court did not make a sincere and reasoned effort to evaluate the credibility and legitimacy

of the prosecutor's explanations." (RB, p. 261.) The record speaks for itself. The trial court twice found that the defense had failed to make out a *prima facie* case, and twice directed the prosecutor to state his reasons just in case a "higher authority" or the "higher court" disagreed with his assessment. (RT 3220, 3294.) There is *nothing* in the record to suggest that the trial court went beyond the second stage of Batson inquiry and considered the merits of the prosecutor's explanations. Consequently, this case is unlike People v. Arias, supra, 9 Cal.4th at p. 137), People v. Monteil (1993) 5 Cal.4th 877, 910, and People v. Reynoso, supra, 31 Cal.4th at pp. 929-930, in which the trial courts made sincere and reasoned efforts to evaluate the prosecutor's justifications, and comparable to People v. Hall, supra, 35 Cal.3d at p. 170, People v. Silva, supra, 25 Cal.4th at pp. 384-386, and People v. Turner, supra, 42 Cal.3d at pp. 727-728, in which the trial courts did *not*. (RB, pp. 261-262.) In the latter group of cases, reversal was required.

Accordingly, it would be inappropriate to presume based on the absence of any oral or written findings by the court that "the trial court found the facts necessary to support the judgment." (RB, p. 262.) The cases cited by respondent have nothing to do with Wheeler-Batson issues and they do not compel the application of such a presumption in the Wheeler-Batson context. (Denham v. Superior Court (1970) 2 Cal.3d 557, 564, and Roffinella v. Sherinian (1986) 179 Cal.App.3d 230, 236.)

3. This Court should engage in comparative juror analysis on appeal.

Respondent's argument XXX, B, 3, cites People v. Johnson, supra, 30 Cal.4th at pp. 1318-1325, People v. Jackson (1996) 13 Cal.4th 1164, 1195, and People v. Heard (2003) 31 Cal.4th 946, 971, for the proposition that this Court has already rejected employing comparative juror analysis for the first time on appeal. (RB, p. 262.) This Court would not be employing comparative juror analysis "for the first time on *appeal*." In the trial court, the *prosecutor* relied on a comparison

of black and non-black jurors to establish the absence of disparate treatment. (RT 3294-3296.)

Respondent also argues that nothing in Miller-El I – Miller-El v. Cockrell, supra, 537 U.S. at p. 322 – requires a reviewing court to engage in comparative juror analysis for the first time on appeal. (RB, p. 264.) Appellant respectfully submits that the U.S. Supreme Court's decisions in the second Miller-El – Miller-El v. Dretke, supra – and Johnson v. California, supra, put that argument to rest. However, appellant has already addressed this argument fully in Section B, 2 of Argument XXX of the ARB. Those arguments need not be repeated here.

4. Respondent concedes that this Court must reverse the judgment, whether it finds that the trial court erred in finding no *prima facie* case of group bias, or finds that the prosecutor used peremptory challenges to remove potential jurors on the basis of race.

Respondent acknowledges that there is conflicting authority regarding the appropriateness of a remand when a trial judge erroneously finds no *prima facie* case of group bias. Respondent points to several decisions authorizing a limited remand for purposes of a further hearing on the validity of the prosecutor's peremptory challenges (People v. Gore (1993) 18 Cal.App.4th 692, 705-707, and People v. Williams (2000) 78 Cal.App.4th 1118, 1125), and several other decisions finding a remand inappropriate due to the passage of time. (People v. Snow (1987) 44 Cal.3d 216, 226-227; People v. Allen (2004) 115 Cal.App.4th 542, 553; see, RB, pp. 264-265.)

The principle distinguishing feature among these cases appears to be the speed with which the cases were resolved on appeal. In Gore, the case was tried in 1992, and the Court of Appeal's decision was filed in 1993. In Williams, the case was tried in 1999, and the Court of Appeal filed its decision in 2000. These cases were remanded. The other cases involved much longer delays between trial and resolution of the appeal, three years (People v. Allen) and six years (People v. Snow), respectively. These cases were *not* remanded. Appellant agrees that a remand would be inappropriate in this case, given that the jury selection occurred

in 1993, nearly 12 years ago, and the trial judge, the Honorable John E. Fitch retired several years ago.

In addition, remand is unnecessary because appellant's Wheeler-Batson claims are based on a fully developed record, which includes a complete transcript of the *voir dire*, and the jury questionnaires of most, if not all, of the 250 panelists in this case. Pursuant to Miller-El II, appellant's Wheeler-Batson claims are fairly presented on the available record. (Id., at p. 2325, fn. 1, 2326, fn. 2.) The prosecutor's justifications must "stand or fall" on the reasons he stated at the time of excusal, giving due consideration to any evidence in the record, including evidence drawn from a comparison of non-black panelists, which might cast the prosecutor's reasons for striking prospective jurors Johnson, Mitchell, Blue and Cato in an "implausible light." (Id., at p. 2332.)

The constitutional ramifications of the trial court's Wheeler-Batson errors have been discussed at length in the AOB. (AOB, pp. 340-342, 366.)
For purposes of reply, it suffices to say that he prosecutor's purposeful discrimination in the selection of the jury violated appellant's state and federal equal protection guarantees. (Batson v. Kentucky, supra, 476 U.S. at p. 86-89; see also, Cal. Const., Art. I, § 7.) In addition, the denial of appellant's Wheeler-Batson motions in the trial court eviscerated appellant's Fourteenth Amendment rights to a fair trial, and the protection of life and liberty against racial prejudice. (Batson at pp. 86-87; see also, Cal. Const., Art. I, § 7, 15.) The use of peremptory challenges to purposefully remove jurors of appellant's own race also violated appellant's right to trial by a jury of his peers, contrary to the Sixth Amendment, and Article I, section 16 of the California Constitution. (People v. Wheeler, supra, 22 Cal.3d at p. 283.) Last but not least, because these errors occurred in the context of a death penalty trial, appellant was also deprived of a reliable death judgment in violation of the Eighth Amendment and Article I, section 17 of the California Constitution. The error requires reversal of the guilt, sanity and penalty phase judgments. (Batson v. Kentucky, supra, 476 U.S. 79; People v. Wheeler,

supra, 22 Cal.3d 258; People v. Turner, supra, 42 Cal.3d at p. 728; People v. Hall, supra, 35 Cal.3d at p. 169.)

XXXI

CUMULATIVE ERROR DEPRIVED APPELLANT OF DUE PROCESS, EQUAL PROTECTION, AN IMPARTIAL JURY COMPRISED OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY, AND A RELIABLE DEATH JUDGMENT IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Respondent argues that no errors were committed during jury selection; therefore, if there were no errors, there cannot have been cumulative errors. (RB, pp. 266-267.) Appellant has argued at length how cumulative errors during jury selection violated appellant's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, and California Constitution, Article I, sections 7, 15, 16 and 17. Those arguments have been adequately stated and will not be repeated here.

ARGUMENT SECTION 5

XXXII

APPELLANT WAS DENIED THE RIGHT TO BE PRESENT, PERSONALLY AND/OR THROUGH COUNSEL WITH WHOM HE COULD COMMUNICATE, AT CRITICAL PHASES OF THE PROCEEDINGS.

A. Roy did not waive his right to be personally present.

Respondent concedes that Roy was excluded from numerous at bench and *in camera* proceedings, and that Roy did not expressly waive his right to be personally present, except for an unreported conference on guilt-phase jury instructions. (RB, pp. 268, 270.) Respondent also does *not* quarrel with appellant's characterization of the matters discussed at proceedings from which Roy was excluded. (RB, pp. 270-271. Of course, respondent disagrees with appellant's claim that this resulted in error of constitutional dimension, requiring reversal of the judgment.

B. Appellant was denied a full opportunity to defend against the charges; reversal of the judgment is required.

Roy was personally absent and out of earshot from 180 proceedings that took place at bench, or in the hallway outside the courtroom. These proceedings were not reported, in violation of Penal Code section 190.9. Full or partial settlement was accomplished for many of the proceedings, although in approximately ten instances, settlement was impossible because the parties disagreed regarding what occurred and the court could not recall. (See, AOB, pp. 372-375.)

Respondent cites the substantial number of published cases in which this Court, or the U.S. Supreme Court, has declined to reverse judgments premised on the exclusion of defendants from portions of their criminal proceedings. (RB, pp. 268-273.) All of these cases are substantially distinguishable from this case. (RB, pp. 268-273.) United States v. Gagnon (1985) 470 U.S. 522, 524-525, and People v. Johnson (1993) 6 Cal.4th 1, 17-20, each involve single instances of defendants

being excluded from in- chambers conferences with jurors. In People v. Morris (1991) 53 Cal.3d 152, 210, and People v. Dennis (1998) 17 Cal.4th 468, 538, defendants were excluded from conferences on jury instructions. (Id., at p. 538.) In People v. Ochoa (2001) 26 Cal.4th 398, the defendant was excluded from confidential sessions between the court, counsel and two prospective jurors. (Id., at p. 433.) In People v. Hardy (1992) 2 Cal.4th 86, the defendant was absent for two short periods during preliminary *voir dire*, and for jury instructional conferences. (Id., at pp. 177-178.) In People v. Bradford (1997) 15 Cal.4th 1229, the defendant was excluded from 9 proceedings, including many in which the defendant expressly waived his presence. (Id., at p. 1355-1358.) In People v. Wharton (1991) 53 Cal.3d 522, the defendant missed 11 proceedings, but in each instance this Court found an express or implied waiver of the defendant's presence by counsel. (Id., at p. 602.) People v. Waidla (2000) 22 Cal.4th 690, involved 17 unreported proceedings regarding instructions, or evidentiary, housekeeping and other matters. In People v. Holt (1997) 15 Cal.4th 619, involved 28 unreported proceedings, but it is not clear that the defendant was *absent* from them all. (Id., at p. 707, fn. 29 [listing approximately 14 proceedings from which Holt was excluded].) In People v. Price (1991) 1 Cal.4th 324, the defendant's exclusion from the trial proceedings was largely the product of his wish to discharge counsel, and his obdurate refusal to come to court. (Id., at pp. 407-408.) People v. Arias (1996) 13 Cal.4th 92, 158-159, involves a number of unreported proceedings, but none from which the defendant was excluded.

Only one of the cases cited, People v. Pinholster, supra, 1 Cal.4th at pp. 919-923, even bears any resemblance to this case. (RB, p. 271.) In Pinholster, there were 133 unreported sidebar conferences. Of these, 27 were unable to be settled. (Id., at p. 922.) This Court denied all of the defendant's claims of prejudicial error. However, Pinholster was based on a trial that occurred *prior* to the enactment of Penal Code section 190.9, the provision which mandates reporting of all proceedings in death penalty cases. (Id., at pp. 919-920.)

Furthermore, in Pinholster, the defendant was not *excluded* from all 133 at bench or in chambers proceedings, while Roy was excluded from about 180 proceedings in this case. This is a significant difference. Roy's exclusion from all unreported proceeding denied him any opportunity to participate in record settlement proceedings, so as to insure accuracy of the record considered by this Court on direct appeal.

For the reasons previously stated in the AOB (pp. 376-386), the exclusion of Roy from such a large number of proceedings violated Roy's Sixth Amendment rights to confrontation and to counsel (see, also, Cal. Const., Art. I, § 14, § 15), his due process right to be personally present at any proceeding critical to the outcome, or contributing to the fairness of the proceedings (U.S. Const., Amend. XIV; Cal. Const., Art. I, § 7, § 15), and his right to a reliable death judgment (Cal. Const., Art. I, § 17; U.S. Const. Amend. VIII.)

C. Roy's exclusion from 180 unreported proceedings was structural error.

Respondent argues that Roy's exclusion from 180 unreported proceedings does *not* constitute structural error, which would require reversal of the judgment without any showing of prejudice. The cases relied upon by respondent are distinguishable because of the sheer number of unreported proceedings from which Roy was excluded. In addition, in this case, the prejudice was exacerbated by the breakdown in the attorney client relationship, and dual representation of Roy by multiple teams of attorneys, a factor not present in any of the cases cited by respondent. (See, AOB, ARB, Argument Section 2.)

Roy brought Marsden motions to discharge is public defenders on September 29, 1993, October 8, 1993, and again on October 14 and 15, 1993. Independent counsel were thereafter appointed to assist Roy at a Marsden hearing held on October 19, 1993. One of Roy's complaints was that his attorneys were not communicating and were *excluding* him from bench conferences. The trial court did not interrupt the trial while the Marsden proceedings were pending, and

Roy was represented by two sets of attorneys pending the hearing. Unreported proceedings occurred 53 times during this portion of the trial, between September 29, 1993 and October 15, 1993, outside the presence of Roy. (SCT #7 162-186.) Moreover, between October 15, 1993, and October 25, 1995, Roy's independent counsel – who were supposed to be investigating grounds to discharge Ms. Martinez and Ms. O'Neill – did not attend the trial or participate in unreported proceedings on Roy's behalf.

The court refused to discharge the public defenders and instead, on October 25, 1993, appointed Ernest Kinney to facilitate communication between Roy and his lawyers. Mr. Kinney was accorded official status as a third co-counsel on November 8, 1993. For the first few weeks of Mr. Kinney's involvement in the case, however, he did not attend 21 conferences at bench, or in the hallways of the courtroom. (SCT #7 186-195.) For this period, also, Roy had one legal team charged with his defense with whom he could *not* communicate, and one attorney with whom *could* communicate, but who was *not* playing any role in his defense.

Respondent cites People v. Lyons (1962) 204 Cal.App.2d 364, 368, for the proposition that it is "presumed that an attorney has been faithful to the best interests of the client." That presumption is completely inapplicable here, where there was dual representation, and Roy was incapable of communicating with the lawyers who attended unreported conferences and had authority to act on his behalf. This is not a case where a defendant was excluded from a few insignificant proceedings at which he was represented by able and unconflicted counsel. In effect, Roy was not represented by unconflicted counsel at more than 70 of the unreported proceedings. Furthermore, he was excluded from at least one conference in which Mr. Kinney discussed his inability to represent Roy due to health problems. (CT SCT #7 1494.) This was a denial of the right to be present at a critical stage of the proceedings, and enough to require reversal of the judgment. (See, Bradley v. Henry (9th Cir. 2005) 2005 U.S. App. LEXIS 11954; filed June 22, 2005 [defendant's exclusion from an *in camera* hearing regarding

the discharge of retained counsel required reversal].)

Is impossible to determine in hindsight the prejudice that resulted from this circumstance. There is no reasoned alternative but to find the error structural, requiring reversal *per se.* (Arizona v. Fulminante, supra, 499 U.S. at p. 307.)

Alternatively, because the holding of more than 180 unreported proceedings in Roy's absence resulted in a profound interference with the Sixth Amendment right to counsel, Fourteenth Amendment guarantees of due process and a fair trial, and the Eighth Amendment right to a reliable death judgment, this Court should at minimum apply the Chapman standard of review. This record does not support a finding "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (Chapman v. California, supra, 386 U.S. at pp. 23-24.) Therefore, the guilt and penalty judgments must be reversed.

XXXIII

THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT DELIBERATELY VIOLATED PENAL CODE SECTION 190.9, AND CREATED A RECORD INADEQUATE FOR FULL AND FAIR APPELLATE REVIEW.

A. There was no meticulous compliance with Penal Code section 190.9 in this case.

Respondent concedes that not all proceedings were conducted with a court reporter, in violation of express provisions of Penal Code section 190.9(a)(1). (RB, p.275.) The Attorney General also agrees that meticulous compliance with Penal Code section 190.9 is especially important in a death penalty case, and that a defendant is entitled to an appellate record adequate for meaningful appellate review. (RB, pp. 275-276.)

B. The record on appeal is inadequate to provide full and fair appellate review.

Respondent asserts that the record on appeal is adequate and that appellant's ability to prosecute his appeal has not been impaired. Appellant disagrees. He has discharged his burden of showing that the record is inadequate

to permit appellate review at pages 390-393 of the AOB.

Respondent cites numerous cases to show that the record is *adequate* in this case. None of the cited cases bear any resemblance to the facts of this case.

In People v. Alvarez (1996) 14 Cal.4th 155, 196 (RB, p. 276), rejects a defendant's claim that the absence of juror questionnaires was prejudicial to a defendant's ability to urge a Wheeler-Batson claim on appeal. (Id., at p. 196, fn. 8.) In that case, the Wheeler-Batson issue was raised and addressed by this Court on the merits. In this case, jury questionnaires were also missing, but most were reconstructed using copies from the parties' original files. Appellant's claim of prejudice stems not from the failure to preserve jury questionnaires, but rather, from the court's having held scores of unreported conferences on a variety of topics, including many at which substantive matters were addressed. Roy was excluded from all such proceedings. (See, Argument XXXII, ante.)

In People v. Frye (1998) 18 Cal.4th 894, 941 (RB, p. 276), only *one* hearing was unreported. The minute order for that date indicated that the proceeding involved resolution of some discovery matters. In this case, in contrast, the trial court held more than 180 proceedings in the absence of a reporter and in the absence of the defendant himself. A sizable number of unreported proceedings could not be settled because the parties disagreed what occurred, and the trial court could not remember.

United States v. Wilson (9th Cir. 1994) 16 F.3d 1027, 1031 (RB, p. 276) supports appellant's position. In Wilson, the federal court *reversed* a judgment because it was *unable* to determine the merits of the defendant's judicial bias claim without a more complete and accurate record. This case also involves claims of judicial bias during jury selection (see, AOB and Reply, Arguments XVIII, XXIX, XXX & XXXI). The trial court's conduct of unreported proceedings outside Roy's presence may well have shed additional light on these judicial bias claims. A trial court's attitude or pattern of behavior toward a defendant or defense counsel is not something that is susceptible to "settlement"

of proceedings, which takes place many years after the trial.

In People v. Howard (1992) 1 Cal.4th 1132, 1165 (RB, p. 276), only *four* judicial conferences were not reported. The subject of each conference had been sufficiently preserved so that the issues were raised and addressed by this Court in the defendant's direct appeal. (Id., at p. 1165.) Moreover, the Howard case was tried prior to the enactment of Penal Code section 190.9. (Id., at p. 1164.) This is a post-Penal Code section 190.9 case and more than 180 unreported proceedings were involved.

In People v. Pinholster, supra 1 Cal.4th at p. 921 (RB, p. 276), 133 sidebar conferences were not reported. However, in Pinholster, the defendant was not *excluded* from the 133 unreported proceedings; consequently, he was not rendered incapable of participating in record settlement. Furthermore, in that case, the defense attorneys received daily reporter's transcripts and were permitted to clarify any objections that were not fully reflected in reported proceedings. Furthermore, this is another case in which the trial was held prior to enactment of Penal Code section 190.9. (Id., at pp. 919-923.)

Respondent also argues that appellant has failed to explain how the many unreconstructed proceedings have rendered the record inadequate for meaningful appellate review. (RB, p. 277.) Appellant disagrees; he has done so in some depth at pages 390-393 of the AOB.

Cases cited by respondent to establish the inadequacy of appellant's showing are inapt. In People v. Hawthorne (1992) 4 Cal.4th 43, 66-67 (RB, p. 277), the "fulcrum" of the defendant's claim was that the judge, through the bailiff, improperly instructed the jury *ex parte* and off the record regarding a jury deadlock. (Id., at p. 63.) During settlement of the record, the trial judge reviewed contemporaneous documents, refreshed his recollection of the limited proceedings at issue, and was examined under oath at the record correction proceedings, which were presided over by a different judge. The settled statement provided a "detailed and complete rendition of events based upon all available facts and

circumstances." (Id., at p. 65.) Consequently, the issue in Hawthorne was not whether the record thus created was inadequate, but rather, whether the reconstruction of the record more than three years after the trial was inherently unreliable due to passage of time. (Id., at p. 64.)

In this case, however, record settlement was accomplished by stipulation and it was *agreed* that settlement of some unreported proceedings was not possible, due to disagreements of counsel, and the lack of recollection by the court. Furthermore, there is no indication that the Hawthorne case, like this case, involved a constantly evolving cast of lawyers playing the role of lead counsel, and the substitution of an attorney who had not been present for much of the trial or for many unreported proceedings, for the penalty phase of a capital trial.

In People v. Holt, supra, 15 Cal.4th at p. 708 (RB, p. 708), discussed in Argument XXXII, ante, only 28 unreported proceedings were involved, not more than 180. In that case, the defendant was excluded from *some* but not all of the conferences. This court found no prejudice, in part because the record was sufficient to show that the defendant had prevailed on many of the issues addressed at unreported proceedings held in his absence. (Id., at p. 707.) It is not known what occurred during some of the unreported conferences in this case. Furthermore, the parties do not agree that these proceedings were strictly administrative, or of minimal significance. In addition, in this case, unlike Holt, the evolving roles of the trial attorneys and midtrial replacement of lead penalty phase counsel are complicating factors.

People v. Scott (1972) 23 Cal.App.3d 80, 84 (RB, p. 278) is a Court of Appeal decision in a case involving prosecution for sale of drugs, *not* a case in which the death penalty was at stake. In that case, reporter's notes were completely lost for one date. The attorney declined to participate in settlement, but entered into an "agreed statement" which the appellate court treated as tantamount to a settled statement establishing the facts. This case bears little resemblance to this case, involving more than 180 unreported proceedings from which the

defendant was excluded.

In United States v. Grundset (7th Cir. 1982) 675 F.2d 870, 876 (RB, p. 278), the defendant pleaded guilty to a *misdemeanor* aggravated assault. He filed a motion to withdraw the plea and vacate the judgment, on the ground that he was unaware that he could have pleaded insanity. On appeal, the defendant argued that his constitutional rights were violated by the denial of a verbatim transcript of the plea. His attorney had not taken advantage of Illinois procedures for preparing a "bystander's report" in lieu of a transcript. (Id., at p. 872.) The appellate court held that the defendant had no state or federal statutory or constitutional right to a transcript of a guilty plea proceeding. (Ibid.) The Seventh Circuit concluded that a verbatim transcript would not have been helpful because it would not have shed light on whether the defendant was aware of the availability of an insanity plea anyway. Hence, there was no denial of the right to appeal or the effective assistance of counsel.

This case arises in the context of a death penalty proceeding, not a misdemeanor guilty plea gone awry. Furthermore, appellant's right to a transcript of *all* death penalty trial proceedings under California law is not contested. In this case, scores of unreported proceedings were conducted in Roy's absence; many were conducted at times when he was under some form of dual representation, or conflicted representation, and not all attorneys participated in the conferences. (See, RB, Argument XXXII, ante.) Furthermore, unlike the defendant in Grundset, Roy's appellate counsel made a good faith but unsuccessful effort to settle all unreported proceedings. Furthermore, as previously argued, because so *many* proceedings were conducted in Roy's absence and *not* reported, *and* there was such pervasive discontinuity of counsel, this case is readily distinguishable from all other cases cited by respondent.

Respondent argues that appellant has failed to bear the burden of showing how the lack of a verbatim transcript rendered either trial counsel, or appellate counsel, ineffective. (RB, p. 278.) Appellant has made such a showing in the

AOB. (See, AOB, pp. 390-393.) Cases cited as exemplary are not particularly helpful to respondent. In re Neely (1993) 6 Cal.4th 901, 908-909 (RB, p. 278), for example, is irrelevant. This Court *reversed* the judgment in Neely, based on a finding that trial counsel incompetent for failing to raise a Massiah objection to the admission of certain evidence. (Massiah v. United States (1964) 377 U.S. 201, 206.) In People v. Apalatequi (1978) 82 Cal.App.3d 970, 973 (RB, p. 278), the defendant in a noncapital case made a motion to vacate a judgment under Penal Code section 1181, subdivision 9, because the reporter lost her notes and was unable to provide a transcript of the prosecutor's arguments to the jury. The defendant wanted to raise prosecutorial misconduct on appeal. The missing record could not be accurately settled because the judge and defense counsel could not agree whether arguments giving rise to the defendant's prosecutor misconduct claims had been made. The Court of Appeal reversed, because it was unable to give full consideration of the defendant's prosecutor misconduct claims on such a record.

In this case, the missing proceedings pervade the entire appellate record. Settlement of the record is incomplete at best. In a number of instances there is no settlement whatever because counsel for the parties disagree on what transpired and the trial judge cannot remember. Numerous issues have been raised regarding judicial bias during jury selection, the denial of effective counsel, denial of unconflicted counsel, and/or the constructive denial of counsel. Under such circumstances, it is impossible to know to what extent appellant's ability to prosecute this appeal has been compromised by the trial court's deliberate noncompliance with Penal Code section 190.9. Possibly, preservation of issues for appeal simply went unremembered and unreported. (See, AOB, p. 392.) Roy was absent from all unreported proceedings and incapable of giving any meaningful input during settlement efforts in the trial court.

Respondent argues nonetheless that any prejudice produced by Mr. Kinney's absence from unreported conferences is entirely "speculative." (RB, p.

278; citing, McKethan v. Texas Farm Bureau (5th Cir. 1993) 996 F.2d 734, 740, fn. 14 ["that another lawyer in counsel's firm may have prepared and submitted the pretrial order is immaterial; obviously, that knowledge is imputed to him"].) If the injury to Roy is "speculative," it is only because it is nearly impossible to determine in hindsight what prejudice was caused. Appellant suggests that this amounts to "structural" error, not "speculative" prejudice. (Arizona v. Fulminante, supra, 499 U.S. at p. 307.)

Many of the unreported proceedings occurred at a time when Roy's legal interests were at odds with his public defender's interests. Ms. O'Neill and Ms. Martinez continued to represent Roy, not only at the trial, but also at unreported conferences, while Roy's Marsden motions was pending, and independent counsel from another law firm was contemporaneously investigating alleged *incompetency* of trial counsel. The practice of conducting unreported conferences out of Roy's earshot continued even after Roy complained that he distrusted the public defenders *because* they excluded him from conferences with the trial court. Furthermore, *after* the Marsden motion was finally denied, the trial court appointed Mr. Kinney to act as conduit for communication between Roy and counsel. However, Mr. Kinney did not attend bench and sidebar conferences until later in the proceedings, when he was made a part of the legal team. Apart from whether unreported proceedings may have included objections which never made it onto the record, it is certain that the trial court's flagrant disregard of Penal Code section 190.9 interfered with Roy's legal representation at trial. Therefore, for the reasons previously stated, the error should be treated as "structural" and the entire judgment should be reversed without any specific showing of prejudice. (Arizona v. Fulminante, supra, 499 U.S. at p. 307.)

Alternatively, the Chapman standard should apply because the errors profoundly interfered with Roy's Sixth Amendment right to counsel, his Fourteenth Amendment due process guarantees, and his right to a reliable death judgment, guaranteed by the Eighth Amendment. The record does not support a

finding "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (Chapman v. California, supra, 386 U.S. at pp. 23-24; see also, Bradley v. Henry, supra, 2005 U.S. App. LEXIS 11954.) Reversal is accordingly mandated.

XXXIV

CUMULATIVE ERROR REQUIRES REVERSAL OF THE ENTIRE JUDGMENT.

Respondent argues that there was no error involved in conducting unreported judicial conferences in Roy's absence; therefore, there can be no finding of cumulative error. (RB, p. 280.)

Respondent does not directly address the broader cumulative error argument advanced by appellant – that errors assigned in Argument Section 2, pertaining to the breakdown in the attorney-client relationship, interruptions in the continuity of counsel, and conflicts of interest (AOB, pp. 84-183), combine with the errors alleged in Argument Section 5, regarding the unreported conferences held in Roy's absence, to produce reversible error. However, appellant has adequately argued cumulative error in the AOB at pages 395-396. Respondent has offered no arguments that require any additional reply.

ARGUMENT SECTION 6

XXXV

A MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED AFTER THE PROSECUTOR ELICITED TESTIMONY COMMENTING ON ROY'S EXERCISE OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

Respondent does not argue the absence of error under Doyle v. Ohio (1976) 426 U.S. 610, but does argue that the trial court did not abuse its discretion in finding no prejudicial effect. (RB, p. 397.) Appellant submits that respondent has failed to sustain his burden under Chapman v. California, supra, 386 U.S. at p. 26, of proving beyond a reasonable doubt that the error had no effect on the jury's guilt, sanity and penalty phase verdicts.

Appellant does not dispute that, in general, trial courts' rulings on motions for mistrial are reviewed for abuse of discretion. (RB, p. 284; People v. Ayala (2000) 24 Cal.4th 243, 284.) Appellant also does not dispute that, as a general rule, a mistrial must be granted if the court finds "prejudice that it judges incurable by admonition or instruction." (RB, p. 284; People v. Lucero (2000) 23 Cal.4th 692, 713-714.) Nor does appellant dispute that there are many circumstances in which a trial court has broad discretion to grant or deny a motion for mistrial. (See, People v. Gray (1998) 66 Cal.App.4th 973, 986, cited at RB, p. 286; Illinois v. Somerville (1973) 410 U.S. 458, 461-461, cited at RB, p. 286.)

However, this is not just a "mistrial" case. It is a case in which mistrial was requested based on violation of the accused's Fifth Amendment self-incrimination rights – i.e., Doyle error. An appellate court reviews such constitutionally-based errors *de novo*, and, assuming error occurred, the *state* bears the burden of demonstrating beyond a reasonable doubt that the error did not contribute to the verdicts. (See, People v. Hughes (2002) 27 Cal.3d 287, 332; cited at RB, p. 285; United States v. Elkins (1st Cir. 1985) 774 F.2d 530, 538, cited at RB, p. 285 [applying Chapman standard to Doyle error]; see also, Wainwright v. Greenfield (1986) 474 U.S. 284, 286-295, cited at RB, p. 285, ; [applying Chapman standard

where the defendant's silence was used against him in a trial of his not guilty by reason of insanity plea]; United States v. Velarde-Gomez (9th Cir. 2001) 269 F.3d 1023, 1034, cited at RB, p. 286, and United States v. Rivera (11th Cir. 1991) 944 F.2d 1563, 1569, cited at RB, p. 286, fn. 85; [applying Chapman standard where, as here, the prohibited comment was upon defendant's silent "demeanor"].)

Respondent argues that the trial court's ruling, denying a mistrial motion after the prosecutor's violation of Doyle principles, must be affirmed unless the ruling was "arbitrary and capricious." (RB, p. 284-285; citing People v. Carbajal (1995) 10 Cal.4th 1114, 1120-1121.) The cited case – Carbajal – addresses the "abuse of discretion" standard as it applies to a trial court's imposition of a condition of probation, not a trial court's denial of a motion for mistrial based on a prosecutor's comment on the defendant's exercise of the Fifth Amendment self-incrimination privilege. As previously noted, the Chapman standard applies. In other words, the laws regarding the propriety of a mistrial are totally irrelevant.

Respondent cites People v. Martin (1983) 150 Cal.App.3d 148, 163, for the proposition that "absent evidence to the contrary," Doyle error is cured by a judicial admonishment. The Martin case involves a curative admonition after a witness had an emotional outburst, in which she told the defendant he was guilty. (Id., at pp. 162-163.) It did not involve Doyle error. Doyle error is not deemed cured merely because the court gives a curative admonition. The error must be found harmless beyond a reasonable doubt.

In the alternative, respondent argues that prosecutor's Doyle error was harmless beyond a reasonable doubt. (RB, p. 287; citing Brecht v. Abrahamson (1993) 507 U.S. 619, 629-630, and United States v. Kallin (9th Cir. 1995) 50 F.3d 689, 693.) Brecht is not particularly relevant or helpful for respondent; in that case, the U.S. Supreme Court held that Chapman standard, applicable on direct appeal, is not the proper standard where a Doyle violation is asserted on collateral review. (Id., at p. 638.) This is a direct appeal case; therefore, the Chapman standard does apply.

United States v. Kallin, supra, is likewise not helpful to respondent. In that case, the judgment was *reversed* based on Doyle error, even though a curative admonition was given. (Id., at pp. 694-695.) The Ninth Circuit Court of Appeals did "not believe that the jury could 'possibly be expected to forget [the improper comment on the invocation of Fifth Amendment privilege] in assessing the defendant's guilt . . . .'" (Id., at p. 695; internal citation omitted.) Kallin supports reversal of the judgment in this case, despite the court's giving of a curative admonition.

Doyle error occurred in this case when the prosecutor elicited testimony by Detective Souza that Roy, when told he was being arrested for murder and attempted murder, had "no reaction," and made "no inquiry who he allegedly murdered." (See, RT 3940-3941; RB, pp. 281-282.) Given that at the three stages of the trial, Roy's defenses were diminished actuality, insanity, and mitigating mental illness, respectively, the damaging inference is obvious. If Roy *really* suffered from a mental disease or defect, and as a result had *no* recollection of what occurred during the late evening hours of January 26, and early morning hours of January 27, 1991, the average person might assume Roy would have denied any wrongdoing when confronted with a murder accusation. Hence, the Doyle error in this case went straight to the heart of the defense strategy at the guilt, sanity *and* penalty phases of the trial. As in the Kallin case, it is unlikely the jury was able to disregard Detective Souza's improper comment on the exercise of Roy's Fifth Amendment privilege.

Respondent argues that there was overwhelming evidence of guilt. (RB, pp. 288-289, & fn. 87.) Appellant disagrees. The Attorney General completely ignores the utter lack of substantial evidence to support the robbery and attempted rape counts, *and* the three special circumstance findings – attempted rape-murder, robbery murder, and witness-killing. (See, AOB, & RB, Arguments I-VI.) The fact that Roy did *not* deny any wrongdoing, after being advised of the murder and attempted murder charges, was not something most jurors could easily ignore, with

or without an admonition. Even though the evidence on many counts was weak, Roy's failure to *deny* any wrongdoing may well have tipped the scales in favor of the jury returning *across-the-board* guilty verdicts and true findings on all three of the special circumstance allegations.

Furthermore, contrary to respondent's argument, the evidence was far from *overwhelming* that Roy killed Laurie, and attempted to kill Angie, and did so intentionally, and while of sound mind. Roy's mental state was a hotly contested issue at the guilt, sanity and penalty phases of the trial. Defense experts testified that Roy suffered from neurological damage to his frontal and temporal lobes, which affected his judgment, impulse control, and emotions, and very likely caused him to suffer from recurrent outbursts of aggression and rage. Experts for the defense also opined that Roy had no control over his actions at the time of his crimes, and suffered from a seizure-related, postictal lapse of memory in the hours that followed. (See, AOB, pp. 39-43.) Roy's medical and mental health history included much corroborating evidence, including a blow with a baseball bat that could have produced an injury to the brain, prior mental hospitalizations, seizures, and prior explosive episodes involving violence against other women. Just because prosecution experts offered rebuttal evidence does *not* render the prosecution's evidence for "overwhelming." In weighing the credibility of defense and prosecution experts, it is unlikely the jury was capable of discounting evidence that Roy was accused of murder and attempted murder, yet did and said nothing consistent with his professed lack of recall. Reversal of the entire judgment is required. (Accord: Wainwright v. Greenfield, supra, 474 U.S. 284 [affirming the Eleventh Circuit's judgment, reversing a defendant's conviction for sexual battery based on prosecutorial comment on the accused's post-arrest silence to rebut a defense of not guilty by reason of insanity].)

Respondent argues that defense counsel also made a reference to Roy's silence during his initial encounter with the police. Respondent implies that this reference renders the prosecution's Doyle error harmless. (RB, p. 288, fn. 86.)

Defense counsel's reference came after the motion for mistrial based on Doyle error was denied. Counsel was obviously attempting to mitigate the damage produced by the earlier testimony regarding Roy's post-arrest demeanor and silence. (RT 5927.) Counsel's valiant effort to make a silk purse out of a sow's ear does not render the error harmless beyond a reasonable doubt.

For reasons previously stated, respondent has failed to meet his burden of proving that the error was harmless beyond a reasonable doubt. The entire judgment must, accordingly, be reversed. Furthermore, Doyle error in this case was far from harmless; it resulted in a violation of Roy's fundamental constitutional rights to due process of law, and to heightened reliability in death sentencing required by the Eighth Amendment.

XXXVI

APPELLANT WAS PREJUDICED BY THE ERRONEOUS RECEIPT OF EVIDENCE THAT THERE WAS UNDATED SEMEN PRODUCED BY SEXUAL AROUSAL ON HIS UNDERSHORTS.

Appellant does not dispute the definition of relevant evidence set forth in Evidence Code section 210, or the existence of a general rule which provides for appellate court review of trial court "relevance" for abuse of discretion. (RB, p. 290; People v. Gurule (2002) 28 Cal.4th 557, 614; People v. Waidla (2000) 22 Cal.4th 690, 717.) Appellant rejects, however, the argument that the abuse of discretion is only shown by proving that the trial court exercised its discretion in an arbitrary, capricious, and patently absurd manner. (RB, p. 290; citing People v. Jordan (1986) 42 Cal.3d 308, 316.) Elsewhere in his brief, respondent admits that a trial court lacks discretion to admit irrelevant evidence. (RB, p. 295; citing People v. Heard, supra, 31 Cal.4th at p. 973.)

Furthermore, the case cited for this proposition – People v. Jordan – addresses a trial court's exercise of discretion under Penal Code section 1170.1(h) to strike several enhancements. In that context, this Court reviewed the trial court's exercise of *sentencing* discretion to determine whether the it was done in

an arbitrary, capricious or absurd manner. The Jordan case does not involve review of a trial court's admission of evidence. In this case, the trial court's ruling should be reversed if legally unsupported, i.e., if there was an inadequate nexus between a semen stain of unknown age and origin and the alleged attempted rape. (Cf. Patterson v. Texas (Tex. App. 2002) 96 S.W.3d 427, 434-435; cited at RB, p. 291 [evidence of semen stain on comforter was properly excluded where there was no evidence showing that the stain was left by the complainant's assailant]; see also, State v. Smith (N.H. 1992) 607 A.2d 611, 524-526 [evidence of sexual assault victim's infection with venereal disease was "unreasonable and to the prejudice of [the defendant's] case" where the disease could have been transmitted from mother to child at time of birth as well as from close genital contact.].)

Respondent cites People v. Vallez (1978) 80 Cal.App.3d 46, 56, and People v. Smithey (1999) 20 Cal.4th 936, 974, in support of the merits of the trial court's ruling. (RB, p. 291.) Neither case involves admission of a semen stain of unknown age and origin to prove that an attempted rape or rape.

In Vallez, the defendant argued that the trial court should have disallowed, *sua sponte*, expert testimony that semen stains on the victim's nightgown were from a man with type A blood. The defendant, as well as 40 percent of the world's population, had type A blood. The Court of Appeal found the error waived and did not consider the argument that the evidence was more prejudicial than probative. (Id., at p. 56.) In addition, the court found that the evidence was relevant and admissible.

In this case, defense counsel strenuously objected to the receipt of the evidence on multiple grounds, including relevance, notice and untimely testing and violation of discovery. (See, AOB, pp. 401-402, fns. 67 & 68.) The state's criminalist, Andrea DeBondt, could not say that the stain had been made by Roy; furthermore, not even the age of the stain could be determined. (RT 5544-5549.) There was no evidence of semen on the victim or her clothing, and hence, there was not even circumstantial evidence tending to establish that the stain must have

occurred during the alleged attempted rape.

Respondent argues that this Court should *presume* Roy was wearing the dirty boxers at the time of the crimes because he was wearing the boxer shorts when arrested, at about noon the next day. However, the police seized Roy's dirty laundry from the trunk of his car before laundering; a pair of black drawstring pants found in the bag of dirty clothing was tested. It was stained with human blood consistent with Angie's blood type. (RT 4686-4689, 4694.) This evidence is consistent with Roy's testimony that he had changed his clothing before the police came, and put what he was wearing in the laundry. (RT 5910-5913, 6860-6861.) Moreover, it tends to impeach the rebuttal testimony of Donna Kellogg, that she did not request, or collect Roy's dirty laundry on the morning of his arrest.

Even if there was credible evidence that Roy was wearing the soiled, stained boxer shorts at the time of the crime, the probative value of the evidence was extremely tenuous in comparison with its prejudicial effect. The state's own criminalist could not date the stain. Given that Roy lived with his girlfriend, with whom he was sexually active, the presence of semen on the boxer shorts had little tendency in reason to prove that Roy was sexually aroused by Laurie on the night of Laurie's death. (People v. Schultz (Ct. App. Ill. 19987) 506 N.E.2d 1343, 1346.)

Respondent cites People v. Smithey, supra, for the proposition that evidence does not become irrelevant because it is cumulative of other evidence. (RB, p. 291.) In Smithey, however, the issue was whether the trial court erred by admitting into evidence the victim's identification card, which had a bloodstain on it consistent with the victim's genetic markers. (Id., at p. 974.) The Court held that the blood-stained card was not irrelevant merely because it was cumulative of other items of evidence found stained with blood. (Id., at p. 975.)

Appellant's contention is *not* that evidence of the semen stain was *cumulative*. To the contrary, evidence of a semen stain on Roy's boxer shorts was the *only* forensic evidence suggestive of sexual arousal or activity. Yet the

evidence lacked probative value, absent any evidence of a nexus between the stain and Roy's activity on the night of the crimes. Otherwise, there was no semen anywhere on Laurie's body or clothing, or at the scene of the assaults, suggestive of a forcible, sexually motivated attack. (See, AOB, & ARB, Argument III [insufficiency of evidence to prove attempted rape].) That is precisely why the evidence was so prejudicial that its admission cannot be written off as harmless. (Cf. People v. Smithey, supra, 20 Cal.4th at p. 975 [admission of the blood-stained identification card, even if error, could not have prejudiced the defendant].) Without this evidence, the jury would have had *no* evidence upon which to even speculate that Roy's assault on Laurie constituted attempted rape. The error infected *both* the guilt and penalty phases because the attempted rape conviction, and the attempted rape-murder special circumstance, finding were integral to the jury's selection of the death penalty. A conviction of a capital crime which is not supported by substantial evidence violates due process of law and a reliable penalty determination guaranteed by the Fifth, Eighth and Fourteenth Amendments. (Jackson v. Virginia, supra, 428 U.S. 280; Beck v. Alabama, supra, 447 U.S. 625.) Reversal of the conviction and death sentence is required.

XXXVII

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

Respondent argues that it was *not* error to admit testimony by Donna Kellogg and Detective Caudle regarding when Donna Kellogg last had sex with Roy, and regarding whether Roy had admitted having recent sex with other women. Respondent argues that this evidence was relevant and admissible to prove that the stain on Roy's boxer shorts did not occur during a recent encounter with Donna or some other woman – not for the improper purpose of showing that Roy must have tried to rape Laurie because he suffered from a frustrated libido. (RB., pp. 295-296; cf. People v. Flanagan (Ct. App. Mich. 1983) 342 N.W.2d 609, 612-613; People v. Sterling (Ct. App. Mich. 1986) 397 N.W.2d 182, 232-233; People v. Travis (Ct. App. Mich. 1983) 342 N.W.2d 609.)

The weakness inherent in this analysis is that the state's own witnesses admitted they could not determine when the boxer shorts were stained or by whom, or whether Roy was wearing them at the time of the crimes. (See, Argument XXVI, ante.) Assuming evidence of the semen stain was erroneously admitted, it was also improper to admit testimony regarding Roy's lack of sexual activity with Kellogg – who was pregnant – and other women for the purpose of showing that the semen stain could not have been the product of recent sexual activity with someone other than Laurie.

If the evidence was received for such a limited purpose, the record on appeal does not reflect it. Furthermore, the prosecutor never argued to the jury that Roy's lack of sexual activity with Kellogg and other women was probative of the age of the semen on the boxer shorts. The jury was free to consider Roy's supposed sexual deprivation for any purpose; the logical inference to be drawn was the improper one – that Roy's sexual deprivation provided a motive to commit rape. (Ibid.)

Respondent argues that even if error, the admission of evidence of Roy's sexual deprivations was harmless according to the Watson standard. (RB, p. 297.) Respondent tries unsuccessfully to compare and contrast People v. Travis, supra, and People v. Flanagan, supra, on their facts. In People v. Travis, the judgment was *reversed* based on improper questioning by a prosecutor about the frequency of the defendant's sexual contact with his wife. That case, like this one, involved alleged criminal sexual conduct with a young teenage girl. The defendant denied the charge, and offered testimony from numerous family members that the alleged sexual acts could not have occurred without their knowledge. The conviction was *reversed* because the jury was faced with weighing the defendant's credibility against that of the complaining witness; testimony that the defendant and his wife slept in separate rooms, and had not had sex for about four years was found prejudicial because of the inference that a man who had not had sexual intercourse was more likely to commit rape than one whose desires were regularly satisfied. (People v. Travis (1929 Mich.) 224 N.W. 329, 330.)

In People v. Flanagan, supra, which *affirmed* the convictions based on a harmless error analysis, the defendant was also accused of forcibly abducting at knife point, and raping two 13 year-old girls. The girls escaped and immediately called the police and were transported to a hospital. The girls gave consistent accounts of the rape, and one suffered from small vaginal tears consistent with the claim of a rape. The defendant admitted picking up the girls, but claimed the rape charge was fabricated as revenge because he had refused to supply the girls with marijuana. Given this significantly stronger evidence of rape, the Michigan court concluded the defendant could *not* have been prejudiced by receipt of his testimony regarding his marital problems and divorce. (342 N.W.2d at pp. 612-613.)

Contrary to what respondent argues, this case is more like the Travis case than the Flanagan case. Here, the state's evidence supporting Roy's commission of an attempted rape was very weak. (See, AOB & ARB, Argument III.) There

was no physical injury consistent with a rape, and no forensic evidence of sexual contact between Laurie and Roy on Laurie's body or on her clothing. At the time she was found, she was fully clothed, except for her disturbed bra, which could easily have been displaced when she was dragged on the ground and/or thrown in the trunk of the car. At most, there was evidence of some prior romantic or sexual interest on Roy's part, which does not necessarily bespeak a motive to rape. The night of the crimes, Roy sexually propositioned Angie as well as Laurie; when Angie declined, Roy voluntarily desisted. He did not attempt to force her to participate in any sexual act.

Consequently, evidence that Roy had not had sex with his girlfriend or any other women for several weeks had much greater potential to cause prejudice than did evidence of the defendant's marital discord and divorce in the Flanagan case. Given the weakness in the overall evidence proving the attempted rape, evidence of Roy's sexual deprivation or abstinence could well have been the deciding factor in the jury's guilty verdicts on the attempted rape count and the attempted rape murder special circumstance finding. A conviction of a capital crime that is not supported by substantial evidence violates due process of law, and denies Roy a reliable penalty determination, in violation of the Fifth, Eighth, and Fourteenth Amendments. (Jackson v. Virginia, supra, 428 U.S. 280; Beck v. Alabama, supra, 447 U.S. 625.)

XXXVIII

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

A. Background.

Appellant has adequately summarized the facts surrounding the admission of emergency room doctor Ann Fisher's testimony at pp. 409-410 of the AOB. Additional factual material will be discussed in the ARB in the context of appellant's arguments in reply.

B. Discussion.

1. Applicability of Crawford v. Washington (2004) 541 U.S. 36, and the Confrontation Clause.

In Crawford v. Washington, supra, the U.S. Supreme Court abandoned 25 years of *Confrontation Clause* precedent, dating back to its holding in Ohio v. Roberts (1980) 448 U.S. 56. Crawford holds that whenever the state offers hearsay evidence against the accused that is "testimonial" in nature, the Sixth Amendment requires a showing of (1) unavailability and (2) a prior opportunity for cross-examination. (541 U.S. at p. 68; overruling Ohio v. Roberts, supra, to the extent it sanctions admission of "core testimonial statements that the *Confrontation Clause* plainly meant to exclude.") Crawford makes it clear that the Confrontation Clause is a rule of procedure, not of evidence. In the wake of Crawford, the admissibility of " testimonial" statements – i.e., those that a declarant would reasonably expect to be used for evidentiary purposes – no longer turns on the "vagaries of the rules of evidence, much less [on] some amorphous notions of 'reliability.'" (541 U.S. at p. 61; internal citations omitted.)

Recently, the Ninth Circuit Court of Appeals held that the Crawford rule was a watershed rule of criminal procedure, and thus retroactive. (Bockting v. Bayer (9th Cir. 2005) 2005 U.S. App. LEXIS 9973; see also, Bockting v. Bayer (9th Cir. 2005) 399 F.3d 1010.) Respondent does not contend otherwise. (See,

People v. Harrison (2005) 35 Cal.4th 208, 239 [assuming, without deciding, that Crawford is retroactive].)

Respondent defines the threshold question in this case as whether the hearsay statements of Angie were "testimonial." (RB, p. 300.) Respondent assumes that the declarant – Angie – though present at trial, was not subject to meaningful cross-examination regarding the statements attributed to her because she suffered from amnesia; therefore *Confrontation Clause* analysis applies. Appellant so contends. "If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements." (United States v. Cromer (6th Cir. 2004) 389 F.3d 662, 679.) "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (Crawford v. Washington, supra, at pp. 68-69.) There was no meaningful confrontation in this case.

Angie was seen in the emergency room at 4:50 a.m. (RT 5242.) Dr. Fisher completed an emergency room record, by asking questions, and noting Angie's answers, at about 9:45 a.m.. She asked Angie if she had been threatened with harm in any way. According to written notations in a medical form, Angie responded "that the person who injured her would kill them if not quiet." (RT 5244.) The doctor had no memory of her conversation with Angie. (RT 5245.) Angie did not recall anyone asking her questions, other than in the ambulance. (RT 5157.) Angie reviewed the emergency room medical report at trial (People's Exhibit 74), but it did not refresh her recollection about the substance of the statement. (5159.) Consequently, Roy's lawyers had no opportunity to confront and cross-examine Angie about these alleged statements, that were clearly offered to prove the truth of the fact that Roy had threatened to kill Laurie and Angie if they were not "quiet."

Nevertheless, Crawford states

> "that, when the declarant appears for cross-examination at trial, the *Confrontation Clause* places no constraints at all on the use of his prior testimonial statements. [Citation omitted.] It is therefore irrelevant that the reliability of some out-of-court statements '"cannot be replicated, even if the declarant testifies to the same matters in court"' [citation omitted]. The Clause does not bar admission of a statement *so long as the declarant is present at trial to defend or explain it.* (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.)"

(Crawford, supra, at p. 59; emphasis added; People v. Morrison (2004) 34 Cal.4th 698, 720.) Accordingly, despite respondent's failure to discuss the issue, as a threshold inquiry, appellant will address the question of whether there was no *Confrontation Clause* violation because Angie was present and testified at the trial.

This issue has yet to be fully addressed by the U.S. Supreme Court or this Court in the post-Crawford period. There is prior case law – however, distinguishable – suggesting that a witness's significant failure to recollect a prior hearsay statement, received in evidence, does not necessarily violate the accused's right of confrontation and cross-examination

In California v. Green (1970) 339 U.S. 149, for example, the U.S. Supreme Court considered whether the defendant's Sixth Amendment rights were violated by the receipt of portions of a key witness's preliminary hearing testimony to prove the truth of the matter asserted. (Evid. Code,§ 1235.) During the witness's direct-examination at trial, the prosecutor read excerpts from the preliminary examination transcript because the witness claimed he no longer recalled the actual events as reported at the preliminary hearing. The U.S. Supreme Court found no *Confrontation Clause* violation in this circumstance; however, the witness in Green had been subjected to rigorous cross-examination during the preliminary examination, at a time when he still claimed he recalled the incident, unlike Angie in this case. In Green, the U.S. Supreme Court's ruling was narrow: "the Confrontation Clause does not require excluding from evidence the prior

statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and present version of the events in question . . . ." (California v. Green, supra, 399 U.S. at p. 164.) Angie was unable, due to a total failure of memory, to confirm that the statement was made.

More importantly, because the issue was not ripe for determination, Green did not decide whether the witness's "apparent lapse of memory so affected Green's right to cross-examination as to make a critical difference in the application of the *Confrontation Clause*. . . ." (Id., at pp. 168-169 & fn. 18.) Here, the record shows that Angie's failure of memory was total. The question is ripe for review.

In United States v. Owens (1988) 484 U.S. 554, the victim was a correctional counselor who was brutally beaten with a pipe. His memory was severely impaired. Initially, the victim was lethargic and unable to remember his attacker's name. Several weeks later, at a subsequent interview, he named the attacker and identified him from photographs. At the trial, the counselor described the attack, and clearly remembered identifying the defendant as the attacker during the latter interview. On cross-examination, he admitted he did not presently recall seeing his assailant during the attack. The defense tried unsuccessfully to impeach the counselor, using hospital records indicating that he had earlier attributed the assault to someone other than the defendant. The U.S. Supreme Court held that the *Confrontation Clause* was not violated by the admission of the counselor's statement, identifying the defendant as the attacker, because he was unable due to memory loss to testify concerning the basis for the identification. (Id., at p. 564.)

In this case, the issue is not identification. Rather, hearsay was relied upon to establish the premeditation, deliberation and intent elements of murder and attempted murder, and the witness-killing special circumstance allegation. Hearsay attributed to Angie was the only evidence that Roy threatened to kill the girls before they were strangled. Unlike the circumstances presented in Owens,

the denial of meaningful confrontation and cross-examination was total. Angie did not remember making the statement at all; she did even recall answering the doctor's questions. Reviewing the written record of the statement did nothing to refresh her recollection. Not even the doctor could recall the statement. This is precisely the issue left open in Green – whether the *Confrontation Clause* is violated by the admission of a hearsay statement to prove the truth of the matter asserted, when the witness testifies, but cannot affirm or contradict the accuracy of the statement, or whether it was made at all, due to a total loss of memory.

In People v. Perez (2000) 82 Cal.App.4th 760, another distinguishable case, a witness to a gang shooting repeatedly testified "I don't remember," or "I don't recall" as to virtually all questions asked regarding what she saw on the night of the murder. (Id., at p. 763.) Her statement to police detectives was admitted as a prior inconsistent statement. (Evid. Code, § 1235.) The Court of Appeal found ample support in the record for the court's finding that the witness was being deliberately evasive at the trial. In addition, on cross-examination, defense counsel led the witness to testify that defendant was *not* the person who shot the victim. (Id., at p. 766.) No violation of the *Confrontation Clause* was found.

In this case, Angie was *not* being deliberately evasive. Her total loss of memory was genuine, as was the doctor's failure to recall. There was no way for the defense attorneys to cross-examine her about the veracity of the statement, or even the accuracy of the doctor's report. A violation of the *Confrontation Clause* did result.

A recent Court of Appeal decision rejected a similar *Confrontation Clause* challenge in the wake of Crawford; however, due to a subsequent review grant and depublication order, the case is not citable as precedent. (See, People v. Harless (2004) 125 Cal.App.4th 70 [holding no *Confrontation Clause* violation where a testifying minor in a sex abuse case could not remember what she had said or to whom she had said it]; review granted, depublished by People v. Harless,

2005 Cal. LEXIS 3145 (Cal. Mar. 23, 2005; later proceeding at People v. Harless, 2005 Cal. LEXIS 3774 [counsel appointed to represent the defendant on appeal].) This Court has yet to directly decide the issue left open in Green.

A recent Ninth Circuit decision held that restrictions on cross-examination can render use of a prior statement violative of Sixth Amendment confrontation rights. (United States v. Wilmore (9th Cir. 2004) 381 F.3d 868.) The case is consistent with other cases holding that evidence rules that significantly undermine the effectiveness of cross-examination offend the Sixth Amendment, even if the witness has been questioned in open court. (Smith v. Illinois (1968) 390 U.S. 129; Davis v. Alaska (1974) 415 U.S. 308; Delaware v. Van Arsdall (1986) 475 U.S. 673.) In this case, cross-examination was not restricted, but the impact was the same. The loss of memory suffered by Angie, who made the statement, and Dr. Fisher, who recorded the statement, so undermined any potential for cross-examination that it resulted in a *Confrontation Clause* violation just the same as if Angie had not testified at the trial.

Assuming Angie's mere bodily presence at the trial does not defeat appellant's *Confrontation Clause* claim, the next question is whether the statement was "testimonial" within the meaning of Crawford. Respondent argues that it was not. (RB, pp. 300-301.) Appellant submits that the "testimonial" character of the statement to Dr. Fisher turns on whether the police were already involved, so that the doctor's questioning was, in a sense, part of the police investigation. (People v. Sisavath (2004) 118 Cal.App.4th 1396; People v. Cervantes (2004) 118 Cal.App.4th 162; People v. Vigil (2004 WL 1352647 (Colo. App.; June 17, 2004, cert. Granted 2004 WL 2926003 (Colo. December 20, 2004); People v. Cage (2004) 120 Cal.App.4th 770; review granted, depublished by People v. Cage (2004) 19 Cal.Rptr. 824; People v. Harless, supra; see, also In re T.T. (Ill. App. 2004) 815 N.E.2d 789; Idaho v. Wright (1990) 497 U.S. 805 [a pre-Crawford case holding that the admission of a child sexual abuse victim's hearsay statements made to a doctor who examined the victim pursuant to a police sex abuse

investigation violated the *Confrontation Clause*].) The record on appeal clearly establishes that Dr. Fisher asked Angie questions regarding the offense as a component of an ongoing police investigation. Her statements were therefore "testimonial."

Angie's alleged statement was read by Dr. Fisher from People's Exhibit 74, entitled "State of California Medical Report – Suspected Sexual Assault." (Supplemental Clerk's Transcript #1 [hereafter SCT #1], p. 424-428.) The form was a publication of the State of California's Office of Criminal Justice Planning; pursuant to California law, any physician who conducted a medical examination for evidence of a sexual assault was required to fill it out. (Pen. Code, §13823.5; Pen. Code, § 11160-11161; SCT #1, p. 424.) This form included a list of questions designed to elicit information from a victim regarding "methods employed by perpetrator." (SCT #1, p. 425.) The statement attributed to Angie – "to kill them if not quiet" – was written in a blank in this section, provided on the form to list "Threat(s) of harm." (SCT #1, p. 425.) The form was signed by Detective John Souza, who acknowledged receipt of the evidence collected by Dr. Fisher, and the original copy of the medical report. (SCT #1, 428.) Without naming Detective Souza by name, Dr. Fisher acknowledged that there were police officers present during questioning. (RT 5257.)

The statement was generated under circumstances that would have led the hearsay declarant, Angie, to reasonably conclude that her statement would be available for use at a later trial. (Crawford v. Washington, supra, 541 U.S. at pp. 51-52; see also, White v. Illinois (1992) 502 U.S. 346, 365 [Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment].) "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ." (Crawford v. Washington, supra, at p. 56.) There can be no question, on the facts of this case, that the hearsay statement was "testimonial" as that term is used in Crawford, because the unique potential for abuse was palpably present.

People v. Sisavath, supra, 118 Cal.App.4th 1396, is in accord. In that case, a sexual assault victim was interviewed by personnel at a professional facility designed and staffed for interviewing children suspected of being victims of abuse. The court allowed testimony by a district attorney who attended the interview. The Court of Appeal held that Crawford was violated because the use of the victim's "testimonial" statement for prosecution purposes "was reasonably foreseeable by an objective observer." (Id., at p. 1402, fn. 3; cf. People v. Cervantes, supra,118 Cal.App.4th 162 [no violation of the Sixth Amendment where the witness made statements to a friend from whom he had sought medical assistance, without any reasonable expectation that his statements would be used at a later trial]; People v. Cage, supra, 120 Cal.App.4th 770; review granted, depublished [statement to the doctor at the hospital was nontestimonial; statement to officer at the hospital was not testimonial where the police had not yet focused on a crime or a suspect, there was no structured questioning, and the interview was informal and not recorded].) In this case, the interview was formally conducted in compliance with California law, as part of an investigation of a possible sexual assault. Questions about the perpetrator's "methods" were not asked for diagnostic and treatment purposes; the questions were asked by Dr. Fisher nearly five hours after Angie's admission to the emergency room. (RT 5242-5243.) In addition, the questions were asked in the presence of an investigating officer, who took the original "Medical Report – Suspected Sexual Assault," along with the evidence collected for use in a future criminal prosecution. It was reasonably foreseeable by any objective observer that the statement might be used in criminal proceedings. The statement's admission into evidence similarly violated the *Confrontation Clause.*

Even if Angie's statement was not "testimonial," there was a *Confrontation Clause* violation under the constitutional framework for analyzing the reliability

of nontestimonial hearsay, set forth in Ohio v. Roberts, supra.[40] The testimony of Dr. Fisher, reading into the record the statement of Angie regarding the perpetrator's death threat, does not bear adequate indicia of reliability to permit its receipt, without violating the *Confrontation Clause.*

The following incident illustrates the problem. Judge Fitch struck from Dr. Fisher's testimony another statement from the same section of People's Exhibit 74, which indicated "thrown from car." (SCT #1, p. 425; RT 5257.) This statement was elicited by defense counsel on cross-examination of Dr. Fisher. It would have supported the defense's contention that Laurie's clothing was likely disturbed while she was dragged and thrown, rather than during a sexual assault. The trial court struck this part of Dr. Fisher's testimony because she admitted that she was not certain of the source of the statement, "thrown from a car." (RT 5257.) Dr. Fisher stated that she might have written some things down in the medical record that came from a source other than Laurie. (RT 5254, 5256.) Although Dr. Fisher did not recall officers giving her any information about Angie being thrown from a car, she acknowledged there were some officers there. (RT 5257.) Dr. Fisher's testimony leaves open the possibility that the hearsay written in the suspected sexual assault report was derived from sources other than Angie, as well as the possibility that the statement was inaccurately heard or transcribed. Under the circumstances, admission of the statement as past recollection recorded and a spontaneous utterance violated the *Confrontation Clause.*

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[40]Crawford casts some doubt on whether the constitutional framework for evaluating the reliability of hearsay, set forth in Ohio v. Roberts, supra, should apply to the *nontestimonial* statements of a witness who is not present at trial and subject to cross-examination. (Crawford v. Washington, supra, 541 U.S. at p. 61.) However the U.S. high court declined to expressly overrule that aspect of Ohio v. Roberts, thus leaving lower courts bound to follow it. (See, e.g., Agostini v. Felton (1997) 521 U.S. 203, 238 ["If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (Quotations omitted)]; see also, United States v. Hendricks (3rd Cir. 2005) 395 F.3d 173, fn. 7.)

2. Spontaneous utterance.

Respondent cites several dozen cases in support of the contention that the statement was properly received as a spontaneous utterance. (Evid. Code, § 1200. (RB, pp. 301-308.) None compel the conclusion that the statement was properly received in this case.

Respondent cites two U.S. Supreme Court cases: Idaho v. Wright (1990) 497 U.S. 805, 817, and White v. Illinois (1992) 502 U.S. 346, 355, fn. 8. Both cases pre-date Crawford. (RB, p. 307.) In White, statements made by a child sexual assault victim to a mother, babysitter, police officer, doctor, and nurse, were received in evidence under the spontaneous declaration and medical examination exceptions to the hearsay rule. The child was called to the stand, but due to emotional difficulties did not end up testifying. The U.S. Supreme Court held that the firmly rooted hearsay exceptions for spontaneous declarations and medical examinations carried sufficient indicia of reliability to satisfy the reliability requirement posed by the *Confrontation Clause.*

To the extent White stands for the proposition that *testimonial* hearsay may be received merely because it meets firmly rooted hearsay exception requirements, it has been overruled by Crawford v. Washington. The U.S. Supreme Court stated:

> "One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois 502 U.S. 346, 116 L.Ed.2d 848, 112 S.Ct. 736 (1992),* which involved, inter alia, statements of a child victim to an investigating police officer admitted as spontaneous declarations. [Citation omitted.] It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage.' [Citation omitted.] In any case, the only question presented in *White* was whether the *Confrontation Clause* imposed an unavailability requirement in the types of hearsay at issue. [Citation omitted.] The holding did not address the question of whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We '[took] as a

given . . . that the testimony properly falls within the relevant hearsay exceptions.'"

(Crawford v. Washington, supra, 541 U.S. at p. 58, fn. 8.)

In this case, the hearsay was testimonial. Angie's statement was a response to questioning with a law enforcement purpose, that was mandated by state law. In addition, the statement would *not* have satisfied the common law definition of a spontaneous declaration, discussed in Crawford, above. Angie made the "threat" statement not "immediately upon the hurt received," but rather, more than five hours after her arrival at the hospital. Angie knew Roy was her attacker, and may well have had a motive to exaggerate or embellish his culpability for her injuries and the death of her friend. Accordingly, White no longer supports respondent's position.

In Idaho v. Wright, supra, a judgment *reversing* the defendant's conviction for lewd conduct with a minor was affirmed. In that case, the victim was only three years old at the time of the trial; all agreed that she was not capable of testifying. At issue were statements made by the victim to a pediatrician with an expertise in child abuse cases. The U.S. Supreme Court ruled that the child's statements to the doctor did not meet the "indicia of reliability" requirement of the *Confrontation Clause.*

The Court explained: ". . . if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." (Idaho v. Wright, supra, 497 U.S. at p. 820.) In other words, "cross-examination" would be superfluous." (Ibid.) Furthermore, particularized guarantees of trustworthiness may not be proven by reference to other evidence at trial. (Id., at p. 822.) In this case, as in Wright, cross-examination on Angie's statement would have been far from superfluous. The exact words used by Angie could have been critical to the jury's assessment of Roy's liability for premeditated murder, and the witness-killing special circumstance allegations.

A large number of the cases cited by respondent are clearly distinguishable, in that the statements of victims or witnesses were clearly made within a much shorter time after the "exciting" event than in this case. (See, e.g., People v. Poggi (1988) 45 Cal.3d 306, 319 (30 minutes after the attack]; People v. Roybal (1998) 19 Cal.4th 481, 516 ["within minutes" of discovery the body]; People v. Hughey (1987) 194 Cal.App.3d 1383, 1388 [immediately after the victim was heard yelling, "help me"]; People v. Guitierrez (2000) 78 Cal.App.4th 170, 175-177 [written statement with vehicle license number written down three to four minutes after a robbery]; People v. Francis (1982) 129 Cal.App.3d 241, 254 (RB, p. 305) [within 20 minutes of a stabbing]; People v. Farmer (1989) 47 Cal.3d 888, 902-903 (RB, p. 306) [statements made by crime victim to police dispatcher, and responding police]; People v. Jones (1984) 155 Cal.App.3d 653, 662 (RB, p. 306) [30 to 40 minutes after injury while the victim was "dazed"]; People v. Washington (1969) 71 Cal.2d 1170, 1175-1177 (RB, p. 306) [as soon as the victim regained consciousness in the hospital, a little more than an hour after the robbery]; People v. Fratello (N.Y. App. 1998) 706 N.E.2d 1173, 1175-1176 (RB, p. 308) [less than a minute after the shooting victim's car crashed, while he was moaning in pain]; Rufo v. Simpson (2001) 86 Cal.App.4th 573, 590-591 (RB, p.308) [statements made by victim, Nicole Brown Simpson, immediately upon arrival of officers responding to domestic violence calls].)

Commonwealth v. King (Mass. 2002) 763 N.E.2d 1071, and Commonwealth v. Napolitano (Mass. App. Ct. 1997) 678 N.E.2d 447 (RB, p. 308), are cited in support of the proposition that the excited utterances of victims were admissible even though the declarants in those cases later recanted. In King, the spontaneous statements were made at 3 a.m. to a police officer who found the victim of an assault and battery crying and shaking. In Napolitano, the spontaneous statements were made within moments of beating that left the declarant visibly injured and agitated to the point of hysteria. The declarant-victims did not claim any lapse of memory. They admitted making the statements,

but claimed they were only partially true. The defendants were not denied confrontation rights. To the contrary, they called the recalcitrant victims as witnesses for the defense, and sought to immunize the victims against impeachment by the prosecutor with their prior spontaneous accounts of the crimes.

In this case, Angie did not recant; due to lack of memory, she was unable to confirm that the threats were made, or that the hearsay statement was made or accurately recorded. Furthermore, the statement attributed to Angie was made, if at all, nearly five hours after her hospital admission, and many more hours after the events that resulted in her injuries and Laurie's death. Roy did not call Angie as his witness; the prosecutor did. Cross-examination was a virtual impossibility.

Many of the cases cited by respondent are neither relevant nor helpful. For example, People v. Hines (1997) 15 Cal.4th 997, 1036 (RB, p. 303), does not involve a spontaneous utterance, but rather a statement which qualified for the "present sense" exception to the hearsay rule. People v. Jordan (1986) 42 Cal.3d 308, 316 (RB, p. 303), presents a sentencing issue. People v. Brown (1973) 35 Cal.App.3d 317, 323-324 (RB, p. 307), is a "fresh complaint" case, not a spontaneous utterance case. People v. Martinez (2000) 22 Cal.4th 106, 132 (RB, p. 307) deals with the admissibility of computer records. United States v. Catabran (9th Cir. 1988) 836 F.2d 453, 458 (RB, p. 307), presents an unrelated issue regarding the admissibility of computer printouts.

To the extent respondent relies on several decisions in which the "spontaneous utterances" were made many hours or days after the exciting event, the viability of those holdings is now questionable in light of dicta in Crawford, quoted above. The genesis of the presumed trustworthiness of such statements is that they occurred immediately, "upon the hurt received," before the declarant had time to contrive. (Crawford, supra, at p. 58, fn. 8.) The longer the delay between event and "spontaneous utterance," the less likely these cases would survive U.S. Supreme Court scrutiny in the aftermath of Crawford. Cases cited by respondent

are, in any event, distinguishable.

In People v. Trimble (1992) 5 Cal.App.4th 1225, 1234 (RB, 302), for example, there was a two day delay between the crime, a murder, and the spontaneous statement of the murder victim's young daughter, who was a witness. However, during the two days that preceded the statement, the daughter was sequestered in a cabin with her brother and the murderer. It was the departure of the perpetrator and the arrival of two trusted adults that sparked the "immediate, unsolicited, emotional outpouring of previously withheld emotions and utterances." (Id., at p. 1235.) No such circumstances were extant in this case.

In People v. Raley (1992) 2 Cal.4th 870, 893-894 (RB, p. 305, p. 306), the murder victim, while still alive, was rescued by a good Samaritan nearly 18 hours after the fatal attack. While waiting for medical assistance, the victim made statements regarding the sexual nature of the attack. The statements were spontaneously made in response to a comment by another bystander about the victim being raped. Angie's statement about the death threat was not spontaneous, but a response to methodical questioning by Dr. Fisher, who was acting on behalf of the state pursuant to a criminal investigation of a sexual assault. The questioning was conducted many hours after Angie had been safely transported to the hospital and given emergency treatment.

In State v. Bass (N.J. 1987) 535 A.2d 1, 9-10 (RB, p. 305), the admissibility of two "spontaneous" statements were at issue in a child abuse case. The child was asked by his caretaker about healed cigarette burns on his buttocks. The child reported the name of the person who had burned him several years earlier. The second statement occurred when the caretaker flicked a lighter to light a cigarette, and the child spontaneously said not to burn him. Both statements were received as "spontaneous" declarations, even though the statement identifying the abuser was made several years after the abuse had occurred. Apart from whether this case would survive scrutiny under federal *Confrontation Clause* jurisprudence after Crawford, the trial court in Bass concluded that the child's nervous excitement

about the lighting of a cigarette was evidence that the burning incident was still fresh in the mind of the three-and-a-half-year old child when he made the statement identifying his abuser. Manifestly, Bass is not a case involving statements made in response to systematic, state mandated questioning of a suspected teenage sexual abuse victim by a doctor, for law enforcement purposes, many hours after the injuring attack.

Accordingly, even if the statement attributed to Angie is not "testimonial," it does not bear intrinsic indicia of reliability, and therefore does not satisfy the federal constitutional requirements for a spontaneous utterance suggested by the U.S. Supreme Court in Crawford.

3. Waiver of the "true statement" issue.

Respondent argues that appellant *preserved* the issue of whether the prosecutor's met their burden of proving that the statement was made at a time when the fact recorded actually occurred, or was fresh in the witness' mind (Pen. Code, § 1237(a)(1), but did *not* preserve the issue of whether the statement was offered "after the witness testifies that the statement he made was a true statement of such fact. . . ." (Pen. Code, § 1237(a)(3).) Respondent's waiver argument must be rejected.

On October 8, 1993, Ms. O'Neill objected that the statement attributed to Angie on the sexual assault form was double hearsay. (RT 3445.) Angie had no current memory that the threat occurred. (RT 3444, 4952-5133, 5157, 5159.) The prosecutor offered the evidence under the past recollection recorded hearsay objection. (RT 3445-3446.) The Court refused to forbid any reference to the statement in the prosecutor's opening argument based on the prosecutor's representation that he could meet "all four requirements under section 1237(a)." (RT 3448.)

On October 27, 1993, Dr. Fisher testified. Defense counsel objected again when the prosecutor sought to elicit the statement as past recollection recorded. "And we feel he hasn't met his burden." (RT 5241.) The court confirmed that the

objection was brought under Evidence Code section "1237." (RT 5241.) The court asked if the burden had not been met as to a particular subjection. Ms. O'Neill referred to subsection "237(a)(1)," by which she presumably meant 1237(a)(1). (RT 5241.) The defense objected additionally that the statement did not qualify for admission as a spontaneous declaration under Evidence Code section 1240. (RT 5241.) At this point, the Court held one of its many unreported conferences. (RT 5241.) The settled statement for this conference reflects an objection lodged by defense counsel under Evidence Code section 1237, with no particular subdivision indicated. (SCT #7 190.) The settled statement was derived from the trial court's summary of what had occurred off the record; the court indicated the defense had "objected to the statement," and the court had "let it in under 1237 and 1240." (RT 5272.) When the parties resumed proceedings on the record, the court asked if, for the record, counsel were objecting pursuant to "1237." The Court expressed concern with "1237 . . . (a)(1)." (RT 5242.) Dr. Fisher, responding to Mr. Cooper's questions, testified that she first saw Angie at 4:50 a.m., but completed the sexual assault questionnaire at approximately 9:45 a.m. (RT 5242-5243.) The Court stated that its ruling was the same, that there was a "strong inference that the requirement of 1247(a)(1) was met." (RT 5243.)

Appellant has preserved all objections under the rubric of Evidence Code section 1237. The Attorney General and the deputy district attorney, Dennis Cooper, participated in record correction proceedings in the trial court. The settled statement reflects that an objections were made, without limitation, pursuant to Evidence Code section 1237 and 1240. Respondent is bound by the settled record.

If not, then this exemplary of why the trial court's practice of holding all conferences on evidentiary objections outside the presence of the defendant and the court reporter has violated Roy's right to full and fair review of the convictions and death judgment. (See, AOB & ARB, Arguments XXXII and

XXXIII.) It is no longer possible to establish with any specificity what the parties discussed in chambers on October 27, 1993. Ms. O'Neill's on-the-record argument, that Angie did not recall the threat (RT 3444; RT 5159) goes directly to the heart of subdivision (a)(3) of Evidence Code section 1237, which requires that the witness testify that the statement was a "true statement of such fact." The prosecutor's failure to meet the foundational requirements for past recollection recorded has been adequately preserved, or alternatively, must be *presumed* to have been preserved for purposes of addressing this issue on appeal. In any event, the purpose of requiring a "specific" objection is to enable the party proffering the evidence to cure the defect. (People v. Crittenden (1994) 9 Cal.4th 83, 126; cited for this proposition at RB, p. 309.) In this case, the prosecutor could not have cured the defect. The record is clear that Angie did not remember having a conversation with Dr. Fisher, much less the threat itself. (RT 5157-5158.)

Other cases cited by respondent on the waiver issue do not compel a different conclusion. In re Avena (1996) 12 Cal.4th 694 (RB, p. 310), involves the failure to advance a "relevance" objection. People v. Hill (1992) 3 Cal.4th 959, 994-995 (RB, p. 310), and People v. Mitcham (1992) 1 Cal.4th 1027, 1044, present defendants' failure to object to statements on *Bruton-Aranda* grounds. Furthermore, in none of these cases were the objections memorialized in settled statements, because objections were argued off the record, as in this case.

4. The merits of the "true statement" issue.

Respondent effectively concedes that the foundational requirements for past recollection recorded were not met, because Angie could not attest to the veracity of her statement. (RB, pp. 310-311; citing People v. Shirley (1982) 31 Cal.3d 18, 33-34; People v. Parks (1971) 4 Cal.3d 955, 960-961; People v. Blair (1979) 25 Cal.3d 640, 664-666; People v. Simmons (1981) 123 Cal.App.3d 677, 680-683.) Respondent also appears to concede that the statement may lack the necessary indicia of reliability to pass muster under the federal constitution. (RB, p. 311, citing Chambers v. Mississippi (1973) 410 U.S. 284, 298-302.) Consequently,

respondent falls back on his previous argument, that the statement was properly received as a spontaneous utterance. (RB, p. 311.) Appellant has adequately addressed that argument in subsec. 2.

5. Prejudice.

Respondent naturally argues that the error, if any, was harmless, whether evaluated under Watson or Chapman tests for prejudice. It is argued that "even without Angie's statement, there was overwhelming evidence of appellant's intent to commit murder." (RB, p. 312.)

Appellant submits that the Chapman "harmless beyond a reasonable doubt" standard must be applied, because the error violated the constitutional right to confrontation and cross-examination. (See, subsection of this Argument.) Respondent cannot meet this burden. Among other offenses, Roy was charged with intentional murder and attempted murder and the special circumstance of killing a witness. There was no evidence whatever that Roy threatened to kill the girls if they were not quiet, other than Angie's hearsay statement. Evidence that Roy did not "trust" the girls is a far cry from synonymous with evidence that he threatened to *kill* them. Respondent cannot prove beyond a reasonable doubt that this very significant evidence did not weigh heavily in the determination of at least one juror that Roy was guilty of knowingly, intentionally, and deliberately killing Laurie, and attempting to kill Angie, to prevent them from becoming witnesses to his crimes in a future criminal proceedings, and that he deserved to die. Moreover, evidence of the threat to kill could have spilled over into the jury's deliberations on other counts.

Even if the Watson standard is applied, reversal is required. As previously argued in the AOB (p. 415), the hearsay was evidence of a pre-offense statement expressing the intent to commit murder. Its admission rendered the trial fundamentally fair in violation of due process, and deprived the judgment of reliability in violation of the Eighth Amendment. (Dudley v. Duckworth (7th Cir. 1988) 854 F.2d 967.)

XXXIX

APPELLANT WAS PREJUDICED BY DR. SHARON'S TESTIMONY THAT ANGIE WAS REFERRED FOR PSYCHIATRIC CONSULTATION BECAUSE SHE WAS AT RISK FOR POST-TRAUMATIC-STRESS DISORDER.

Respondent argues, in essence, that the trial court did not err by admitting testimony that Angie was referred to a psychiatrist because she was at risk for post-traumatic stress disorder. Respondent asserts the evidence was relevant, and admissible pursuant to the prosecutor's right to tell "a colorful story with descriptive richness." (RB, p. 315-316; quoting Old Chief v. United States (1997) 519 U.S. 172, 186-199.) Ironically, in the Old Chief case, the judgment was *reversed* because the trial court erroneously received evidence a bit too descriptive in its richness – i.e., evidence of the nature of a prior conviction offered to prove the "convicted felon" element possession of a firearm by an ex-felon. If this case stands for any relevant proposition, it is that a prosecutor does not have the unfettered right to present irrelevant, or tangentially relevant evidence merely to paint a colorful picture, where the picture thus painted is more prejudicial than probative. Raising the mere possibility of Angie suffering from post-traumatic stress disorder was highly prejudicial in this case, and completely irrelevant to establishing her great bodily injury. Counsel's objection should have been sustained.

Beyond the foregoing observation, appellant has adequately addressed these arguments in the AOB, at pp. 416-418, and submits on these arguments rather than reiterating them in full here.

XXXX [RB XL]

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

The trial court overruled a defense objection to testimony that Roy was

unemployed and Donna Kellogg's income of $700 per month was his sole source of support. The evidence was received to prove a motive for robbery. (RT 4900-4906.) The trial court's ruling violated well-settled law, that evidence of a defendant's wealth or poverty is not admissible to show a motive to commit crime. (See, AOB, pp. 419-421.) Nevertheless, respondent argues that the trial court did not err. (RB, p. 319.)

Respondent argues that the evidence was not admitted to establish poverty as a motive for taking the girls money. This is contrary to what the record shows; the evidence was offered for this purpose, and the trial court found the evidence relevant to prove the robbery. (See, RB, pp. 316-317; RT 4900-4901, 4906.)

Respondent further argues that the evidence was received to show that "appellant had little or no money at the time he picked up the girls." (RB, p. 319.) Respondent calls Roy's lack of money "significant" because it showed that Roy "needed money that night to put gas in his car so he could drive the girls around and then drive to remote areas to dispose of their bodies." (RB, p. 319.) Appellant does not know what respondent is describing, if not facts establishing a purported "motive" for taking money. Admission of the evidence was therefore error. (People v. Kelly (1901) 132 Cal.430, 431-432; People v. Hogan (1982) 31 Cal.3d 815, 854; People v. McDermott (2002) 28 Cal.4th 946, 999 [cited at RB, p. 318.) The numerous cases cited by respondent for the definition of "relevance," or for the trial court's broad discretion to determine relevance, do not hold otherwise. (See, RB, p. 318.)

Respondent cites United States v. Saniti (9th Cir. 1979) 604 F.2d 603, 604, for the proposition that evidence that a defendant is living above his means is relevant to prove a crime resulting in financial gain. (RB, p. 319.) In this case, however, there was no evidence that Roy was living beyond his means. To the contrary, there was only evidence that he was unemployed and survived on his girlfriend's negligible income. Saniti is irrelevant to this case.

Respondent cites People v. Edelbacher (1979) 47 Cal.3d 983, 1024, for the

proposition that evidence of poverty or indebtedness are relevant to refute a defendant's claim that he did not rob because he did not need money. (RB, p. 319.) In this case, however, the central issue was whether Roy used force or fear to take money from Laurie and Angie at all, not whether Roy committed the robberies because he needed money. (AOB & ARB, Arguments I & II.) When Roy later testified, he sought to minimize the prejudicial effect of the trial court's erroneous ruling by explaining that Donna managed their money, and provided him whatever he needed. (RT 5785-5786.) However, under the "defensive acts doctrine," the state may not use this evidence as a shield to defend against the claim that "poverty" evidence was erroneously received to prove a robbery. (People v. Eilers (1991) 231 Cal.App.3d 288; see also, People v. Scott (1978) 21 Cal.3d 284, 291; People v. Sam (1969) 71 Cal.2d 194, 207-208 ["And even if an appeal is required, counsel obviously cannot be certain of a reversal, and he must therefore take all necessary steps to meet all contentions, including those he considers clearly erroneous."].)

Respondent argues, in essence, that the evidence of "poverty" could not have prejudiced Roy because there was plenty of other evidence in the record that he was on welfare, stole from others for food, and had suffered prior convictions of robbery and theft. (RB, pp. 320-321.) All of this evidence came in *after* the prosecutor was allowed to introduce evidence of Roy's impoverishment in the case-in-chief, for purposes of proving the robbery counts. Much of the evidence of Roy's impoverished circumstances were rehashed during Roy's direct-examination, after the prosecutor was allowed to elicit testimony from Ms. Kellogg, regarding Roy's lack of money. Under the doctrine of defensive acts, mentioned above, defense counsel were at liberty to "take all necessary steps" to minimize the prejudicial impact of erroneously admitted evidence. (People v. Sam, supra, at pp. 207-208.)

Respondent argues that Roy was not prejudiced because the state introduced additional evidence of Roy's pattern of unemployment, and reliance on public

assistance, to show a diagnosis of anti-social personality disorder. (RB, pp. 321-322.) The diagnosis of anti-social personality disorder was not contested by defense experts and not inconsistent with the particular defense theory; hence, the evidence was unnecessary and improperly received for that purpose. (See, RT 8705; AOB & ARB, Argument XLI.)

Furthermore, had the trial court not erroneously ruled that evidence of Roy's impoverishment was admissible to prove the robbery, the defense would have been entitled to a limiting instruction, telling the jury it could not consider Roy's lack of wealth to prove the crime of robbery, only to establish a diagnosis of anti-social personality disorder. Under the circumstances, it would have been futile for counsel to request a limiting instruction, since the evidence of poverty was received as substantive proof that Roy committed robbery and robbery-murder.

Respondent also suggests that Roy suffered no prejudice because evidence of his prior robberies and vehicle theft were received at the guilt phase trial. (RB, pp. 320-321.) It must be recalled that Roy testified on *direct*-examination about his convictions, because the trial court had ruled, over defense objection, that impeachment would be permitted by the prosecutor. (RT 5667, 5680, 5679, 5682, 5692, 5708, 6589, 8225.) Consequently, Roy's testimony about these convictions also falls under the rubric of the defensive acts doctrine, discussed above. Furthermore, appellant contends on appeal that the trial court's ruling, which allowed excessively broad impeachment with prior convictions, was prejudicial error. (See, AOB, pp. 433-440.) Had the trial court correctly ruled, the defense may have been presented very differently.

In any event, evidence of Roy's prior crimes was received for the limited purpose of impeachment. The jury was directed that it could not consider Roy's prior convictions for any purpose except to determine his believability as a witness. (CT 948; CALJIC No. 2.23.) No such instruction was given regarding evidence of Roy's lack of income. To the contrary, the jury was instructed: "presence of motive may tend to establish guilt. Absence of motive may tend to

establish innocence." (CT 951; CALJIC No. 2.51.) The jury was effectively directed to consider Roy's lack of money in determining whether he had a motive to commit, and therefore did commit robberies of Laurie and Angie, and a robbery-murder.

Evidence proving robbery and robbery-murder was exceeding thin. (See, AOB & ARB, Arguments I. & II.) Consequently, since there no substantial evidence to support these convictions, it is reasonably probably that a more favorable verdict would have been reached on the robbery counts, had the evidence of poverty not been received as motive evidence. The robbery convictions must be reversed, even if the Watson standard is applied.

Furthermore, for reasons previously articulated at length in the ARB, Argument VI, because there was constitutionally deficient evidence to prove the robbery-murder special circumstance finding, yet the existence of the robbery-murder special circumstance was considered as an aggravating factor during the jury's death penalty deliberations, the death judgment violates the Eighth Amendment's reliability guarantee. Accordingly, the death judgment must also be reversed.

XXXXI [RB XLI]

APPELLANT WAS PREJUDICED BY THE RECEIPT OF EXPERT OPINION TESTIMONY REGARDING A DIAGNOSIS OF ANTISOCIAL PERSONALITY DISORDER, AND EXCESSIVE EVIDENCE OF HIS LAZINESS, FAILURE TO PROVIDE CHILD SUPPORT, AND LACK OF INTEREST IN OBTAINING EMPLOYMENT AS REBUTTAL EVIDENCE.

Respondent cites the usual panoply of cases defining "relevant evidence," and discussing the broad discretion of trial courts to decide what is relevant. (RB, p. 322.) Appellant does not contest these general principles and will not spend time discussing them.

Respondent argues that it was proper to allow numerous witnesses to testify regarding appellant's laziness, his failure to help with household chores and

children, and lack of interest in finding employment, to support the diagnosis of anti-social personality disorder, and to rebut the testimony of a defense expert witness, Dr. Berg, that Roy claimed he did not marry Donna Kellogg because he did not feel good about the fact that he was not "in a career" and not "earning money." (RB, p. 323-324.)

People v. Daniels (1991) 52 Cal.3d 815, 882 (RB, p. 324), one of respondent's supporting authorities, is inapt. In that case, the issue was the admissibility of an expert's *opinion* testimony that the defendant was a sociopath, and not schizophrenic. No evidence was received in the Daniels case of the defendant's bad character, on the pretense that it bolstered the expert's diagnostic opinion. Appellant is not contesting the admission of contrary expert opinion testimony, but rather the receipt of testimony asserting that Roy was lazy and shiftless.

Lockheed Litigation Cases (2004) 115 Cal.App.4th 558, 563-565 (RB, p. 324) is equally unsupportive of admitting testimony establishing Roy's laziness and disinterest in work. In that case, the issue was whether the trial court erred by excluding expert testimony, based on its conclusion that the epidemiological study relied upon by the expert did not reasonably support his opinion. Appellant does not challenge the receipt of opinion testimony by the state's experts, nor their reliance on social history information to reach a diagnosis. He contests the receipt of large quantities of lay testimony regarding bad behavior and bad character traits – not considered by experts in reaching their opinions – for the pretense of "bolstering" the state's experts' undisputed anti-social personality disorder diagnosis.

In People v. Sundlee (1977) 70 Cal.App.3d 477, 484-485 (RB, p. 324), the issue was whether the trial court erred by allowing the state's arson expert to describe various types of time-delay devices used to start fires. The expert found no evidence at the scene of a time-delay device, but concluded nonetheless, based on his other observations, that one must have been used. The defendant contended

that the expert should have been required to proceed by way of hypothetical questions. The appellate court rejected this contention. It is difficult to see how this holding supports the trial court's receipt of bad character testimony in this case.

Respondent also argues that the trial court did not err by refusing to exclude the evidence as more prejudicial than probative. (RB, p. 325.) Cases cited in support of this proposition bear little resemblance to this case. In People v. Kipp (2001) 26 Cal.4th 1100, 1121-1122 (RB, p. 325), for example, this Court reviewed a death judgment against the defendant for the murder of Tiffany Frizzell; the Court had previously affirmed a death judgment against the same defendant for the murder of another victim, Antaya Howard. The issue in the case was the admissibility of a letter written by the defendant to his wife, admitting that he murdered both women. This Court concluded that the defendant's spontaneous admission to his wife that he raped and killed Frizzell was highly probative on the material disputed issue of his identity as the perpetrator. In reaching this conclusion, this Court considered the fact that the trial court and the prosecutor had been willing to redact from the letter all material that was irrelevant and excessively prejudicial; it was the defendant who insisted on introducing the whole letter with few deletions.

In this case, the opposite occurred. Roy's psychiatric experts had testified *over objection* that Roy suffered from antisocial personality disorder as well as other mental disorders, to which they attributed Roy's loss of consciousness and lack of deliberate intent at the time of the crimes. (RT 7304-7305, 7309-7310, 7664-7666, 8242-8246.) This evidence was not relevant to any contested issue because the defense had counsel offered to stipulate that Roy suffered from anti-social personality disorder. (See, AOB, Argument XXXI; RT 8705.) The state's expert, Dr. Thackrey, had admitted that antisocial personality disorder could co-exist with other mental disorders. (RT 8242.) The judge and prosecutor rejected defense counsels' offer of a stipulation, and insisted on introducing testimony by

multiple witnesses to show that Roy was lazy, unhelpful, and disinterested in employment, ostensibly to prove Roy exhibited the characteristics of the undisputed diagnosis. Whereas the trial court in the Kipp case took steps to minimize the unnecessary prejudice against defendant, in this case, the trial court rejected all defense efforts to limit highly prejudicial evidence of nominally probative value.

Another case, People v. Rodrigues (1994) 8 Cal.4th 1060, 1124 (RB, p. 325), is cited in support of the trial court's broad discretion to admit and exclude evidence pursuant to Evidence Code section 352. That case involves the exclusion of defense evidence to impeach a lay prosecution witness, and has nothing to do with the scope of permissible rebuttal to impeach a defense expert.

People v. Bolin (1998) 18 Cal.4th 297, 321-322 (RB, p. 326), is cited to support the argument that the trial court did not abuse its discretion in admitting the testimony of rebuttal testimony that was relevant and not cumulative. The rebuttal testimony of Donna Kellogg, Tina Edmonds, and Michael Hall *was* cumulative of other evidence that established Roy's life long pattern of failing to hold down a job, and not particularly probative of any material contested fact. Furthermore, the issue in Bolin was whether the trial court erred by finding the prosecutor's criminalist qualified to testify as an *expert* on blood splatter evidence. Appellant does not contest the qualifications of the prosecutor's experts in this case.

Respondent cites People v. Ventura (1991) 1 Cal.App.4th 1515, 1519 (RB, p. 326), for the proposition that a prosecutor "cannot be limited to presenting an opinion when it ha[s] testimonial evidence from percipient witnesses to support such opinion." (RB, p. 326.) In Ventura, the trial court admitted evidence that the narcotics officer called several numbers found on the defendant's beeper, and reached people who asked for the defendant by name, and wanted to purchase a "dove," meaning $20 worth of rock cocaine. The evidence was received to support the expert's opinion testimony that the defendant possessed the drugs for

purposes of sale rather than personal use. The appellate court rejected the argument that the evidence should have been excluded as more prejudicial than probative.

In Ventura, however, the defendant did not offer to stipulate that the drugs were possessed for sale. The purpose of his drug possession was a material contested issue at the trial. In this case, the diagnosis of antisocial personality disorder was not contested by the defense. All testimony that Roy slept late, did not help with household chores, never looked for work, and expressed no dissatisfaction with his lack of a career, used to prove the accuracy of the diagnosis of antisocial personality disorder, was not probative of any *contested* material fact. There was, however, a strong risk that such evidence would weigh heavily with the jury in deciding whether Roy was a bad person, and therefore guilty of all charged crimes, and deserving of the death penalty. (Cf. Owings v. Industrial Accident Commission (1948) 31 Cal.2d 689, 692 [appeal from decision of the Industrial Accident Commission, holding that the petitioner's diabetes was a noncompensable condition]; RB, p. 326.)

Respondent cites Old Chief v. United States, supra 519 U.S. at pp. 186-189, to support the right of the prosecutor's not to stipulate, and to introduce evidence of its own choosing. (RB, p. 327.) However, in Old Chief, the case was *reversed* because the prosecutor *refused a defense offer to stipulate* to the ex-felon element of the crime of possession of a firearm by an ex-felon. The U.S. Supreme Court made it clear that prosecutors are not free to "structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance." (Id., at 183.) The high court found that the "recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, virtually no application when the point at issue is the defendant's legal status, dependent on some judgment rendered wholly independent of the concrete events of later criminal behavior charged to him." (Id., at 190.) By analogy, the prosecutor's interest in providing "evidentiary depth" has little application when

the issue is the strength of an *uncontested* psychiatric diagnosis, founded on a pattern of *uncontroverted* historical behavior that is wholly independent of the concrete criminal events at hand.

Respondent argues that specific instances of Roy's anti-social conduct – such as his failures to look for work, or to provide support for his children -- were relevant and admissible to prove he was fully conscious at the time of the crimes, and continuing his pattern of anti-social behavior. (RB, p. 326.) This justification was not advanced in the trial court, and for good reason. Evidence Code section 1101 prohibits using "evidence of a person's character or a trait of his or her character . . . to prove his or her conduct on a specified occasion."

Ignoring, appellant's due process-based prejudice argument (AOB, pp. 427; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378), respondent argues that the error, if any, was harmless according to the Watson standard. (RB, pp. 327-328.) People v. Boyette (2002) 29 Cal.4th 381, 424 (RB, p. 327) is cited as exemplary. In Boyette, this Court found that the admission of photographs of victims while they were alive was harmless "in light of the strong evidence of guilt, including the defendant's confession." (Id., at p. 424.) In this case, however, Roy was charged with many different crimes and three different special circumstance allegations. The evidence proving many counts and all three special circumstance findings was extremely spare (whether or not this Court finds the evidence constitutionally adequate to survive appellant's challenges to the sufficiency of the evidence). (See, AOB & ARB, Arguments I – VI.) The prosecutor's reliance on an overabundance of bad character evidence increased the likelihood that the jury would both convict Roy and sentence him to die, not based on a fair weighing of the evidence, but rather, based on his antisocial character traits. This rendered the trial fundamentally unfair in violation of due process. (McKinney v. Rees, supra, 993 F.2d at pp.1380-1384.) In addition, it deprived the death judgment of any semblance of reliability in violation of the Eighth Amendment.

XXXXII [RB XLII]

APPELLANT WAS PREJUDICED BY THE INTRODUCTION OF EVIDENCE THAT HE HAD SEX WITH WOMEN OTHER THAN DONNA KELLOGG

Respondent argues that the trial court did not admit "rebuttal" evidence of Roy's sexual activity with women other than Donna Kellogg. (RB, p. 329.) Appellant's argument on this point does refer to "rebuttal," but makes it clear that what he contests is the trial court's decision to allow cross-examination of Roy to elicit evidence of specific acts of infidelity while he was in a relationship with Ms. Kellogg. The purpose of this cross-examination was to "rebut" testimony that Roy regarded Donna Kellogg as his wife. Respondent does not dispute that cross-examination was allowed. Respondent argues that the trial court did not abuse its discretion in allowing cross-examination to elicit testimony about Roy's infidelity with other women. (RB, p. 330.) Two cases are cited in support of this argument. In People v. Gutierrez (2002) 28 Cal.4th 1083, 1147 (RB, p. 330), the defendant was charged with the murder of two men, including his wife's boyfriend, and the residential burglary, kidnapping and aiding and abetting the rape of his wife. The case presents a claim of prosecutorial misconduct, based on a prosecutor's cross-examination of a defense witness, during which he asked the witness whether the defendant had told her of his belief that his wife had given birth to a daughter just to "trap" him, and he did not want the baby, and wanted her to get an abortion. An objection to this evidence was sustained, but the court denied a mistrial. The trial court admonished the jury, and told the prosecutor he could call the wife to testify to rebut the defense' portrayal of the defendant as a loving husband and father. This Court found the denial of a mistrial harmless in light of properly admitted evidence that cast serious doubt on the defendant's role as a good father.

The differences between this case and the Guitierrez case are obvious. In that case, the defendant's wife and her boyfriend were the victims, and the appellate court properly suggests that nonhearsay evidence could have been

introduced to rebut the testimony of a defense witness that the defendant was a loving husband and father. In contrast, Roy's sex life with other women was completely collateral to contested issues in the case. Roy's professed marital relationship with Donna was not relevant to prove his guilt of the charged crimes, or to disprove any asserted defense. The diagnosis of the defense experts did not rest on a claim of marital fidelity. Roy did not testify that he was monogamous. Consequently, evidence that he had sex with women other than Ms. Kellogg on two occasions had little probative value as to contested fact issues, yet the potential to prejudice the jury was tremendous.

People v. Wissenfeld (1951) 36 Cal.2d 758, 765-766 (RB, p. 330), presents facts that are dissimilar from this case. There, the defendant testified and denied having made a bus trip to Reno. The prosecutor cross-examined with a prior inconsistent statement to the police, in which the defendant had admitted going to Reno. This Court held that the trial court did not err in permitting such impeachment. In this case, Roy never claimed sexual fidelity to Donna. Evidence of his infidelity cannot be justified as proper impeachment.

Respondent argues that it was defense counsel, Mr. Kinney, who elicited testimony from the prosecution's rebuttal witness, Dr. Missett, on cross-examination, that Roy had affairs with other women while he was involved with Donna Kellogg. (RB, p. 329.) The questioning of Dr. Missett by Mr. Kinney occurred *after* the trial court had already allowed the prosecutor to elicit evidence of Roy's infidelity. Mr. Kinney may have approached cross-examination differently had the defense objection to such evidence been sustained.

Respondent appears to be arguing that Roy's infidelity was in fact relevant to support the antisocial personality disorder diagnosis of Dr. Missett. (RB, p. 330.) Roy's sexual conduct with other women was no more probative of a contested material fact issue than was evidence of his slothful lifestyle and behavior. (See, AOB & ARB, Argument XLI.) The antisocial personality disorder diagnosis was not contested. The defense offered to stipulate that Roy

suffered from the disorder. (RT 8705) Consequently, for reasons previously explained, the evidence was not properly received as "rebuttal" to bolster the uncontested diagnosis of the state's experts.

Furthermore, evidence of Roy's promiscuous behavior, like evidence of his laziness, was highly prejudicial; it made it likely the jury would determine guilt and penalty issues based on "bad character" evidence, rather than a careful weighing of admissible evidence. This is particularly true with respect to the attempted rape count, and related special circumstance finding, for which there was little solid evidence. (See, AOB & ARB, Arguments III & IV.) Evidence of Roy's promiscuity would have tended to sway the jury toward conviction on those charges, even more so than on other counts. The error was prejudicial because it denied Roy a fair trial, and contributed to convictions on several counts based on insufficient evidence. Furthermore, the error necessarily infected the reliability of the death judgment, in violation of the Eighth Amendment, because the jury considered the convictions, and all special circumstance findings in deciding penalty. The entire judgment should therefore be reversed. (McKinney v. Rees, supra, 993 F.2d at pp. 1384-1385.)

XXXXIII [RB XLIII]

APPELLANT WAS PREJUDICED BY EXCESSIVELY BROAD IMPEACHMENT WITH TWO PRIOR ROBBERIES, MISDEMEANOR MISCONDUCT, AND EXTRAJUDICIAL STATEMENTS ADMITTING OTHER UNCHARGED ACTS OF DISHONESTY, MANIPULATIVE BEHAVIOR OR MISCONDUCT.

Respondent takes the position that the trial court did not abuse its discretion by permitting impeachment with two prior felony robbery convictions, two instances if misdemeanor conduct, and extrajudicial statements by Roy purporting to show dishonesty and manipulation. (RB, p. 1.)

Appellant does not dispute that People v. Castro (1985) 38 Cal.3d 301, 316 (RB, p. 331) sets forth guidelines for analyzing the admissibility of prior felony convictions. Appellant also does not dispute that the trial court must determine

whether the crime is one of moral turpitude, and that robbery is such a crime, involving dishonesty. (People v. Brown (1985) 169 Cal.App.3d 800, 805-806; People v. Collins (1986) 42 Cal.3d 378, 395; People v. Turner (1990) 50 Cal.3d 668, 705; cited at RB, p. 332.) Appellant recognizes that, as a general principle, the trial court is vested with some discretion to determine, pursuant to Evidence Code section 352, whether moral turpitude convictions should be admitted. (People v. Brown, supra, [failure of trial court to exercise discretion under Evidence Code section 352 to exclude or admit robbery conviction].) Furthermore, appellant agrees with respondent that a court will consider, among other important factors, the passage of time since the offense was committed, and the whether the conviction is for the same or similar conduct for which the accused is on trial. (People v. Beagle (1972) 6 Cal.3d 441, 453; People v. Foreman (1985) 174 Cal.App.3d 175, 181; RB, p. 332.)

Appellate counsel is well aware of decisions of the Court of Appeal, some of which are cited by respondent, holding that impeachment with identical prior convictions is not in all cases an abuse of discretion. (People v. Castro (1986) 186 Cal.App.3d 1211, 1215-1218 [prior burglaries in a burglary prosecution]; People v. Johnson (1991) 233 Cal.App.3d 425, 458-459 [prior murder in murder prosecution]; People v. Muldrow (1988) 202 Cal.App.3d 636, 646-647 [prior burglaries in burglary prosecution]; People v. Lewis (1987) 191 Cal.App.3d 1288, 1296-1298 [prior rape in rape prosecution] (RB, pp. 332-333.) Appellant submits that these cases were wrongly decided. Introducing multiple identical convictions to impeach a testifying defendant is prosecutorial overkill, particularly in a death penalty case like this one, where the reliability of the death judgment as well as the convictions are at stake. (U.S. Const., Amend. VIII.) As this Court wisely observed in People v. Beagle, supra, many years ago:

> "A special and even more difficult problem arises when the prior conviction is for the same or substantially similar conduct for which the accused is on trial. When multiple convictions of various kinds can be shown, strong reasons arise for excluding those that are for the same crime because of the

> inevitable pressure on lay jurors to believe "'if he did it before he probably did so this time.'"'"

(6 Cal.3d at p. 453.)

Respondent concedes that Roy was charged with robbery, an identical crime, but asserts that it was not an abuse of discretion to receive evidence of his two prior robbery convictions for impeachment purposes. (RB, p. 333.) Appellant disagrees. This Court has condoned the use of identical prior felonies to impeach, where it would endow the defendant with a "false aura of veracity" to disallow it. (People v. Tamborrino (1989) 215 Cal.App.3d 575, 590; cited with approval in People v. Gutierrez, supra, 28 Cal.4th at p. 1139.) Roy had suffered a number of prior convictions that were available to use for impeachment purposes, other than the identical crime of robbery. It would not have clothed Roy with "a false aura of veracity" to prohibit impeachment with his prior identical crimes. Furthermore, the danger of prejudice was great. Given the slim evidence on which the robbery charges were predicated – Laurie's missing change, and removal of money from Angie's pocket to make a phone call – impeachment with the robbery convictions created "inevitable pressure" on the jurors to believe that if he did it before, "he probably did so this time." (Ibid.; internal quotation marks omitted.)

Respondent also argues that it was *not* an abuse of discretion to permit impeachment with a 1984 misdemeanor burglary and a 1984 misdemeanor vehicle theft. People v. Wheeler (1992) 4 Cal.4th 284, 295 (RB, p. 333), cited by respondent, stands for the proposition that past criminal conduct amounting to a misdemeanor may be used for impeachment if it has some logical bearing on the witness' credibility. Appellant does not deny that burglary and vehicle theft constitute crimes of moral turpitude. (See, e.g., People v. Collins, supra, 42 Cal.3d at p. 395; People v. Green (1995) 34 Cal.App.4th 165, 182; RB, p. 334.) However, the availability of these misdemeanor acts to impeach *strengthens* the argument that it was an abuse of discretion to allow impeachment with Roy's prior

identical robberies. The burglary and vehicle theft were acts of dishonesty that had the advantage of being dissimilar to all of the charged crimes. Furthermore, the misdemeanors and both robberies occurred between 1980 and 1985. The instant crimes occurred in 1991. There was little or no danger the jury would consider the dissimilar misdemeanor acts too remote to be probative. Respondent concedes as much. (RB, p. 334.) Under the circumstances it was an abuse of discretion to allow impeachment with Roy's misdemeanors *and* the prior identical felonies, rather than allowing impeachment with just the former.

Respondent also argues that it was proper to allow impeachment with Roy's prior hearsay statements, which the state claims demonstrated dishonesty and manipulation. (RB, p. 334.) Statements include admissions by Roy to begging and robbing (an unspecified number of times) for food, traveling on public transportation without paying, lying to gain admission to LAC-USC hospital to gain food and shelter, and feigning suicide to get out of juvenile hall, into the hospital. (RT 5755, 5990-5991, 6018-6021, 6666, 6084, 6244-6445, 6390-6395.)

Cases cited by respondent to support this particular exercise of discretion are not on point. In People v. Mickle (1991) 54 Cal.3d 140, 168 (RB, p. 334), the issue was the trial court's refusal to admit letters, proffered by the defense, that would have shown that a prosecution witness had written to judges in criminal cases pending against him, and offered to inform on various people in exchange for leniency. This Court said that it was error to exclude the letters, which would have shown that the witness had a bias, motive or interest. People v. Stern (2003) 111 Cal.App.4th 283, 298-300 (RB, pp. 334-335), presents a nearly identical issue – the erroneous exclusion of a letter offered by the defense to show the motive, bias or interest of a prosecution witness. In People v. Harris (1989) 47 Cal.3d 1047, 1080-1083, the discussion centers on whether a *pro tanto* repeal of Evidence Code sections 790, 786 and 787 was effected by the passage of Article I, section 28(d) to the California Constitution. This Court concluded it did, and upheld the admission of evidence of a witness-informant's past reliability as an

informant. These cases are not germane because they do not address the heightened danger of wrongful conviction that results when a criminal defendant is subjected to excessive or improper impeachment with evidence of prior bad acts.

For a substantive discussion on why it was an abuse of discretion, and a violation of Roy's constitutional rights, to admit evidence of Roy's admissions – which were themselves of questionable reliability -- regarding an assortment of claimed misdeeds, appellant refers the Court to pages of 435-440, where the issue is already discussed at length.

Respondent predictably argues that even if there was error, it was not prejudicial, applying the Watson standard. (RB, pp. 335-336.) It is argued that Roy's behavior on the night of the crimes effectively impeached his own mental defenses. The argument is overly simplistic. Roy was charged with multiple offenses, and multiple special circumstance allegations. His guilt was adjudicated at a the guilt phase, and again at the sanity phase of the trial. The strength of the state's evidence varied greatly from count to count. Substantial evidence to support the robbery and attempted rape counts was practically nonexistent. Evidence of the three special circumstances was also extraordinarily weak. (See, AOB & ARB, Arguments I – IV.) Evidence of Roy's mental state at the time of the offenses was strongly contested. At the guilt phase the defense presented testimony of a neuropsychologist, a neurologist, and a psychologist, in support of defenses of diminished actuality and unconsciousness. Evidence that Roy was mentally *unimpaired* at the time of his offenses was far from overwhelming. Roy's behavior was extremely abnormal, and he had a corroborative history of mental problems that included similar explosive incidents, problems with seizures and blackouts, and prior mental hospitalizations.

Because Roy testified, the prosecutor had an unfettered opportunity to impeach Roy with prior identical felonies, prior dishonest misdemeanors, and an assortment of unspecified robberies, his claimed fraudulent use of public

transportation, and untruthful and manipulative statements and acts attributed to Roy as far back as his juvenile years. While a limiting instruction was given on the jury's use of Roy's prior felonies, no similar limiting instruction was giving to inform that jury that evidence of Roy's other assorted bad acts could not be considered as substantive proof of guilt. (CT 948, 951.) Under the circumstances, it is reasonably probable that the jury's unrestricted use of the "impeachment" evidence adversely influenced at least one juror's determination guilt of one or more offenses, or one or more of the special circumstance findings.

Moreover, the trial court's rulings on impeachment were not just an abuse of discretion; they resulted in a profound 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; United States v. Myers (5th Cir. 1977) 550 F.2d 1036, 1044.) As a result of the excessive evidence of Roy's prior bad acts, he was, unfortunately, tried for "who he is" not for "what he did." (United States v. Myers, supra, at p. 1044.) Because the error occurred in the context of a capital trial, the error also deprived the death judgment of reliability in violation of the Eighth Amendment. Accordingly, the entire judgment must be reversed.

ARGUMENT SECTION 7

(GUILT PHASE INSTRUCTIONAL ERRORS)

XXXXV [RB XLV][41]

APPELLANT WAS PREJUDICED BY THE OMISSION OF 2.71.7.

Respondent has neither conceded nor contested the merits of this claim, and instead argues that there was no prejudice as a consequence of the trial court's failure to satisfy its *sua sponte* duty to give CALJIC No. 2.71.1 [cautionary instruction on oral statements of a defendant showing motive, plan, intent, design]. (RB, p. 338.) The claim of no prejudice should be rejected.

Respondent argues that there was "ample circumstantial and physical evidence of appellant's intent to have sex with Laurie that night." (RB, p. 339.) Respondent does not, however, describe any such evidence. (RB, p. 339.) In fact, there was nearly a total lack of circumstantial or physical evidence of sexual activity, and a dearth of evidence of a plan or motive to have sex with Laurie against her will, *except* for the extrajudicial statements that were attributed to Roy by various prosecution witnesses. (See, AOB & ARB, Arguments III & IV.)

Furthermore, although some of the oral statements had relevance to prove the attempted rape and attempted-rape-murder special circumstance finding, not all had such a limited purpose. Several of Roy's alleged oral statements were also received to prove related counts, such as the kidnapping, robbery, false imprisonment, felonious assault, attempted murder, and first degree premeditated murder counts, and the robbery-murder and witness-killing special circumstance allegation.

For example, Laurie's sister, Angelique, described a number of statements, including Roy's inquiries about the girls' virginity, and whether they would like to have an older experienced boyfriend. (RB 3613.) Michael Hall testified that Roy said of Laurie, "she wants me." (RT 8727, 8849-8852.) In addition,

[41]Appellant inadvertently omitted an argument XLIV (44). Respondent intentionally did likewise. Consequently, in the Reply, appellant also omits argument XLIV.

however, Laurie's brother, William, testified that Roy walked toward Laurie's bedroom with a newspaper in hand and said he was going to see what movie the girls intended to see. (RT 3624-3625.) Laurie's mother testified that after Laurie and Angie left the house, Roy asked her where they had gone. (RT 3584.) Angie testified that Roy asked Laurie to buy him some food. (RT 4976.) She also testified that after the initial assaults, Roy said that he did not "trust" the girls not to tell anyone. (RT 5028.) As discussed in Argument XXXVIII, ante, this particular piece of double hearsay was admitted to show that Roy threatened to kill Laurie and Angie if they were not quiet.

Respondent implies, without actually making the argument, that the oral statements in question might not be "the sort of statements that require the cautionary instruction CALJIC No. 2.71.7." (RB, p. 338, fn. 95.) The only authority cited for this is People v. Carpenter (1997) 15 Cal.4th 312, 426-431 – specifically, the concurring opinion of Justice Baxter. On the cited pages, Justice Baxter makes the argument, not embraced by the majority, that the defendant's statement to the victim, "I want to rape you," is an integral part of the crime, not an admission of the type requiring a cautionary instruction. The majority held that a cautionary instruction was required. (Id., at pp. 392-393.) In any event, numerous of the statements in this case were made in advance of the crimes and were not even arguably a part of the crimes themselves. The Court was required to give CALJIC No. 2.71.7 *sua sponte.*

The only question that remains is prejudice. Respondent cites several cases for the proposition that there was no prejudice, including People v. Carpenter, supra, People v. Shoals (1992) 8 Cal.App.4th 475, 498, and People v. Blankenship (1970) 7 Cal.App.3d 305, 310-313. In Carpenter, there were only two statements attributed to the defendant: "I want to rape you," and a statement to the police, "I just pray that nobody finds Heather's body, or that in fact she has been raped." (Id., at p. 392.) In that case, evidence of the crimes *was* overwhelming. The victim was shot in the face at close range with a gun purchased by the defendant's

friend, and seen in the defendant's possession in temporal proximity to the crimes. The victim had a large concentration of seminal fluid in her vagina, which experts believed was placed there within an hour of the gunshot wound. (Carpenter at pp. 347-347.)

In this case, many oral statements were received to prove motive, plan, design and intent to rape, rob, kidnap, and kill, as well as to prove the rape-murder, robbery-murder, and witness-killing special circumstance findings – not just two. In contrast to the state of the record in Carpenter, in this case, solid evidence to support the robbery and attempted rape counts, and all three special circumstance findings, was sorely lacking. There was no forensic evidence of sexual activity on the victim's clothing or body. The robberies of Angie and Laurie were, for all intents and purposes, predicated on missing pocket change. And the witness-killing special circumstance finding depended on finding that Laurie was killed because she witnessed the nonfatal assault upon Angie. (See, AOB & ARB, Arguments I – V.)

Moreover, the facts purportedly established by the various oral statements were contested. Roy denied having an inappropriate sexual interest in Laurie, or any preconceived plan to meet the girls that night. He also denied attempting to rape or rob either of the girls, or threatening to kill them. This is not a case where the defendant's oral statements could have played no material role in the jury's determination of guilt. A cautionary instruction should have been given.

People v. Shoals is also distinguishable. In that case, the defendant was charged with drug offenses, not capital murder. He was arrested following a parole search of hotel room, which he occupied with a woman. The search yielded large quantities of cocaine base and cash. In Shoals, only one oral statement was attributed to the accused; the hotel manager testified that the defendant had called on the afternoon of his arrest to say he "was renting the room for a lady or something like that." The defendant contended that CALJIC No. 2.71 was wrongfully given because the oral statement was *exculpatory*. The Court

of Appeal found that the *giving* of the instruction could not have been prejudicial. In this case, it is the *failure* to instruct that gives rise to the prejudice.

In People v. Blankenship, supra 7 Cal.App.3d 305, the defendant was charged with arson with the intent to defraud on an insurer, not capital murder. In that case, there was overwhelming evidence to corroborate the accuracy of the witness' testimony describing the defendant's extrajudicial statements. The witness testified that the defendant had told her she intended to burn down the house to collect the insurance, and then, after the fire, the defendant complained that she had to open a gas jet to get the fire started. Prior to the fire, the witness had helped the defendant move her belongings out of the residence and pack them in the trunk of her car. In addition, she had seen the defendant's son siphon gasoline into a coffee can and place it in the service porch area of the house. The witness' observations and statements were consistent with the arson investigator's testimony that the fire was started by a flammable liquid in the service porch area, ignited by an open gas jet. In that case, the trial court reasonably concluded that a properly instructed jury would not have reached a different verdict on the single arson count.

In this case, in contrast, many elements of the prosecution's case depended on the jury's belief that the witnesses had accurately and honestly recalled and described Roy's pre-offense and mid-offense statements, offered to prove motive, plan, design and intent. There was virtually no evidence to corroborate the testimony of Laurie's family members, Angie, or Michael Hall, that these statements were actually made, much less that they were truthfully and accurately recounted. Not even Angie could corroborate the testimony of Dr. Fisher that Angie stated that Roy threatened to kill Angie and Laurie if they were not quiet.

Under the circumstances, the failure to give CALJIC No. 2.71.7 resulted in a miscarriage of justice. Contrary to respondent's argument (RB, p. 338), the error was not rendered harmless by the giving of CALJIC No. 2.71.) The latter instruction is much more general and does not caution against consideration of

statements attributed to a defendant that are offered to show pre-existing intent. Because the jury, in determining penalty, considered all of the guilt phase evidence, including all convictions and special circumstance findings, the lack of a proper instruction deprived the penalty phase judgment of reliability in violation of the Eighth Amendment. The entire judgment must be reversed.

XXXXVI [RB XLVI]

THE TRIAL COURT FAILED TO GIVE AN ADEQUATE INSTRUCTION DEFINING "SEXUAL INTERCOURSE."

Since the filing of the AOB and RB in this case, this Court decided People v. Stitely (2005) 35 Cal.4th 514, which presents the identical issue raised by appellant in this case – the adequacy of the instructions on sexual intercourse. In Stitely, as in People v. Holt, supra, 15 Cal.4th at p. 676, this Court concluded that the term "sexual intercourse" has a common meaning which "can only refer to vaginal penetration or intercourse." (Stitely at p. 554.) Accordingly, no additional instructions were needed to define the term for the jury.

For reasons already set forth in the AOB, at pages 444-448, appellant respectfully submits that Holt and Stitely were wrongly decided and should be reconsidered.

ARGUMENT SECTION 8

(GUILT PHASE PROSECUTORIAL MISCONDUCT)

XXXXVII [RB XLVII]

APPELLANT'S PROSECUTORIAL MISCONDUCT CLAIM SHOULD BE DEEMED PRESERVED; THE PROSECUTOR'S CLOSING REMARKS EXCEEDED THE BOUNDARIES OF PROPER ARGUMENT AND WERE PREJUDICIAL.

Respondent argues that there was no prosecutorial misconduct, but even if there was, it was not prejudicial. Appellant respectfully disagrees.

Respondent argues that the prosecutor's disparagement of trial counsel was waived by the failure to object. (RB, p. 347.) Appellant does not dispute the fact that there was no objection; nor does he dispute the general rules governing waiver of prosecutorial misconduct claims. He does, however, assert that the *exceptions* to the waiver rule apply. Making an objection would have been futile; the court would have overruled the objection. (People v. Arias (1996) 13 Cal.4th 92, 159.) In addition, an admonition would not have cured the harm caused by the prosecutor suggesting that Mr. Kinney was brought in to case belatedly to manufacture a convincing defense, using out-of-area experts. (People v. Bradford (1997) 15 Cal.4th 1229, 1333.) Furthermore, the jurors would have laid blame on Roy's attorneys for being obstructionist. (People v. Hill (1998) 17 Cal.4th 800, 821.) Also, a reviewing court may reach the merits of a claim where the facts are not in dispute, and a pure question of law is presented. (People v. Welch (1993) 5 Cal.3d 228, 235.)

Respondent, of course, argues that an appropriate admonition could have cured the harm; four cases are cited for this proposition. In People v. Bemore (2000) 22 Cal.4th 809, 845-846 (RB, p. 347), the prosecutor made remarks in closing argument about the defense attorney's purported change of defense strategy, first denying the defendant's shoe size was 13, and later admitting it. (Id., at p. 845.) After the third time the prosecutor mentioned the defendant's shoe size,

counsel objected that the prosecutor was implying that counsel had changed defenses and was playing tricks on the jury. (Ibid.) This Court rejected the misconduct claim on the merits, and found that the prosecutor did not accuse counsel of dishonesty in presenting a defense. (Id., at p. 847.)

In this case, the prosecutor's comment unmistakably suggested that Mr. Kinney was added to the legal team at the last minute and "brought with him three witnesses who say that they can see the truth about [Roy]." (RT 9082.) He called it an "11th hour packaging of a not uncommon defense by doctors from out of town which are what [Roy] had been asking for." (RT 9084.) The comments imply a dishonest motive for adding a third counsel: to create "a dramatic effect" by importing out of town doctors who could fool the jury into accepting Roy's phony mental defenses. (RT 9082.) This was not proper comment.

In People v. Miller (1990) 50 Cal.3d 954, 1001 (RB, p. 347), the prosecutor made a clearly improper attack on counsel by stating in closing argument his belief that the attorney had told the jury "a bunch of garbage," and expressing doubt that counsel really identified with the defendant or took the case for anything other than money. (Id., at p. 1000.) The attorney objected to the misconduct but failed to request a curative admonition. This Court found the error waived. (Id., at p. 1001.) The Court also found the prosecutor's remarks understandable, taken in context. (Id., at p. 1001, fn. 19.) The Court pointed out that defense counsel had invited the prosecutor's improper comments by repeatedly suggesting he had taken on the defendant's " 'cause'" as a matter of principle rather than for money, and by saying he "'identified'" with the defendant, who was a "'poor boy,'" just like himself. (Ibid.) In this case, there was no similar invitation to impugn Mr. Kinney's credibility.

In People v. Williams (1996) 46 Cal.App.4th 1767, 1781 (RB, p. 347), the prosecutor argued that the defense attorney had to "'obscure the truth'" and confuse and distract the jury in order to manufacture doubt where none existed. In rebuttal, the prosecutor also took exception to defense counsel's attack on

identification evidence because counsel had presented an alternative, apparently inconsistent theory of defense. The prosecutor urged that defense counsel could not stick to the defense of mistaken identity because "even he knows" the defendant did it. The Court of Appeal addressed the merits, and found that the prosecutor's remarks proper. Appellant contends that Williams is wrongly decided. Attacks on the integrity of counsel are universally viewed as inexcusable under accepted doctrines of courtroom decorum and legal ethics. (People v. Hill, 17 Cal.4th at p. 832; see also, People v. Bain (1971) 5 Cal.3d 839, 847; People v. McCracken (1952) 39 Cal.2d 336, 348; United States v. Matthews (9th Cir. 2000) 240 F.3d 806; Redish v. Florida (1988) 525 So.2d 928, 931; Riley v. State (Nev. 19091) 808 P.2d 551, 556; Yates v. State (Nev. 1987) 734 P.2d 1252, 1255-1256; Bruno v. Rushen (9th Cir. 1983) 721 F.2d 1193, 1194-1195.)

In People v. Crawford (1967) 253 Cal.App.2d 524, 534 (RB, p. 347), the Court noted the lack of a proper objection but addressed the merits of the defendant's prosecutorial misconduct claim. The Court found that the prosecutor's remark, calling the defendant's case "a Perry Mason type case," was not misconduct. The Court explained: "To the contrary, this fictional character is depicted as a man with integrity, and his clients are seldom if ever guilty." (Id., at p. 534.) In addition, the Court that found the defendant's failure to object operated a waiver, since any harm could have been cured with an appropriate admonition. (Ibid.)

In this case, Mr. Kinney was not depicted as a man of integrity, like the fictional Perry Mason. To the contrary, he was portrayed as a hired conjurer whose job it was save the day by finding previously unknown experts from afar to pull the wool over the jury's eyes. (RT 9082.) A curative admonition would have been insufficient to cure the prejudicial impact of the remark.

Respondent argues that the district attorney's remarks were "well within the proper bounds of vigorous argument." (RB, p. 347.) He also asserts that appellant has isolated certain parts of the district attorney's remarks to provide a

"skewed interpretation." (RB, p. 349.) Respondent quotes from this Court's decision in People v. Hill, supra, 17 Cal.4th at p. 819 (RB, p. 348). However, little support for respondent's position can be found in that case. In Hill, the judgment was *reversed* due to prosecutorial misconduct. Throughout the trial, the prosecutor, Ms. Morton, made derogatory comments directed at defense counsel. She called counsel "unprofessional" and "contemptuous" for asking her to stipulate to the length of the jury box. (Id., at p. 833.) In another incident, the prosecutor accused the defense attorney of having "unabashedly . . . . defamed" the prosecutor's fingerprint expert. (Id., at p. 834.)

While there were many other instances of misconduct committed by the district attorney in Hill, all of which contributed to the reversal of the judgment, the acts of disparagement of counsel committed by Ms. Morton had less potential to cause prejudice than did the remarks made in this case. In Hill, the prosecutor's remarks were rude and insulting, but they did not imply that counsel was importing experts to help fabricate a defense. Yet that is what Mr. Cooper clearly implied in this case.

Respondent also cites People v. Bain (1971) 5 Cal.3d 839, 847, as an example of *improper* remarks by a prosecutor attacking the integrity of defense counsel. (RB, p. 349.) In Bain, the prosecutor made a number of remarks, among them some suggesting that the defendant and his attorney had fabricated the defendant's story. This Court held: "The unsupported implication by a prosecutor that defense counsel fabricated a defense constitutes misconduct." (Id., at p. 847.) Furthermore, in Bain, the error was found to be prejudicial even though counsel did not object to each instance of misconduct. If anything, Bain supports appellant.

In this case, the prosecutor argued that a third lawyer entered the picture at the last minute and brought three witnesses with him," and that this amounted to "an 11th hour packaging of a not uncommon defense from doctors from out of town which was what the defendant was asking for." (RT 9084.) The obvious

meaning was that Mr. Kinney came into the case late to help manufacture a defense.

Respondent speculates that the DA's argument was a legitimate attempt to combat the "Perry Mason/Ben Matlock" effect – where something new is brought up in the middle of trial and leaves everyone flabbergasted. (RB, p. 350.) Specifically, respondent suggests that Mr. Cooper was making an oblique attempt to combat the belated BEAM testing, which Dr. Berg and Dr. Kinney used to support their test findings. (RB, p. 349, p. 349.) Respondent's argument might be more convincing if Mr. Cooper had even mentioned the BEAM testing during this part of his argument, or if he had omitted the gratuitous references to the "dramatic effect" of having a third lawyer brought in, to "package" the defense and satisfy Roy's demand for outside experts. The prosecutor also emphasized that, before Mr. Kinney entered the case, the theory of defense was "he doesn't remember." (RT 9082.)

Respondent seeks to distinguish People v. Lindsay (1988) 205 Cal.App.3d 112, 115-118, in which the Court of Appeal held that the prosecutor committed prejudicial misconduct by suggesting that the defendant had failed to reveal his alibi defense before trial. (RB, p. 350.) In that case, the prosecutor commented that it was inconceivable that defense counsel would have let her innocent client sit in jail for five months and not tell anyone about the client's alibi. (Id., at p. 116.) The appellate court found that this was tantamount to error under Doyle v. Ohio (1976) 426 U.S. 610, 619.

The prosecutor's remarks had a similar impact in this case. They insinuated that Ms. O'Neill and Ms. Martinez did not consider Roy's mental defense meritorious; Mr. Kinney had to be brought to advance a belatedly conceived theory of defense. Instead of improper comment on the defendant's right to remain silent, however, Mr. Cooper's argument constituted improper comment on Roy's exercise of his Sixth Amendment right to be represented by a competent attorney with whom he could cooperate and communicate.

People v. Frye (1998) 18 Cal.4th 894, 977-978, is offered as an example of a case in which an assignment of misconduct was rejected on the merits. The case is not like this one. In Frye the prosecutor called the defense attorney irresponsible for suggesting that a prosecution witness might have murdered the victims. This Court found that the remark was not improper because the focus of the prosecutor's criticism was on the lack of any evidentiary support for such a claim. Frye does not involve an improper comment implying that a third attorney had to be brought into a defendant's case at the last minute to fabricate a defense.

Respondent also offers People v. Medina (1995) 11 Cal.4th 694, 758-759, as authority for rejecting this claim of error. (RB, p. 351.) Medina is another case in which this Court addressed the merits and found that no misconduct had occurred. The comment was, "any experienced defense attorney can twist a little, poke a little, try to draw some speculation to try to get you to buy something . . . ." (Id., at p. 759.) This Court held that the remark did not constitute an attack on counsel's integrity. In this case, the prosecutor's remarks did attack Mr. Kinney's integrity as well as the integrity of the "doctors from out of town" who testified on Roy's behalf. Even, worse, the remarks insinuated that there were manipulative and dishonest reasons for bringing Mr. Kinney into the case.

Respondent cites Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-644, and People v. Espinoza (1992) 3 Cal.4th 806, 820, for the proposition that Mr. Cooper's single instance of misconduct did not amount to a "pattern" of misconduct so egregious that it infected the trial with unfairness. It is true that appellant has only assigned this one incident as misconduct on direct appeal – his habeas corpus petition has yet to be filed. It is equally true, however, that the misconduct committed in this case cumulates with an extraordinarily large number of other serious errors committed in this case, to produce a trial that was fundamentally unfair.

For example, Mr. Kinney's addition to the legal team was the direct byproduct of the trial court's earlier erroneous decision to appoint a "facilitator"

in lieu of granting Roy Clark's meritorious motion to discharge the public defenders and appoint different counsel. Roy's evolving relationship of trust with Mr. Kinney exacerbated the lack of communication between Roy and Ms. O'Neill and Ms. Martinez, and led to Mr. Kinney's gradually increasing role in the case. Eventually, the Court had to appoint Mr. Kinney as third counsel. (See, AOB & ARB, Arguments VII – XII.)

The prosecutor's improper remark would have had a dangerous tendency to reinforce in the minds of jurors any suspicion that Roy was dissatisfied with the public defenders because they would not abide by his wishes in tactical matters. It may also have "planted the seed" of suspicion that Mr. Kinney's help was enlisted because of his connections with out-of-area experts who could help bolster a flagging defense. Hence, contrary to respondent's argument, the improper argument did impugn the right to counsel guaranteed by the Sixth Amendment. (See, RB, p. 348.)

Respondent argues that, even if the argument was misconduct, it was not prejudicial. One of the cases cited, People v. Cunningham (2001) 25 Cal.4th 926, 1001, is not particularly supportive. (RB, p. 351.) In that case, the prosecutor's comment was about the defendant's change of *appearance* for the trial, to raise a doubt regarding his identity. The comment in this case was about Roy's *change of counsel*, to which an improper motive was attributed.

People v. Clair (1992) 2 Cal.4th 629, 662, fn. 8, and People v. Sanchez (2001) 26 Cal.4th 834, are cited in support of the presumption that jurors are presumed to have followed the court's instructions. Appellant does not quarrel with the general rule, but fails to see how Clair and Sanchez compel a "no prejudice" finding in this case. In Clair, the Court rejected all the claims of misconduct on the merits, except for one claim, for which there was an objection *sustained* by the trial judge, *before* the remarks reached the level of misconduct. (Id., at pp. 663-664.) Sanchez was not decided in the context of a claim of prosecutorial misconduct at all, much less misconduct of the type committed in

this case.

Accordingly, for the foregoing reasons, as well as the reasons previously articulated in the AOB (pp. 449-453), the prosecutor's misconduct violated Roy's right to a fair trial, and deprived the death judgment of reliability, and therefore requires reversal of the judgment. (U.S. Const., Amends. XIV, XVIII.)

ARGUMENT SECTION 9
(SANITY PHASE ERRORS)

XXXXVIII [RB XLVIII]

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING ROY TO ENTER A PLEA OF NOT GUILTY BY REASON OF INSANITY OVER DEFENSE COUNSELS' OBJECTION.

Roy was allowed to enter a plea of NGI over the objections of his trial lawyers that they had no evidence to support such a plea. Although Roy's *sanity* had not yet been adjudicated, the fact that Roy insisted on disregarding counsels' advice not to enter an NGI plea was used against him at a trial to determine whether Roy was *competent* to stand trial. After this, guilt, sanity, and penalty trials were held. Against this backdrop, respondent argues that the insanity plea issue is moot merely because the jury found Roy sane. (RB, p. 353-354.) The issue is obviously not moot.

At the time the request to add the NGI plea was granted, Roy had been examined by seven psychiatrists and psychologists; none were of the opinion that he was legally insane at the time of the offenses. (RT May 24, 1993, pp. 40-43; RT June 4, 1993, pp. 56-60.) That is precisely why defense counsel had objections to the entry of a not guilty by reason of insanity plea. It was the defense attorneys' burden to prove insanity, and they had no persuasive evidence of insanity to present. Defense counsel also did not want Roy to enter an NGI plea because, if he did so, the defense would be forced to release to the prosecution confidential psychological reports containing damaging information. (RT June 4, 1993, pp. 56-57.)

The damage caused by entry of the NGI plea is not ameliorated by virtue of the jury's rejection of the insanity defense. *That* outcome was predictable. The prejudice inures because the sanity trial was *held.* As previously discussed in the AOB (see, pp. 458-460), the fact that the NGI plea was entered against counsel's advice was used *against* Roy at the competency trial. (RT II 605-605, 618-630.)

During the sanity phase trial, the credibility of the defense and defense attorneys was irrevocably damaged because the prosecutor was able to argue that the opinion of the sole sanity phase defense expert, Dr. Berg, inherently incredible and contrary to the conclusions of numerous other doctors who had examined Roy. (RT 9849-9850, 9857, 9862.) The impaired credibility of the defense team, and dulling effect of hearing psychiatric and psychological testimony again during a sanity trial -- *after* the jury had rejected all mental theories of defense at the guilt phase trial -- would have had an immeasurable and damaging impact on the jury's assessment of Roy's culpability at the penalty phase.

More importantly, however, the issue is not moot because the question presented – whether a defendant has a right to belatedly enter a not guilty by reason of insanity plea against counsel's advice, when he has been examined by numerous mental health professionals, all of whom have found the defendant sane – is "issue of broad public interest that is likely to recur." (Vernon v. State (2004) 116 Cal.App.4th 114, 121, fn. 4 [" . . . appellant has now retired from the City of Berkeley Fire Department. We nevertheless find that the case falls within the mootness exception for an issue of public interest that is likely to recur . . . "]; cited at RB, p. 354; see also, In re Law (1973) 10 Cal.3d 21, 23 ["Although petitioner's contention is now moot in these proceedings, we deem it to raise a question of broad public interest likely to recur . . . ."]; Tracy v. Municipal Court (1978) 22 Cal.3d 760, 763 ["we exercise our inherent discretion to resolve the issue even though Loiseau's guilty plea has rendered it technically moot"]; cf. People v. Keefer (1939) 31 Cal.App.2d 335, 337 [change of venue issue in divorce case moot after finality of annulment]; In re Katherine R. (1970) 6 Cal.App.3d 354 [appeal from Welf. & Inst. Code, § 601 wardship order rendered moot by marriage of minor, which terminated wardship].) This Court should address the issue on the merits.

In the AOB, respondent discussed the case of People v. Anderson (Colo. App. 2002) 70 P.3d 485. (AOB, p. 457.) At that time, the case was listed as

unpublished. It has now been published. Due to an error by undersigned counsel in transcribing the date of the case, respondent assumed appellant was referring to a different case, People v. Roadcap, 2003 Colo. App. LEXIS 206. (RB, p. 357, fn. 101.) Appellant apologizes for any confusion, and continues to assert that the Colorado court's resolution of a nearly identical issue in Anderson was both proper and instructive.

In the Anderson case, a defendant was allowed to enter a NGI plea over counsel's objection. Seven months later, the attorney informed the court that after contacting 12 experts, he was still unable to produce any credible evidence to support an insanity defense. At counsel's request, over the defendant's objection, the trial court vacated the NGI plea and entered in its stead a plea of not guilty. On appeal, the defendant challenged the trial court's ruling.

The Colorado Court of Appeals affirmed the trial court. The appeals court reaffirmed the general rule, that a defendant who is competent to stand trial has the right to determine the nature of his or her defense, and correspondingly, what plea to enter. (Id., at p. 487.) It concluded nonetheless that the right to present and determine the nature of a particular defense or plea is "not absolute." (Ibid.) The Colorado court explained: "Because the defendant's proffered evidence and theory did not support an insanity plea and defense, we conclude that he was not entitled to pursue or have counsel pursue them at trial. Consequently, under the circumstances, the trial court did not err in vacating defendant's NGRI plea. . . . [I]n the present case, defendant was not deprived of an opportunity to present evidence of his insanity; he simply had no such evidence to present." (People v. Anderson, supra, 70 P.3d at p. 488; see also, Hendricks v. People (Colo. 2000) 10 P.3d 1231, 1242-1243; State v. Francis (Wis. App. 2005) 2005 Wis. App. LEXIS 529 ["the right to an NGI plea simply does not qualify as a fundamental constitutional right."].)

Appellant and respondent have both discussed the handful of cases in which California appellate courts have been faced with similar questions. In at least one

such decision, this Court recognized that a defendant's right to control whether a sanity defense is litigated is not absolute. In People v. Merkouris (1956) 46 Cal.2d 540, 549-555 (AOB, p. 457; RB, p. 356), this Court held that the trial court abused its discretion by permitting a defendant to personally withdraw an insanity plea, where counsel wanted to proceed with the sanity trial, and there existed a doubt regarding the defendant's sanity.

In People v. Gauze (1975) 15 Cal.3d 709, 717-718 (AOB, p. 455; RB, p. 355), the defendant steadfastly refused to enter an insanity plea despite counsel's advice. The Court of Appeal rejected the defendant's post-conviction challenge to the trial court's decision to allow the defendant to waive his sanity defense. The court partially relied on the fact that the defendant in Gauze – unlike the defendant in Merkouris – had twice been found competent to stand trial. Furthermore, in Merkouris, the record demonstrated that the defendant did not understand the gravity of his predicament. Indications were to the contrary in Gauze. (Gauze at p. 718.)

In People v. Medina (1990) 51 Cal.3d 870, 899-900 (AOB, p. 456; RB, pp. 354-355), the defendant reinstated a previously withdrawn NGI plea, against his counsel's advice. Both the Court and the defense attorney agreed that the decision was tactically unsound. This Court affirmed the trial court's decision to *allow* reinstatement of the insanity plea. Respondent asserts that Medina supports the trial court's ruling, allowing entry of an insanity plea in this case, against counsel's advice.

However, in Medina, this Court recognized that pursuant to Penal Code sections 1016 and 1018,[42] once a plea has been entered, a trial court retains

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[42]Penal Code section 1016 states in relevant part: "A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall conclusively be presumed to have been sane at the time of the commission of the offense charged; provided, that the court may *for good cause shown* allow a change of plea at any time before the commencement of the trial. . . ." Penal Code section 1018 (continued...)

discretion to refuse to allow a defendant to withdraw a plea, or to enter a new or additional plea of not guilty by reason of insanity. (Id., at p. 899.) Penal Code section 1016 requires a showing of "good cause" to change or add a plea after arraignment. Respondent *concedes* that a defendant's right to decide how to plead is not absolute. (RB, p. 356, citing People v. Chadd (1981) 28 Cal.3d 739, 747-748, fns. Omitted.) In fact, respondent has cited other appellate court decisions in which trial courts have *refused* to allow defendants to enter belated pleas of NGI and have been upheld on appeal. (People v. Nolan (1932) 126 Cal.App.623, 630-631; RB, p. 356; People v. Hagerman (1985) 164 Cal.App.3d 967, 974-978; RB, p. 357; cf. People v. Lutman (1980) 104 Cal.App.3d 64, .)

In this case, when Roy belatedly asked to enter a plea of NGI, as in the Colorado case (People v. Anderson, supra, 70 P.3d 485), there was no "good cause" to allow a *change of plea* to not guilty by reason of insanity. The defense attorneys had the nearly impossible burden of proving by a preponderance of evidence that Roy "was incapable of knowing or understanding the nature and quality of his . . . act and of distinguishing right from wrong at the time of commission of the offense." (Pen. Code, § 25.) Examinations by seven mental health professionals had yielded no substantial evidence with which to prove insanity, as narrowly defined. Under such circumstances, it was an abuse of discretion to grant Roy's request to enter an insanity plea, thereby forcing counsel to present the defense despite the lack of witnesses and evidence with which to accomplish the task.

This Court's decision in People v. Frierson (1985) 39 Cal.3d 803, 809-818 (RB, p. 355), does not compel a different conclusion. In that case, the issue presented was "whether a defense counsel's traditional power to control the conduct of a case includes the authority to withhold the presentation of any

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(...continued)

provides in relevant part: "Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court." (Italics added.)

defense at the guilt/special circumstance stage of a capital case, in the face of a defendant's openly expressed desire to present a defense at that stage and despite the existence of some credible evidence to support the defense." (Id., at p. 812.) In Frierson, a case tried before the repeal of the diminished capacity defense (Pen. Code, § 25), there was evidence of diminished capacity available which could have been presented in defense of the special circumstance findings; the defendant wanted to present his defenses to the special circumstance findings to preserve his only hope of a sentence less than death or life without parole. The trial lawyer preferred to withhold presentation of this evidence, to enhance the possibility of a life without parole sentence. This Court held that the attorney's failure to present mental defense evidence at the guilt/special circumstance phase deprived the defendant of his "only viable defense to the special circumstance allegations." (Id., at p. 818.)

In Frierson, this Court expressly did not decide "whether a defendant 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." (People v. Frierson, supra, 39 Cal.3d at p. 816, fn. 3.) This Court also observed that Frierson did not raise the "difficult questions that are posed when an attorney – for ethical reasons – determines he cannot properly present the defense that the defendant desires to present." (Id., at p. 817.) The trial court *was* presented with such a situation in this case: a defendant who wanted to present an affirmative defense with no evidentiary support. Under this circumstance, Roy had no absolute, constitutionally guaranteed right to enter a plea of not guilty by reason of insanity against counsel's advice. It was an abuse of discretion for the trial court to allow the insanity plea at a time when counsel had no hope of meeting their burden of proving the defense, and when forcing counsel to trial had tremendous potential to adversely "impinge on defense counsel's handling of the case." (Frierson at p. 816.)

Respondent suggests that the error, if any, was harmless. He suggests that

there was "substantial evidence to support such a plea." (RB, p. 358.) The question is not whether there was "substantial" evidence of insanity, but whether, on June 4, 1993, defense counsel had any hope of producing evidence sufficient to sustain *the defense's burden of proving insanity by a preponderance of the evidence.* (Pen. Code, § 25.) The fact that by seven months later, Ms. O'Neill managed to find a single expert willing to testify that Roy was legally insane, does not change the equation. The prosecutor easily produced two of many available mental health experts to testify that Roy was legally sane -- Dr. Brooks and Dr. Missett. The prosecutor obviously concluded that more prosecution experts were unnecessary. The jurors deliberated for four hours, at most, before arriving at verdicts finding Roy sane as to all counts. (CT 1105-1107.) Obviously, jurors concluded that the defense had failed to meet its burden of proving insanity by a preponderance of evidence. Ms. O'Neill was correct when she voiced doubt on June 4, 1993, that an insanity defense was viable.

The only question is whether the fallout from the failed sanity defense itself produced any prejudice. Appellant has addressed that question at length in the AOB and will not repeat those arguments here. (See, pp. 458-460.) The nature of the error was such that the structural integrity of the trial was undermined. Such errors are not amenable to harmless error review. (Arizona v. Fulminante, supra, 499 U.S. at p. 294; People v. Flood (1998) 18 Cal.4th 470, 493.) Furthermore, because the error occurred in the context of a capital trial, the reliability of the death judgment was necessarily affected. (U.S. Const., Amend. VIII.) The entry of an NGI plea rendered counsel ineffective, and the entire proceeding unfair in violation of substantive due process. (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; U.S. Const., Amends. VI & XIV.) The entire judgment should be reversed.

XXXXIX [RB XLIX]

THE COURT ERRED BY REFUSING A SPECIAL DEFENSE INSTRUCTION AT THE SANITY PHASE THAT WOULD HAVE INSTRUCTED JURORS THAT THE TERM "MENTAL ILLNESS" INCLUDED ANY MENTAL CONDITION WHICH PRODUCED THE REQUISITE EFFECTS.

In footnote 103, respondent discusses an alleged inconsistency in the special instruction requested by trial counsel and the instructions referred to by appellate counsel as having been requested. (RB, p. 361, fn. 103.) According to the transcript, the instruction requested by defense counsel read: "The terms 'mental disease' and 'mental defect' include all mental conditions which produce the requisite effects." (RT 9831.) This is the instruction which appellant maintains should have been given.

Respondent seems to imply that the defense theory at trial differs from the defense theory on appeal, and that the evidence at trial was not consistent with the instruction requested. This argument, contained wholly in a footnote, borders on specious. The record speaks for itself. The evidentiary phase of the sanity trial consumed many hours over a two-day period. Dr. Paul Berg testified for the defense. (RT 9523-9595.) Dr. James Missett and Dr. Mark Brooks testified for the prosecution. (RT 9642-9786.) There was a wide array of testimony given regarding Roy's medical and psychiatric history, including the results of tests and evaluations conducted by doctors other than the three who testified. Dr. Berg's testimony was not limited to testifying that Roy's "rage was so enormous and so beyond what we normally think of as anger or rage that he would not at that time understand and know and appreciate . . . what he was doing or know the difference between right and wrong at the time." (RB, p. 361; citing RT 9575.) There was ample evidence in the record from which the jury could have concluded that a constellation of mental problems, including Roy's seizures, memory blackouts, and dysfunctional brain, contributed to his temporary state of insanity at the moment of the killing.

Furthermore, the trial court did not reject the requested instruction on the ground that it was unsupported by the sanity phase evidence. The court "did not find the instruction to be necessary." (RT 9831.) This implies a finding that the rejected instruction was adequately covered by other instructions. It was not. The jury was told: "a person is legally insane when by reason of mental disease or mental defect he was incapable of knowing or understanding the nature and quality of . . . his acts, or incapable of distinguishing right from wrong at the time of the commission of the crime." (RT 9926.) The jury was not told that the terms "mental defect" and "mental disease" included all mental conditions that could cause the effect of insanity, including, in this case, momentary rage, seizure activity, brain dysfunction, blackouts as well as any of Roy's other problems. That is what the requested instruction, sanctioned by People v. Medina (1990) 51 Cal.3d 870, 901, would have done.

Respondent argues that the court did not err by refusing the instruction. (RB, p. 360.) Several cases are cited to support this argument, but none involve a trial courts' denial of a pinpoint instruction on insanity in a case in which the defendant suffers from a multiplicity of medical and psychological maladies that could have combined to produce temporary insanity. (See, RB, p. 360, citing People v. Frye (1985) 166 Cal.App.3d 941, 951-951 [burglary instruction]; People v. Anderson (1966) 64 Cal.2d 633, 641 [robbery-murder instruction]; Walker v. San Diego County Department of Social Circumstances (1987) 196 Cal.App.3d 1082, 1099-1100 [failure to give special instructions on "grave disability" *sua sponte*].) Notably, respondent does not discuss any of the numerous state and federal cases cited in the AOB to support the need for pinpoint instructions. (See, AOB, p. 462.)

Respondent also argues that the error, if any, is harmless. People v. Kelly (1992) 1 Cal.4th 495, is supported as authority. However, in Kelly, there was no request for a clarifying instruction. This Court rejected the claim on appeal that the trial court should have given a clarifying instruction *sua sponte*. Here, the

defense requested a pinpoint instruction on the defense theory of insanity. The Court refused to give it. For the reasons previously stated in the AOB, at pp. 461-462, the error was not harmless.

ARGUMENT SECTION 10
(COMPETENCY TRIAL ERRORS)

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IT WAS PREJUDICIAL ERROR TO ADMIT EVIDENCE AT THE COMPETENCY TRIAL THAT ROY'S INSANITY PLEA WAS ENTERED AGAINST HIS COUNSELS' ADVICE, AND THAT HE TOLD DEPUTY HAW THAT HE WANTED TO PLEAD GUILTY, AND WOULD DISRUPT COURT PROCEEDINGS IF THE VICTIMS' FAMILIES OR NEWS MEDIA WERE PRESENT.

At the competency trial, the trial court received evidence over objection that Roy had entered a plea of not guilty by reason of insanity against counsel's advice, and that he had told the bailiff, Deputy Haw, that he wanted to plead guilty, and would disrupt the proceedings if the news media or victims' family members were in the courtroom. Respondent argues that the trial court did not err by admitting any of the above evidence. Respondent generally relies on the definition of relevancy set forth in Evidence code section 210, and the trial court's "broad discretion" to decide what has relevance. (RB, pp. 373-374; citing People v. Gurule, supra, 28 Cal.4th at p. 392; People v. Hart (1999) 20 Cal.4th 546, 653; People v. Jordan,supra, 42 Cal.3d at p. 316 [discretion to sentence] .) Appellant does not dispute these general principles. Rather, he contends that the evidence was not relevant to the issue at hand, and therefore, was not admissible at all.

Respondent argues that that testimony regarding Roy's insanity plea, his admission of guilt, and his threat to be disruptive in the presence of the press and the victims' family, was relevant and admissible to prove he was capable of cooperating with his defense attorneys in an intelligent manner. (RB, p. 374.) He cites a number of cases to support the argument, but none present questions concerning the *admissibility* of comparable evidence at a jury trial of the competency issue.

People v. Superior Court (Campbell) (1975) 51 Cal.App.3d 459, 464, is cited for the proposition that the test for competency is whether the defendant is

competent to cooperate; "other procedures . . . apply if defendant becomes too obstreperous or too uncooperative." (RB, p. 374.) In the Campbell case, the Court of Appeal *reversed* a trial court's finding of incompetency because the court had applied the wrong standard, and found the defendant incompetent because he was refusing to cooperate with his attorneys. Yet in this case, respondent takes the inverse position -- that Roy's uncooperative behavior was relevant to prove his *ability* to cooperate with counsel, or to rebut testimony by Dr. Woods that he was unable to cooperate with counsel. Campbell does not stand for the principle for which it is stated.

Respondent also relies on People v. Johnson (1978) 77 Cal.App.3d 866, 869-871 (RB, p. 374). In Johnson, the issue was whether, once the defendant was orally declared incompetent to stand trial based solely on the his *refusal* to cooperate, the court retained authority to renounce its incompetency finding, and recess the matter for several days to do further investigation. When proceedings resumed, the defendant had new counsel, and was willing to cooperate and proceed to trial. The appellate court concluded that there was insufficient evidence of incompetency and the trial court was not bound by its pronouncement to the contrary. (Id., at p. 871.) The Johnson case does not support the court's *admission* of the contested rebuttal evidence at a competency jury trial.

Another case cited by respondent, People v. Kurbegovic (1982) 138 Cal.App.3d 731, 751-755 (RB, p. 374), addresses the *sufficiency of evidence* to support a jury's verdict finding the defendant competent. The Court of Appeal easily found that the conflicted evidence of incompetency in the Kurbegovic case was insufficient to carry the defendant's burden of proof. Appellant does not contest the *sufficiency* of evidence to prove Roy competent to stand trial, but rather, the admissibility and prejudicial effect of allowing the jury to consider certain highly irrelevant and prejudicial evidence, including a transcript of Roy's insanity plea.

Furthermore, in Kurbegovic, one of the defense experts had diagnosed the

defendant as competent based on his delusions of being the Messiah. In rebuttal, the prosecutor presented letters written by the defendant to the prosecutor and the trial judge, in which he bragged that the "best way to beat a murder rap" was to "play a Savior." Roy's insistence on entering a plea of NGI against counsels' advice, his desire to plead guilty, assertedly thwarted by counsel, and threats of disruption, had considerably less probative value as rebuttal evidence than did the letters in Kurbgovic. Their primary value was to prove that Roy had admitted committing the charged crimes, and that his trial lawyers did not believe him to be legally insane when the crimes were committed. This evidence had little or no value to rebut Dr. Woods' testimony that Roy was presently unable to cooperate with counsel due to paranoid feelings of distrust of the public defenders.

Furthermore, the rebuttal evidence in this case had much greater potential to cause prejudice in the minds of jurors. Jurors were essentially told that Ms. O'Neill and Ms. Martinez felt their client's insanity defense was meritless. Jurors would not necessarily have understood, however, that the defense of insanity embraces totally different questions than the issues presented in a competency proceeding. There was a palpable risk that jurors would erroneously assume that if Roy was not insane, he was also not incompetent. In addition, as pointed out in the AOB at pp. 468, the evidence was completely unnecessary; the prosecution called numerous other witnesses to testify to Roy's functioning in the courtroom and the jail.

Respondent places great emphasis on the fact that the experts who testified all based their opinions on information obtained from Roy. (RB, p. 375; citing Owings v. Industrial Accident Comm. (1948) 31 Cal.2d 689, 692; People v. Sundlee, supra 70 Cal.App.3d at p. 484.) Only one defense expert testified. He derived information from sources other than Roy, including neuropsychological testing, and historical documents and records. More importantly, however, the fact that Dr. Woods may have derived information from Roy has little bearing on the admissibility of evidence of Roy's longing to plead guilty, and the unadjudicated

NGI plea. The defense expert, Dr. Woods, did not base his opinion on Roy's assessment of his own guilt, or his own sanity at the time of the crimes; nor did he base his opinion on Roy's decision to enter a plea of not guilty by reason of insanity despite counsels' contrary advice. Consequently, it was not appropriately received as rebuttal evidence.

Respondent also argues that appellant cannot be permitted to stipulate or admit his way out of the full evidentiary force of the government's case. (RB, pp. 375-376; citing Old Chief v. United States, supra, 519 U.S. at p. 186-189.) In Old Chief, however, the U.S. Supreme Court, for sound policy reasons, held that the government's absolute right to present "descriptively rich" evidence of a prior felony conviction in lieu of accepting a defendant's stipulation to his ex-felon status was *not* unfettered. In his AOB (pp. 467-468), appellant discussed similar policy considerations which weigh *against* admitting evidence of the type received in this case. Those arguments will not be reiterated again here. It suffices to say that respondent has not addressed public policy considerations, which clearly *weigh against* allowing a defendant's unadjudicated NGI plea, or his expressions of desire to plead guilty against counsels' advice, to be used against him in a competency trial.

Citing a number of cases having nothing to do with the issue at hand, respondent argues that the trial court enjoys broad discretion to decide whether the probative value of a particular piece of evidence is outweighed by the potential for confusion or prejudice. (RB, pp. 376-377.) Appellant does not dispute this as a general principle.

Respondent also argues on the merits, that the evidence was not more prejudicial than probative. (RB, p. 377.) However, none of the cases cited by respondent involve the admission of evidence of a defendant's unadjudicated NGI plea against counsel's advice, or his wish to plead guilty against counsel advice, in a competency trial. (See, RB, pp. 377-378.)

People v. Alvarez (1996) 14 Cal.4th 155, 214-215, is cited for the principle

that "the fact that the jury may reach their verdict on an improper basis is not enough to show that the evidence should have been excluded as unduly prejudicial." (RB, p. 377.) In Alvarez, the court allowed testimony that the defendant had engaged in a violent quarrel with a woman. The evidence was offered to corroborate the testimony of the defendant's accomplice, who claimed that she accompanied the defendant to commit the crime out of fear. In contrast to what occurred in this case, in Alvarez, the trial court *redacted* the testimony to make it less prejudicial. The witness was prohibited from testifying that the defendant had threatened to kill the woman with whom he was fighting. In Roy's case, the trial court did not redact the testimony and transcripts in this case to remove the most potentially prejudicial portions, such as Roy's desire to plead guilty, and his attorneys' objections to the NGI plea.

Respondent argues that the jury was properly instructed that Roy's guilt or innocence, and legal insanity were not issues to be decided at the competency trial. (RB, p. 378; CT 552; RT IV 810.) The state argues that the jury is *presumed* to have understood and followed the court's instructions. (RB, p. 378.) This ignores the fact that some kinds of relevant evidence are excluded for policy reasons, precisely because the highly prejudicial nature of the evidence makes it likely jurors will be *unable* to resist the temptation to consider the evidence for an improper purpose, whether or not limiting instructions are given. (See, e.g. Old Chief v. United States, supra, 519 U.S. at p. 186-189 [prior felonies]; Pen. Code, § 1153 [withdrawn pleas and offers to plead]; see also, Kercheval v. United States (1927) 274 U.S. 220, 223, 224; People v. Koontz (2002) 27 Cal.4th 1041 1090 [polygraph results]; People v. Kelly (1901) 132 Cal. 430, 431-432 [poverty]; People v. Shirley (1982) 31 Cal.3d 18, 66; see also, Evid. Code, § 795.) Some of the rebuttal evidence received at Roy's competency trial falls into this category; evidence that he pleaded insanity against his counsels' advice, and that he wanted to plead guilty but thwarted by counsel, should have been excluded for the same reason that the law precludes admission of evidence of offers to plead guilty and

withdrawn guilty pleas. Such evidence would have had an overwhelming tendency to bias the jury in favor of finding of competency.

Respondent argues that, regardless of the admissibility question, any error was harmless, assuming the Watson standard applies. Appellant does not dispute that three of four experts who testified found Roy competent. However, appellant disagrees that Watson states the applicable standard. In this case, as previously explained in the AOB, use of this type of rebuttal evidence burdened numerous of Roy's fundamental constitutional rights, including the right to counsel, to confrontation and cross examination, to due process and a fair trial, and to reliable guilt and penalty determinations. For example, assuming this Court finds Roy had a right to enter a plea of NGI over counsel's objection (see, AOB & ARB, Argument XLVIII), the use of his plea burdened the exercise of this right. Furthermore, by admitting evidence of counsel's opinion on Roy's sanity, counsel, in effect, became a witness to competency, who could not be cross examined. In addition, this case presents a unique circumstance; the trial court allowed Roy to enter his NGI plea despite counsel's objection that she had no evidence to support the plea, and then used that plea against him at the competency proceeding. The cumulative effect of the trial court's rulings was to undermine the fairness of the entire proceeding in violation of due process. (See, AOB, pp. 468-469.) The error should be treated as structural. (Arizona v. Fulminante, supra, 499 U.S. 279.) At the very least, the state must bear the burden of showing that the error was harmless beyond a reasonable doubt according to the Chapman standard. (Cf. People v. Cudjo (1993) 6 Cal.4th 585, 610-611.) This, they cannot do.

Moreover, as previously argued in the AOB (pp. 468), the error did not just infect the competency proceedings. Roy's right to effective counsel was irreparably damaged. After an inherently unfair competency proceeding, Roy was adjudicated guilty of capital murder, found sane at the time of his offenses, and sentenced to die. These fundamental defects deprived the guilt, sanity and penalty judgments

of their reliability in violation of the Eighth Amendment and Article I, section 17 of the California Constitution

ARGUMENT SECTION 11

(ADDITIONAL PENALTY PHASE ERRORS)

LI

THE TRIAL COURT COMMITTED PREJUDICIAL JUDICIAL MISCONDUCT AND VIOALTED APPELLANT'S RIGHT OF PERSONAL PRESENCE BY COMMUNICATING WITH JURORS EX PARTE DURING THE DELAY BETWEEN THE SANITY AND PENALTY PHASE TRIALS.

Respondent concedes that the trial court's *ex parte* communications with jurors were improper. Respondent contends, however, that the contacts did not occur during a critical stage of the proceedings, and were therefore harmless beyond a reasonable doubt.[43] (RB, p. 383-387.)

To say that Judge Fitch's several communications with individual jurors did not occur during a "critical stage" of the proceedings runs afoul of the pronouncements of this Court. (See, e.g., People v. Wright (1990) 52 Cal.3d 367, 402-403; People v. Jennings (1991) 53 Cal.3d 334, 383-384; People v. Delgado (1993) 5 Cal.4th 312, 330.) The "guilt and penalty phases in a capital prosecution are not separate trials but parts of a single trial . . . ." (People v. Mayfield (1997) 14 Cal.4th 668, 810.) The phone calls with jurors occurred during a recess between phases of a "trial" which had not yet concluded. A "critical stage" of a trial includes "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial." (United States v. Wade (1967) 388 U.S. 218, 226.) The court's conversations with sitting jurors, carried on in counsel's absence, had great potential to derogate Roy's right to a fair trial; it had the potential to coerce jurors to continue serving, despite severe personal and employment hardships imposed as a result of the delay. Counsel should have been present during any such discussion of future scheduling to gauge the demeanors of jurors, to preserve objections, and to move for mistrial

[43]Appellant takes this as a concession that Chapman v. California, supra, 368 U.S. 18, states the applicable standard of prejudice.

in the event it appeared that scheduling problems were interfering with Roy's right to a fair trial. The telephone calls occurred during a "critical stage" of the proceedings.

Respondent's counsel devotes a substantial portion of his argument to distinguishing this case from the Colorado Supreme Court's decision in Key v. People (Colo. 1994) 865 P.2d 822. (RB, p. 384-385, 387, fn. 110.) In the Key case, the jurors were in the midst of deliberations when the court held an *ex parte* scheduling conference with the jurors. The fact that Judge Fitch's communications were solely about scheduling (RB, p. 386) of the penalty trial is a distinction without a difference. The potential for coercion was equally strong in this case, where jurors who promised availability for a four-month trial were forced to put their lives on hold for a much longer period. In such circumstances, mere "scheduling" took on much greater significance. The longer the delay and the more problems experienced by jurors, the more likely it was that Roy would be deprived of a fair trial by impartial jurors. This is very similar to the mere "scheduling" decision made by the trial court in the Key case.

Respondent argues that the trial court's *ex parte* communications were harmless beyond a reasonable doubt. (RB, p. 387.) It was the state's burden to rebut the *presumption* of prejudice; "[o]nly the most compelling showing to the contrary will overcome the presumption." (People v. Jennings, supra, 53 Cal.3d at p. 384.) In this case, the trial judge spoke with three jurors about scheduling problems. In one instance, the judge not only talked to Juror Schmidt, he also asked her to change her vacation plans, something she could not do. (RT 10408-10409; CT 1343.) The effect of a judge imploring jurors to continue their protracted jury service for months, despite personal and financial hardship, is just as coercive as asking jurors to remain and deliberate after the end of the work day, to avert a conflict with jurors' impending vacation plans. (Key v. People, supra, 865 P.2d 822.)

Respondent cites People v. Pride (1992) 3 Cal.4th 195, 263-264, to support

his "harmless error" argument. (RB, p. 477.) In Pride, however, the court's *ex parte* communication about the juror's employment hardship was reported. In this case, the telephone calls were not contemporaneously reported. (See, also People v. Jennings, supra, 53 Cal.3d at p. 383 [counsel was offered reporter's notes of the conversation with jurors].) Furthermore, the court's pattern of rulings during *voir dire*, and tenacious refusal to declare a mistrial despite problems with the continuity of trial and Roy's legal representation, raise serious questions about the court's impartiality. (See, AOB & RB, Argument Sections 2 and 4.) In addition, in Pride, the *ex parte* discussion occurred during deliberations, and concerned the juror's employer, who was questioning whether the juror's absence was really due to jury service. The court wrote a letter to the boss to relieve pressure resulting from the employer's skepticism. The *ex* parte conversation did not occur during an extraordinarily long, unanticipated interruption in the proceedings, which had greatly prolonged jury service, nor was it coercive with respect to the juror's willingness to continue serving.

Respondent also cites People v. Wright, supra, 52 Cal.3d at pp. 402-403 as exemplary of "harmless error." (RB, p. 387.) In Wright, as in Pride, the *ex* parte communication occurred while the trial was ongoing, and involved information received from a juror's employer, indicating the juror would not be paid for more than 10 days of jury service. The court sent a letter to the employer, who agreed to pay for 20 days of jury service. A settled statement of what occurred during the *ex parte* conversation established that the juror had advised the court that her continued service on the jury would not cause her any hardship. The juror confirmed that she was never pressured to remain on the jury and willingly continued to serve. No such assurances by the jurors who voiced hardships are established by the record in this case.

For these reasons, and the reasons previously set forth in the AOB, the error was not harmless beyond a reasonable doubt, and the June 17, 1994, motion for mistrial should have been granted. (See, AOB, pp. 473-479.)

LII

ADMISSION OF THE DECEASED ROBBERY VICTIM'S HEARSAY STATEMENT WAS PREJUDICIAL ERROR.

Respondent devotes several paragraphs to demonstrating that the robbery victim's statement, "a black man cut my throat and took my wallet," was not testimonial within the meaning of Crawford v. Washington, supra, 541 U.S. 36. (RB, pp. 388-389.) Crawford has been discussed at length in argument XXXVIII of the ARB. Appellant will not repeat that discussion here. Pursuant to Crawford, unless the conductor had law enforcement powers, the now deceased robbery victim's statements to the train conductor probably would not qualify as "testimonial."

The question remains whether the statement of the robbery victim contains sufficient indicia of reliability to pass muster under the constitutional framework provided by Ohio v. Roberts, supra, 448 U.S. 56. (See, AOB, p. 482.) Respondent insists that the statement is reliable because it falls within a firmly rooted hearsay exception – the spontaneous statement. (Evid. Code, § 1240.) (RB, pp. 390-391.) Even assuming the statement was admissible under the spontaneous statement exception to the hearsay rule, the evidence lacked adequate indicia of reliability for reasons adequately covered in Argument LII of the AOB. The train conductor who heard the statement testified at the penalty trial; his penalty testimony differed in material respects from the report of the incident, written the day after the robbery. The report did not include the victim's alleged statement: "A black man cut my throat and took my wallet." The witness even admitted that he victim may have said, "Someone beat me up and took my wallet." (RT 11032.) This discrepancy rendered this highly inflammatory description of the statement unreliable. (See, AOB, pp. 482-483.)

Respondent argues, contrary to appellant's assertion, that the trial court did not abuse its discretion by refusing to exclude the statement under Evidence Code section 352. Respondent falls back on his oft-repeated argument that the

prosecutor "is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." (RB, p. 391, quoting Old Chief v. United States, supra, 519 U.S. at pp. 186-187.) As previously noted, the Old Chief case stands for the opposite proposition as well. A prosecutor does *not* have an unlimited right to choose what evidence, or how much evidence, will be presented to a jury. The court always has discretion to exclude evidence that is of insignificant probative value, particularly if the evidence is cumulative, unnecessary, and very likely to produce undue prejudice. That is precisely why the U.S. Supreme Court in Old Chief held that it was error to allow the prosecutor to introduce evidence of a defendant's prior conviction to prove the ex-felon element of the crime of possession of a firearm by a convicted felony, despite the defendant's offer to stipulate to the existence of the prior conviction.

In this case, the purpose of admitting this very unreliable evidence was to prove that the offense "involved the use or attempted use of force or violence, or the express or implied threat to use force or violence." (Pen. Code, § 190.3(b).) The evidence was completely unnecessary for this purpose. The Penal Code section 969b packet for the robbery conviction showed a plea of guilty in Texas to "aggravated" robbery, defined as a robbery causing serious bodily injury, or use or exhibition of a deadly weapon. (CT 1630; Tex. Pen. Code, §§ 29.02, 29.03.) In addition, defense counsel offered to stipulate that the robbery involved violence. (RT 10967.)

The evidence was of questionable reliability, given the suspicious circumstance that the statement was omitted from the original written report of the robbery. The victim had died of unrelated causes many years before Roy's trial; hence, he was unavailable for cross-examination. Moreover, the defense attorneys received inadequate discovery of the evidence because the prosecutor had failed to call either Mr. Bradley, the train conductor, or Mr. Steele, a former Texas

Ranger who arrested Roy, to testify at pretrial hearings concerning the admissibility of the prosecutor's aggravating evidence. (RT 10966.)

Respondent cites only one case other than Old Chief to support the trial court's exercise of discretion in this case: Parr v. United States (5th Cir. 1958) 255 F.2d 86. In Parr, a defendant charged with conspiring to transport a lewd and obscene motion picture film offered to stipulate that the film was "lewd and obscene." The prosecutor refused the stipulation and the film was shown to the jury. In Parr, however, the reliability of the evidence was not an issue.
In this case, the trial court admitted completely unnecessary hearsay evidence of very questionable reliability, for which the defense had not even received benefit of proper notice and discovery.

Respondent cites both People v. Watson, supra, 46 Cal.2d at pp. 836-837, and Chapman v. California, supra, 386 U.S. at p. 24, and argues that, regardless of what standard is used, any error was harmless. Appellant suggests that, because the error implicates Roy's Sixth Amendment confrontation rights, and his right to adequate notice of penalty phase evidence under the Due Process Clause, and the reliability of the death penalty, guaranteed by the Eighth Amendment, the proper standard is the Chapman test. Because of the highly inflammatory nature of the statement attributed to the deceased victim, the state cannot sustain its burden of proving beyond a reasonable doubt that the error did not contribute to the jury's penalty phase judgment. For this reason, and for the reasons previously set forth in the AOB, the error requires reversal of the death judgment.

LIII

APPELLANT'S MOTIONS FOR A NEW TRIAL AND FOR REDUCTION OF THE PENALTY SHOULD HAVE BEEN GRANTED.

In the AOB, appellant asserted two grounds on which a new trial should have been granted: (1) insufficiency of the evidence to prove the special circumstance findings and the element of premeditation and deliberation; and (2)

the long, prejudicial delay between the sanity and penalty phase trials. For the most part, appellant incorporated by reference earlier arguments contained in Argument Sections 1, 2, and 3 of the AOB. (AOB, pp. 487-492, & AOB, fns. 85, 86, & 87.)

Respondent has followed suit, but adding approximately 10 single-spaced, typewritten pages quoted from the record of the sentencing hearing. (RB, pp. 393-406.) Since the record speaks for itself, and the substantive arguments have been addressed by both appellant and respondent elsewhere in the RB and ARB (see, RB & ARB, Argument Sections 1-3, Arguments I – XXVII, ante), appellant merely urges this Court to reverse the trial court's order denying a new penalty trial for reasons previously stated.

LIV

THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS REQUIRES REVERSAL OF THE GUILT AND PENALTY JUDGMENTS.

Respondent concedes only one error in the guilt phase and no error in the penalty phase. (RB, p. 407.) Only Doyle error is conceded. (RB, Argument XXXV.) Respondent reiterates the argument, previously made, that the improper reference to Roy's invocation of the right to remain silent was harmless. (RB, pp. 287-289, 407.) Appellant has adequately replied to this argument in Argument XXXV of the ARB.

Since respondent unrealistically assumes that there were no other errors committed during Roy's trial, no substantive response is offered to appellant's argument that the cumulative effect of the many guilt and penalty phase errors was prejudicial. (AOB, Argument LIV, pp. 493-497.) Consequently, no additional argument in reply appears necessary. For the reasons fully set forth in Argument LIV of the AOB, the cumulative effect of the numerous guilt and penalty phase errors requires reversal of the judgment.

ARGUMENT SECTION 12
(CHALLENGES TO CALIFORNIA'S DEATH PENALTY SENTENCING SCHEME)

LV

SECTION 190.3(A) PERMITS ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

Respondent's one-paragraph argument cites Tuilaepa v. California (1994) 512 U.S. 967, 987-988, People v. Jenkins, supra, 22 Cal.4th at pp. 1050-1053; People v. Lewis (2001) 26 Cal.4th 334, 394-395, and People v. Maury (2003) 30 Cal.4th 342, for the proposition that Penal Code section 190.3(a) – which allows consideration of the "circumstances of the crime" – does not violate any constitutional provisions.

The U.S. Supreme Court held factor (a) constitutional, but did so on the assumption that it was limited to the "traditional" understanding of the circumstances of the crime. This Court has gone far beyond what Tuilaepa contemplated. For example, in People v. Edwards (1991) 54 Cal.3d 787, 833, this Court held that "victim impact" evidence was admissible at the penalty phase, disapproving of previous opinions that held otherwise. In Edwards, this Court held that the word "circumstances," as used in factor (a), did not mean merely temporal or spatial circumstances of the crime. Rather it extends to ''[t]hat which surrounds materially, morally, or logically' the crime." (Id., at p. 833.)

The language of Edwards, and its potential erosion of the very guiding principles that the 1978 initiative grafted onto the 1977 version of Penal Code section 190.3 has been noted by justices of this Court, and the United States Supreme Court. In People v. Bacigalupo (1993) 6 Cal.4th 457, 492, fn. 2, Justice Mosk decried the language of Edwards in his dissent, asserting that the Court had potentially rendered California's capital sentencing statute unconstitutionally vague. Justice Kennard, in her concurring and dissenting opinion in People v. Fierro (1991) 1 Cal.4th 173, criticized the Edwards case's approach to defining

Penal Code section 190.3(a). Justice Kennard stated: "The majority's construction of 'circumstances of the crime' makes this factor so broad that it encompasses all of the other factors listed in section 190.3." (Id., at p. 263.) She further suggested that to survive constitutional challenge, "the circumstances of the crime" should be construed to mean those facts or circumstances known to the defendant when he or she committed the crime, or properly adduced in proof of the charges at the penalty phase. (Id., at p. 264.) In People v. Boyette (2002) 29 Cal.4th 381,445, fn. 12, this Court expressly recognized that the U.S. Supreme Court has not yet addressed whether factor (a) is unconstitutionally vague to the extent it is interpreted to include "a broad array of victim impact evidence."

Appellant recognizes that this Court has steadfastly adhered to its prior rulings, rejecting the identical claim raised here. (See, People v. Schmeck (2005) 2005 Cal.LEXIS 9350; People v. Blair (2005) 36 Cal.4th 686, 752; People v. Panah (2005) 35 Cal.4th 395. However, in light of the ongoing expansion of the definition of "the circumstances of the crime" (see, e.g., People v. Smith (2005) 35 Cal.4th 334, 363-365 [psychologist's testimony regarding the suffering of a child victim of sadistic molestation]), appellant respectfully suggests that Penal Code section 190.3(a), so construed, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. Accordingly, this Court should reconsider its previous holdings to the contrary. (See, AOB, Argument LV, pp. 499-505.)

LVI

APPLICATION OF CALIFORNIA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Arguments LVI, A – H of the AOB discuss appellant's challenges to the constitutionality of California's death penalty sentencing scheme based on the absence of safeguards to protect against arbitrary and capricious sentencing, and the denial of the right to a jury trial on each element necessary for imposition of a death sentence. Respondent has generally relied on this Court's prior decisions, which reject substantially similar claims. Therefore, with limited exceptions, appellant submits these issues on the AOB briefing, and requests reconsideration by this Court.

Appellant will confine his additional arguments in Reply to Argument LVI, A, because this is the section that encompasses arguments advanced under Apprendi v. New Jersey (2000) 530 U.S. 466, 490, and Ring v. Arizona (2002) 536 U.S. 584. The principles discussed previously will be amplified in the wake of the U.S. Supreme Court's recent decision in Blakely v. Washington (2004) 124 S.Ct. 2531.

In Argument LVI, A of the RB, respondent lists the substantial number of cases in which this Court has rejected challenges to California's death penalty statute under Apprendi and Ring. Respondent does not discuss Blakely, which was decided after the RB was filed.

In Blakely, the defendant pled guilty to second degree kidnapping involving domestic violence and use of a firearm. Washington law specified a "standard range" sentence of 49 to 53 months for this offense. By statute, a Washington court could impose a sentence above the standard range, up to a maximum of 10 years, if it found compelling reasons to justify the exceptional sentence. According to Washington law, the reasons offered to justify an exceptional sentence had to be different from those which were used in computing the standard range sentence. When a court imposed an "exceptional" sentence, it was required to set forth

findings of fact and conclusions of law to support it. (Blakely v. Washington, supra, 124 S.Ct. at p. 2535.) Blakely's trial judge imposed an "exceptional" sentence which added 37 months beyond the standard maximum sentence for the crime. The court justified the sentence on the ground that Blakely had acted with "deliberate cruelty," a statutorily enumerated ground for exceptional sentencing in domestic-violence cases. The trial court imposed the sentence after conducting an evidentiary hearing and issuing findings to support the increased sentence. (Blakely v. Washington, supra, 124 S.Ct. at pp. 2535-2536.)

The U.S. Supreme Court reversed the judgment on Ring and Apprendi grounds. The high court observed that the facts supporting the judge's finding that Blakely had acted with "deliberate cruelty," had neither been admitted by Blakely nor found by a jury, and that without such a finding, the maximum sentence was only 53 months. The government contended that there was no Apprendi violation because the relevant "statutory maximum" was not 53 months, but instead was the 10-year maximum that could be imposed for felonies of the class to which Blakely had pled guilty. However, the United States Supreme Court rejected the government's assertion. (Blakely v. Washington, supra, 124 S.Ct. at pp. 2537-2538.)

> "Our precedents make clear ... that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See *Ring, supra,* at 602, 122 S.Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi, supra,* at 483, 120 S.Ct. 2348); *Harris v. United States,* 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra,* at 488, 120 S.Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," *Bishop, supra,* § 87, at 55, and the judge exceeds his proper authority.
>
> "The judge in this case could not have imposed the exceptional 90- month sentence solely on the basis of the facts

admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense,' *Gore,* 143 Wash.2d, at 315-316, 21 P.3d, at 277, which in this case included the elements of second-degree kidnapping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b). [Footnote Omitted.] Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)."

Blakely rejected the state's argument – also made here -- that that the function of the sentencing phase was not to find facts but to make a "normative" judgment based on subjective evaluations. (Blakely v. Washington, supra, 124 S.Ct. at p. 2538; emphasis in original.)

"Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [FN8]"

Footnote 8 of Blakely states:

"Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence."

Blakely thus makes it clear that such "normative evaluation" does not

remove sentencing decisions from the ambit of the protections that were recognized in Apprendi v. New Jersey, supra, 530 U.S. 466. Sentencing factors which increase penalties *beyond* the sentence which could be imposed based on fact findings made at the guilt phase of a trial must be treated as elements of a substantive offense. Such factors must be found true by the jury beyond a reasonable doubt.

In this case, jurors were not required to agree upon any particular aggravating circumstance; each was free to consider as an aggravating circumstance any fact he or she believed to be true, irrespective of whether it had already been determined by the jury in the guilt or special circumstance phases, without any guidance as to a burden of proof, and irrespective of whether the juror was the only one who believed that the alleged aggravating fact had been proven. The failure to require concurrence of *any* minimum number of jurors that aggravating facts have been proven *beyond a reasonable doubt* clearly does *not* satisfy the requirements imposed by Blakely, Apprendi, and Ring.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are crucial factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme court has made clear that such factual findings must be made by a jury beyond a reasonable doubt, and cannot be attended with fewer procedural protections than decisions of much less consequence. (Ring v. Arizona, supra, 536 U.S. 584; Blakely v. Washington, supra, 124 S.Ct. 2531.)

These protections require jury unanimity. The U.S. 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 (1998) 524 U.S. 721, 732), the Sixth, Eighth, and Fourteenth Amendments are 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 should be guaranteed *more* rigorous protections than those afforded non-capital defendants. (See, Monge v. California supra, at p. 732; Harmelin v. Michigan (1991) 501 U.S. 957, 994), and certainly no *less*. (Ring v. Arizona, supra, 536 U.S. at p. 609.) To apply the unanimity requirement to findings carrying a maximum punishment of one year in the county jail – but not to findings that will have a "substantial impact on the jury's determination whether the defendant should live or die" (People v. Medina, supra 11 Cal.4th at pp. 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. As Justice Kennedy observed in his concurring opinion in McKoy v. North Carolina (1990) 494 U.S. 433, 452, "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community."

In a more recent, non-capital case, 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 jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a finding that there was a continuing criminal enterprise ["CCE"]. The 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 v. United States, supra, 526 U.S. at p. 819.)

These reasons are equally applicable 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 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 provides ample reason for insisting upon jury unanimity as to the factors to be weighed in support of a sentence of death. This Court and the United States Supreme Court have repeatedly recognized the need for "reliability in the determination that death is the appropriate punishment in a specific case." (Woodson v. North Carolina (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 96 S.Ct. 2978] (plurality opinion); accord: Gilmore v. Taylor (1993) 508 U.S. 333, 341-342 [124 L.Ed.2d 306, 113 S.Ct. 2112]; Herrera v. Collins (1993) 506 U.S. 390, 398-399 [122 L.Ed.2d 203, 113 S.Ct. 3446]; California v. Ramos (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 103 S.Ct. 3446].)

In light of the now well-established principle that the right to trial by jury extends to all fact-finding required to make a criminal defendant eligible for the punishment imposed upon him or her (Apprendi v. New Jersey, supra, 530 U.S. 466; Ring v. Arizona, supra, 536 U.S. 584; Blakely v. Washington, supra), this Court should hold that in California, a capital jury's penalty phase findings of the truth of the aggravating circumstances, and that aggravation substantially outweighs

mitigation, must be determined unanimously and beyond a reasonable doubt. Cases holding otherwise should be overruled. (See, e.g., People v. Cornwell (2005) 2005 Cal. LEXIS 9060 [filed August 18, 2005]; People v. Blair (2005) 36 Cal.4th 686, 753; People v. Davis (2005) 36 Cal.4th 510, 564; People v. Ward (2005) 36 Cal.4th 186, 218; People v. Stitely (2005) 35 Cal.4th 514, 573; People v. Morrison (2004) 34 Cal.4th 698, 731.)

LVII

APPLICATION OF CALIFORNIA'S DEATH PENALTY STATUTE VIOLATES EQUAL PROTECTION

Respondent offers a one paragraph response to appellant's Argument LVII, asserting that the denial of procedural safeguards afforded to non-capital defendants violates equal protection. (RB, p. 415.) Respondent asserts, in essence, that the equal protection argument has been considered and rejected by this Court. (RB, p. 415.) This appellant does not dispute.

Accordingly, appellant will refrain from reiterating arguments amply made in the AOB, and request that this Court reconsider the issue.

LVIII

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL NORMS AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Respondent offers less than a page of argument in response to appellant's comparably lengthy claim that California's death penalty violates international norms, and the Eighth and Fourteenth Amendments. (RB, p. 416; AOB, pp. 546-551.) Without analysis, respondent relies on this Court's prior decisions rejecting similar claims. Appellant is aware that this Court has continued to reject the argument in decisions filed after the AOB and/or the RB. (See, e.g., People v. Harris (2005) 2005 Cal. LEXIS 9546 [filed August 29, 2005]; People v. Dunkle (2005) 36 Cal.4th 861, 940; People v. Blair, supra, 36 Cal.4th at p. 754; People v. Ward, supra, 36 Cal.4th at p. 222; People v. Panah (2005) 35 Cal.4th at pp. 500-501;

People v. Smith, supra, 35 Cal.4th at p. 375.)

Several days after the filing of the AOB in this case, the U.S. Supreme Court filed its decision in Lawrence v. Texas (2003) 539 U.S. 558. While this case – holding unconstitutional a Texas law that made consensual, private, adult sexual behavior between same-gender adults unlawful – may seem to have little relevance to this case, it does demonstrate the increasing degree to which the federal high court will consider international norms in determining the constitutionality of our state penal laws. Overturning Bowers v. Hardwick (1986) 478 U.S. 186, in Lawrence, the U.S. Supreme Court placed great emphasis on the fact that criminalization of private consensual homosexual conduct was at odds with the European Convention on Human Rights, "[a]uthoritative in all countries that are members of the Council of Europe . . . ." (Id., at p. 573.) The high court recognized that, to the extent Bowers relied on values shared with a wider civilization, the case's reasoning and holding had been rejected by the European Court of Human Rights, and other nations had also affirmed the right of adult homosexuals to engage in intimate, consensual conduct.

The death penalty now enjoys a comparable lack of support in the international community, particularly in Western Europe. As previously noted in the AOB (pp. 546-551), of 180 nations, only ten, including the United States, China, Iran, Nigeria, Saudi Arabia, and the former apartheid regime of South Africa, have accounted for an overwhelming majority of state executions. (See, 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; People v. Bull (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. Opn. Of Harrison, J.].) All nations of Western Europe, and our immediate neighbors, Canada and Mexico, have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.

It is also significant that the U.S. Supreme Court recently abolished the death penalty as applied to children whose crimes occurred when they were younger than 18 years of age. (Roper v. Simmons (2005) 125 S.Ct. 1183.) The court reasoned, in part, that the United States was the only country in the world that continued to give official sanction to the execution of juvenile offenders. (Id., at p. 1198.) The U.S. high court paid particular attention to the fact that the United Kingdom had abolished the death penalty for juveniles even before several international covenants were promulgated, prohibiting the practice in signatory countries. (Id., at p. 1199.) The U.S. Supreme Court said:

> "The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the *Eighth Amendment's* own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: '[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusall Punishments inflicted.'"

(Id., at p. 1199; internal citations omitted.)

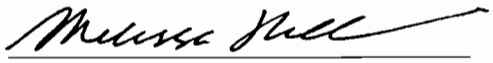
This reasoning applies equally to the death penalty as it is administered in the United States against *adult* offenders. The death penalty is regarded as cruel and unusual punishment in the United Kingdom; so, too, should it be held to violate our own nearly identical Eighth Amendment. Accordingly, "[t]he opinion of the world community, while not controlling . . . does provided respected and significant confirmation for" the abolition of the death penalty in California, as well as elsewhere in the United States. (See, Roper v. Simmons, supra, 125 S.Ct. at p. 1200.)

CONCLUSION

For the foregoing reasons, the entire judgment must be reversed. Appellant should be afforded such other 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, as supported by the evidence; reversal of the competency and sanity phase judgments; and reversal of the death penalty with a remand for a new penalty trial.

Dated: October 22, 2005

Respectfully submitted,



Melissa Hill
State Bar No. 71218
PO Box 2758
Corrales, NM 87048
Phone: (505) 898-2977
FAX: (505) 898-5085
Email: mhcorrals@direcway.com

Attorney for Appellant
Royal Clark

PROOF OF SERVICE BY MAIL

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 October 24, 2005, I served the attached Appellant's Reply Brief on the interested parties in this action by personal service or by placing true copies, postage prepaid, in the U.S. Mail in Albuquerque, New Mexico, addressed as follows:

Attorney General
Attn: William Kim
2550 Mariposa Mall
Fresno, CA 93721-2219

Habeas Corpus Resource Center
50 Fremont Street, #1800
San Francisco, CA 94105

Dennis Cooper
Fresno County District Attorney's Office
2220 Tulare Street, #1000
Fresno, CA 93721

Hon. John Fitch (Retired)
Fresno County Superior Court
1100 Van Ness
Fresno, CA 93724-0002

Royal Clark [by personal service on 10/26/05]
San Quentin State Prison
J51100
San Quentin, CA 94974

Michael Lasher
California Appellate Project
101 Second Street Suite 600
San Francisco, CA 94105

I declare under penalty of perjury pursuant to the laws of the State of California that foregoing facts are true.

Executed this October 24, 2005, at Corrales, New Mexico.

Melissa Hill

MELISSA HILL