No. S045696

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RANDY EUGENE GARCIA,

Defendant and Appellant.

L. A. Sup. Ct.
No. BA077888

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

HONORABLE JACQUELINE CONNER

MICHAEL HERSEK
California State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender
California Bar No. 62784

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

TABLE OF CONTENTS

Page

APPELLANT'S OPENING BRIEF 1

INTRODUCTION 1

ERROR IN RESPONDENT'S STATEMENT OF FACTS 2

ARGUMENT 3

I THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS COUNTS I THROUGH VII ON THE GROUND THAT LOS ANGELES COUNTY'S GRAND JURY, WHICH INDICTED HIM ON THOSE COUNTS, WAS THE PRODUCT OF A SELECTION PROCESS THAT SYSTEMATICALLY EXCLUDED HISPANICS AND WOMEN AND THUS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION. AS A RESULT, COUNTS I THROUGH VI MUST BE REVERSED AND APPELLANT'S SENTENCE OF DEATH SET ASIDE 3

A. Introduction 3

B. The Trial Court Erred by Evaluating Appellant's Grand Jury Challenge under the Wrong Legal Standard 5

C. The Statistical Evidence in this Case Shows That Hispanics and Women Were Underrepresented on the Grand Juries in Los Angeles County over a Significant Period of Time 6

1. The Statistical Evidence in This Case Shows That Hispanics Were Consistently Underrepresented on Los Angeles County's Grand Juries 7

TABLE OF CONTENTS

Page

2. The Statistical Evidence in This Case Shows That Women Were consistently Underrepresented On Los Angeles County's Grand Juries 11

D. The Trial Court Erred by Failing to Consider the Significance of the Evidence Showing That Hispanics and Women Have Been Consistently Underrepresented on Los Angeles County's Grand Juries During the Years at Issue in Appellant's Case 11

E. Respondent's Contention That Appellant Has Failed to Satisfy the Third Prong of *Castaneda* with Respect to the Underrepresentation of Hispanics Is without Merit ... 12

1. Respondent's Contention That Few Hispanics Can Afford to Serve As Grand Jurors Is without Merit 13

2. Respondent's Contention That Many Hispanics Feel That They Lack the Skills Required of Grand Jurors Is without Merit 15

3. The Trial Court's Finding of No Discriminatory Intent Is Not Supported by the Evidence 17

4. Respondent's Contention That Appellant Has Failed to Prove That Los Angeles County's Use of the Key-Man System Discriminated against Either Hispanics or Women is without Merit 23

F. The Trial Court Erred in Finding That Appellant had Failed to Make a Prima Facie Showing That Los Angeles County's Key-Man System for Selecting Its Grand Jurors Unlawfully Discriminates against Hispanics 33

G. Appellant Has Established a Prima Facie Case of Discrimination and Reversal Is Required 41

TABLE OF CONTENTS

Page

H. This Court's Recent Decision in *People v. Burney* (2009) 47 Cal.4th 203, Which Involved a Challenge to Orange County's Grand Jury Selection Process, Is Inapposite to Appellant's Jury Challenge 42

I. A Limited Remand Would Be an Inappropriate Remedy in This Case Given the Impracticalities of Holding Such a Hearing After the Extraordinary Passage of Time 44

CONCLUSION 48

II THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, A FAIR AND RELIABLE CAPITAL SENTENCING HEARING, AND DUE PROCESS BY ERRONEOUSLY EXCUSING FOR CAUSE PROSPECTIVE JUROR DIANNA GREER BASED ON HER VIEWS ON THE DEATH PENALTY 49

III APPELLANT'S CONVICTION AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE PROSECUTOR IMPROPERLY STRUCK THREE PROSPECTIVE WOMEN JURORS IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS 50

IV THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE 53

A. Introduction 53

B. The Trial Court Erred in Admitting the Victim Impact Videotape Because It Was Inflammatory and Prejudicial 54

C. The Trial Court Erred in Refusing to Exclude the Song "Hero" from the Victim Impact Videotape 63

TABLE OF CONTENTS

Page

D. The Trial Court Erred in Permitting Lynn's Display of Brinlee from the Witness Stand and Lynn's Testimony Regarding Brinlee's Difficulties at the Time of Her Birth 67

E. The Trial Court Erred in Admitting Evidence Concerning Joe's Funeral and Visits to His Grave 70

F. Reversal is Required 73

V THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S REQUEST FOR A SHORT CONTINUANCE IN ORDER TO PERMIT HIM TO PRESENT SURREBUTTAL EVIDENCE TO REFUTE THE SURPRISE REBUTTAL EVIDENCE WHICH WAS OFFERED BY THE PROSECUTOR TO UNDERMINE THE CREDIBILITY OF APPELLANT'S KEY DEFENSE MITIGATION EXPERT, DR. NANCY KASER-BOYD. THE TRIAL COURT'S ERROR REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE BECAUSE IT VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND RELIABLE PENALTY DETERMINATION UNDER THE STATE AND FEDERAL CONSTITUTIONS 80

A. Introduction 80

B. Appellant's Federal Constitutional Claims Are Properly Before This Court 80

C. The Trial Court Erred by Denying Appellant a Short Continuance in Order to Permit Him to Present Surrebuttal Evidence from Dr. Kaser-Boyd 82

TABLE OF CONTENTS

		Page
	D. The Trial Court's Error Requires Reversal	91
VI	THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT AT THE PENALTY PHASE	93
	A. Introduction	93
	B. Appellant's Federal Constitutional Claims Are Properly Before this Court	93
	C. The Prosecutor's Repeated References to Appellant as an Animal Denied Appellant His Right to a Fair and Reliable Penalty Determination	95
	D. The Prosecutor's Reading of the Children's Imaginary Letters to Their Deceased Father Was Improper	99
	E. Reversal of the Death Judgment Is Required	102
VII	THE TRIAL COURT FAILED TO INSTRUCT THE JURY SUA SPONTE ON THE APPROPRIATE USE OF THE VICTIM IMPACT EVIDENCE IN THIS CASE	106
VIII	CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION	108
IX	REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT	109
CONCLUSION		111
CERTIFICATE OF COUNSEL		112

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

Avery v. Georgia
(1953) 345 U.S. 559 32

Batson v. Kentucky
(1986) 476 U.S. 7 . . . . . 25, 47, 50, 51

Berghuis v. Smith
___ U.S. ___, 130 S.Ct. 48, 174 L.Ed.631 . . . . . 9, 10

Boyde v. California
(1990) 494 U.S. 370 75

Caldwell v. Mississippi
(1985) 472 U.S. 320 . . . . . 103, 110

California v. Brown
(1987) 479 U.S. 538 57

Castenada v. Partida
(1977) 430 U.S. 482 . . . . . passim

Chapman v. California
(1967) 386 U.S. 18 . . . . . 53, 92, 105, 110

Dallago v. United States
(D.C. Cir. 1969) 427 F.2d 546 104

Drayden v. White
(9th Cir. 2000) 232 F.3d 704 101

Duren v. Missouri
(1979) 439 U.S. 357 . . . . . 3, 5, 8, 43

TABLE OF AUTHORITIES

Pages

Eubanks v. Louisiana
(1958) 356 U.S. 584 24

Gabriel v. Benitez
(D.P.R. 1975) 390 F.Supp. 988 41

Garza v. County of Los Angeles
(C.D. Cal. 1990) 756 F.Supp. 1298 8

Ghent v. Woodford
(9th Cir. 2002) 279 F.3d 1121 ..... 77, 88

Gibson v. Clanon
(9th Cir.1980) 633 F.2d 851 104

Hitchcock v. Dugger
(1987) 481 U.S. 393 ..... 103, 110

J.E.B v. Alabama ex. rel. T.B.
(1994) 511 U.S. 127 51

Jefferson v. Morgan
(6th Cir. 1992) 962 F.2d 1185 ..... 24, 25

Jones v. Georgia
(1967) 389 U.S. 24 25

Kyles v. Whitley
(1995) 514 U.S. 419 ..... 77, 102

Norris v. Alabama
(1935) 294 U.S. 587 24

Parker v. Gladden
(1966) 385 U.S. 363 104

TABLE OF AUTHORITIES

Pages

Paulino v. Castro
(9th Cir. 2004) 371 F.3d 1083 51

Payne v. Tennessee
(1991) 501 U.S. 808 ..... 55, 70, 73, 100

Reece v. Georgia
(1955) 350 U.S. 85 24

Rideau v. Whitley
(5th Cir. 2000) 237 F.3d 472 ..... 24, 32

Rose v. Mitchell
(1979) 443 U.S. 545 ..... 5, 41

Scott v. Walker
(5th Cir.1966) 358 F.2d 561 ..... 31, 40, 41

Skipper v. South Carolina
(1986) 476 U.S. 1 ..... 103, 110

Smith v. Berghuis
(6th Cir. 2008) 543 F.3d 7, 8

Smith v. Texas
(1940) 311 U.S. 128 ..... 31, 40

United States v. Brodwin
(S.D.N.Y 2003) 292 F.Supp.2d 484 104

United States v. Orange
(10th Cir. 2006) 447 F.3d 792 9

Vasquez v. Hillery
(1986) 474 U.S. 254 6

TABLE OF AUTHORITIES

Pages

Wainwright v. Witt
(1985) 469 U.S. 412 ..... 31, 49

Williams v. Runnels
(9th Cir. 2006) 432 F.3d 1102 51

Zamudio v. California
(2008) __ U.S.__ 129 S.Ct. 564 ..... 59, 60

STATE CASES

American Business Credit Corp. v. Kirby
(1981) 122 Cal.App.3d 217 22

Fuselier v State
(Miss. 1985) 468 So. 2d 45 68

Hale v. Morgan
(1978) 22 Cal.3d 388 ..... 81, 94

Hovey v. Superior Court
(1980) 28 Cal.3d 1 ..... 16, 17

Lockett v. State
(Okla.Crim.App. 2002) 53 P.3d 418 101

Mask v. State
(Ark. 1993) 314 Ark. 25, 869 S.W.2d 1 69

Maupin v. Widling
(1987) 192 Cal.App.3d 568 104

People v. Alvarez
(1996) 14 Cal.4th 155 30

People v. Ashmus
(1991) 54 Cal.3d 932 ..... 79, 105

TABLE OF AUTHORITIES

Pages

People v. Basuta
(2001) 94 Cal.App.4th 370 . . . . . 30, 31

People v. Boyer
(2006) 38 Cal.4th 412 . . . . . 82, 94

People v. Brown
(1999) 75 Cal.App.4th 916 25

People v. Brown
(1988) 46 Cal.3d 432 . . . . . 53, 79

People v. Burney
(2009) 47 Cal.4th 203 42-44

People v. Cardenas
(1982) 31 Cal.3d 897 . . . . . 103, 104

People v. Carrington
(2009) 47 Cal.4th 145 6

People v. Carter
(1957) 48 Cal.2d 737 88-90

People v. Cole
(2004) 33 Cal.4th 1158 . . . . . 82, 94

People v. Corona
(1989) 211 Cal.App.3d 529 6

People v. Cuccia
(2002) 97 Cal.App.4th 785 90

People v. Dabb
(1948) 32 Cal.2d 491 57

TABLE OF AUTHORITIES

Pages

People v. Edelbacher
(1989) 47 Cal.3d 983 98

People v. Edwards
(1991) 54 Cal.3d 787 ..... 56, 67, 100

People v. Farnam
(2002) 28 Cal.4th 107 95

People v. Ford
(1948) 89 Cal.App.2d 467 97

People v. Fuentes
(1986) 183 Cal.App.3d 444 104

People v. Harris
(2005) 37 Cal.4th 310 71

People v. Haskett
(1982) 30 Cal.3d 84 107

People v. Hawkins
(1995) 10 Cal.4th 920 96

People v. Heard
(2003) 31 Cal.4th 946 31

People v. Hill
(1992) 3 Cal.4th 959 1

People v. Hines
(1997) 15 Cal.4th 997 ..... 81, 94

People v. Jenkins
(2000) 22 Cal.4th 900 ..... 82, 84

TABLE OF AUTHORITIES

Pages

People v. Johnson
(2006) 38 Cal.4th 1096 ..... 47, 52

People v. Jurado
(2006) 38 Cal.4th 72 51

People v. Kelly
(2007) 42 Cal.4th 763 ..... passim

People v. Mack
(1986) 178 Cal.App.3d 1026 ..... 81, 94

People v. McDermott
(2002) 28 Cal.4th 946 96

People v. Medina
(1995) 11 Cal.4th 694 100

People v. Mickey
(1991) 54 Cal.3d 612 ..... 84, 86, 87

People v. Nye
(1969) 71 Cal.2d 356 ..... 58, 59

People v. Ochoa
(1998) 19 Cal.4th 353 79

People v. Pearch
(1991) 229 Cal.App.3d 1282 104

People v. Prince
(2007) 40 Cal.4th 1179 ..... passim

People v. Roder
(1983) 33 Cal.3d 491 77

TABLE OF AUTHORITIES

Pages

People v. Rodriguez
(1943) 58 Cal.App.2d 415 88

People v. Rogers
(2006) 39 Cal.4th 826 ..... 82, 94

People v. Sandoval
(1992) 4 Cal.4th 155 96

People v. Stansbury
(1993) 4 Cal.4th 1017 100

People v. Stewart
(2004) 33 Cal.4th 425 31

People v. Stowell
(2003) 31 Cal.4th 1107 ..... 81, 94

People v. Sully
(1991) 53 Cal.3d 1195 97

People v. Wheeler
(1978) 22 Cal.3d 258 ..... 30, 47, 50, 51

People v. Wilkes
(1955) 44 Cal.2d 679 97

People v. Wilson
(2005) 36 Cal.4th 309 ..... 84, 85

People v. Woodard
(1979) 23 Cal.3d 329 104

People v. Yeoman
(2003) 31 Cal.4th 93 ..... 81, 82, 94

TABLE OF AUTHORITIES

Pages

People v. Zamudio
(2008) 43 Cal.4th 327 ..... 59, 71, 106, 107

Phillips v. State
(Okla.Crim.App. 1999) 989 P.2d 1017 101

Ross v. Superior Court
(1977) 19 Cal.3d 899 ..... 81, 94

State v. McHenry
(Kan. 2003) 78 P.3d 403 100

State v. Storey
(Mo. 2001) 40 S.W.3d 898 70

Walker v. State
(Ga. 1974) 32 Ga.App. 476, 208 S.E.2d 350 69

Welch v. State
(Okla.Crim.App. 2000) 2 P.3d 356 70

Whittlesey v. State
(Md. 1995) 340 Md. 30, 665 A.2d 223 66

CONSTITUTIONS

Cal. Const., art I, §§ 7 53
15 53
17 53

U.S. Const., Amends 6 ..... 53, 92
8 ..... 53, 92
14 ..... 53, 92

28 U.S.C. § 2254 11

TABLE OF AUTHORITIES

Pages

STATUTES

Evid. Code §§ 352 66
452 22
459 22
664 ..... 81, 94

Pen. Code §§ 190.3 ..... 54, 72, 99, 100
893 ..... 16, 30
904.8 48

JURY INSTRUCTIONS

CALJIC No. 8.85 106

TEXT AND OTHER AUTHORITIES

Aaron Copland, *The Aims of Music for Films*,
N.Y. Times, March 10, 1940, § 11 64

Better, Institutional Racism. A Primer on Theories and
Strategies for Social Change (2002) 34

Cashmore, Dictionary of Race and Ethnic
Relations (4th ed. 1996) 34

Cohen, *Music as a Source of Emotion in Film.*
In Music and Emotion (Juslin & Sloboda, eds. 2001) 64

David Hennes, Comment, Manufacturing Evidence for Trial:
The Prejudicial Implications of Videotaped Crime
Scene Reenactments, 142 U. Pa. L. Rev. 2125 (1994) 56-57

Ed S. Tan, Emotions and the Structure of Narrative
Film: Film as an Emotion Machine
(Lawrence Erlbaum Associates, 1996) 56

TABLE OF AUTHORITIES

Pages

Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717 (2000) 15, 21, 34, 37

Leighton, The Boob Tube: Making Videotaped Evidence Interesting (2001) 2 Ann. 2001 56

Passionate Views: Thinking About Film and Emotion (Gregory Smith and Carl Plantinga eds., Johns Hopkins University Press, 1998) 56

6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 45 104

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. RANDY EUGENE GARCIA, Defendant and Appellant.	No. S045696 L. A. Sup. Ct. No. BA077888

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ERROR IN RESPONDENT'S STATEMENT OF FACTS

In its statement of facts, respondent refers to an incident described at trial by appellant's mother, Suszanne, where Tim Tugg, the man Suszanne began living with just before appellant entered the seventh grade, assaulted her with a butcher knife and threatened to kill her if she ever left him, and if she did leave "somebody else would die." (15 RT 2691.)[1] Respondent has mistakenly attributed this assault incident in its statement of facts to appellant. (See RB 29 [respondent erroneously states that appellant was the person who threatened Suszanne with a butcher knife].)

---

[1] The following abbreviations are used herein: "RB" refers to respondent's brief; "AOB" refers to appellant's opening brief; "CT" refers to the clerk's transcript on appeal; "SCT" refers to the clerk's supplemental transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS COUNTS I THROUGH VII ON THE GROUND THAT LOS ANGELES COUNTY'S GRAND JURY, WHICH INDICTED HIM ON THOSE COUNTS, WAS THE PRODUCT OF A SELECTION PROCESS THAT SYSTEMATICALLY EXCLUDED HISPANICS AND WOMEN AND THUS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION. AS A RESULT, COUNTS I THROUGH VI MUST BE REVERSED AND APPELLANT'S SENTENCE OF DEATH SET ASIDE[2]

A. Introduction

In his opening brief, appellant argued that the trial court erred in denying his motion to dismiss counts I through VII of the indictment on the ground that the grand jury that indicted him on those counts was the product of an improper selection process that resulted in the underrepresentation of both Hispanics and women on the grand jury, in violation of his federal constitutional right to equal protection under the Fourteenth Amendment. Appellant argued that the trial court applied the wrong legal standard in its evaluation of appellant's grand jury challenge and whether he had established a prima facie case of discrimination against Hispanics and women, i.e., that the trial court applied the legal standard set forth in *Duren v. Missouri* (1979) 439 U.S. 357,[3] instead of the legal standard set forth in

---

[2] As noted in appellant's opening brief, Count VII was dismissed at trial pursuant to section 1385. (See II CT 328.)

[3] In order to establish a prima facie case under *Duren v. Missouri*, *supra*, 439 U.S. 357,

> the defendant must show (1) that the group alleged to be

(continued...)

Castenada v. Partida (1977) 430 U.S. 482.[4] Appellant also argued that the trial court ignored the significance of the numerical disparities shown by the evidence in this case, disparities which established a prima facie case of discrimination against Hispanics and women in Los Angeles County's grand jury selection system in appellant's case. (AOB 60-103.)

Finally, appellant argued that the trial court was simply wrong in concluding that Los Angeles County's use of a key-man system for selecting its grand jurors did not discriminate against Hispanics and women.

Respondent concedes that the trial court erred in evaluating appellant's jury challenge under the *Duren* standard. (See RB 37 ["respondent agrees with appellant's assertion that the trial court employed an erroneous legal standard for rejecting his claim below"]; see also RB 58.) Nevertheless, respondent contends that reversal is not required because any underrepresentation of Hispanics and women on Los Angeles County's

---

[3](...continued)
excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

(*Id.* at p. 364.)

[4] In order to establish a prima facie case under *Castenada v. Partida*, *supra*, 430 U.S. 482, the defendant is required to establish (1) that the excluded group is a recognizable, distinct class, singled out for different treatment under state law, as written, or as applied; (2) that the degree of underrepresentation was substantial over a significant period of time; and (3) that the procedure which is being used to select the jurors is "susceptible of abuse or is not racially neutral." (*Id.* at p. 494.) Once the defendant has established a prima facie case, the burden then shifts to the state to rebut the prima facie case. (*Id.* at p. 495.)

grand juries during the time period at issue here was not due to the selection system employed by Los Angeles County for selecting its grand jurors and therefore appellant has failed to make out a prima facie case of purposeful discrimination under *Castaneda*'s third prong. (See RB 63.).

Respondent's contentions lack merit. As shown by the evidence in this case, the long history of underrepresentation of Hispanics and women on the grand juries in Los Angeles County dispels any notion that the selection practices employed by Los Angeles County in selecting its grand jurors are not discriminatory and can pass constitutional muster under the Equal Protection Clause of the federal Constitution. Accordingly, appellant's convictions on counts I through VI must be reversed and his sentence of death set aside.

B. The Trial Court Erred by Evaluating Appellant's Grand Jury Challenge under the Wrong Legal Standard

As previously noted, respondent concedes that the trial court erred by evaluating appellant's grand jury challenge under *Duren*. (RB 37, 58.) This error is significant because the *Duren* and *Castaneda* standards concern different constitutional rights: *Duren*, the defendant's Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community (*Duren v. Missouri*, *supra*, 439 U.S. at pp. 358-359), and *Castenada*, the defendant's right under the Equal Protection Clause of the Fourteenth Amendment to have members of his grand jury selected in a nondiscrimatory manner (see *Castenada v. Partida*, *supra*, 430 U.S. at pp. 492-494; see also *Rose v. Mitchell* (1979) 443 U.S. 545, 564-566).[5] This

---

[5] The *Duren* and *Castenada* standards also differ in that they have (continued...)

fundamental error on the part of the trial court undermines completely the validity of its analysis and denial of appellant's grand jury challenge.

C. The Statistical Evidence in this Case Shows That Hispanics and Women Were Underrepresented on the Grand Juries in Los Angeles County over a Significant Period of Time

Respondent does not dispute the fact that the evidence in this case shows that Hispanics and women were underrepresented on the grand juries in Los Angeles County over a significant period of time. (See RB 49-57.) With respect to the underrepresentation of women on the Los Angeles County grand juries, respondent contends that the "low disparity percentages for the five years prior to appellant's grand jury did not rise to a level of a constitutional violation." (RB 64.) Respondent does not make a similar contention with respect to the underrepresentation of Hispanics. This is no doubt because the disparities shown by the evidence in this case with respect to Hispanics firmly establish the second *Castaneda* prong, i.e., "that the degree of underrepresentation was substantial over a significant period of time." (*Castaneda v. Partida*, *supra*, 430 U.S. at p. 494.)

---

[5](...continued)
different prejudice requirements. In the case of a successful Sixth Amendment challenge to the grand jury following conviction, the defendant must establish prejudice in order to be entitled to relief. (See *People v. Carrington* (2009) 47 Cal.4th 145, 178; *People v. Corona* (1989) 211 Cal.App.3d 529, 535.) But, in the case of a successful challenge to the grand jury under the Equal Protection Clause of the Fourteenth Amendment, prejudice is presumed and automatic reversal is required. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 260-264; *People v. Carrington*, *supra*, 47 Cal.4th at pp. 178-179.)

1. The Statistical Evidence in This Case Shows That Hispanics Were Consistently Underrepresented on Los Angeles County's Grand Juries

In the present case, whether one takes the numbers generated by the prosecution's expert in *People v. Vallarino* (Super. Ct. Los Angeles County, 1993, No. BA027100),[6] Dr. William Clark (Clark), or the defense's expert in *Vallarino*, *supra*, Dr. Dennis Willigan (Willigan), appellant established that jury-eligible Hispanics were underrepresented on the grand jury pools in Los Angeles County for the six-year period at issue here, 1986 to 1992. (See AOB 95-97.) The numbers in this case show that jury-eligible Hispanics who spoke some English made up either 19.1 percent (Clark) or 19.36 percent (Willigan) of the entire population in Los Angeles County, and jury-eligible Hispanics who spoke English at least well made up either 17.2 percent (Clark) or 17.98 percent (Willigan) of the County's population.[7] But, for the six years at issue here, Hispanics made up an

---

[6] *People v. Vallarino*, *supra*, was a multi-defendant Los Angeles County case in which the defendants mounted a lengthy and extensive challenge to Los Angeles County's grand jury system, alleging that it discriminated against Hispanics. The record in that case was made part of the record in appellant's case, and was referred to by the trial court and the parties below by the name *People v. Vela*. (See 2 RT 348.) In his opening brief, appellant also referred to this case by the name *People v. Vela*. (See, e.g., AOB 60.) It appears, however, that at some point the criminal case against defendant Vela settled and the name of the case changed to *People v. Vallarino et al.* (See 1 SCT VII 27.) Consequently, the 19 volumes of Supplemental Clerk's Transcript (Supplemental VII) in appellant's case are denominated *People v. Vallarino, et al.* Respondent refers in its brief to the record in the multi-defendant case that once included defendant Vela by the name *People v. Vallarino* (see, e.g., RB 40), and appellant will now do so as well in his reply brief to avoid any possible confusion.

[7] Clark's and Willigan's numbers of jury-eligible Hispanics differ (continued...)

average of only 6.56 percent of the grand jury pools, thus yielding an average absolute disparity[8] of either 12.54 percent (Clark) or 12.8 percent

---

(...continued)
slightly because Clark relied on the census long form which was sent to and filled out by about 16 percent of the public to estimate Hispanic English-speaking abilities. (12 SCT VII 2701-2702.) Clark also reduced his 1990 census numbers based on Dr. Jeffrey Passel's nationwide study of the 1980 census, a practice that was criticized by defense expert Williganand specifically rejected by the district court in *Garza v. County of Los Angeles* (C.D. Cal. 1990) 756 F.Supp. 1298, 1324-1325, a case in which Hispanic voters successfully challenged the 1981 redistricting plan adopted by the Los Angeles County Board of Supervisors on grounds that it violated their rights under the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. In *Garza*, *supra*, 756 F.Supp. at p. 1324, the court specifically rejected the accuracy of Clark's population calculations based on Passel's nationwide study of the 1980 census. In the present case, Willigan testified that he used PUMS (Public Use Microdata Sample) data to get a more accurate estimate of adult Hispanic English-speaking abilities. (13 SCT VII 3086, 3089, 3091.)

[8] As noted by appellant in his opening brief, the absolute disparity standard is one of several different measures of underrepresentation. Another is the comparative disparity standard. (AOB 88-89.)

The absolute disparity standard measures the difference between the proportion in the population of a cognizable class (here Hispanics) and the proportion of that class on the grand jury pools. (3 SCT VII 588.) The comparative disparity standard relates the size of the absolute disparity to the size of the community percentage of the cognizable class. "It is used to help understand and measure the degree of underrepresentation by looking at it from a probabilistic point of view." (3 SCT VII 601, 686; 13 SCT VII 3073.)

In *Duren v. Missouri*, *supra*, the high court utilized the absolute disparity standard to determine that women were underrepresented by 35 percent in venire panels in the Missouri district at issue in that case. (*Duren*, 439 U.S. at p. 365, fn. 23.) However, in the years since *Duren*, the Supreme Court has not mandated that a particular test be used to measure

(continued...)

(Willigan) for jury-eligible Hispanics who speak some English and an average absolute disparity of either 10.6 percent (Clark) or 11.42 percent (Willigan) for jury-eligible Hispanics who speak English at least well. (9 SCT VII 1801-1802; 13 SCT VII 3071-3072.) For these same two Hispanic population groups, the comparative disparity is either 65.7 percent (Clark) or 66.1 percent (Willigan) for jury-eligible Hispanics who speak some English and either 61.9 percent (Clark) or 63.5 percent (Willigan) for jury-eligible Hispanics who speak English at least well.[9] Thus, both the absolute and comparative disparities in this case demonstrate that grand jury-eligible Hispanics have been consistently and substantially underrepresented on the grand jury pools in Los Angeles County over a significant period of time, and respondent does not contend otherwise.[10]

---

[8](...continued)
underrepresentation in either Sixth or Fourteenth Amendment challenges. And courts across the country have utilized a number of methods, including absolute disparity and comparative disparity, to measure whether a distinctive group has been underrepresented on venire panels. (See *Smith v. Berghuis* (6th Cir. 2008) 543 F.3d 326, 337 [comparative disparity], cert. granted September 30, 2009, *Berghuis v. Smith*, ___ U.S. ___, 130 S.Ct. 48, 174 L.Ed.631; *United States v. Orange* (10th Cir. 2006) 447 F.3d 792, 798-799 [absolute and comparative disparity]; *United States v. Forest* (6th Cir. 2004) [absolute disparity].)

[9] Willigan testified that in all of the literature he has reviewed in preparation for his testimony in this case, he has never seen a comparative disparity in the juror-eligible population greater than the one in this case. (3 SCT VII 602.)

[10] Willigan noted that, in order to establish a prima facie case, a number of courts require that the absolute disparity be 10 percent or greater. (3 SCT VII 586-587, 588, 686-687.) Willigan criticized the use of a 10 percent threshold, noting that such a threshold would allow for the total elimination of minority groups from the grand jury where they constitute 10
(continued...)

[10](...continued)
percent or less of the total jury eligible population. For example, use of the 10 percent absolute disparity standard in appellant's case would sanction the total elimination of non-Hispanic Blacks and non-Hispanic Asians, 18 years and older, who constitute 10.2 percent and 10.3 percent of the adult population of Los Angeles County, respectively. (3 SCT VII 595-601.)

Similar criticism of the absolute disparity test was recently voiced by the Sixth Circuit Court of Appeals in *Smith v. Berghuis*, *supra*, 543 F.3d 326, 337-338. In that case, the evidence showed that African Americans made up 7.28 percent of the jury eligible population but only 6 percent of the total pool of people on the venire resulting in an absolute disparity of 1.28 percent. (*Id.* at p. 337.)

After noting the unfairness of applying the absolute disparity threshold to cases like Smith's, where the distinctive group alleged to have been underrepresented is small, the Court of Appeals held that "the comparative disparity test is the more appropriate measure of underrepresentation." (*Id.* at p. 338.) Applying the comparative disparity test to Smith's case, the Court of Appeals found that the number of African Americans on the venire panels in the county where Smith was tried "was 18 to 34 percent lower than one would have expected based on random selection factors." (*Ibid.*) The court held:

> These figures, which are larger than those revealed by the absolute disparity test, are sufficient to demonstrate that the representation of African American veniremen in Kent County at the time of Petitioner's trial was unfair and unreasonable.

(*Id.* at p. 338.) After finding that Smith had satisfied all three prongs of the *Duren* test, the Court of Appeals set aside the decision of the Michigan Supreme Court.

A petition for writ of certiorari in the United States Supreme Court was filed by the state challenging the Court of Appeals ruling based on its use of the comparative disparity test to show substantial underrepresentation for purposes of the second *Duren* prong. That petition was granted on September 30, 2009. The question presented in the petition is as follows:

> Whether the U.S. Court of Appeals for the Sixth Circuit erred

(continued...)

2. The Statistical Evidence in This Case Shows That Women Were Consistently Underrepresented on Los Angeles County's Grand Juries

For women, the statistical evidence in this case shows that, while they comprised approximately 50 percent of the population of Los Angeles County 18 years and older (see SCT V 4-13; 2 RT 450), for the period 1987-1988 to 1993-1994, they comprised only between 34 and 45 percent of the grand jury nominee pools each year, for an absolute disparity of 5 to 16 percent and a comparative disparity of 10 to 32 percent (see 2 RT 450).

D. The Trial Court Erred by Failing to Consider the Significance of the Evidence Showing That Hispanics and Women Have Been Consistently Underrepresented on Los Angeles County's Grand Juries During the Years at Issue in Appellant's Case

Despite the importance of the large disparities shown by the grand jury and population statistics in this case as they relate to appellant's grand

---

[10](...continued)
in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which this Court has never applied and which four circuits have specifically rejected.

A decision by the United States Supreme Court in *Berghuis v. Smith*, *supra*, may settle, once and for all, the appropriate test for cases like appellant's. But, no matter what the high court decides in that case, as previously noted, respondent appears to concede that, at least with respect to appellant's claim concerning the underrepresentation of Hispanics on the grand juries in Los Angeles County during the period of time at issue in his case, appellant has satisfied both the absolute and comparative disparity tests.

jury challenge, the trial court declined to take a position as to "which numbers are right." (2 RT 467-468.) The court stated:

> I don't think I even want to get into the second [*Duren*] prong. On appeal that is going to be argued forever as to which numbers are right. . . . I think you [defense counsel] have protected your position, and the numbers are all there for somebody else to have fun with.

(2 RT 467-468.) The trial court's failure to understand the importance of the disparities shown by the evidence in this case as they relate to appellant's grand jury challenge is significant. As held by the high court in *Castaneda v. Partida*, *supra*, 430 U.S. 482,

> Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

(*Id.* at p. 495.)

Thus, the trial court committed at least three errors that fatally undermine the validity of its denial of appellant's grand jury challenge: it erred by evaluating appellant's grand jury challenge under the wrong legal standard (the *Duren* standard instead of the *Castenada* standard); it erred by ignoring the significance of the disparities shown by the numbers in this case, disparities which established the second and third *Castenada* prongs, which in turn established a prima facie case of discriminatory purpose on the part of Los Angeles County; and it erred by failing to require the prosecution to rebut appellant's prima facie case.

E. Respondent's Contention That Appellant Has Failed to Satisfy the Third Prong of *Castaneda* with Respect to the Underrepresentation of Hispanics Is without Merit

Respondent contends that appellant has failed to satisfy *Castaneda*'s third prong – i.e., that he has failed to show that the procedure employed by

Los Angeles County to select its grand jurors is either "susceptible of abuse or is not racially neutral" (*Castaneda v. Partida*, *supra*, 430 U.S. at p. 494) – and that he has therefore failed to establish a prima facie case of purposeful discrimination. In support of this contention, respondent makes a number of contentions in a vain attempt to justify the underrepresentation of Hispanics on the grand juries in Los Angeles County during the time period at issue here. As will be demonstrated below, respondent's various contentions lack merit.

1. Respondent's Contention That Few Hispanics Can Afford to Serve As Grand Jurors Is without Merit

Respondent contends, citing Clark's testimony, that the underrepresentation of Hispanics on the Los Angeles County grand juries during the period of time at issue here was due, not to the selection system, "but because there were fewer Hispanic citizens over the age of 55, and hence fewer retired Hispanics who could afford to serve as grand jurors." (RB 62.) Not so.

Respondent's contention that the underrepresentation of Hispanics was due to the fact that there are fewer Hispanics over 55 and hence fewer Hispanics who could afford to serve is based on Clark's testimony that people over 55 made up "a large amount of the [grand jury] pool" (9 SCT VII 1988), and the notion that only retirees could afford to serve as grand jurors. But this notion is undermined by the testimony of Juanita Blankenship, the Director of Juror Management for Los Angeles County, who testified that persons selected for grand jury service who are employed, inter alia, by the City of Los Angeles, the federal and state governments, and the post office receive their full salary for the duration of their grand jury service. (13 SCT VII 3167.) Of the nearly two and a half million jury-

eligible Hispanics in Los Angeles County during the period of time at issue here (see 15 SCT VII 3658), it is fair to assume that there were many grand jury-eligible Hispanics employed by the City of Los Angeles, the state and federal governments, and the post office, who would have suffered no financial hardship by serving on the grand jury, and because they would have suffered no financial hardship, would have been willing to serve as grand jurors.[11]

Respondent's contention also runs counter to Willigan's testimony in *People v. Vallarino*, *supra*, that the economic ability to serve as a grand juror is not a cause of the underrepresentation. (3 SCT VII 505-506, 514.) Willigan attributed the disproportionate underrepresentation of Hispanics on the Los Angeles County grand juries to the fact that the judges in the nominating process, most of whom were non-Hispanic White, nominated

---

[11] In the present case, there is no evidence that this important fact about grand jury pay was ever communicated to the public at large in an effort to get people who were employed by the City of Los Angeles, the state and federal governments, or the post office to apply for grand jury service. (See 15 SCT VII 3686-3688.) In fact, the evidence in this case shows that the public at large was told only that

> Grand jurors generally are expected to work four days each week. Pay is $25 per day of service, auto mileage to and from home and free parking near the Criminal Courts Building in the Civic Center.

(15 SCT VII 3688.) And the judges participating in the interview process were instructed to tell the prospective grand jurors that they would be paid only "$25 plus mileage, for each day in attendance during July through June for approximately four days per week." (15 SCT VII 3625; see also 1 SCT VII 133.)

people who were known to them within their social network.[12] (3 SCT VII 506-507; see also Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1741-1743, 1755-1757 (2000) [hereafter "*Institutional Racism*"].)[13]

2. Respondent's Contention That Many Hispanics Feel That They Lack the Skills Required of Grand Jurors Is without Merit

Respondent contends, again citing Clark's testimony, that the underrepresentation of Hispanics on the Los Angeles County grand juries during the period of time at issue here was because Hispanics generally had less education, and "a stated desire for analytical skills would tend not to attract those who thought they lacked such skills." (RB 62.) Respondent's contention lacks merit.

Respondent's contention that the underrepresentation of Hispanics can be explained by the fact that many Hispanics may feel that they lack the necessary analytical skills required of grand jurors and do not apply for that reason finds no solid evidentiary support in the record. Moreover, it is

---

[12] Willigan testified that he reviewed the real property records of the 11 judges sitting on the grand and petit jury committee for the year 1989 to discover their residential addresses. According to Willigan, 10 of the 11 judges lived in upper middle-class neighborhoods, neighborhoods which had the lowest percentages of Hispanics. (3 SCT VII 553-554.)

[13] In his article entitled *Institutional Racism*, which is discussed further *post*, Lopez examined the grand jury selection practices of Los Angeles County in the 1960s and 1990s and noted that Los Angeles County then, as now, relies on a key-man grand jury selection system that discriminates, either intentionally or unintentionally, against Hispanics, and thus produces grand juries where Hispanics are substantially underrepresented in proportion to their population numbers in Los Angeles County. (*Institutional Racism*, *supra*, 109 Yale L.J. at pp. 1741-1743, 1755-1757.)

inconceivable that, of the nearly two and a half million jury-eligible Hispanics residing in Los Angeles County during the period of time at issue here, Los Angeles County could not recruit more than a small handful of members of the Hispanic community who believed that they possessed the basic analytical skills required of grand jurors.[14] But, even assuming that the committee of judges responsible for selecting the prospective grand jurors believed that it was desirable that they possessed certain specific skills, such as "[a]ccounting, communications, report writing, and interviewing" (15 SCT VII 3625; see also 15 SCT VII 3686 ["good oral and writing skills"]), not all of the prospective grand jurors needed to possess the same skills. Nor would it necessarily be desirable that they all possessed the same skills, as it is equally important to have grand jurors with a diversity of experience, knowledge, judgment, and viewpoints. (Cf. *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 21-25.) Furthermore, the law governing the qualifications for grand jurors does not require that grand jurors possess any particular skills, only that they be "in possession of [their] natural faculties, of ordinary intelligence, of sound judgment, and of fair character." (Pen. Code, § 893.)[15]

---

[14] The notion that Hispanics would feel that they lacked the necessary analytical skills required of grand jurors smacks of institutional racism, a subject which is discussed *post*.

[15] Penal Code section 893 sets forth the requirements for grand jurors and provides as follows:

> (a) A person is competent to act as a grand juror only if he possesses each of the following qualifications:
>
> (1) He is a citizen of the United States of the age of 18 years or older who shall have been a resident of the state and

(continued...)

3. The Trial Court's Finding of No Discriminatory Intent Is Not Supported by the Evidence

Respondent next contends that the trial court's finding that appellant had failed to make out a prima facie showing of "discriminatory intent or purpose was virtually compelled by the evidence" in this case. (RB 60.) According to respondent, the evidence shows "that the selectors of grand jury nominees, who were the 238 Los Angeles County superior court judges, engaged in efforts to include rather than exclude Hispanics," and, citing the testimony of demographer Dr. Nancy Bolton in *People v. Vallarino*, *supra*, that "the judges had been enriching the nominee pool after the interview process, by nominating Hispanics at a higher rate than white applicants." (RB 53, 60.) Respondent also contends that the that the

---

[15](...continued)
of the county or city and county for one year immediately before being selected and returned.

(2) He is in possession of his natural faculties, of ordinary intelligence, of sound judgment, and of fair character.

(3) He is possessed of sufficient knowledge of the English language.

(b) A person is not competent to act as a grand juror if any of the following apply:

(1) The person is serving as a trial juror in any court of this state.

(2) The person has been discharged as a grand juror in any court of this state within one year.

(3) The person has been convicted of malfeasance in office or any felony or other high crime.

(4) The person is serving as an elected public officer.

evidence shows that Los Angeles County engaged in "extensive" efforts to recruit grand jurors, including Hispanics. (RB 60.) Hence, according to respondent, appellant failed to satisfy the third prong of the *Castaneda* test to make out a prima facie case of intentional discrimination. Respondent's contentions are not supported by the record.

First, with respect to Bolton's testimony that "the judges had been enriching the nominee pool after the interview process, by nominating Hispanics at a higher rate than white applicants," she was forced to admit, on cross-examination, that the 238 Los Angeles County superior court judges did little to actually enrich the grand jury nominee pool with Hispanics, and that this was a possible cause of the underrepresentation of Hispanics on the grand jury pools. (18 SCT VII 4405.) She also acknowledged that for the 1991-1992 grand jury, no Hispanics were directly nominated by the superior court judges; for the 1990-1991 grand jury, only one Hispanic was directly nominated; for the 1989-1990 grand jury, no Hispanics were directly nominated; and for the 1988-1989 grand jury, only one Hispanic was directly nominated by the superior court judges. (18 SCT VII 4404-4405.)[16]

---

[16] Willigan testified that the total number of Hispanics directly selected by judges for the five-year period 1987 through 1992 was nine. (4 SCT VII 811.) He provided the following breakdown:

For the year 1987-1988, of the 100 people directly selected by judges, 7.1 percent were Blacks, 82.8 percent were non-Hispanic Whites, 6.1 percent were Hispanics, and 3 percent were Asians. In the volunteer pool for that year, 18.8 percent of the volunteers were Blacks, 70.8 percent were Whites, 2.1 percent were Hispanics, and 8.3 percent were Asians. (4 SCT VII 810-811; see also 17 SCT VII 4045.)

For the year 1988-1989, of the 100 people directly selected by judges,

(continued...)

Second, with respect to respondent's contention that the evidence shows that Los Angeles County engaged in "extensive" efforts to recruit grand jurors, including Hispanics, most, if not all, of those so-called efforts post-date the selection of the grand jury that indicted appellant, and the trial court here ruled specifically that Los Angeles County's current recruitment efforts did not apply to the selection of the grand jury in appellant's case. (2 RT 463, 467.)

Furthermore, there was no evidence presented below regarding any efforts made by Los Angeles County to reach out to the Hispanic community for the period during which members of appellant's grand jury

---

[16](...continued)
none was Hispanic, 88 percent were non-Hispanic Whites, 6.9 percent were Blacks, and 3 percent were Asians. In the volunteer pool for that same year, 28.7 percent were Blacks, 49.12 percent were non-Hispanic Whites, and 15.79 percent Hispanics. (4 SCT VII 809-810; see also 17 SCT VII 4045.)

For the 1989-1990 grand jury, a total of 84 people were directly selected by judges. Only one person or 1.2 percent was Hispanic, 81 percent were non-Hispanic Whites, and 13.1 percent were Blacks. In the volunteer pool for that year, Hispanic volunteers made up 12.9 percent, Blacks 12.9 percent, and non-Hispanic Whites 70.97 percent. (4 SCT VII 806-807; see also 17 SCT VII 4045.)

For the 1990-1991 grand jury, judges directly selected 61 people. Of that number, 96.8 percent were non-Hispanic Whites, 1.6 percent were Asians, and 1.6 percent were Blacks. No Hispanics were nominated. (4 SCT VII 798-799.) In the volunteer pool for that year, 72.4 percent were non-Hispanic Whites, 8.62 percent were Hispanic, 17.36 percent were Black, and 1.72 percent were Asians. (4 SCT VII 800; see also 17 SCT VII 4045.)

Finally, for the 1991-1992 grand jury, of the 102 people directly selected by judges, approximately 6.9 percent were Blacks, 2 percent were Hispanics, 3.9 percent were Asians, and 84.3 percent were non-Hispanic Whites. (4 SCT VII 806-807; see also 17 SCT VII 4045.)

were selected, 1992.[17] The only evidence presented below regarding Los Angeles County's efforts to reach out to members of the minority community, including Hispanics, was a memo sent by the presiding judge to all of the county's superior court judges, which was dated October 3, 1989, reminding them "that, whenever possible, qualified minority citizens should be considered," and a November 21, 1989, press release captioned "VOLUNTEERS FOR THE GRAND JURY NEEDED," which contained the following statement from the presiding judge: "'The pool of nominees from which the Grand Jury is chosen should reflect the diverse makeup of our county and I especially encourage citizens who are Black, Hispanic and Asian to volunteer in light of their historical underrepresentation on the Grand Jury.'" (RB 60-61; 15 SCT VII 3686-3688.) However, as previously noted, both the presiding judge's October 3, 1989, reminder to his fellow judges and the November 21, 1989, press release were issued several years before the impanelment of the grand jurors in appellant's case, and therefore played no role in the recruitment of the grand jurors in his case.

Moreover, the fact that the presiding judge sent a "reminder" to all of the superior court judges that they should consider "qualified minority citizens" may say something about the efforts on the part of the presiding judge in 1989 to try to get his fellow judges to deal with the historical problem of the underrepresentation of Hispanics and others on Los Angeles County's grand juries, but, as shown by Bolton's testimony, discussed *ante*, the presiding judge's "reminder" fell largely on deaf ears and *no* Hispanics

---

[17] As noted by appellant in his opening brief, the grand jury that indicted him was the grand jury selected for service in 1992. (AOB 60, fn. 18; see 1 SCT VII 126; I CT 213-222.)

were nominated by the superior court judges for that year. (18 SCT VII 4404-4405.)[18]

The November 21, 1989, press release, noted above, was also largely ineffectual in recruiting Hispanics for grand jury service. November 21, 1989, was a Tuesday, and the deadline for the filing of an application was Friday, December 1, 1989. There were two holidays between those two dates: Thanksgiving, Thursday, November 23, and the day after Thanksgiving, Friday, November 24. The information in the press release was mentioned in only one newspaper, the Los Angeles Daily Journal, on only one day, Monday, November 27, 1989, which was four days before the application deadline. (5 SCT VII 1078-1081.) The press release appeared on page three of the paper in a section of the paper called "Briefs" under the heading "County Seeks Grand Jurors."[19] (15 SCT VII 3688.)[20]

---

[18] That the presiding judge's reminder fell on deaf ears is not surprising and nothing new. As noted by Lopez in his article *Institutional Racism*, *supra*, the superior court judges had received similar reminders from the presiding judge beginning in 1962.

> Beginning in 1962, the presiding judge on several occasions sent to each sitting judge a letter on selecting grand jurors that included the following instructions: "The Grand Jury should be representative of a cross section of the community. Each Judge must therefore be mindful of the need for making nominations from the various geographical locations within the County, and different racial groups, and all economic levels . . . ."

(*Institutional Racism*, *supra*, at pp. 1792-1793.) Despite these reminders, Lopez notes that they were largely ignored by the superior court judges and they continued to "engage[] in a practice that systematically excluded minorities." (*Id.* at p. 1793.)

[19] A photocopy of this newspaper article was admitted into evidence (continued...)

Willigan was asked his opinion about the November 21 press release, and he testified that giving the public only one week to apply to serve on the grand jury would not, in his opinion, produce a very large public response. And he was right, as only eight Hispanics submitted applications as a result of that press release. (5 SCT VII 1078-1081; 6 SCT VII 1287-1289.)

---

[19](...continued)
in *People v. Vallarino*, *supra*, regarding Los Angeles County's efforts to recruit Hispanic grand jurors. (See 15 SCT VII 3638, 3688; 2 RT 417-425.) Unfortunately, that photocopy does not show the page number on which the article resides. (15 SCT VII 3688.) Appellant has obtained from the Los Angeles County Law Library a photocopy of that same article that shows the article and the number of the page on which it resides, and has attached it to his reply brief as Exhibit A. A motion requesting that this Court take judicial notice pursuant to Evidence Code sections 452, subdivision (h), and 459, subdivision (a), of the indisputable fact that the article entitled "County Seeks Grand Jurors" resides on page three of the November 27, 1989, edition of the Los Angeles Daily Journal accompanies the filing of appellant's reply brief.

[20] Given the fact that the Los Angeles Daily Journal is a relatively small newspaper that caters almost exclusively to members of the legal community, it is highly unlikely that very many members of the general Hispanic community, or for that matter the general public, ever read, or, much less, saw, the press release which was buried on page three of that paper. (Cf. *American Business Credit Corp. v. Kirby* (1981) 122 Cal.App.3d 217, 221 [recognizing that the Los Angeles Daily Journal "is hardly a paper of 'general' circulation; its contents, both notices and news items, are directed to the legal profession"].)

4. Respondent's Contention That Appellant Has Failed to Prove That Los Angeles County's Use of the Key-Man System Discriminated against Either Hispanics or Women is without Merit

Respondent contends that the evidence in this case supports the trial court's "finding" that appellant failed to prove that Los Angeles County's use of the key-man system to select its grand jurors discriminated against Hispanics or women. (RB 60, 63.) Not so.

Here, the trial court noted that "the key man [system] is split into two sets of types of nominees, those nominated by the judges who the judges find and then the volunteers." (2 RT 464.)

With respect to the people nominated by the judges, the trial court said "that there is no dispute that those judges are a substantial minority of the judges. Very few of them find anybody," and "where we have such a small minority of judges who are able to find anybody, there's no guarantee that those judges are the white judges." (2 RT 465-466.)

With respect to the critical process by which the entire group of nominees and volunteers are screened by the judges on the grand jury committee, the trial court said that the nominees and volunteers

> are segregated out by race to allow judges to try to increase the number of minority representation on the grand jury. [¶] By the same token, I suppose you could argue that it also allows judges to avoid those minorities, but the bottom line is the minorities and the majorities, the whites and Hispanics and Asians or whatever, are all nominated for the most part, and they find themselves in the pool, and I find that the efforts do not suggest any discriminatory impact by the system.

(2 RT 467.) The court concluded by stating:

> I don't find there has been any discriminatory system in place by the superior court. I don't find any fault with the key man system to the extent that the key man system doesn't have the impact it could

> conceivably have as was described by one of the defense witnesses based on his experience, experiences 20 years ago in the south.

(2 RT 468.)

The trial court's statement, "I don't find there has been any discriminatory system in place by the superior court," is nothing more than wishful thinking on the part of the trial court, and finds no support in the record. In any event, the trial court's statement is insufficient to overcome the strength of appellant's prima facie case. (*Castaneda v. Partida*, *supra*, 430 U.S. at p. 498, fn. 19 ["simple protestation from a commissioner that racial considerations played no part in the selection . . . has been found insufficient on several occasions"]; see also *Alexander v. Louisiana*, *supra*, 405 U.S. at p. 630 [finding the racial identification in the selection process impermissible "although there is no evidence that the commissioners consciously selected by race"]; *Whitus v. Georgia*, *supra*, 385 U.S. at p. 551 ["While the commissioners testified that no one was included or rejected on the jury list because of race or color this has been held insufficient to overcome prima facie evidence"]; *Eubanks v. Louisiana* (1958) 356 U.S. 584, 587; *Reece v. Georgia* (1955) 350 U.S. 85, 88 ["[M]ere assertions of public officials that there has not been discrimination will not suffice"]; *Rideau v. Whitley* (5th Cir. 2000) 237 F.3d 472, 488-489, citing *Norris v. Alabama* (1935) 294 U.S. 587, 598 ["If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause] would be but a vain and illusory requirement"]; *Jefferson v.*

Morgan (6th Cir. 1992) 962 F.2d 1185, 1191 [same];[21] *People v. Brown* (1999) 75 Cal.App.4th 916, 926 [same].) "Neither is the State entitled to rely on a presumption that the officials discharged their sworn duties to rebut the case of discrimination." (*Castaneda*, *supra*, 430 U.S. at p. 498, fn. 19, citing *Jones v. Georgia* (1967) 389 U.S. 24, 25.)[22]

---

[21] For example, in *Jefferson v. Morgan*, *supra*, the state argued that it had rebutted defendant's prima facie case based on the testimony of the two judges who were primarily responsible for selecting grand jurors during the relevant time period. Both of the judges denied that they excluded jurors on the basis of race. They said that in order to recruit grand jurors they depended on first-hand knowledge and on recommendations from friends and civic groups. The judges also said that they used supposedly objective guidelines to select grand jurors, including citizenship activities, maturity, work experience, and standing in the community. In finding this rebuttal evidence to be insufficient, the Court of Appeals held:

> We believe the judges' testimony constitutes no more than affirmations of good faith, which are insufficient to rebut the prima facie case established by Jefferson.

(*Jefferson v. Morgan*, *supra*, 962 F.2d at p. 1191.)

[22] See also *Batson v. Kentucky* (1986) 476 U.S. 79, 94, where the high court held:

> Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander v. Louisiana*, 405 U.S., at 632, 92 S.Ct., at 1226. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See *Alexander v. Louisiana*, *supra*, 405 U.S., at 632, 92 S.Ct., at 1226; *Jones v. Georgia*, 389 U.S. 24, 25, 88 S.Ct. 4, 5, 19 L.Ed.2d 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana*, *supra*, at 632, 92 S.Ct., at 1226; see *Washington v. Davis*, *supra*, 426 U.S., at 241, 96 S.Ct., at 2048.

Furthermore, the trial court here was wrong in requiring appellant to prove that Los Angeles County's system for selecting its grand jurors actually discriminated against Hispanics or women, as he was only required to show that the highly subjective selection procedures utilized by Los Angeles County for selecting its grand jurors were "susceptible of abuse," which he plainly did. Thus, having already satisfied the first and second prongs of *Castaneda,* once appellant made that showing, *Castaneda* compelled a finding that he had carried his burden of establishing a prima facie showing of intentional discrimination and the burden should have shifted to the state to rebut the prima facie case. (*Castaneda v. Partida, supra*, 430 U.S. at p. 495.)

In addition to the evidence presented below concerning the highly subjective and discriminatory system by which prospective grand jurors were nominated by the superior court judges, the evidence presented below also included the highly subjective selection procedures used by the interviewing judges. That evidence included the following:

Juanita Blankenship testified that all of the prospective grand jurors – both those who volunteer and those who are nominated by a judge – are asked to fill out the same application which asks them their race and ethnicity. (1 SCT VII 160.) Prospective grand jurors are also asked to provide a brief biographical statement, describing their background and employment experience. (1 SCT VII 181, 182; see also 15 SCT VII 3628.) The prospective grand jurors were required to provide a brief statement concerning "your perception of the role or function of the Grand Jury," and to "describe what you think is the function of County Government." (15 SCT VII 3629.) According to Blankenship, each of the volunteers is then interviewed by a judge, who assigns a rating "based upon the individual

judge's perception of that person's ability to serve as a grand juror." (1 SCT VII 182.) Blankenship testified that there is no established procedure for a judge to follow in determining whether the person is a qualified nominee. (1 SCT VII 183.) She said that it is necessary that the nominees meet the minimum statutory qualifications for grand jury service, "but that again is an individual judge's discretion whether or not they will be nominated." (1 SCT VII 184.)

The judges participating in the selection process were provided written instruction that told them that they were to make sure that their nominees, "in addition to meeting the statutory minimum qualifications,"

> Are possessed of a working knowledge of the functions of the Grand Jury and local government.
>
> Are possessed of good oral and writing skills.

(15 SCT VII 3686.)

The judges were given eight suggested interviewing guidelines "designed with the thought in mind of eliminating the well-meaning but ill-equipped volunteer. Any thoughts and additional questions you have during the interview that will assist in achieving this goal will be appreciated." (*Ibid.*) Below is a list of those eight guidelines:

1. Make certain candidate is aware of pay and term of service: $25.00 plus mileage, for each day in attendance during July through June for approximately four days per week.
2. Candidates should be asked to weigh carefully their state of health, personal and business obligations, and vacation plans. (No more than one month's vacation permitted during term of one year's service – none during July.)
3. What special qualification does candidate possess that he/she feels would make them a valuable Grand Juror?

4. What does candidate believe is [*sic*] function of Grand Jury?

5. Inquire as to specific skills: Accounting, communications, report writing, interviewing. All of these skills will be brought into play when successful candidates are assigned to Grand Jury committees.

6. Inquire as to community involvement and establish level of responsibility.

7. Determine motivation for wanting to serve. Pay? Civic responsibility? Any individual organization candidate feels should be investigated by Grand Jury. Other?

8. Advise the candidate that if they are nominated and their name is drawn, they will be fingerprinted and investigated, in depth by the Sheriff's Department. Inquire if there is anything in their background that might come out as a result of an investigation by the Sheriff's Department.

(15 SCT VII 3625.) The judges were also told to "*please advise [each of the candidates] that even though the candidate is found qualified as a result of the interview, this does not guarantee nomination by a Superior Court Judge.*" (*Ibid.*, italics in original.)

The interviews are not recorded in any fashion. The judges who participate in the interviewing process are asked only

to rate (and initial) each candidate per the following code:

E = Exceptionally Well-Qualified
W = Well-Qualified
Q = Qualified
U = Uncertain

(15 SCT VII 3625.)

As shown by the evidence below, under the highly subjective

guidelines used by Los Angeles County to select its grand jurors, a prospective grand juror could easily be eliminated or discouraged from serving by the interviewing judge if that judge happened to have a problem or disagreement with the prospective juror's answers to questions about the prospective juror's "special qualifications" that "would make them a valuable Grand Juror" (guideline 3); the prospective juror's beliefs as to the proper function of the grand jury (guideline 4); the prospective juror's "community involvement experience" (guideline 6); and the prospective juror's motivation for wanting to serve (guideline 7). (15 SCT VII 3625.) Indeed, the stated purpose of the guidelines for interviewing prospective grand jurors was, as noted above, "designed with the thought in mind of eliminating the well-meaning but ill-equipped volunteer." (*Ibid.*) Worse than that, the written guidelines also encouraged the interviewing judges to come up with "thoughts and additional questions you have during the interview that will assist in achieving this goal [of eliminating the well-meaning but ill-equipped volunteer]." (*Ibid.*)

Furthermore, it appears that even those prospective jurors found qualified during the interviewing process could still be eliminated at some later stage of the selection process for no particular reason. (See 15 SCT VII 3625.)[23]

As previously noted, the judge-conducted interviews are not recorded, making it impossible to know the reason(s) for the excusal of any particular prospective grand juror. This lack of a written record undermines

---

[23] As noted above, the interviewing judges were instructed to *"[p]lease advise [each of the candidates] that even though the candidate is found qualified as a result of the interview, this does not guarantee nomination by a Superior Court Judge."* (15 SCT VII 3625, italics in original.)

the legitimacy of Los Angeles County's grand jury selection system by failing to provide sufficient safeguards to make sure that any prospective juror who is excused from grand jury service during the interview process was excused for reasons that comport with the requirements of Penal Code section 893, and not because of any unlawful ethnic, racial or gender discrimination, bias or prejudice on the part of the judge who conducted the interview.

In the context of the selection of petit jurors, the law requires that the selection proceedings be recorded to safeguard the defendant's jury rights, and to preserve the defendant's right to a record on appeal that is adequate to permit meaningful appellate review. "That is true under California law. It is true as well under the United States Constitution – under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved." (*People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 8, internal citations omitted.) There is absolutely no reason why the same safeguards should not hold true for the selection of grand jurors.

As this Court has observed in the context of excusing potential petit jurors for hardship and undue suitability, because such excusals are highly discretionary, the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258, 273.) For this reason, both the Legislature and the Judicial Council have formulated rules both restricting the instances in which hardship excusals may be granted and providing for the maintenance of a "paper trail" of the reasons for hardship requests. As held by the Court of Appeal in *People v. Basuta* (2001) 94 Cal.App.4th 370:

The obvious purpose [for maintaining records of hardship

> requests] is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool. . . . As noted, the keeping of such a record is not for historical purposes. It is kept because it along with other evidence may be useful in demonstrating that the manner in which potential jurors are excused for hardship, either by the jury commissioner or trial court, improperly results in panels not representative of the community.

(*Id.* at p. 396.)

Further, in the context of the death qualification of prospective petit jurors under *Wainwright v. Witt* (1985) 469 U.S. 412, having a written record of the interaction between the trial judge and the prospective petit jurors has shown that well-intentioned judges acting in good faith do sometimes err in concluding that a particular prospective juror's views on the death penalty require his or her excusal under *Witt*. (See, e.g., *People v. Stewart* (2004) 33 Cal.4th 425, 445 [trial court improperly excused five jurors]; *People v. Heard* (2003) 31 Cal.4th 946, 966 [judge improperly excused juror for cause based on the juror's stated views on the death penalty].)

In *Castaneda v. Partida*, *supra*, the high court noted that a jury-selection system which, like the system used by Los Angeles County in the present case, relies on jury commissioners to select prospective grand jurors from the community at large rather than a random-selection method, is "highly subjective" and susceptible of abuse. (*Castaneda*, *supra*, 430 U.S. at pp. 495-497; see also *Smith v. Texas* (1940) 311 U.S. 128, 132 ["Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who knew no negroes as well as from commissioners who know but eliminate them."]; *Scott v. Walker* (5th Cir.1966) 358 F.2d 561, 573-574

[discrimination found where "[i]t is plain from the record here that the commissioners put on the list only those personally known to them"].)

In addition, the fact that in the present case the grand juror applicant's race, gender and ethnicity were listed on their applications provided further potential for abuse by the judges serving on the grand jury selection committee, a possibility that was noted by the trial court in its ruling below. (2 RT 467.) As the Fifth Circuit Court of Appeals has observed in the context of racial discrimination, which applies equally to gender discrimination, "[i]n cases in which the jury commissioners have had access to the racial identity of potential grand jurors while engaged in the selection process, the Supreme Court has repeatedly found that the procedure constituted a system impermissibly susceptible to abuse and racial discrimination." (*Rideau v. Whitley*, *supra*, 237 F.3d at p. 488, citing *Castaneda v. Partida*, *supra*, 430 U.S. at p. 495 [finding that the non-random selection of names of grand jurors was susceptible to abuse because Mexican-Americans were easily identifiable by their Spanish surnames]; see also *Alexander v. Louisiana*, *supra*, 405 U.S. at p. 630 ["[W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves are not racially neutral. The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination."]; *Whitus v. Georgia*, *supra*, 385 U.S. at pp. 548-549 [finding a selection system was susceptible to abuse where potential grand jurors were selected from segregated tax-digest lists, which also coded Blacks with a "c" behind each name]; cf. *Avery v. Georgia* (1953) 345 U.S. 559, 562 [finding that the practice of placing potential petit jurors' identification on yellow cards if

they were Black and on white cards if they were White "[o]bviously . . . makes it easier for those to discriminate who are of a mind to discriminate"].)

In sum, there can be little doubt, as shown by the evidence below, that the highly subjective grand jury selection procedures employed by Los Angeles County to select its grand jurors during the time period at issue here were "susceptible of abuse" and therefore more than sufficient to establish the third *Castenada* prong.

F. The Trial Court Erred in Finding That Appellant had Failed to Make a Prima Facie Showing That Los Angeles County's Key-Man System for Selecting Its Grand Jurors Unlawfully Discriminates against Hispanics

Here, the trial court, after acknowledging that "the key man system I think is subject to some question as to its ultimate result in coming up with what may be argued as a discriminatory result" (see 2 RT 464), said that it saw no evidence that the judges who participated in the grand jury selection process consciously engaged in racial discrimination. (2 RT 464-467.) But that finding, even if true, completely ignores the judges' non-intentional decision-making processes, which studies have shown can result in racial discrimination as a result of institutional racism[24] and very likely did so in

---

[24] Institutional racism is defined as a form of racism which is structured into political and social institutions. It occurs when institutions, including corporations and governments, discriminate either deliberately or indirectly, against certain groups of people to limit their rights. It reflects the cultural assumptions of the dominant group, so that the practices of that group are seen as the norm to which other cultural practices should conform. Institutional racism is more subtle, less visible, and less identifiable than individual acts of racism, but no less destructive to human life and human dignity. The people who manage our institutions may not be racists as individuals, but they may well discriminate as part of simply

(continued...)

appellant's case. (See *Institutional Racism, supra,* 109 Yale L.J. 1717.)

In his article *Institutional Racism, supra*, Lopez, who, as previously noted, studied Los Angeles County's grand jury selection system and the long history of underrepresentation of Hispanics on the grand juries in Los Angels County, discusses the prevalence and social significance of institutional racism based on a genre of organizational sociology known as "New Institutionalism." Lopez argues that racial discrimination is "not consciously motivated, or at least not principally so, but instead stems from the unconsidered repetition of cognitively familiar routines." (*Id.* at p. 1723.) Lopez discusses how Hispanics are almost never selected to serve on grand juries in Los Angeles County despite the fact that they make up a sizeable portion of the Los Angeles County population. He examines two cases from the 1960s known in the Hispanic community as the East LA 13 and the Biltmore 6.

East LA 13 involved an indictment by grand jurors of 13 activists on various charges, and Biltmore 6 involved three of the original 13 defendants plus 3 others indicted on arson and burglary charges arising out of a staged

---

[24](...continued)
carrying out their job, often without being aware that their role in an institution is contributing to a discriminatory outcome. (See Cashmore, Dictionary of Race and Ethnic Relations (4th ed. 1996) pp. 169-172.)

> Institutional racism is powerful due to many factors. For one, institutional racism comes from the fact that it is a norm in American society. A norm is a widely accepted practice, procedure, or custom. Institutional racism is normal, expected action; it is not a pattern which is considered unusual or out of place. It has the false value of tradition.

(Better, Institutional Racism. A Primer on Theories and Strategies for Social Change (2002) p. 47 [hereafter Better].)

protest. (*Institutional Racism*, *supra*, at p. 1721.) In both cases, the defendants moved to quash the indictments on the ground that the judges who had selected the grand jurors had excluded Mexican-Americans in violation of the Fourteenth Amendment. (*Id.* at p. 1722.) As part of the defense strategy for proving discrimination, the defendants examined more than 100 superior court judges on the witness stand. (*Ibid.*) The record of the judges' testimony is the basis for Lopez's article. (*Ibid.*)

Based on the judges' testimony, Lopez demonstrates how the informal, ad hoc process used by the judges at that time for selecting grand jurors likely led to this lack of underrepresentation of Mexican-Americans. Specifically, the standard practice for selecting grand jurors was for the judges to select nominees from among their social acquaintances. (*Id.* at p. 1731.) In fact, as many as 83 percent of the nominations (211 out of 255) for the relevant time period (1959-1968) were social acquaintances of the judges, most often friends, neighbors, spouses of acquaintances, or co-members of a church, civic organization or club. (*Id.* at pp. 1735-1736.) Of the remaining 17% (or 44 jurors), at least 17 were recommended by a friend, family relation, fellow club member, or another judge. (*Id.* at p. 1736.) The fact that all of the judges picked nearly exclusively from their social acquaintances was not surprising because all of the judges selected jurors in the same way, namely, by selecting jurors casually from their personal acquaintances. (*Id.* at pp. 1736-1737.) "In the eleven years between and including 1959 and 1969, Los Angeles superior court judges made 1690 grand juror nominations, but the number of nominated Mexican Americans totaled only forty-seven. Of these, a single judge nominated twelve. Thus, Mexican-Americans constituted less than three percent of the grand jury nominations, and if the actions of a single judge are set aside, the

percentage drops to no more than two percent." (*Id.* at p. 1743, fns. omitted.)[25]

This selection process is discriminatory because the people with whom the judges were acquainted were a very limited group. As shown by the evidence, the judges knew few, if any, Mexican-Americans, and most of the ones they knew were gardeners or servants, not the people they would consider for jury selection. (*Id.* at pp. 1737-1739.)

"New Institutionalism posits that frequently repeated but largely unexamined social practices or patterns at once structure and give meaning to human interaction." (*Id.* at pp. 1737-1739.) Within institutional structures and practices, "frequently repeated patterns of activity relatively quickly take on an unexamined, rule-like status such that they are spontaneously followed and disrupted only with difficulty." (*Ibid.*) In other words, "we often act in definable ways without a consciously formulated purpose, simply because it is 'the way it is done.'" (*Ibid.*) As part of the institutional structure, individuals therefore "fail to recognize their reliance

---

[25] Lopez noted that the number of Mexican Americans actually seated as grand jurors is even more dismal:

> Members of this community constituted only four of 233 grand jurors in the years between 1959 and 1969; that is, they constituted no more than 1.7% of all grand jurors in that period. If one assumes that Mexican Americans constituted on average fourteen percent of the population of Los Angeles County during this period, they were underrepresented on Los Angeles grand juries by a ratio of eight to one. Put another way, during the 1960s, Mexican Americans counted for one of every seven persons in Los Angeles, but only one of every thirty-six nominees and one of every fifty-eight grand jurors.

(*Id.* at pp. 1742-1743, fn. omitted.)

on racial notions, and indeed may stridently insist that no such reliance exists, even while acting in a manner that furthers racial status hierarchy." (*Id.* at p. 1827.) Organized settings dictate standard nonconscious understandings of appropriate conduct – institutions – that effectively delimit the actions of individuals. These institutions operate either as scripts, spontaneously triggered routines, or paths – unexamined background understandings that specify the range of legitimate action. Institutions often produce conduct that entrenches racial hierarchy by persons who genuinely do not intend to discriminate.

Applying institutional analysis to the Los Angeles County Superior Court's grand juror selection practices during the years 1968 and 1969, Lopez demonstrates that "institutional analysis brings into view important features of the judges' nonintentional decision-making processes . . . [and] suggests that judicial conduct pursuant to such unexamined decision making often produces discrimination." (*Id.* at p. 1726.)

Lopez also compared the number of Hispanics who served on the grand juries in Los Angeles County for the years 1960 through 1969 with the number of Hispanics who served on Los Angeles County grand juries for the years 1990 through 1999, and concludes that nothing had changed with respect to Los Angeles County's grand jury selection practices,[26] and that Hispanics remained underrepresented on the grand juries in Los

---

[26] For his article, Lopez obtained the number of Hispanics who served on the grand juries in Los Angeles County for the years 1990 through 1999 from Gloria M. Gomez, Manager, Juror Services Division, Los Angeles County Superior Court. (*Institutional Racism*, *supra*, at pp. 1756-1757.) Gloria Gomez is the same Gloria Gomez who testified as a witness in the trial court on appellant's grand jury challenge. (See 2 RT 431.)

Angeles County as a result of Los Angeles County's continued use of the key-man system. (*Id.* at p. 1728 ["Institutional racism of the sort ascribed to practices of thirty years past seems to be almost equally prevalent today."].)[27]

---

[27] This is how Lopez described the discriminatory effects of Los Angeles County's use of a key-man system to select its grand jurors:

> The judges' continuing exercise of extraordinary discretion in the nomination of grand jurors suggests a potential for high contemporary levels of discrimination on California county grand juries. In Los Angeles County between 1960 and 1969, Mexican Americans accounted for four of the 214 grand jurors seated, or slightly under two percent of the total. Have the numbers changed much over three decades? Consider the following table:
>
> Table 2. Participation of Hispanics on Los Angeles County Grand Juries, 1990-1999

Year	Number of Grand Jurors	Number of Hispanic Grand Jurors
1990	23	1
1991	23	0
1992	23	2
1993	23	1
1994	23	1
1995	23	2
1996	23	3
1997	23	4
1998	23	1
1999	23	0
Total 230		15 (6.5%)

(continued...)

Institutional racism thus provides a cogent explanation for how Los Angeles County's past and present grand jury selection practices, including its use of the highly subjective key-man system to nominate and select its grand jurors, operates to discriminate unlawfully against Hispanics.[28]

---

[27](...continued)
Source: Letter from Gloria M. Gomez, Manager, Juror Services Division, Los Angeles County Superior Court (Jan. 14, 2000) (on file with the author).

> Mexican-American participation on Los Angeles grand juries more than trebled from the 1960s to the 1990s, from under two to over six percent. But recall that during the 1960s, Mexican-Americans accounted for fourteen percent of Los Angeles County's total population, while in the 1990s, Latinos numbered closer to forty-one percent. Thus, proportional to their presence in Los Angeles County as a whole, Latinos were excluded from grand jury service by an eight-to-one ratio during the 1960s, and by six-to-one during the 1990s. The continuing exclusion of this community from grand jury service in Los Angeles County in the last decade almost equals the relatively extreme exclusion of Mexican-Americans during the 1960s. What little reform occurred in the 1970s apparently did not endure long enough or reach deep enough to alter the levels of exclusion in the grand juror selection system of the 1990s.

(*Institutional Racism*, *supra*, at pp. 1756-1757.)

[28] Like Lopez, Willigan also placed the blame for the underrepresentation problem squarely on Los Angeles County's use of a key-man system to select its grand jurors. (3 SCT VII 510.) He testified that the results of studies of the key-man system have revealed it to be highly subjective, giving tremendous discretion to the decision-makers in how they go about selecting jurors. According to Willigan, "the persons who select or nominate the grand jurors tend to draw from individuals who are well known to them and in fact in some jurisdictions, I believe that's what the decision makers are instructed to do." The problem with the key-man system is that "if the judges [] only know a certain segment of a

(continued...)

Of course, some may say that appellant has failed to prove that any of the individuals involved in the grand jury selection process engaged in any type of overt racism, which was the view of the trial court in appellant's case. (2 RT 468 ["I don't find there has been any discriminatory system in place by the superior court."].) But appellant does not have to prove overt racism; all he needs to show is that the selection procedure is subject to abuse (see *Castaneda v. Partida*, *supra*, 430 U.S. at pp. 495-497; see also *Smith v. Texas* (1940) 311 U.S. 128, 132 ["Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who knew no negroes as well as from commissioners who know but eliminate them."]; *Scott v. Walker* (5th Cir. 1966) 358 F.2d 561, 573-574 [discrimination found where "[i]t is plain from the record here that the commissioners put on the list only those personally known to them"]), and he has done that.

Moreover, it is important to keep in mind that because of its nebulous quality, institutional racism often goes undetected.

> Like a mist or vapor, institutional racism cannot be seen, and often goes undetected. Racism is nebulous because it moves surreptitiously throughout or social institutions, hardly making a ripple unless you are the recipient of its harsh treatment. Thus, bureaucrats and citizens alike can plead ignorance of its existence. Unlike individual or personal racism, there is no one person to identify as the guilty party. Institutional racism does not need individual acts of hostility to perpetuate itself. More importantly, racism within American institutions is normative, that is, racist patterns

---

[28](...continued)
community or are more familiar with certain racial or ethnic groups part of the people who they are not familiar with get left out." (3 SCT VII 540-541.)

operate as ordinary forms of behavior and bureaucracy.

(Better, *supra*, p. 48.)

G. Appellant Has Established a Prima Facie Case of Discrimination and Reversal Is Required

Los Angeles County's use of the key-man system in appellant's case, by which the judges on the superior court selected applicants who were identified by their race, gender and ethnicity, which persistently underrepresented Hispanics and women over a substantial period of time, establishes a prima facie case of discrimination in the selection of the grand jury that indicted appellant.

Based on the long, well-documented history of discrimination against Hispanics and women on the grand juries in Los Angeles County, "[i]t would require stretching of our credulance to the breaking point to ascribe this sequence of events to mere coincidence. One can hardly resist but to say that there is something 'rotten in (this) state' of affairs." (*Gabriel v. Benitez* (D.P.R. 1975) 390 F.Supp. 988, 993, quoting William Shakespeare, Hamlet, Act I, Scene iv, 90: "Something is rotten in the state of Denmark.")

Because appellant's jury challenge involves discrimination in violation of the Equal Protection Clause, no actual prejudice need be shown and reversal is required. (*Vasquez v. Hillery*, *supra*, 474 U.S. at pp. 260-264; *Rose v. Mitchell*, *supra*, 443 U.S. at p. 551 ["[W]here sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed."]; *People v. Carrington*, *supra*, 47 Cal.4th at pp. 178-179; *People v. Corona*, *supra*, 211 Cal.App.3d at pp. 536-537.)

H. This Court's Recent Decision in *People v. Burney* (2009) 47 Cal.4th 203, Which Involved a Challenge to Orange County's Grand Jury Selection Process, Is Inapposite to Appellant's Jury Challenge

After the filing of appellant's opening brief and respondent's brief, this Court decided *People v. Burney* (2009) 47 Cal.4th 203, which involved a challenge to Orange County's grand jury selection process on the ground that the underrepresentation of Asians on Orange County's grand juries denied him his Sixth Amendment right to a jury drawn from a representative cross-section of the community. (*Id.* at pp. 222-227.) As discussed below, this Court's recent decision in *Burney* is inapposite to appellant's case.

In *People v. Burney*, *supra*, defendant moved to quash the indictment against him on the ground that the Orange County grand jury selection process was unconstitutional because of the absence of Asian-American prospective jurors in the venire. In connection with his motion to quash, defendant had joined other defendants making the same claim. (*Id.* at pp. 222-223.) Applying the three-prong *Duren* test to the facts in defendant's case, the trial court denied his motion to quash, ruling that Asians did not constitute a cognizable group (the first *Duren* prong) and that the absolute disparity in the case, which was estimated at 3.8 percent by Orange County's demographer and 6.4 percent by defendant's expert, was constitutionally insignificant (the second *Duren* prong). The trial court stated that it was making its decision without reaching the third *Duren* prong (i.e., that the underrepresentation is due to systematic exclusion of the group in the jury-selection process). (*Id.* at pp. 225-226.)

In his automatic appeal, Burney argued that the trial court erred in denying his motion to quash. This Court applied *Duren*'s three-prong test

to defendant's jury challenge and ruled that he had failed to satisfy the third prong of the test articulated in *Duren*, namely, that there was "systematic exclusion" of Asians from the grand jury selection process.[29] (*Id.* at p. 227.) In arriving at this conclusion, this Court noted that, during the time period at issue in Burney's case, the superior court clerk's office engaged in extensive efforts to recruit Asians, including distributing grand jury information to some 36 Asian organizations. (*Id.* at p. 225 & fn. 5.)

People v. Burney, *supra*, is readily distinguishable from appellant's case for at least the following four reasons. First, Burney's challenge to the Orange County grand jury system was a fair cross section jury claim brought under the Sixth Amendment and *Duren v. Missouri*, *supra*. Appellant's challenge is a purposeful discrimination claim brought under the Due Process Clause of the Fourteenth Amendment and *Castaneda v. Partida*, *supra*.

Second, as noted above, the evidence in *Burney* showed that the Orange County Superior Court Clerk's Office engaged in extensive efforts to try to get Asian-Americans to apply for grand jury service, and, as noted by this Court in its opinion, Burney offered no evidence to rebut the showing of substantial efforts undertaken by the county to include Asian-Americans in the venire. (*People v. Burney*, *supra*, 47 Cal.4th at p. 227.) In appellant's case, as discussed in his opening brief and above, Los Angeles County's efforts to recruit Hispanics at the time appellant's grand jurors were selected were next to none.

---

[29] Because defendant had failed to show any systematic exclusion of Asians, this Court declined to decide whether Asian-Americans constitute a cognizable group under *Duren*'s first prong. (*People v. Burney*, *supra*, 47 Cal.4th at p. 227.)

Third, as found by this Court in its rejection of Burney's claim on appeal, Burney offered no proof of any improper feature of the jury selection process that might have accounted for the underrepresentation of Asians on Orange County's grand juries. (*People v. Burney*, *supra*, 47 Cal.4th at 227.) In appellant's case, appellant offered extensive evidence showing that Los Angeles County's use of a key-man system in selecting its grand jurors was responsible for the underrepresentation of Hispanics on the grand juries in Los Angeles County.

Finally, the absolute statistical disparities testified to in *Burney* – 3.8 percent or 6.4 percent (*People v. Burney*, *supra*, 47 Cal.4th at p. 227) – were significantly less than those present in appellant's case – 12.54 percent (Clark) or 12.8 percent (Willigan) for jury-eligible Hispanics who speak some English and an average absolute disparity of either 10.6 percent (Clark) or 11.42 percent (Willigan) for jury-eligible Hispanics who speak English at least well (9 SCT VII 1801-1802; 13 SCT VII 3071-3072).

In short, this Court's decision in *Burney* is inapposite to appellant's grand jury challenge.

I. A Limited Remand Would Be an Inappropriate Remedy in This Case Given the Impracticalities of Holding Such a Hearing After the Extraordinary Passage of Time

In his opening brief, appellant argued that because of the extraordinary passage of time since the various grand juries at issue here were selected – as of the writing of this reply brief between 17 and 24 years ago[30] – it is highly unlikely that a full and fair limited remand hearing could be held in this case. Appellant argued that it is unrealistic to believe that

---

[30] Of course, much more time will have passed by the time any decision in appellant's automatic appeal becomes final.

any of the judges who participated in the grand jury selection process for the years 1986 through 1993 would be able to give, much less recall, the specific reasons for their grand juror selection decisions made so many years ago.[31] In addition, as noted by appellant in his opening brief, the grand juror questionnaires that were filled out by all of the grand jury volunteers and nominees and relied upon by the judges in making their selection decisions no longer exist (see 2 SCT VII 415-416), so there is nothing to refresh the memories of the few remaining judges in the event of a limited remand. In other words, it would be almost impossible to recreate with any degree of accuracy the grand jury selection process that took place so many years ago.

Nevertheless, respondent contends that in the event this Court

---

[31] As noted by appellant in his opening brief, a majority of the judges who participated in the selecting of the grand jurors at issue here are no longer listed as active judges on the Los Angeles County Superior Court. Since the filing of the opening brief in this case, even fewer judges are listed as still being active. (See generally California Courts and Judges Handbook (2009-2010 Ed.).) The updated numbers are as follows: For the year 1986-1987, of the 14 judges who participated in the selection process (17 SCT VII 4202), only 2 – Judges Hiroshige and Martinez – are listed as still being active. For the year 1987-1988, of the 14 judges who participated in the selection process (17 SCT VII 4201), only 3 – Judges Hiroshige, Martinez and Mireles – are listed as still being active. For the year 1988-1989, of the 17 judges who participated in the selection process (17 SCT VII 4200), only 3 – Judges Hiroshige, Mireles and Revel – are listed as still being active. For the year 1989-1990, of the 17 judges who participated in the selection process (17 SCT VII 4199), only 3 – Judges Connor, Hight and Mireles – are listed as still being active. For the year 1990-1991, of the 19 judges who participated in the selection process (17 SCT VII 4198), only 4 – Judges Connor, Hight, Hiroshige and Mireles – are listed as active. And finally, for the year 1991-1992, of the 14 judges who participated (17 SCT VII 4197), only 4 – Judges Connor, Hight, Hiroshige, and Mireles – are listed as still being active.

concludes that appellant has established a prima facie case of discrimination, the judgment in this case should not be reversed but should instead be remanded to the trial court

> for the trial court to apply the correct legal standard, including resolution of the undecided issue of whether appellant met Castenada's second prong for establishing a prima facie case of a Fourteenth Amendment equal protection violation based on the underrepresentation of Hispanics and women on his grand jury. If the court finds that appellant has established a prima facie case, the prosecution should be allowed to present any additional rebuttal evidence.

(RB 65.)

Respondent's contention that this case should be remanded to the trial court with directions that it apply the correct legal standard set forth in *Castaneda*, and then decide whether appellant met *Castaneda*'s second prong for establishing a prima facie case, should be rejected out of hand. The trial court had an opportunity to address this precise matter when it came before it, as *Castaneda*'s second prong (i.e., that the degree of the group's underrepresentation was substantial over a significant period of time) is virtually the same as *Duren*'s second prong (i.e., that the representation of the underrepresented group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community), but decided not to address it, saying "I don't think I even want to get into the second prong. On appeal that is going to be argued forever as to which numbers are right." (2 RT 467-468.) In the present case, the population figures and grand jury numbers speak for themselves, and this Court is in the same position as the trial court in deciding the significance of those numbers.

In contending that appellant's case should be remanded to the trial

court to allow the prosecution to present any additional rebuttal evidence, respondent relies on this Court's decision in *People v. Johnson* (2006) 38 Cal.4th 1096, where this Court ordered a limited remand in a case involving a *Batson-Wheeler*[32] claim that had been made some seven to eight years earlier in the trial court. However, the present case is distinguishable from *People v. Johnson*, *supra*, in several important respects.

In *Johnson*, this Court concluded that a remand hearing was an available remedy in that case because "the court and the parties have the jury questionnaires and a verbatim transcript of the jury selection proceedings to help refresh their recollection." (*Johnson*, *supra*, 38 Cal.4th at p. 1102.) In appellant's case, a majority of the judges who participated in the grand jury selection process for the years at issue here are no longer available, the grand jury selection proceedings were never transcribed, and the questionnaires filled out by the prospective grand jurors, which were presumably relied upon by the judges in making their selection decisions, no longer exist. In addition, the delay of 7-to-8 years between the jury selection proceedings at issue in *Johnson* and the limited remand hearing ordered by this Court in that case is significantly less than the at least 17-to-24 year delay in appellant's case.

In sum, given the extraordinary passage of time in appellant's case, the fact that most of the judges who participated in the grand jury selection process at issue are no longer available, and the loss of the grand juror questionnaires, a remand is not a feasible option in this case, and the entire judgment must therefore be reversed.

---

[32] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler*, *supra*, 22 Cal.3d 258.

J. Conclusion

Penal Code section 904.8, subsection (e), reads in relevant part:

> It is the intent of the Legislature that, in the County of Los Angeles, all persons qualified for jury service shall have an equal opportunity to be considered for service as criminal grand jurors within the county, and that they have an obligation to serve, when summoned for that purpose.

In the present case, the evidence shows that qualified Hispanics and women were denied the an equal opportunity to be considered for grand jury service as a result of Los Angeles County's discriminatory grand jury selection practices. For each of the reasons set forth in appellant's opening brief and in appellant's reply brief, appellant's convictions on Counts I through VI must be reversed and his death sentence set aside.

II

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, A FAIR AND RELIABLE CAPITAL SENTENCING HEARING, AND DUE PROCESS BY ERRONEOUSLY EXCUSING FOR CAUSE PROSPECTIVE JUROR DIANNA GREER BASED ON HER VIEWS ON THE DEATH PENALTY

Appellant argued in his opening brief that the trial court erred in granting the prosecutor's challenge for cause under *Wainwright v. Witt* (1985) 469 U.S. 412 to prospective juror Dianna Greer based on her views on the death penalty because the record below fails to establish that her views on the death penalty would have prevented or substantially impaired the performance of her duties as a juror. (AOB 104-124.)

Respondent disagrees, and contends that the trial court properly excused Greer because her views regarding capital punishment would have prevented or substantially impaired the performance of her duties as a juror in accordance with her instructions and oath. (RB 66-78.)

Respondent's contention has already been addressed by appellant in his opening brief, and no useful purpose would be served by repeating appellant's argument here. No reply is therefore necessary to respondent's contention.

III

APPELLANT'S CONVICTION AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE PROSECUTOR IMPROPERLY STRUCK THREE PROSPECTIVE WOMEN JURORS IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS

In his opening brief appellant argued that his conviction and death sentence must be reversed because the prosecutor improperly struck three prospective women jurors (prospective jurors Tammy Barner, Marietta Esquival and Nanah Finley) in violation of appellant's rights under the state and federal Constitutions. (AOB 125-134.) Even though the trial court found no prima facie case of gender discrimination under *People v. Wheeler* (1978) 22 Cal.3d 258 or *Batson v. Kentucky* (1986) 476 U.S. 79, it invited the prosecutor to state her reasons for excusing these three potential jurors. The prosecutor gave her reasons as to Esquival and Finley, but not as to Barner, because she did not have her notes with her at the time she was invited to state her reasons for excusing Barner. Because the trial court did not find that appellant had established a prima facie case, it never evaluated the genuineness of any of the prosecutor's reasons, as required by *Batson.* (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 98.) Appellant argued that, because the prosecutor failed to give any reasons to support the exercise of her peremptory challenge against prospective juror Barner, reversal of appellant's conviction and death sentence is required. Alternatively, appellant argued that if this Court did not reverse the judgment outright, his case must be remanded to the trial court for further proceedings to require the prosecutor to state her reasons for excusing Barner, if she can do so at this point in time, and for the trial court to decide whether the prosecutor's stated reasons for excusing Barner and the other two prospective women jurors are genuine and not pretexts for gender discrimination. If the

prosecutor is unable to provide reasons for excusing Barner, or if the trial court determines that the prosecutor's stated reasons for excusing any of the three women are pretexts for gender discrimination, then appellant's conviction and death sentence must be reversed.

Respondent contends that appellant's argument fails because he failed to establish a prima facie case of gender discrimination, since his prima facie showing rests entirely on statistics. (RB 79-88.) Respondent does not offer any discussion of the prosecutor's failure to provide any justification for her challenge to prospective juror Tammy Barner, or the appropriate remedy for the trial court's failure to decide whether appellant has proved purposeful racial discrimination.

Respondent's contention that appellant had failed to establish a prima facie case of gender discrimination should be rejected.

Appellant established a prima facie case of gender discrimination under *People v. Wheeler*, *supra*, and *Batson v. Kentucky*, *supra*, by showing that the prosecutor's first three strikes were against prospective jurors who were members of a cognizable class (women). (*J.E.B v. Alabama ex. rel. T.B.* (1994) 511 U.S. 127, 130-131; *People v. Jurado* (2006) 38 Cal.4th 72, 104 [exercise of peremptory strikes against potential jurors based on their gender constitutes a violation of both the federal and state Constitutions].) "[A] defendant can make a prima facie case showing based on statistical disparities alone." (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091 [considering both the percentage of jurors in the suspect class who were removed and the percentage of peremptory challenges exercised against such jurors]; see also *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107 [noting cases in which a prima facie showing was based solely on a statistical disparity].) In the present case, the statistics show that the

prosecutor removed 25 percent of the potential women jurors who were seated in the box and used all of her early peremptory challenges against women. Accordingly, the trial court erred in failing to find that appellant had established a prima facie case of gender discrimination.

On this point, the issues are fully joined, and no useful purpose would be served by repeating appellant's argument here, so he will not do so. Respondent does not address the other two issues raised by appellant in his opening brief, namely, the prosecutor's failure to provide any justification for her challenge to prospective juror Tammy Barner, or the appropriate remedy for the trial court's failure to decide whether appellant has proved purposeful racial discrimination, so there is nothing for appellant to respond to here with respect to these two issues.

In conclusion, appellant has established a prima facie case of gender discrimination and reversal is required based on that showing and because of the prosecutor's failure to state any reasons to support her excusal of prospective juror Barner. If this Court decides not to reverse the judgment outright, his case must be remanded to the trial court in order to require the prosecutor to state her reasons for excusing Barner, and to permit the trial court to determine whether the prosecutor's reasons for challenging Barner and prospective jurors Esquival and Finley were improperly based on group bias. (See *People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104.)

IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE

A. Introduction

In his opening brief, appellant argued that the trial court committed reversible error by admitting at the penalty phase of his trial victim impact evidence that was excessive, irrelevant, cumulative and highly prejudicial. (AOB 135-169) That evidence included extensive and detailed testimony from Lynn Finzel, the wife of murder victim Joe Finzel and also a victim of appellant's crimes; numerous photographs and other exhibits presented during Lynn's testimony, including a professionally made victim impact videotape especially prepared for trial that eulogized Joe's life; Lynn displaying their baby daughter, Brinlee,[33] from the witness stand, and the act of the prosecutor cradling Brinlee in her arms in the jury's presence; Lynn's testimony regarding the serious complications suffered by Brinlee at the time of her birth; and evidence concerning Joe's funeral and visits to his grave. The erroneous admission of the victim impact evidence denied appellant his right to a fair and reliable determination of penalty under both the state and federal Constitutions. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17). Because this was a close case as to penalty, as evidenced by the fact that appellant's jury deliberated over seven court days and twice announced that it was hopelessly deadlocked as to penalty, the erroneous admission of this evidence was not harmless error and reversal of appellant's death sentence is required. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432,

---

[33] Brinlee was under two years old at the time she was displayed to appellant's jury from the witness stand. (See 12 RT 2286, 2362.)

447-448.)

Respondent disagrees. Respondent contends that the victim impact evidence at issue in this case was properly admitted. Respondent contends that the victim impact video was properly admitted as part of the circumstances of the offense under Penal Code section 190.3, factor (a), and that the trial court acted well within its broad discretion in admitting this evidence in its entirety. (RB 89.) Respondent contends that neither Lynn's display of Brinlee from the witness stand nor Lynn's testimony concerning the complications surrounding Brinlee's birth constituted error. Respondent also contends that the evidence concerning Joe's funeral and visits to his grave was not error. Finally, respondent contends that, assuming any error was committed in admitting the victim impact evidence at issue in this case, its admission was harmless. (RB 89-120.)

As discussed below, each of respondent's contentions lacks any merit.

B. The Trial Court Erred in Admitting the Victim Impact Videotape Because It Was Inflammatory and Prejudicial

Respondent contends that the trial court properly exercised its discretion when it overruled appellant's various objections to the victim impact videotape and admitted it in its entirety without any limitation.

Respondent states that the challenged videotape was admissible because it "'properly focused on [Joe's] life and the pain [his] death caused [his] family . . . . This testimony was rather typical of the victim impact evidence we routinely permit.'" (RB 105, quoting from *People v. Kelly* (2007) 42 Cal.4th 763, 793.)

With respect to the various special effects contained in the videotape – e.g., the flashbacks to scenes of Joe and Lynn's wedding, a photo montage, including pictures of Joe as a young boy, one with him fast asleep

on a couch next to a sleeping puppy, echo effects, music, lyrics, and voiceovers – which appellant has argued were purposefully designed to tug at the jurors' heartstrings in an effort to get them to vote for death, respondent's answer to that argument is that "an actual review of the videotape shows that it comes off as quite amateurish, with choppy segues between clips and photographs and audible background noise in those parts where Lynn is speaking.[34] No juror would have been overwhelmed by the purported 'professional' quality of the videotape." (RB 108.)

Here, the victim impact videotape was presented by the prosecution at the penalty phase not to win an Academy Award, but to eulogize Joe's life, and in that effort it "exceeded every limitation that this court unanimously set forth in [*People v.*] *Prince* [(2007) 40 Cal.4th 1179]." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 802, conc. and dis. opn. of Moreno, J.; see also *ibid.*, conc. opn. of Werdegar, J.)[35]

The admission of the victim impact videotape cannot be justified on the ground that without it the jury would have been deprived of information about Joe's "'uniqueness as an individual human being.'" (*Payne v. Tennessee* (1991) 501 U.S. 808, 823.) As Justice Souter noted in *Payne*, "Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles." (*Id.* at p. 838 (conc. opn. of Souter, J.).)

---

[34] The "audible" background noise to which respondent refers is a baby crying, presumably Brinlee. (See AOB 148 [appellant's verbatim summary of the contents of the videotape].) Rather than detracting from the videotape's overall emotional effect, the sound of a baby crying adds an emotional effect of its own.

[35] This Court's decisions in *People v. Prince*, *supra*, 40 Cal.4th 1179 and *People v. Kelly*, *supra*, 42 Cal.4th 763, are discussed *post*.

Joe Finzel was never a valueless fungible. At the penalty phase, Lynn testified about Joe's relationship with his parents and what he meant to them. She testified extensively about her relationship with Joe, including their courtship, and his many positive qualities and characteristics. She testified about Joe's relationship with their daughter Brinlee, and Joe's relationship with Garrett, his son from a prior marriage. Lynn also testified concerning Joe's funeral. (See AOB 140-144 [summary of Lynn Finzel's testimony at the penalty phase].)

In short, the victim impact videotape was highly inflammatory and prejudicial, and the trial court committed reversible error by admitting it into evidence at the penalty phase because it diverted "the jury's attention from its proper role [and] invite[d] an irrational, purely subjective response." (*People v. Edwards* (1991) 54 Cal.3d 787, 836.).[36]

---

[36] As a general matter, the use of victim impact videos, such as the one in appellant's case, makes unavoidable the injection of excessive emotionalism into the capital sentencing process, and that is because the very point of using a victim impact video is to manipulate the emotions of the viewer. (Leighton, The Boob Tube: Making Videotaped Evidence Interesting (2001) 2 Ann. 2001 American Trial Lawyers-CLE 1519, p. 2) A victim impact videotape like the one presented in appellant's case is editorialized evidence. It is, by definition, "staged and contrived" to achieve dramatic effect (*People v. Kelly*, *supra*, 42 Cal.4th at p. 798), and, as in all film, cinematic techniques, such as the ones used to create the video in appellant's case, are used to manipulate the viewer's emotions toward a particular perspective. The emotional impact of evocative images on the viewer is well documented. (See, e.g., Ed S. Tan, Emotions and the Structure of Narrative Film: Film as an Emotion Machine (Lawrence Erlbaum Associates, 1996); Passionate Views: Thinking About Film and Emotion (Gregory Smith and Carl Plantinga eds., Johns Hopkins University Press, 1998). And studies have shown that visual presentations account for the vast majority of the information retained by jurors. David Hennes, Comment, Manufacturing Evidence for Trial: The Prejudicial Implications

(continued...)

Respondent disagrees, and contends, citing this Court's decision in *People v. Kelly*, *supra*, 42 Cal.4th 763, that the trial court did not err in admitting the victim impact videotape in this case. As discussed below, appellant's case is readily distinguishable from the facts and circumstances in *Kelly*, and, in any event, respondent's contention that the victim impact video was properly admitted in this case is devoid of merit.

In *Kelly*, the defendant was convicted of first degree murder with special circumstances of robbery and rape, and sentenced to death. At the penalty phase, the prosecution played for the jury a 20-minute video consisting of a montage of still photographs and video footage documenting the victim's life from her infancy until shortly before she was killed. The video was narrated by the victim's mother with soft music playing in the background, and it showed scenes of the victim swimming, horseback

---

[36](...continued)
of Videotaped Crime Scene Reenactments, 142 U. Pa. L.Rev. 2125, 2173 & fn. 292 (1994).) "A television videotape, much more than other forms of demonstrative visual evidence, leaves a lasting impression on jurors' mental processes, since its vividness dictates that it will be readily available for cognitive recall." (*Id.* at p. 2180; see also *People v. Dabb* (1948) 32 Cal.2d 491, 498 [recognizing "the forceful impression made upon the minds of the jurors" by motion pictures].)

These are some of the reasons why this type of victim impact evidence, if used at all at the penalty phase of a capital trial, must be used very sparingly. Having said this, however, it is appellant's position that such victim impact videotape evidence should never be admitted at the penalty phase of a capital trial. This Court's prohibition only of victim videos that are "unduly emotional" (*People v. Kelly*, *supra*, 42 Cal.4th at p. 798; *People v. Prince*, *supra*, 40 Cal.4th at pp. 1286-1287) is insufficient to satisfy the Eighth Amendment's dictate that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.)

riding, and attending school and social functions with her family and friends. The video ended with a view of the victim's grave marker and footage of people riding horseback in Alberta, Canada – the "'kind of heaven'" in which the victim's mother said she belonged. (*People v. Kelly*, *supra*, 42 Cal.4th at pp. 796-797.)

On appeal, Kelly argued that the playing of the videotape constituted reversible error because it prevented the jury from reaching a penalty verdict in a reliable and non-arbitrary way, and denied him a fair and reliable penalty hearing. This Court acknowledged the risk that victim videos inject emotionalism into the penalty phase, especially through the use of a "'staged and contrived presentation'" and "irrelevant background music or video techniques that enhance the emotion of the factual presentation." (*People v Kelly*, *supra*, 42 Cal.4th at p. 798, quoting *People v. Nye* (1969) 71 Cal.2d 356, 371 [discussing but not deciding the issue].) This Court posited that "the videotape, even when presented factually, must not be unduly emotional." (*Ibid.*) While noting that "the videotape might have contained irrelevant aspects," this Court "did not decide whether the trial court abused its discretion in failing to exclude these possibly irrelevant portions, finding that "any error" in "permitting the jury to view and hear" them "along with the rest of the mostly factual and relevant videotape was harmless in light of the trial as a whole." (*Id.* at p. 799.) That harmless error finding is not surprising in view of the fact that Kelly presented no evidence in mitigation, and that the evidence in aggravation was substantial, consisting of the charged crimes and three prior rapes. (See *id.* at pp. 775-777.)

Two members of this Court – Justices Werdegar and Moreno – found the admission of the videotape in *Kelly* to be error, but, like the

majority, harmless in view of the totality of the evidence. (*Id.* at pp. 801-802 (conc. opn. of Werdegar, J.);[37] *id.* at pp. 802-806 (conc. and dis. opn. of Moreno, J.) ["The videotape in the present case is akin to a eulogy, and should therefore not have been admitted as victim impact evidence."]).)[38]

---

[37] In her concurring opinion, Justice Werdegar wrote that she agreed with the *Kelly* majority opinion insofar as it,

> consistent with our pronouncement in *Prince*, stands for the proposition that it is an abuse of discretion to admit a videotape that is unduly lengthy, has elements of theatricality in the use of evocative music and visions of the victim's place in the hereafter, and goes beyond a factual presentation of the victim as she was in life . . . .

(*Id.* at p. 802 (conc. opn. of Werdegar, J.).)

[38] After the decision in *Kelly* became final to this Court, a petition for writ of certiorari was filed in the United States Supreme Court, and three members of that court – Justices Breyer, Souter and Stevens – voted to hear the case. (*Kelly v. California*; *Zamudio v. California* (2008) __ U.S.__, 129 S.Ct. 564; *Kelly v. California*; *Zamudio v. California* (2008) __ U.S. __, 129 S.Ct. 567.)

In the statement of Justice Stevens respecting the denial of the petitions for writs of certiorari in *People v. Kelly*, *supra*, 42 Cal.4th 763 and *People v. Zamudio* (2008) 43 Cal.4th 327, a capital case that, like *Kelly*, involved the admission of a victim impact videotape, he wrote:

> Victim impact evidence is powerful in any form. But in each of these cases, the evidence was especially prejudicial. Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of the crime on the victims' family members.

(continued...)

In his concurring and dissenting opinion in *Kelly*, Justice Moreno noted that this Court had previously considered the admissibility of videotape victim impact evidence in *People v. Prince*, *supra*, 40 Cal.4th 1179.[39] (*People v. Kelly*, *supra*, 42 Cal.4th at pp. 802-805 (conc. and dis. opn. of Moreno, J.).)

In *Prince*, the prosecution introduced a 25 minute videotape of a television interview of one of the defendant's victims conducted at a local television station. The *Prince* court held that

> Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved

---

(...continued)

> Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.

(*Kelly v. California*; *Zamudio v. California*, *supra*, 129 S.Ct. 564, fn. omitted.)

[39] *People v. Prince*, *supra*, 40 Cal.4th 1179, was decided by this Court after the filing of appellant's opening brief in this case.

> parents. . . . In order to combat this strong possibility, courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion.

(*Id.* at p. 1289.) The *Prince* court found no prejudice from the admission of the videotape victim impact evidence in that case because it did not in any way, shape or form constitute an emotional memorial tribute to the victim. (*Ibid.*)

> There was no music, emotional or otherwise. The tape did not . . . display the victim in her home or with her family, nor were there images of the victim as an infant or young child. The setting was a neutral television studio, where an interviewer politely asked questions concerning the victim's accomplishments on the stage and as a musician and the difficulty she experienced in balancing her many commitments, touching only briefly upon her plan to attend college in the fall and follow the stage as a profession. If not for the circumstances of her subsequent murder, the videotape admitted at trial likely would be of modest interest to anyone apart from Tarr and her friends and family. The loss of such a talented and accomplished person is poignant even for a stranger to contemplate, but the straightforward, dry interview depicted on the videotaped recording was not of the nature to stir strong emotions that might overcome the restraints of reason.

(*Ibid.*)

Applying the holding in *Prince* to the victim impact videotape in *Kelly*, Justice Moreno concluded that the trial court erred in admitting the *Kelly* videotape because it "exceeded every limitation that this court unanimously set forth in *Prince*." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 802 (conc. and dis. opn. of Moreno, J.) He also concluded that its erroneous admission constituted harmless error. (*Ibid.*)

Appellant's case is readily distinguishable from *Kelly* in many

important respects.

First, the victim impact video in appellant's case is far more prejudicial and inflammatory than the video tape admitted in *Kelly*. (Compare *People v. Kelly*, *supra,* 42 Cal.4th at pp. 796-797 [this Court's summary of the contents of the *Kelly* videotape] to Peo.'s Exh. 61 [the videotape admitted in appellant's case] and AOB 146-152 [verbatim account of the contents of the videotape in this case prepared by appellant].)[40]

Second, unlike *Kelly*, where the evidence in aggravation was substantial, consisting of three prior rapes, and no evidence was offered in mitigation, the evidence in mitigation in appellant's case was substantial, consisting of testimony from family members, medical experts, and others, that appellant's childhood was marred by instability, abuse, and a lack of sustained relationships, and that he suffers from Attention Deficit Hyperactivity Disorder, and the evidence in aggravation consisted of the circumstances of the offense and a prior conviction for receiving stolen property.

Third, in *Kelly*, the jury returned its death verdict fairly quickly and without any apparent difficulty, while appellant's penalty jury deliberated at length over seven court days, asked questions during its penalty phase deliberations, twice announced that it was hopelessly deadlocked on the issue of penalty, and, of great significance here, asked for the victim impact video so it could be viewed in the jury room during its penalty

---

[40] Respondent does not question the accuracy of appellant's verbatim account. (See RB 93, fn. 29.)

deliberations.[41]

In short, the differences between the facts and circumstances in appellant's case and in *Kelly* are such that it cannot be fairly said, like it was in *Kelly*, that the erroneous admission of the victim impact videotape in appellant's case was harmless beyond a reasonable doubt.

C. The Trial Court Erred in Refusing to Exclude the Song "Hero" from the Victim Impact Videotape

Respondent contends that even under this Court's decision in *People v. Kelly*, *supra*, 42 Cal.4th 763, "the trial court did not abuse its discretion or err in making its considered ruling not to exclude the song about the 'hero' played at the end of the videotape." (RB 108.) Appellant disagrees.

In *Kelly*, this Court discussed the use of music on the victim impact videotape in that case as follows:

> Music is not always impermissible. The portion of the videotape showing [the victim's] singing performance seems relevant to the purpose of demonstrating what she was like. It reflects her demeanor in the difficult situation her mother described – a shy girl performing solo before her classmates. Her choice of song to sing at that age and in those circumstances also seems relevant to forming an impression of the victim. Her musical performance was not excessively emotional. But the background music by Enya may have added an irrelevant factor to the videotape. It had no connection to [the victim] other than that her mother said it was some of [the victim's] favorite music. The Enya background music seems unrelated to the images it accompanied and may have only added an emotional element to the videotape.

(*Id.* at p. 798.)[42]

---

[41] See footnote 51, *post*.

[42] In *Kelly*, this Court ruled that "[t]rial courts must not permit (continued...)

Respondent contends that, with respect to the use of music, appellant's case is "readily distinguishable" from *Kelly*, *supra*, in that, first, unlike *Kelly*, where the background music in that case is played throughout much of the video, in appellant's case the song "Hero" is "played only during the final 80 seconds of the 11-minute-45-second videotape"; and second, unlike *Kelly*, where the background music had no connection to the victim in that case other than it was some of her favorite music, in the present case, the song "Hero" had a direct connection to Joe because "The evidence established that the man appellant purposefully elected to shoot and kill was a superlatively loving husband and father and that Lynn and Garrett generally did view Joe as a hero." (RB 109.)[43] Respondent's contentions fail.

First, under *Kelly*, it is not the length of the musical accompaniment

---

(...continued)
irrelevant background music . . . that enhance the emotion of the factual presentation." (42 Cal.4th at p. 798.) There is good reason for this rule: "[M]usic is one of the strongest sources of emotion in film." (Cohen, *Music as a Source of Emotion in Film*. In Music and Emotion (Juslin & Sloboda, eds. 2001), p. 249.) Music has an inherent power to arouse strong feelings in the listener, and its use in film is calibrated for such impact. As the composer Aaron Copland wrote about his musical score for the film, "Of Mice and Men,"

> the score . . . is designed to strengthen and underline the emotional content of the entire picture. . . . The quickest way to a person's brain is through his eye but even in the movies the quickest way to his heart and feelings is still through the ear.

(Aaron Copland, *The Aims of Music for Films*, N.Y. Times, March 10, 1940, § 11 at p. 6.)

[43] The song "Hero" was written by David Crosby and Phil Collins, and appears on Crosby's 1993 album "Thousand Roads."

that determines its admissibility, although that is obviously a factor to be considered, but rather the music's evocative nature.

Here is how the *Kelly* court described the soundtrack that accompanied much of the challenged victim impact videotape in that case:

> Throughout much of the video, the music of Enya – with most of the words unrecognizable – plays in the background; the music is generally soft, not stirring.

(*Id.* at p. 796.)

In appellant's case, by contrast, the music is stirring and evocative, the words are recognizable, and both are played for full emotional effect as a grand finale to the videotape. (See *People v. Prince*, *supra*, 40 Cal.4th at p. 1298.) Here, while the song "Hero" plays in the background, a collection of five photographs followed by six video clips is displayed. The first photograph is of Joe as a very young child fast asleep on a couch. Lying next to him is a puppy which is also asleep. The second is a photograph of Joe as a young boy. The third is a photograph of Lynn and Joe next to a pony and a sign that says "Rent a Pony." The fourth is a photograph of Joe and Lynn together. The fifth is a photograph of Joe and Lynn sitting near a body of water exchanging a kiss. The first video clip is from Joe and Lynn's wedding, showing someone pinning a white rose on Joe's lapel. The second is also from Joe and Lynn's wedding, showing them kissing after having just exchanged their wedding vows. The third and fourth video clips are of Joe taken on Joe and Lynn's honeymoon cruise. The fifth is of Joe with Brinlee. The final video clip shows Joe on a camping trip. The video freezes on Joe's face. The music and lyrics end. The videotape ends.

As such, it is nothing less than disingenuous for respondent to say:

> Neither the music, nor the words, nor the style of singing of the song is particularly emotional or dramatic. And, here, the trial court expressly considered appellant's

request to exclude the song before denying it.

(RB 109.) Yes, the trial court did consider the music before overruling appellant's specific objection to it, but, in so doing, even the court acknowledged that the music was "a little dramatization that is beyond what normally you would see." (11 RT 2221.)

Second, for respondent to contend that the song "Hero" had a "connection" to Joe because his wife and son generally viewed him as a hero demonstrates respondent's misunderstanding of what this Court meant when it said in *Kelly* that the background music in that case had no connection to the victim other than that it was some of her favorite music. (*People v. Kelly*, *supra*, 42 Cal.4th at p. 798.)

Under *Kelly*, the relevance of music on victim impact videotapes is not determined, as respondent would have it, by the name or title of a particular song, but rather whether the music has a direct, necessary and relevant connection to some important aspect of the victim's character or being, such as where the victim impact videotape shows the victim, who was a musician, playing a song, or a singer, singing a song, and the music is an integral part of the videotaped performance. (See, e.g., *People v. Kelly*, *supra*, 42 Cal.4th at p. 798 [portion of videotape showing the victim singing a song "relevant to forming an impression of the victim"]; see also *id.* at p. 794, citing *Whittlesey v. State* (Md. 1995) 340 Md. 30, 665 A.2d 223, 230 [a 90-second videotape of the murder victim playing the piano, a skill for which the victim was nationally recognized, was relevant and admissible].) But even if the music is somehow relevant, it still must pass muster under Evidence Code section 352. (See *People v. Prince*, *supra*, 40 Cal.4th at p. 1287.) In other words, for music to ever be admissible on a victim impact video, it must be both highly relevant and absolutely necessary to establish

some important aspect of the victim's character that cannot be proven by other, less prejudicial, evidence.

Here, the song "Hero" had no connection to Joe, nor was it described by Lynn as one of his or their favorite songs. The song was played on the videotape for purely emotional effect, and the trial court's refusal to exclude its playing at trial was prejudicial error because it diverted "the jury's attention from its proper role [and] invite[d] an irrational, purely subjective response." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836; see also *People v. Kelly*, *supra*, at p. 802 (conc. and dis. opn. of Moreno, J.); see also *ibid.* (conc. opn. of Werdegar, J.); cf. *People v. Zamudio*, *supra*, 43 Cal.4th at p. 366; *People v. Prince*, *supra*, 40 Cal.4th at p. 1287.)

Accordingly, the song "Hero" should have been excluded from the victim impact video should have been excluded by the trial court, and its admission into evidence constitutes reversible error.

D. The Trial Court Erred in Permitting Lynn's Display of Brinlee from the Witness Stand and Lynn's Testimony Regarding Brinlee's Difficulties at the Time of Her Birth

Respondent contends that the trial court did not err in allowing Lynn to display Brinlee to the jury from the witness stand and then to hand Brinlee to the prosecutor, who carried her over to hand her to another person sitting in the courtroom. Respondent defends the trial court's decision, contending that the

> procedure was probative in that it allowed the jury to see and evaluate the daughter appellant purposefully elected to orphan, but was not prejudicial in the least. The jury was by then undoubtedly well aware of Brinlee's presence, and her appearance before the jury was exceedingly brief and unemotional.

(RB 111.) Respondent misses the point of appellant's argument as to why this was prejudicial error.

Having Lynn display Brinlee from the witness stand at the start of Lynn's testimony, and having the prosecutor take Brinlee into her arms and hand her to another person in the courtroom, was nothing less than a theatrical production calculated to inflame the passions of the jury against appellant. As appellant has argued, there was absolutely no need to display Brinlee from the witness stand to inform the jury about Brinlee's existence; the jury already knew about Brinlee from Lynn's testimony at the guilt phase. (Compare 9 RT 1868 with 12 RT 2362.) Moreover, assuming arguendo that some legitimate purpose was served by identifying Brinlee for the jury at the penalty phase, that could have been accomplished in a much less prejudicial manner by either having Lynn identify Brinlee as she sat in the spectator section of the courtroom, or by having Lynn identify her from one of the many photographic exhibits offered at the penalty phase.

Respondent next contends that there was no danger that the jury would be left with the image that the prosecutor was acting on Brinlee's behalf, as opposed to her proper function of acting on behalf of the People, because the prosecutor's act of carrying Brinlee in her arms was brief, and so that Lynn could testify at the penalty phase. (RB 111-112.) Respondent is mistaken.

The prosecutor's act of cradling Brinlee in her arms in the jury's presence presented the jury with the image that the prosecutor was acting on Brinlee's behalf, as opposed to her proper function of acting on behalf of the People. As appellant argued in his opening brief, the prosecutor's actions, however brief, constituted reversible error because it "led to a penalty verdict based on vengeance and sympathy as opposed to reasoned application of rules of law to facts." (*Fuselier v State* (Miss. 1985) 468 So. 2d 45, 52-53 [allowing the victim's daughter to sit in close proximity to the

prosecutor throughout the trial prejudiced defendant's right to a fair guilt and penalty trial because it "presented the jury with the image of a prosecution acting on behalf of [the victim's daughter"]; cf. *Mask v. State* (Ark. 1993) 314 Ark. 25, 869 S.W.2d 1, 3-4 [reversible error to allow robbery victim to sit at the prosecution table following her testimony, as she "was not a party to this case. The prosecuting party was the State of Arkansas"]; *Walker v. State* (Ga. 1974) 32 Ga.App. 476, 208 S.E.2d 350 [mother of the victim sitting at the prosecution table "surely must have had an impact on the jury and we cannot say it was not harmful and prejudicial to the defendant's right to have a fair trial"].)

The unnecessary act of displaying Brinlee from the witness stand and the act of the prosecutor cradling Brinlee in her arms are just two more prejudicial errors that denied appellant his state and federal constitutional rights to a fair penalty determination.

With respect to Lynn's testimony concerning the serious difficulties experienced by Brinlee at the time of her birth, which appellant has argued was improper victim impact evidence because they had nothing to do with the circumstances of the crime, respondent contends, without so much as blinking an eye, that they do because they "help[] explain the depth of experiences Lynn and Joe had recently gone through shortly before appellant committed the subject crimes together, which helped demonstrate their closeness to each other." (RT 112.) Respondent also contends that if it was error to admit this testimony, it was harmless "because no reasonable juror would have seen appellant as in any way responsible for events which took place two months before he committed the subject crimes." (*Ibid.*) Respondent's contentions are without any merit. This testimony was irrelevant and prejudicial, and should have been excluded at trial.

E. The Trial Court Erred in Admitting Evidence Concerning Joe's Funeral and Visits to His Grave

Appellant has argued that the evidence concerning Joe's funeral and visits to Joe's grave by Lynn, Brinlee and others was particularly prejudicial because it exceeded "a quick glimpse of the life' which [appellant] 'chose to extinguish'" (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827), and it inappropriately drew the jury into the mourning process (see *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373; *State v. Storey* (Mo. 2001) 40 S.W.3d 898, 909). (AOB 164-165.)

Respondent contends that appellant's argument is devoid of merit because Joe's burial was a direct consequence of appellant's murder of him, and the visits by Lynn, Brinlee and Garrett show the killing's impact on them. Respondent also contends that there was nothing staged about Lynn and Brinlee's visit to Joe's grave on Christmas Day, which is featured on the victim impact videotape, because "in viewing the video, it becomes plain that a number of other families had similarly visited the cemetery, and placed flowers and decorated Christmas trees, at nearby graves of their loved ones that day." (RB 113.)

That the visit to the grave on Christmas Day was staged and filmed for the purpose of including it in the victim impact video is established by the fact that that matter was brought up by defense counsel as one of the reasons the videotape should be excluded at trial, and neither the prosecutor nor the trial court disputed the fact that it had been staged. (12 RT 2289-2290, 2292-2295.) Indeed, the court thought nothing of the fact that the video was specially prepared for presentation at the penalty phase, stating: "[I]t seems to me inappropriate to prevent the victim from presenting a visual portrayal of the depth of her relationship with the victim regardless of the fact that it was prepared for penalty purposes." (12 RT 2292.) This

should put to rest respondent's unfounded contention that the Christmas Day visit to Joe's grave was not staged. In any event, the Christmas Day visit to Joe's grave had no place in appellant's penalty trial.

Lastly, respondent cites three cases where this Court held that brief views of the victims' grave markers did not constitute error – *People v. Zamudio*, *supra*, 43 Cal.4th at pp. 367-368 [three photographs of grave markers at the end of video photo montage],[44] *People v. Kelly*, *supra*, 42 Cal.4th at p. 797 [video ends with brief view of the victim's grave marker], and *People v. Harris* (2005) 37 Cal.4th 310, 328, 352 [single photograph of victim's gravesite].

Zamudio, *Kelly* and *Harris* notwithstanding, the evidence offered in the present case concerning Joe's funeral and the visits to his gravesite by Lynn, Brinlee, Garrett and others was error because it far exceeds the brief testimony in *Harris* and the single photograph of the victim's grave in that case, the three photographs in *Zamudio*, and the brief view of the victim's grave marker on the videotape in *Kelly*. In the present case, the erroneously-admitted evidence concerning Joe's funeral and visits to his gravesite includes (1) Lynn's testimony concerning Joe's funeral, including

---

[44] In *People v. Zamudio*, *supra*, 43 Cal.4th 327, this Court held that the admission at the penalty phase of petitioner's trial of a 14 minute videotape prepared and narrated by one of the victims' two daughters, consisting of a montage of 118 still photographs which depicted the victims' lives from their infancy to the time of their deaths some 60 years later, closing with photographs of their graves, was not error. (*Id.* at pp. 365-368.) In *Zamudio*, the trial court, unlike the trial court in appellant's case, exercised its discretion and ordered that the videotape's soundtrack be turned off and that the videotape be played stop-action, frame by frame, and narrated by one of the victims' daughters in person and from the witness stand. The videotape in *Zamudio* was pretty straightforward and did not employ any of the cinematic special effects or theatrics found in the videotape in appellant's case.

her testimony about the various personal items that were buried with Joe, including certain photographs and a cookie that Joe's son, "Garrett[,] gave him so he would have something to eat when he got down there"; (2) Lynn's testimony describing the significance of the markings on Joe's gravestone; (3) Lynn's testimony concerning her twice-weekly visits to Joe's grave; (4) the video depicting Lynn and Brinlee's staged visit to Joe's grave on Christmas Day, showing Joe's grave adorned with flowers and a decorated Christmas tree and Brinlee playing with a Santa doll; and (5) Lynn's testimony concerning the note left by Garrett under the Christmas tree at Joe's grave, which contained some drawings, a photograph of Garrett, and the words, "I will see you some day." (12 RT 2374-2375; 13 RT 2436-2437, 2439-2440.)[45] In short, the evidence offered in appellant's case was simply over-the-top and excessive when compared to the very brief funeral-related evidence found in *Zamudio*, *Kelly* and *Harris* (or any other case that appellant has found), and particularly prejudicial because, unlike *Zamudio, Kelly and Harris*, the evidence offered in appellant's case inappropriately drew appellant's penalty jury into the mourning process.[46]

Thus, as appellant has argued in his opening brief, the evidence

---

[45] Lynn testified that she found the note under the small Christmas tree at the grave site.

[46] If this Court should accept respondent's view that the evidence offered in the present case concerning Joe's funeral and visits to his grave was properly admitted as a "circumstance of the crime" (Pen. Code, § 190.3, factor (a)), then there are no limits to what is admissible as victim impact evidence, leading to the stark conclusion that, as appellant has argued in his opening brief, Penal Code section 190.3, factor (a), is unconstitutionally overbroad and vague, in violation of the state and federal Constitutions. (See AOB 156-157.) Respondent's answer to this argument is that this Court "has consistently rejected this same argument in the past and should continue to do so here." (RB 105, fn. 30.)

concerning Joe's funeral and the visits to his grave by Lynn, Brinlee, Garrett and others was so inflammatory as to render the sentencing proceeding in appellant's case fundamentally unfair. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 831 (con. opn. of O'Connor, J.).)

F. Reversal is Required

The erroneous admission of the highly prejudicial and excessive victim impact evidence in this case violated appellant's state and federal constitutional rights to a fair and reliable penalty determination. The victim impact evidence admitted in this case far exceeded the "quick glimpse" envisioned by the high court in *Payne*, and pushed the envelope of what is deemed admissible under California's death penalty law. As discussed below, whether viewed individually or collectively, the several errors committed by the trial court in admitting the challenged victim impact evidence in this case require reversal of the death judgment.

Lynn's testimony at both the guilt and penalty phases concerning the tragic events surrounding the night of the crime and her unending suffering, loss and pain is both powerful and gut-wrenching. Even so, despite Lynn's powerful and emotional testimony at both the guilt and penalty phases, the jury did not view the prosecution's case for the death penalty as being open and shut, as respondent seems to contend in its respondent's brief. (See RB 118-120.) This is evidenced by their lengthy deliberations over seven court days and twice announcing that they were hopelessly deadlocked as to penalty, important facts respondent has conveniently failed to address in its harmless-error analysis.[47]

---

[47] The record shows that the jury began its penalty deliberations on January 19, 1995. (II CT 425). On January 24, 1995, the jury informed the court that it had "reached an impass [*sic*] and we need further instructions

(continued...)

That appellant's jury had such a hard time deciding whether appellant should live or die is probably due to the fact that the defense case for life without the possibility of parole was so compelling. The defense presented extensive evidence in mitigation to show how the chaos and horror that scarred appellant's early childhood and youth helped bring him to the point where he was on trial for his life. The testimony of family members, and from the juvenile justice system professionals, Stephen Walker and Joan McCumby, who came into contact with appellant when he was 13, showed that appellant's mental and emotional development was deeply influenced by the manifold "risk factors" that permeated his childhood and adolescence. Those risk factors included: (a) unstable living and parenting arrangements; (b) drug abuse within the family, including the fostering of appellant's own use of drugs by parental figures; (c) sadistic physical and psychological abuse of appellant, his mother, and his brothers by various parental figures; and (d) appellant's sexual molestation by his

---

(...continued)
as to what to do at this point." (II CT 428.) After talking to the court, the jury resumed its deliberations. Later that same day, the jury requested readback of the entire testimony of defense witnesses Stephen Walker and Joan McCumby. (II CT 430.) On January 25, 1995, the jury requested, inter alia, the victim impact video. (II CT 431.) On January 26, 1995, the jury sent the court the following note:

> We've tried to resolve the problems concerning the decisions of the jury. Progress was made, & a countless number of ballots were taken. At this point the jurors feel that we have made our decisions with X number of people on each side. We also have X number of people who said that they will not be persuaded to go to the other side.

(II CT 432.) After conferring with the court, the jury agreed to resume deliberations. (II CT 433A.) The jury returned its death verdict the following day, January 27, 1995. (II CT 450.)

stepfather. Another extremely significant risk factor that had a very negative impact on appellant's development is the fact that he suffers from Attention Deficit Hyperactivity Disorder. According to defense psychologist Dr. Nancy Kaser-Boyd, the combined effect of all of those risk factors in appellant's life created such a stressful environment for him that he was unable to properly mature and develop, and this led him into delinquency, drug use and eventually into adult crime. (See, e.g., *Boyde v. California* (1990) 494 U.S. 370, 382 [a defendant whose crime is attributable to a disadvantaged background or mental or emotional problems may be less culpable than a defendant with no excuse].)

Respondent contends that "even assuming arguendo the trial court somehow erred in admitting some of the victim impact evidence at the penalty phase, the record shows that any such assumed error was harmless beyond a reasonable doubt" because "'Most of the [victim impact evidence] was factual, relevant, and not unduly emotional.'" (RB 118, citing *People v. Kelly*, *supra*, 42 Cal.4th at p. 799.)[48] Respondent's contention that the victim impact evidence in this case was "not unduly emotional" is devoid of any merit.

As appellant has argued above, the victim impact evidence in this case was excessive in numerous respects, and hence "unduly emotional." Lynn's testimony at the penalty phase was given over two court days, and covers 77 pages of reporter's transcript, not including the playing of the victim impact video. (12 RT 1362-2423; 13 RT 2429-2443.) In addition to the playing of the 11-minute-45-second victim impact video at the end of

---

[48] Appellant has already distinguished the facts and circumstances in his case from those found in *People v. Kelly*, *supra*, 42 Cal.4th 763, and he will not repeat that discussion here. (See *ante*, at pp. 61-67, 71-72.)

her testimony (Peo.'s Exh. 61), Lynn's testimony included an additional 19 exhibits, consisting of 16 photographs (Peo. Exhs. 62, 64, 66, 67A-67D, 69-74), a letter Joe had written to Lynn at the time of their engagement (Peo.'s Exh. 81), a cartoon Joe had given to Lynn (Peo.'s Exh. 83), and a note Joe's son Garrett had left at his father's grave (Peo.'s Exh. 85).

Following Lynn's testimony at the penalty phase, defense counsel made the following statement for the record concerning the emotional impact the playing of the victim impact video had on several members of appellant's jury:

> I want the record to reflect that during . . . the showing of the video, many jurors were crying and also Miss Finzel was crying, and her crying was quite audible because she was still on the witness stand and the microphone was on.

(13 RT 2444-2445.) The prosecutor did not rebut defense counsel's record statement; indeed, the prosecutor, uncharacteristically, said nothing. (See *ibid.*) In response to defense counsel's statement, the trial court made the following statement:

> I only saw one juror crying and it was Miss Safer. It was some tears that she wiped away. . . . I just saw Miss Safer wipe some tears and Miss Finzel was crying softly with the microphone right in front of her at certain points in the video.

(13 RT 2445.) The prosecutor, again, stood silent.[49] In any event, the fact that the trial court saw only one juror crying during the playing of the victim impact video does not negate defense counsel's observation that "many

---

[49] The prosecutor in this case vigorously fought the defense at every turn, and it can be safely assumed that if she did not agree with defense counsel's statement, noted above, she would have said something. But she did not say anything. She also did not say that she agreed with the trial court's observation.

jurors were crying," as it is entirely possible that the trial court, for whatever reason, failed to notice the other crying jurors.[50]

There can be no doubt that the challenged videotape was one of the most powerful and enduring pieces of evidence in the prosecution's penalty phase arsenal. The importance of this evidence to the prosecution's case for death can be gleaned from how hard the prosecutor fought to get the videotape into evidence without any edits or deletions, and the prosecutor's references to the videotape during her penalty phase closing argument. (See, e.g., 18 RT 3158, 3160.) The prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."]; *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless where the prosecutor relied on it in his closing argument].)

There can also be no doubt that the victim impact videotape played a pivotal role in convincing the holdout jurors in this case to vote for death. This is evidenced by the fact that, the day after the jury first announced it was deadlocked, it asked to see the victim impact video again (Peo.'s Exh. 61). (II CT 430-431.) The court then gave the jury the victim impact video and the equipment necessary to view it so that the jury could view the video

---

[50] Defense counsel also noted for the record that "approximately 10 minutes before the video was shown, the District Attorney of Los Angeles County, Gil Garcetti, entered the courtroom with his bodyguard." (13 RT 2444.) The trial court said that "I didn't realize Mr. Garcetti was here until you [defense counsel] announced it." (13 RT 2445.) This statement by the trial court, that it did not notice Mr. Garcetti and his bodyguard enter the courtroom during Lynn's testimony, demonstrates that the court's powers of observation, including the crying of several of the jurors, was not infallible.

in the jury room during its penalty deliberations. (1 SCT VIII 64a-64b.) While the record is silent as to how many times the victim impact video was played in the jury room during the balance of the jury's penalty phase deliberations, it can be safely assumed that it was played at least once in order to persuade those jurors who were holdouts for life without the possibility of parole to change their vote and vote for death.[51] This sequence of events is yet another important point respondent has chosen to ignore in its so-called harmless-error analysis.

Further, as appellant has argued in his opening brief, the erroneous admission of the victim impact video was not the only victim impact evidence-related error committed at the penalty phase that requires reversal of the death verdict. The other errors include the improper display of Brinlee from the witness stand and the prosecutor's act of holding Brinlee in her arms in the jury's presence, and the evidence concerning Joe's funeral and the visits to his grave by Lynn, Brinlee and Garrett.

Respondent acknowledges that, assuming error was committed in admitting any of the victim impact evidence, it bears the burden of establishing, as required by both the state and federal harmless-error

---

[51] That the playing of the victim impact video in the jury room played a critical and deciding role in this case finds support in the declaration filed by defense counsel in connection with appellant's "Motion to Reduce Penalty to Life Imprisonment Without the Possibility of Parole." (II CT 452-459.) In his declaration, defense counsel stated that he had interviewed two members of appellant's jury after the case was over. Both of these jurors told him that there "were eight jurors who at one point and through much of the deliberations were in favor of Life Without Possibility of Parole." (II CT 459.) During their penalty deliberations, the "strongest advocate for death brought in and played the victim impact video and several jurors immediately switched from Life without the possibility of parole to death and a verdict was rendered very shortly thereafter." (*Ibid.*)

standards, that any error was harmless beyond a reasonable doubt. (RB 118, citing *People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

There is simply no way that respondent can prove beyond a reasonable doubt that the trial court's several errors in admitting the victim impact evidence in this case, especially when those errors are viewed as a whole and together with the other penalty phase errors,[52] did not persuade at least one juror to vote for death, such as the juror (Miss Safer) whom the trial court saw wiping tears from her eyes during the playing of the victim impact video. (13 RT 2445.)

Because a death verdict must be unanimous, reversal is required if there is a reasonable possibility that even a single juror might have reached a different decision absent the error. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected"]; *People v. Brown* (1988) 46 Cal.3d 432, 472, fn. 1 (conc. and dis. opn. of Broussard, J.).)

Accordingly, the death judgment in this case must be reversed.

---

[52] See Argument IX, *post.*

V

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S REQUEST FOR A SHORT CONTINUANCE IN ORDER TO PERMIT HIM TO PRESENT SURREBUTTAL EVIDENCE TO REFUTE THE SURPRISE REBUTTAL EVIDENCE WHICH WAS OFFERED BY THE PROSECUTOR TO UNDERMINE THE CREDIBILITY OF APPELLANT'S KEY DEFENSE MITIGATION EXPERT, DR. NANCY KASER-BOYD. THE TRIAL COURT'S ERROR REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE BECAUSE IT VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND RELIABLE PENALTY DETERMINATION UNDER THE STATE AND FEDERAL CONSTITUTIONS

A. Introduction

Appellant has argued that the trial court violated his state and federal constitutional rights by denying his request for a short continuance in order to permit him to present surrebuttal evidence to refute the surprise rebuttal evidence from Fred and Dorothy Baumgarte, which was offered by the prosecutor to undermine the credibility of appellant's key defense mitigation expert, Dr. Nancy Kaser-Boyd.

Respondent disagrees. Respondent contends that, because appellant never asserted any federal constitutional claims below, he "should fairly be held to have forfeited such claims on appeal." (RB 121, 131.) Respondent also contends that the trial court did not err in denying appellant's request for a short continuance because he has not shown that the trial court abused its discretion in denying his request for a continuance or that he was in any way prejudiced by the trial court's denial of his request.

Respondent's contentions lack merit.

B. Appellant's Federal Constitutional Claims Are Properly Before This Court

As noted above, respondent contends that because appellant never

asserted any federal constitutional claims below, he "should fairly be held to have forfeited such claims on appeal." (RB 121, 131.) Respondent's contention lacks merit for at least two reasons. First, appellant did raise his constitutional claims below in his motion for a new trial (II RT 460-466), which claims were then implicitly denied by the trial court when it ruled on the motion (20 RT 3269, 3270). (Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."]; see *People v. Stowell* (2003) 31 Cal.4th 1107, 1114 [a trial court is presumed to have been aware of and followed the applicable law]; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 ["'we are entitled to presume that the trial court . . . properly followed established law'"]; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 ["It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties."].)

Second, appellant's federal constitutional claims are properly before this Court under "the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 118, 133; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

Acting pursuant to this principle, "our courts have several times examined constitutional issues raised for the first time on appeal, especially when the asserted error fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue [citation]." (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 394.) These factors are present here.

Moreover, appellant's federal constitutional claims are properly before this Court because they "merely invite [this Court] to draw an

alternative legal conclusion . . . from the same information he presented to the trial court . . . ." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 133; see also *People v. Rogers* (2006) 39 Cal.4th 826, 850, fn. 7 [same]; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 [same]; *People v. Cole* (2004) 33 Cal.4th 1158, 1197, fn. 8 [same].)

C. The Trial Court Erred by Denying Appellant a Short Continuance in Order to Permit Him to Present Surrebuttal Evidence from Dr. Kaser-Boyd

In contending that the trial court did not abuse its discretion in denying appellant's request for a short continuance in order to secure the surrebuttal testimony of Dr. Kaser-Boyd, respondent notes that a defendant who seeks a continuance is required to show that (1) he exercised due diligence to secure the witness's attendance, (2) the missing witness's expected testimony is material and not cumulative, (3) the testimony can be obtained within a reasonable amount of time, and (4) the facts to which the witness will testify cannot otherwise be proven. (RB 132-133, citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Respondent contends that appellant has failed to make the required showing. Respondent's contention is without merit.

First, respondent contends that appellant's trial counsel failed to exercise due diligence in order to secure Dr. Kaser-Boyd's attendance because he should have had "her remain in the courtroom hallway for about an hour" while the prosecution presented its rebuttal case. (RB 133.) This idea of having Dr. Kaser-Boyd wait outside the courtroom for an indeterminate period of time while the prosecutor put on its case in rebuttal is an idea thought up by respondent here; it is not a reason that was given by the trial court when it denied appellant's request for a short continuance to secure Dr. Kaser-Boyd's attendance as a surrebuttal witness. In any event,

at the time Dr. Kaser-Boyd was excused as a witness by the parties, defense counsel had absolutely no reason to believe that Dr. Kaser-Boyd would be needed as a surrebuttal witness, because the prosecutor never told the defense why she was calling the Baumgartes before Dr. Kaser-Boyd was excused as a witness and left the courtroom. Defense counsel had no idea that the prosecutor would challenge Dr. Kaser-Boyd's account of her contacts with the Baumgartes, as the prosecutor never challenged Dr. Kaser-Boyd's testimony concerning her account of her contacts with the Baumgartes during the prosecutor's extensive and exhaustive cross-examination of Dr. Kaser-Boyd. (16 RT 2809-2864; 17 RT 2870-2938; 18 RT 2988-3022.)

Here, the very instant defense counsel learned why the prosecutor was calling Dorothy Baumgarte as a witness (18 RT 3041 [prosecutor's offer of proof that "[Dorothy Baumgarte] doesn't remember talking to Dr. Kaser-Boyd on the phone]), defense counsel informed the court that he needed "to bring Kaser-Boyd back" (18 RT 3041-3042). Defense counsel acted as diligently as he could under the circumstances. (See 18 RT 3053, 3063-3064). Defense counsel could not leave the courtroom to try to find Dr. Kaser-Boyd, because he was in the midst of trial. He could not have his paralegal, Amy York, leave the courtroom to try to locate Dr. Kaser-Boyd, because York was the prosecution's final rebuttal witness (18 RT 3046-3052), and the prosecutor had requested earlier in the proceedings "that Amy York . . . be available in court during the pendency of this penalty trial in case I need to call her as a witness" (12 RT 2345).

Thus, the record shows that defense counsel acted diligently in trying to secure Dr. Kaser-Boyd's attendance.

Respondent cites the following cases in support of its contention that

appellant failed to exercise due diligence to secure Dr. Kaser-Boyd's attendance: *People v. Wilson* (2005) 36 Cal.4th 309, *People v. Howard* (1992) 1 Cal.4th 1132, and *People v. Mickey* (1991) 54 Cal.3d 612.[53] However, none of these cases involves the same factual situation found in appellant's case, where defense counsel was unaware of the need to present surrebuttal testimony until he heard the testimony of the prosecution's rebuttal witnesses. And when he discovered the need for surrebuttal testimony, he acted diligently to secure that testimony. The cases cited by respondent are ones where the defendant knew long in advance of trial that he needed to present certain testimony at trial but waited until the very last moment to secure that testimony.

In *People v. Wilson*, *supra*, 36 Cal.4th 309, defense counsel claimed surprise when the prosecutor gave notice during the penalty phase that he intended to present the testimony of Farrell Lee Torregano and the prior testimony of Donald Loar. Defense counsel's request for a continuance "to subpoena unidentified witnesses to impeach the testimony of Loar and

---

[53] Respondent also cites *People v. Jenkins*, *supra*, 22 Cal.4th 900. That case, however, is inapposite here. In *Jenkins*, the defendant's "need" for a mid-trial continuance to contact, interview and present witnesses in his case-in-chief at the penalty phase was due largely to the fact that he "had instructed family and friends not to speak to counsel or the defense investigator regarding penalty issues, and that defendant refused to call such persons as witnesses at the penalty trial unless he represented himself. This Court ruled that the trial court did not abuse its discretion in denying defendant's request for a continuance when the "asserted need for continuance is caused by the defendant's persistent failure in the period leading up to the penalty phase to cooperate with counsel." This Court also held that "the trial court properly could find that defendant had not credibly shown a need for a continuance, because defendant had stated he was prepared for the penalty phase and had consulted with his prospective witnesses." (*Id.* at pp. 1037-1038.)

Torregano" was denied by the trial court. (*Id.* at p. 351.) In upholding the trial court's denial of defendant's request for a continuance, this Court held that:

> defendant was aware-as early as jury selection-that the prosecution intended to introduce the testimony of Torregano and the prior testimony of Loar possibly during the guilt phase. Despite being informed of this testimony long before the penalty phase, defense counsel admitted he "did not subpoena or prepare to have those witnesses available to rebut the testimony." We conclude defendant failed to show he exercised any diligence in attempting to obtain the impeaching witnesses.

(*Id.* at p. 352.)

In *People v. Howard*, *supra*, 1 Cal.4th 1132, the defense sought permission to reopen its case-in-chief to present expert testimony after the prosecution had presented its final witness. Based on defense counsel's representation that he was expecting his expert to arrive "at any time," the court recessed instead of beginning with closing argument. A few hours later, however, defense counsel informed the court that the expert he had wished to call was unavailable and that efforts to locate a substitute had not been successful. The trial court denied defense counsel's request for a continuance, "noting that it might have been unintentionally misled about the purported witness's availability and that there was, in fact, no witness to call." (*Id.* at pp. 1170-1171.) This Court upheld the ruling of the trial court, stating:

> In this case, defendant could not show that he had been diligent in securing an expert witness's attendance, that a substitute would be available within a reasonable time, or that any witness, assuming one could be found, would say something material and helpful to the defense.

(*Id.* at p. 1172.)

Finally, in *People v. Mickey*, *supra*, 54 Cal.3d 612, the trial court denied a defense request for a three-week pre-trial continuance, which was premised on the illness of one of defendant's two attorneys and lack of trial preparedness. The trial court concluded that a one-week continuance was more than sufficient. This Court noted that the former ground for the continuance was effectively withdrawn when the "ill" attorney appeared in court. This Court concluded that the latter ground for the continuance could be deemed insufficient by the trial court where the record showed that defense counsel had more than two and a half years to prepare for trial, "and defendant himself evidently possessed much of the information considered crucial, viz., the identity of possible penalty phase witnesses." (*Id.* at p. 661.) In addition, this Court noted that the trial court did grant the defense a three-week continuance between the end of the guilt phase and the start of the penalty phase. (*Id.* at pp. 652-662.)

In the present case, as previously noted, appellant had no idea that the prosecutor would call Fred and Dorothy Baumgarte as rebuttal witnesses to dispute Dr. Kaser-Boyd's testimony that she was told by Mr. Baumgarte that he observed appellant being molested by appellant's stepfather, Rudy Garcia, when appellant was three or four years old. Nonetheless, after Dorothy Baumgarte completed her testimony, defense counsel immediately sought leave for a short continuance so that he could locate and present Dr. Kaser-Boyd's surrebuttal testimony. At the time he made his request, defense counsel thought that Dr. Kaser-Boyd might be in another courtroom, and he had someone try to find her. Unable to find her on such short notice, defense counsel asked for a short continuance, which was denied by the trial court.

Thus, appellant's case is readily distinguishable from the factual

situations found in *Howard*, *Mickey* and *Wilson*, all *supra*. Unlike the defendants in those three cases, appellant acted with due diligence in trying to secure Dr. Kaser-Boyd's surrebuttal testimony on such short notice. Hence, respondent's contention that appellant has failed to show that he was diligent in trying to secure Dr. Kaser-Boyd's attendance is groundless and must be rejected by this Court.

Respondent next contends that appellant failed to establish that Dr. Kaser-Boyd's expected testimony in surrebuttal would be material and not cumulative. (RB 113.)

That appellant had been the victim of sexual abuse when he was a young child was a material issue in this case. In Dr. Kaser-Boyd's opinion, that appellant had been sexually abused as a child by his stepfather, Rudy Garcia, was a significant risk factor in appellant's early development. (18 RT 2975.) Dr. Kaser-Boyd's conclusion that appellant had been the victim of sexual abuse was based on information she had received from appellant's maternal grandfather, Fred Baumgarte. (16 RT 2805.) That this was a material issue in the case is also demonstrated by the fact that the prosecutor challenged whether what Mr. Baumgarte observed was actually an instance of sexual abuse, and by how hard the prosecutor fought to keep this evidence of sexual abuse out. (See, e.g., 12 RT 2347-2352.) Further, that the Baumgartes's rebuttal testimony was of such critical importance to the prosecutor's penalty phase case and her attack on Dr. Kaser-Boyd's credibility as a witness is evidenced by the prosecutor's statements about Dr. Kaser-Boyd (see, e.g., 13 RT 2449 ["I think the psychologist is their most important witness"]; 18 RT 3131 [the prosecutor's closing argument, that had Dr. Kaser-Boyd not testified the way that she did, "you wouldn't have heard from her"]; 18 RT 3106 [prosecutor's closing argument that

appellant's mitigating background evidence is "the testimony you heard from Dr. Kaser-Boyd"]), and by the fact that the prosecutor went to the extraordinary effort and expense of forcing appellant's grandparents to come to Los Angeles all the way from Vidor, Texas. (II CT 408-417 [pleadings in support of the prosecution's request to compel the attendance of Dorothy Baumgarte]; 18 RT 3033-3035, 3038-3040.) (See *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor's "actions demonstrate just how critical the State believed the . . . evidence to be"].)

Further, surrebuttal testimony from Dr. Kaser-Boyd concerning her contacts with the Baumgartes would not have been cumulative to her prior testimony. At the time Dr. Kaser-Boyd was on the witness stand, the prosecutor, who presumably knew what her rebuttal witnesses, the Baumgartes, would say about their contacts with Dr. Kaser-Boyd, never cross-examined Dr. Kaser-Boyd on this subject. Such prosecutorial cross-examination would have given Dr. Kaser-Boyd an opportunity to rebut that evidence at the time she was on the stand, and would have alerted defense counsel that this was to be made an issue in the case, so that he could take appropriate steps to meet it. In other words, the need for a short continuance to bring Dr. Kaser-Boyd back to testify on surebuttal was because the prosecutor raised this new matter after the defense had rested and Dr. Kaser-Boyd was excused by the parties and left the courtroom. (Cf. *People v. Carter* (1957) 48 Cal.2d 737, 753;[54] *People v. Rodriguez* (1943)

---

[54] In *People v. Carter*, *supra*, this Court discussed the purpose of the restriction in section 1093, subdivision (4) [now subdivision (d)] of the Penal Code, which deals with the order of the presentation of evidence in a criminal case, and allows the parties to "offer rebutting testimony . . . ." This Court stated that

(continued...)

58 Cal.App.2d 415, 418 ["The practice of allowing the District Attorney to withhold a part of his case in chief and to offer it after the defense has closed cannot be approved"].)

Finally, respondent contends that appellant has failed to show that the facts he wanted Dr. Kaser-Boyd to testify to on surrebuttal could not otherwise be proven. Respondent points to the fact, that in lieu of Dr. Kaser-Boyd's testimony, "the trial court admitted Dr. Kaser-Boyd's notes of her interview of Mr. Baumgarte, which confirmed that the interview had been conducted, when it had been conducted, and its subject matter." (RB 134.)

Appellant disagrees.

Dr. Kaser-Boyd's interview notes, which, as the trial court noted, required some interpretation to understand,[55] and which were vigorously attacked by the prosecutor during her cross-examination of Dr. Kaser-Boyd as being incomplete, slanted and inaccurate, were not a fair substitute for appellant's right to present Dr. Kaser-Boyd's live testimony. Moreover, as

---

(...continued)

> the purpose of the restriction in that section is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence.

(48 Cal.2d at p. 753.)

[55] At the time Dr. Kaser-Boyd's notes were admitted into evidence, the court advised defense counsel that he was "going to have to interpret for the jury because I don't think they are going to be able to read it." (18 RT 3099.)

noted by the prosecutor, "[w]hat [Dr. Kaser-Boyd] testified to is she talked to Dorothy Baumgarte, not Fred." (18 RT 3099.) In other words, Dr. Kaser-Boyd's notes were an inadequate substitute for her live testimony because they failed to address the heart of the prosecution's rebuttal case, namely, Dr. Kaser-Boyd's use of Dorothy Baumgarte to facilitate her interview of Fred Baumgarte.

In conclusion, because the prosecution's rebuttal evidence injected a new issue in the case which clearly affected Dr. Kaser-Boyd's credibility as a witness, appellant had the right to present evidence on surrebuttal to rebut the Baumgartes's testimony concerning the circumstances surrounding Dr. Kaser-Boyd's interview of Fred Baumgarte and to rehabilitate Dr. Kaser-Boyd's credibility as a witness. The trial court's insistence on rigidly adhering to its trial schedule, and its refusal to give the defense a short continuance in order to contact Dr. Kaser-Boyd and to present evidence on surrebuttal, was an abuse of discretion which denied appellant his right to a fair trial. (*People v. Carter*, *supra*, 48 Cal.2d at pp. 754-758; *People v. Cuccia* (2002) 97 Cal.App.4th 785.)[56]

---

[56] Both *People v. Carter*, *supra*, and *People v. Cuccia*, *supra*, are discussed by appellant in his opening brief. (AOB 178-181.)

D. The Trial Court's Error Requires Reversal

On the issue of prejudice, respondent downplays the significance of the Baumgartes's testimony, and states that any error was harmless beyond a reasonable doubt because "even after the Baumgartes testified in rebuttal, there really was no dispute as to whether Mr. Baumgarte had been interviewed about the incident he observed or whether his account had been conveyed to Dr. Kaser-Boyd." (RB 136.) Respondent also states that "while the prosecutor questioned whether what Mr. Baumgarte observed was actually an instance of sexual molestation [citation], she did not argue that the Baumgartes were never actually interviewed or that Dr. Kaser-Boyd had 'fabricated' her interview of Mr. Baumgarte." (RB 137.)

In fact, the prosecutor presented the testimony of the Baumgartes (especially Mrs. Baumgarte) for the purpose of showing that Dr. Kaser-Boyd willfully lied when she said she had interviewed Fred Baumgarte about Rudy Garcia having sexually abused appellant. (See 18 RT 3033 [prosecutor's statement "I have the right . . . to call this witness and cross-examine this witness because Dr. Kaser-Boyd lied on his [*sic*] testimony"].) This point was not lost on appellant's defense counsel, who argued to appellant's penalty jury that the reason the prosecutor called the Baumgartes was because "She wanted you to actually believe that Dr. Kaser-Boyd fabricated her conversation with Fred Baumgarte because if you believe she fabricated that conversation, maybe you will disregard everything she said." (18 RT 3189.) That the prosecutor did not argue this point to appellant's penalty jury is of no moment and does not diminish its significance to the prosecutor's case for the death penalty, or its impact on appellant's jury, which had, as one of its tasks, to decide the credibility of appellant's "most important witness." (13 RT 2449 [prosecutor describes Dr. Kaser-Boyd as

the defense's "most important witness"]; see also 18 RT 3106 [prosecutor's closing argument that appellant's penalty defense rests almost exclusively on the testimony of Dr. Kaser-Boyd].) Here, the damage was done when the Baumgartes's testimony went to the jury unchallenged by way of any surrebuttal from Dr. Kaser-Boyd herself.

Accordingly, the trial court's denial of appellant's request for a short continuance to secure the attendance of Dr. Kaser-Boyd was an abuse of discretion, and requires reversal of the death judgment because it violated appellant's federal constitutional rights to counsel, to present evidence, to due process, a fair trial, and to a reliable penalty determination. (U.S. Const., 6th, 8th & 14th Amends; *Chapman v. California* (1967) 386 U.S. 18, 24; see discussion AOB 182-186.)

VI

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT AT THE PENALTY PHASE

A. Introduction

In his opening brief, appellant argued that he was denied his state and federal constitutional rights to a fair and reliable penalty determination when the prosecutor repeatedly denigrated and dehumanized appellant in the eyes of the jury by referring to him as an animal and his behavior as animalistic, and when the prosecutor engaged in the sensational tactic of holding in her hands and reading to the jury two letters purportedly written by the murder victim's two young children to their deceased father, both of which served only to inflame the sympathy and passions of the jury against appellant.

Respondent contends that appellant forfeited all of his claims based on the state and federal Constitutions by failing to assert them below. Respondent also contends that even if appellant had preserved his claims of prosecutorial misconduct, the record shows that the prosecutor did not engage in any misconduct as alleged, and, assuming that she did, any such misconduct was harmless beyond a reasonable doubt. (RB 138-151.)

Respondent's contentions lack merit.

B. Appellant's Federal Constitutional Claims Are Properly Before This Court

Respondent contends that because appellant never objected below to the prosecutor's misconduct on federal constitutional grounds, he cannot present his federal constitutional claims here on appeal. (RB 138, 142-143.)

Respondent's contention lacks merit for at least two reasons. First, contrary to respondent's contention, appellant did raise his constitutional claims in the trial court in his motion for a new trial (II CT 460-466), which

claims were then implicitly denied by the trial court when it denied the motion (20 RT 3268-3270). (Evid. Code, § 664 ["It is presumed that official duty has been regularly performed."]; see *People v. Stowell* (2003) 31 Cal.4th 1107, 1114 [a trial court is presumed to have been aware of and followed the applicable law]; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 ["'we are entitled to presume that the trial court . . . properly followed established law'"]; *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 ["It is a basic presumption indulged in by reviewing courts that the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties."].)

Second, appellant's federal constitutional claims are properly before this Court under "the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. [Citations.]" *(People v. Yeoman* (2003) 31 Cal.4th 93, 118, 133; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

Acting pursuant to this principle, "our courts have several times examined constitutional issues raised for the first time on appeal, especially when the asserted error fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue [citation]." (*Hale v. Morgan*, *supra*, 22 Cal.3d at p. 394.) These factors are present here.

Moreover, appellant's federal constitutional claims are properly before this Court because they "merely invite [this Court] to draw an alternative legal conclusion . . . from the same information he presented to the trial court . . . ." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 133; see also *People v. Rogers* (2006) 39 Cal.4th 826, 850, fn. 7 [same]; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 [same]; *People v. Cole* (2004) 33

Cal.4th 1158, 1197, fn. 8 [same].)

C. The Prosecutor's Repeated References to Appellant as an Animal Denied Appellant His Right to a Fair and Reliable Penalty Determination

Respondent contends that the prosecutor did not engage in misconduct when she referred to appellant as an animal and his behavior as animalistic during her closing penalty phase argument, and has cited a number of this Court's decisions where similar epithets were uttered by the prosecutor and this Court found that they did not constitute misconduct and/or were harmless. In a majority of the cases cited by respondent, however, this Court noted that the defense failed to object to the prosecutor's epithets or request an admonition – a situation not present in appellant's case, where defense counsel repeatedly objected to the prosecutor's improper remarks.[57] (Cf. *People v. Farnam* (2002) 28 Cal.4th 107, 199-200 ["At times during her closing argument, the prosecutor referred to defendant as a 'monster,' an 'extremely violent creature,' and the 'beast who walks upright.' . . . Because defendant did not object or request

---

[57] In the present case, the prosecutor brought up the animal reference by referring to appellant's behavior as "animalistic action." Defense counsel immediately objected. The trial court overruled the defense objection, stating: "I think animal is on the list of okay words in terms of the way the argument is posed." (18 RT 3155.) Having won that point, the prosecutor taunted the defense by repeatedly referring to appellant as an animal. (*Ibid.* ["This man, this animal, after intending to deprive Brinlee of both parents."]; 18 RT 3161 ["Lynn Finzel is living with a guilt that is unjustified because of the animal at the end of the table, Randy Garcia."] 3164 ["[Joe Finzel's] life was snuffed out, just like that, by that animal, and that's what he is. He acts like an animal, and that's what he is."].) Defense counsel again objected to the prosecutor's use of the word animal. His objection was overruled. (18 RT 3166.) Following this ruling, the prosecutor called appellant a "predator animal" who "was out seeking his sadistic passions." (18 RT 3168.)

an admonishment with respect to any of this perceived misconduct, he has forfeited the contention on appeal."]; *People v. McDermott* (2002) 28 Cal.4th 946, 1003 ["Defendant also cites as improper the prosecutor's comments in closing argument describing defendant as 'a mutation of a human being,' a 'wolf in sheep's clothing,' a 'traitor,' a person who 'stalked people like animals,' and someone who had 'resigned from the human race.' Because defendant did not object to these remarks or request an admonition at trial, she may not now challenge these statements."]; *People v. Hawkins* (1995) 10 Cal.4th 920, 960-961 [no objection];[58] *People*

---

[58] In *People v. Hawkins*, *supra*, 10 Cal.4th 920, the prosecutor referred to defendant as "coiled like a snake," and compared the act of sentencing defendant to life in prison to "putting a rabid dog in the pound." On appeal, defendant argued that the prosecutor's dehumanizing language improperly inflamed the jury's passions and further invited them to speculate on defendant's future conduct. After noting that "[t]rial counsel failed to object to these alleged incidents of misconduct, . . . and as such, any claim is generally waived on appeal" (*id.* at p. 660), this Court said:

> We do not condone the use of such terms in argument. But as we have held, the use of such opprobrious epithets is not necessarily misconduct.

(*Id.* at p. 661.)

The decision in *People v. Hawkins*, *supra*, illustrates a troubling dichotomy that exists concerning the type of error complained of here. On the one hand, this Court says that it does not condone the use of demeaning and dehumanizing epithets by the prosecutor at the penalty phase of a capital trial, while, on the other, it says that the use of such epithets is not necessarily misconduct. In other words, the use of such opprobrious epithets by the prosecutor is bad, but not bad enough to constitute misconduct. Unfortunately, such a holding does nothing to actually discourage prosecutors from continuing to use such demeaning and dehumanizing epithets; in fact, it does the opposite. If this Court truly does not "condone" such epithets, it should lay down the law and tell prosecutors

(continued...)

v. Sandoval (1992) 4 Cal.4th 155 [defendant "raised no objection during argument to the prosecutor's use of the term 'liar' [and] has thus waived the latter point since any harm caused by this characterization could have been cured by a timely objection and an admonition"]; *People v. Sully* (1991) 53

(...continued)
to stop using them once and for all. (See *People v. Wilkes* (1955) 44 Cal.2d 679, 687-688; *People v. Ford* (1948) 89 Cal.App.2d 467, 472.)

People v. Wilkes, *supra*, 44 Cal.2d 679, illustrates this point. In that case, the claim of error was that the prosecutor had committed prejudicial misconduct by commenting on the defendant's wife's failure to testify. In discussing this particular error, which the reviewing courts had routinely found to be harmless, this Court stated:

> Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings, it appears from the brief of the People, prosecuting officials have come to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. (See *People v. Ford* (1948), 89 Cal.App.2d 467, 472 [200 P.2d 867] ["We have extended our remarks respecting misconduct in the hope that they will be taken as a serious effort to inspire a greater degree of responsibility, duty and caution on the part of those prosecutors who are either careless in the observance of the rights of the accused or wholly indifferent to the consequences of their misconduct. It is regrettable that so much is left for reviewing courts in the way of discouraging misconduct. Fewer judgments would have to be reversed if the trial courts were more firm in controlling the comparatively few prosecutors who need restraint."].)

(*People v. Wilkes*, *supra*, 44 Cal.2d at pp. 687-688.)

Cal.3d 1195, 1250 [no objection]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 [same].)

On the other hand, appellant has cited in his opening brief a number of cases from this Court and other courts, including the United States Supreme Court, where the prosecutor was found to have committed misconduct by characterizing the defendant as an animal. (See AOB 192-193.)

Thus, on this point, the issues have been joined and it serves no useful purpose to repeat appellant's argument here that it is prejudicial misconduct for a prosecutor to make remarks in closing jury argument that have no apparent purpose but to denigrate and degrade the defendant before the jury.

As appellant argued in his opening brief, the prosecutor's repeated references to appellant as an animal and his conduct as animalistic unfairly denigrated, dehumanized and degraded appellant in the eyes of the jury. These references were highly inflammatory and principally aimed at arousing the passion and prejudice of the jury against appellant. Additionally, three of the prosecutor's five animal references were directed at appellant as he sat at counsel table. (18 RT 3155, 3161, 3164.) These particular references by the prosecutor were improper and denied appellant his right to a fair and reliable penalty determination on the separate ground that appellant did nothing in the courtroom to warrant this personal attack by the prosecutor.

In any event, whether the prosecutor's offensive remarks here constituted misconduct, as urged by appellant, or "played an extremely minor role when the prosecutor's penalty phase argument is viewed as a whole," as urged by respondent (RB 147), such remarks and personal

attacks have no place in the penalty phase of a capital trial and should not be sanctioned by this Court on appeal, or in the trial court in the face of a timely objection by the defense, as occurred in appellant's case.

Further, even if these remarks are found by this Court to be harmless in and of themselves, when the prosecutor's improper remarks are viewed in connection with the many other penalty phase errors in this case, the conclusion is inescapable that appellant was denied his right to a fair and reliable penalty determination and reversal of the death judgment is required.

D. The Prosecutor's Reading of the Children's Imaginary Letters to Their Deceased Father Was Improper

Respondent contends that the prosecutor did not commit any misconduct by presenting the impact of appellant's murder on the victim's young children through the rhetorical device of reading letters the children might have written to their father if they could. (RB 148.) Respondent contends that the prosecutor's actions were entirely proper, because all the prosecutor did here was to refer properly to the immediate effects of the capital crime on the victim's family, which constitutes part of the "circumstances of the crime" under Penal Code section 190.3, factor (a). (RB 148-149.) Respondent also contends that, assuming arguendo the prosecutor was guilty of misconduct, her misconduct was harmless given that it was very limited in scope, such that it did not comprise "a pattern of conduct so egregious that it infected the trial with such unfairness as to make the penalty determination a denial of due process." (RB 149.).

Appellant disagrees, and submits that the prosecutor's sensational, dramatic and theatrical tactic of reading the two imaginary letters was neither proper nor harmless beyond a reasonable doubt.

In its brief, respondent cites a number of cases decided by this Court which hold that a prosecutor may argue the immediate effects of a capital crime on the victim's family, because such effects are admissible as circumstances of the offense under Penal Code section 190.3, factor (a). However, victim impact evidence is not admissible under Penal Code section 190.3, factor (a), if it "'diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*People v. Edwards* (1991) 54 Cal.3d at 787, 836.) That was the case here, as the prosecutor's reading of the two imaginary letters invited an irrational, purely subjective response. As noted by Justice Souter in his concurring opinion in *Payne v. Tennessee* (1991) 501 U.S. 808, the more a jury is exposed to the emotional aspects of a victim's death, the less likely its verdict will be a "reasoned moral response" to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of due process. (*Id.* at p. 836 (con. opn. of Souter, J.).)

As argued in appellant's opening brief, the prosecutor's dramatic reading of the two imaginary letters was akin to a "golden rule"[59] argument,

---

[59] As noted in appellant's opening brief (AOB 193-194), a "golden rule" argument is "the suggestion by counsel that jurors should place themselves in the position of a party, a victim, or the victim's family members" (see *State v. McHenry* (Kan. 2003) 78 P.3d 403, 410).

This Court has held that such arguments are not permitted at the guilt phase of a capital case (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 ["We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt."]), but are permitted during the penalty phase of a capital trial, so long as the prosecutor's remarks are brief, mild and "[do] not exceed the bounds of propriety" (*People v. Medina* (1995) 11 Cal.4th 694, 778).

(continued...)

which was improper here because it exceeded the bounds of propriety and served only to inflame the sympathy and passions of the jury against appellant. The reading of the two imaginary letters also violated appellant's right to a fair sentencing hearing, in that the letters referred to future matters involving the victim's two children that were speculative, irrelevant, and not supported by the evidence. (See *Lockett v. State* (Okla.Crim.App. 2002) 53 P.3d 418, 427 [statements about the victim's plans for the future are speculative and not relevant victim impact evidence]; *Phillips v. State* (Okla.Crim.App. 1999) 989 P.2d 1017 [same].) Finally, the prosecutor's "soliloquy in the voice of the victim['s children]" was also improper in that it "inappropriately obscured the fact that [her] role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim." (*Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713 [prosecutor delivered a soliloquy in the voice of the deceased victim during his closing argument, purporting to tell the jury what the victim would have said if he could have testified at the trial].) Here, by putting her own imaginary words in the children's mouths, the prosecutor was obviously trying to unduly create, arouse and inflame the sympathy, prejudice and passions of the jury to appellant's detriment.

In any event, just like appellant's argument that the prosecutor committed misconduct by repeatedly referring to appellant as an animal, the issues here concerning the prosecutor's improper stunt of reading two

---

(...continued)

In the present case, the prosecutor's reading of the two imaginary letters was prejudicial and denied appellant his right to a fair and reliable penalty determination because this prosecutorial stunt exceeded the bounds of propriety and served only to inflame the sympathy and passions of the jury against appellant.

letters purportedly written by the victim's two children to their deceased father have been likewise joined and it serves no useful purpose to repeat appellant's argument that the prosecutor's reading of the children's imaginary letters to their deceased father was also misconduct and denied appellant his right to a fair and reliable penalty determination.

E. Reversal of the Death Judgment Is Required

Respondent contends that the prosecutor's few references to appellant as an "animal" and his behavior in committing the crimes as "animalistic" were brief and isolated instances, and did not prejudice appellant. "Nor could appellant have been prejudiced by the small portion of the prosecutor's argument delivered through the rhetorical device of the letters from Mr. Finzel's children." (RB 150.) As respondent sees it, "even in the absence of the prosecutor's few references to appellant as an 'animal' and the rhetorical device of the letters Mr. Finzel's children might have written him if they could, there was no reasonable possibility that the jury would have reached a different result." (RB 151.) In other words, even assuming the prosecutor was guilty of misconduct, such misconduct did not deny appellant his right to a fair and reliable penalty determination because, in respondent's view, it played such a minor role in obtaining the death verdict. But it is not the quantity of the misconduct, but the prejudicial effect of the misconduct that is the focus of any harmless-error analysis. Here, the prosecutor's improper closing argument played an important role in convincing appellant's jury to return a death verdict, just as the prosecutor intended. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing argument"].)

Moreover, in contending that any prosecutorial misconduct in this

case was harmless, respondent overlooks some important considerations. First, the penalty phase prosecutorial misconduct discussed herein must be viewed in conjunction with the other errors committed at the penalty phase, rather than in isolation, as respondent would like this Court to do. Those additional penalty phase errors include the erroneous admission of highly prejudicial victim impact evidence (Argument IV); the erroneous denial of appellant's request for a short continuance in order to present surrebuttal evidence to support the credibility of key defense mitigation expert Dr. Nancy Kaser-Boyd (Argument V); and numerous instructional errors that undermined the reliability of the jury's death verdict (Arguments VII and VIII). Because it cannot be shown beyond a reasonable doubt that these errors, either individually or collectively, had no effect on the penalty verdict, reversal of appellant's death judgment is required. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Respondent also completely ignores the important and undeniable fact that appellant's case was a very close one on penalty, as evidenced by the fact that appellant's jury deliberated for seven court days, asked to see various exhibits, including the victim impact video, asked for a rereading of certain testimony, and twice announced that it was deadlocked before returning its death verdict.[60] (See *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [length of jury deliberations indicates that the case was close];[61]

---

[60] See II CT 425-433A, 450.

[61] In *People v. Cardenas*, *supra*, this Court wrote:

> The prosecution's case against appellant was not overwhelming. The jury deliberated for 12 hours before

(continued...)

Gibson v. Clanon (9th Cir.1980) 633 F.2d 851, 855 [same]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [same]; *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 572-573 [same]; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 456 [same]; accord, *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"]; *Dallago v. United States* (D.C. Cir. 1969) 427 F.2d 546, 559 ["The jury deliberated for five days, and one would expect that if the evidence of guilt was overwhelming the jury would have succumbed much sooner."]; *United States v. Brodwin* (S.D.N.Y 2003) 292 F.Supp.2d 484, 497 ["the jury found this a close case, as reflected by their five and a half days of deliberations before returning their verdict"].)[62]

In conclusion, since the prosecutorial misconduct cannot be considered harmless beyond a reasonable doubt, the death judgment must

---

(...continued)

> returning its guilty verdicts. This court has held that jury deliberations of almost six hours are an indication that the issue of guilt is not "open and shut" and strongly suggest that errors in the admission of evidence are prejudicial. (See *People v. Woodard* (1979) 23 Cal.3d 329, 341 [152 Cal.Rptr. 536, 590 P.2d 391].) Here, the jury deliberated twice as long as the jury in *Woodard*, a graphic demonstration of the closeness of this case.

(31 Cal.3d at p. 907.)

[62] As stated by Witkin and Epstein:

> The rule is occasionally declared that, in a "close case," i.e., one in which the evidence is 'evenly balanced' or 'sharply conflicting,' a lesser showing of error will justify reversal than where the evidence strongly preponderates against the defendant.

(6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 45, pp. 506-507.)

be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 984.)

VII

THE TRIAL COURT FAILED TO INSTRUCT THE JURY SUA SPONTE ON THE APPROPRIATE USE OF THE VICTIM IMPACT EVIDENCE IN THIS CASE

In his opening brief, appellant argued that the trial court erred by failing to instruct the jury sua sponte on the appropriate use of the highly inflammatory and emotionally charged victim impact evidence in this case. (AOB 200-204.) Appellant proposed that the trial court should have given an instruction like the one quoted below:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(AOB 202.)

Respondent contends that the trial court was under no duty to give such a limiting instruction sua sponte in appellant's case. (RB 152-154.) In support of its contention, respondent cites this Court's recent decision in *People v. Zamudio* (2008) 43 Cal.4th 327, 369-370. In *Zamudio*, this Court considered and rejected an instruction identical to the one proposed by appellant here, holding that the first two sentences of the proposed limiting instruction are adequately covered by CALJIC No. 8.85, and that the "remainder of the proposed instruction . . . is not the type to give rise to a sua sponte duty to instruct." (*Id.* at pp. 369-370, fn. omitted.)

For the reasons set forth in his opening brief, appellant disagrees with this Court's decision in *People v. Zamudio*, *supra*, and urges its reconsideration. A cautionary instruction, such as the one proposed by appellant here, was absolutely necessary in appellant's case given the sheer volume and highly inflammatory nature of the victim impact evidence admitted in this case, especially the victim impact video. In *People v. Haskett* (1982) 30 Cal.3d 841, this Court held that, in every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*Id.* at p. 864.) The limiting instruction proposed by appellant here would have conveyed that critical message to appellant's jury; none of the instructions given at appellant's trial did that. As a result, there was nothing to stop raw emotion and other improper considerations from tainting the jury's ultimate penalty decision.

As argued in appellant's opening brief, in view of the sheer volume and inflammatory nature of victim impact evidence admitted in this case (see AOB 139-152), and the manifest closeness of the case for the death penalty (see AOB 166-167), the trial court's failure to instruct the jury sua sponte on the appropriate use of the victim impact evidence in this case cannot be considered harmless, and therefore reversal of the death judgment is required.

VIII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In appellant's opening brief, appellant set forth numerous bases on which California's death penalty statute violates the federal Constitution, while acknowledging that this Court has already rejected these claims of error. (AOB 205-222.) Respondent simply relies on this Court's prior decisions without adding any new arguments. (RB 155-159.) Accordingly, the issues are fully joined and no reply is necessary.

IX

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In response to appellant's argument that reversal is required based on the cumulative effect of the errors in this case (AOB 223-224), respondent simply contends that

> when the merits of the issues are considered there are no multiple errors to accumulate. Whether considered individually or collectively for their cumulative effect, the alleged errors could not have affected the outcome of the penalty phase of the trial. The records [*sic*] shows that appellant received a fair trial.

(RB 160, citations omitted.)

Respondent's contention lacks merit, as it cannot be fairly said that appellant received a fair and reliable penalty trial.

As set forth in appellant's opening and reply briefs, the numerous errors committed at the penalty phase of appellant's trial denied appellant his right to a fair and reliable penalty trial. These errors include the erroneous admission of highly prejudicial victim impact evidence (Argument IV); the erroneous denial of appellant's request for a short continuance in order to present surrebuttal evidence to support the credibility of key defense mitigation expert Dr. Nancy Kaser-Boyd (Argument V); prosecutorial misconduct (Argument VI); and numerous instructional errors that undermined the reliability of the jury's death verdict (Arguments VII and VIII). Given the undeniable fact that appellant's case was a close one on penalty, as evidenced by the fact that his penalty jury deliberated over seven court days, asked to see various exhibits, including the erroneously admitted victim impact video, requested a rereading of

certain testimony, and twice announced that it was hopelessly deadlocked as to penalty before returning its death verdict, there is absolutely no way that respondent can show beyond a reasonable doubt, as it must, that the errors committed at the penalty phase, either individually or collectively, had no effect on the penalty verdict. Accordingly, reversal of appellant's death judgment is required. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; see also *Chapman v. California* (1967) 386 U.S. 18, 24.)

CONCLUSION

For the reasons set forth herein, as well as those stated in appellant's opening brief, the entire judgment must be reversed.

DATED: March 22, 2010

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender

Attorneys for Appellant

Certificate of Counsel (Cal. Rules of Court, rule 8.630(b)(2))

I, Peter R. Silten, am the Deputy State Public Defender assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our my computer's software. On the basis of that computer-generated word count, I certify that this brief is 31,706 words in length.

P. R. Silten

PETER R. SILTEN

Attorney for Appellant

EXHIBIT A

SOUTHERN CALIFORNIA

BRIEFS

County Seeks Grand Jurors

[illegible] Robert [illegible] is inviting qualified [illegible] to apply for positions on the Los Angeles County Grand Jury for the [illegible] term beginning July 2. Applications must be submitted by [illegible].

Twenty-three English-speaking citizens who have resided in the county for at least a year and who are at least 18 will be chosen. Members of governmental boards or commissions are not eligible.

Byrne called for an end to the "historical under-representation" of minorities on the Los Angeles County Grand Jury.

"The pool of nominees from which the Grand Jury is chosen should reflect the diverse makeup of our county ... and I especially encourage citizens who are black, Hispanic or Asian to volunteer," Byrne said.

The primary role of the Grand Jury is its civil watchdog function of investigating governmental operations. Occasionally, criminal cases are presented for possible indictments.

Grand jurors generally are expected to work four full days each week. Pay is $25 per day of service, auto mileage to and from home and free parking near the Criminal Courts Building in the Civic Center.

Applications and information are available from the Grand Jury coordinator at (213) 974-5333.

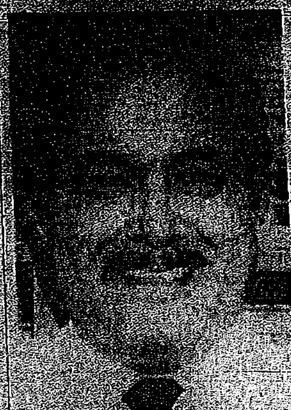
$8.65 Million Jury Award

SANTA MONICA — Following a six-week trial and 7 1/2 days of deliberations, a Superior Court jury ordered Hustler Magazine publisher Larry Flynt and his company, L.F.P. Inc., to pay $8.65 million in damages to two former employees.

Flynt's former bodyguard, William Rider, and his wife, Marsha Rider — once Flynt's executive assistant — were awarded the damages for their suffering after they were fired when William Rider refused to commit perjury for Flynt.

The action began before John

Embattled Judge Gets Vote of Confidence



Judge Raymond Mireles

By Martin Berg
Daily Journal Staff Reporter

A controversial judge in the Van Nuys criminal courts got a vote of confidence Friday from the presiding judge of the Los Angeles Superior Court.

Superior Court Judge Raymond Mireles enraged the Public Defender's Office several weeks ago when he ordered two Los Angeles Metro Division police officers to go to another courtroom and bring Deputy Public Defender Howard Waco back to his courtroom.

Waco said he was injured when the police officers grabbed him, dragged him down the hall and hurled him into Mireles's courtroom. He has hired attorney Hugh Manes, who said he plans to file a federal civil rights suit.

Public Defenders Respond

In the wake of the incident, officials of the public defenders office said they would refuse to try cases before Mireles because he was prejudiced against the entire office. The officials contended that Mireles would have to be reassigned to hearing civil cases because public defenders handle such a high percentage of criminal cases.

But on Friday, Richard Byrne, presiding judge of the Superior Court, said in an interview that Mireles was an outstanding criminal judge. "I don't think he should be prohibited from hearing criminal cases based on this incident that took place," Byrne said. "Everything I know about the incident is second-hand, but from what I've heard it wasn't a simple, clear-cut situation. It was murky, with some fault on every side."

Public defenders contended that the incident involving Waco was only the latest example of Mireles's prejudice against defense lawyers — and the Public Defender's Office in particular — since his assignment to the Van Nuys courthouse earlier this year.

Byrne commented, "It seems to me that their [public defenders'] concern ought to be the quality of justice their clients receive, not on one incident that happened two weeks ago."

Specific Assignment Awaited

Mireles will remain in Van Nuys under new judicial assignments made late last week, Byrne said. But whether Mireles would be assigned to criminal or civil matters would be decided by Richard G. Kolostian, presiding judge of the Van Nuys Superior Court. Kolostian could not be reached for comment Friday.

William D. Weiss, head deputy public defender in Van Nuys, has said his office would seek a hearing in their effort to prevent Mireles from presiding over public defender cases. If such a hearing weren't granted, individual public defenders would file peremptory challenges to remove Mireles from their cases, Weiss said.

County's First DNA Ruling Expected in Van Nuys Case

By Rene Lynch
Los Angeles Daily News

A Los Angeles Superior Court judge is expected to make a landmark decision next week concerning the use of DNA testing in criminal trials to help authorities convict defendants who might otherwise be freed.

Judge James Coleman in suburban Van Nuys is scheduled to hear final arguments Monday in a defense motion to block the use of DNA genetic patterns to link a Los Angeles man to a series of 1986 and 1987 rapes and robberies in suburban North Hollywood, officials said.

If the evidence is admitted, the case of Henry Wilds, 33, would become the first in Los Angeles County to use DNA testing, a scientific technique similar to fingerprinting that is being hailed by law enforcement officials as a way to help convict defendants who might otherwise be freed for lack of evidence.

[illegible] be obtained from a blood test and then compared to the findings at the crime scene, Fulgoni said.

In the Wilds case, experts have testified there is between a one-in-66 million and a one-in-180 billion chance that the evidence obtained from the victim would match someone other than Wilds, Fulgoni said.

Tests matching Wilds' DNA pattern to evidence found at the scene of the crimes were conducted by a Maryland diagnostic center after Wilds' arrest, he said.

According to court records, Wilds was arrested on suspicion of robbery in April 1987 after a woman told police he had followed her into the underground parking garage of her North Hollywood apartment.

Wilds also is accused of raping and robbing a 30-year-old woman at knifepoint after she got out of her underground garage of her North Hollywood apartment building in December 1986. Additionally, he is accused in a similar attack in February 1987.

The robbery victim has identified Wilds as her assailant but the two rape victims said that they could not identify their attacker because he was wearing a mask.

If convicted of 10 felony charges, Wilds could face up to 60 years in prison. He is being held in the Los Angeles County Jail in lieu of $1 million bail.

Circumstantial Evidence Noted

Novotney has said that the prosecution's case is weak because it is based on circumstantial evidence that items belonging to a victim were found weeks after the crime in an apartment Wilds shared with someone else.

In the state's first case involving DNA evidence, Ventura County prosecutors successfully argued to use DNA testing in the case of a 34-year-old woman who is accused in the beating death of an elderly handyman at a Ventura hamburger stand.

James A. Baker, assistant head deputy district attorney in Van Nuys, said that DNA testing could revolutionize the prosecution of sex crimes and murders and might be used to land convictions on previously unsolved cases.

"This is something that law enforcement has been hoping for all along," Baker said. "When we've found evidence at the scene, such as blood or semen, we had no way to connect it to a defendant, and now we do."

Baker said that DNA testing could be helpful in rape cases, where the victim's testimony could be corroborated by the scientific evidence.

"It could make rape easier to solve and lessen the trauma on the victim," he said.

DECLARATION OF SERVICE

Re: *People v. Randy Eugene Garcia* No. S045696

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed, respectively, as follows:

Office of the Attorney General
Attn: Russell Lehman
300 South Spring Street
Los Angeles, CA 90013-1230

Office of the District Attorney
Attn: Sally Thomas
201 North Figueroa St., Rm. 1525
Los Angeles, CA 90012

Office of the Alternate Public Defender
Attn: Mark Zavidow
320 W. Temple St., # 35
Los Angeles, CA 90012-3208

Los Angeles Co. Superior Court
Attn: Hon. Jacqueline Conner
1725 Main Street, Dept. R
Santa Monica, CA 90401

Randy E. Garcia
(Appellant)

Each said envelope was then, on March 22, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on March 22, 2010, at San Francisco, California.

DECLARANT