SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
	CRIM. S057321
Plaintiff and Respondent,	
vs.	Los Angeles Co. Superior Court No.NA023819
DARRELL LEE LOMAX,	
Defendant and Appellant.	

SUPREME COURT
FILED
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Deputy

APPELLANT'S REPLY BRIEF

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

THE HONORABLE JUDGE MARGARET HAY

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In response to appellant's opening brief, respondent attempts to draw this Court's attention to what it describes as appellant's "contumacious" behavior throughout the proceedings below, and suggests that appellant deliberately sought to "inject error" into those proceedings. However, none of error discussed in appellant's opening brief and below can fairly be ascribed to appellant, but instead resulted from the trial court's failure to apply the correct legal standards in resolving the issues before it. It is readily apparent – even from a cold record – that the trial court became increasingly irritated and impatient with appellant, as an unfortunate consequence of which its rulings were poorly reasoned and overly influenced by annoyance or anger. The court's remarks, a number of which appellant has quoted in his opening brief and below (see e.g., AOB 58-61, 89, 124-126), were often unduly sarcastic and hostile in tenor, which made the court appear intemperate and less than even-

handed (See Cal.Code Jud. Ethics, canon 3B(4) [judges are required to be patient, courteous and dignified].) The trial court thus committed numerous prejudicial errors that individually and cumulatively require reversal of appellant's conviction and death sentence.

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

* * * * *

I.

APPELLANT WAS DEPRIVED OF HIS STATUTORY AND CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL AS A DIRECT CONSEQUENCE OF THE PROSECUTION'S DILATORY CONDUCT

A. Introduction

In his opening brief, appellant established a violation of both his statutory and constitutional rights to a speedy trial. (AOB 34-85.) The prosecution's inexplicable and unjustified delay in deciding to seek a death sentence, and its persistent failure for well over a year to comply with its discovery obligations,[1] substantially thwarted appellant's ability to adequately prepare for trial, thus unfairly and unconstitutionally placing him in a position of having to choose between his rights to effective representation and to a speedy trial.

Confronted by the prosecution's delay in (1) complying with its statutory and constitutional obligations to provide discovery, and (2) deciding whether to seek the death penalty, respondent seeks to delude this Court into believing that the delay was instead attributable to appellant. However, respondent cannot succeed in this endeavor, because the record speaks for itself.

A fair review of the record discloses that respondent's claim is

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[1] Appellant was initially arraigned on September 8, 1994, and filed his first discovery motion on September 28, 1994 (RT 1994 Proceedings 7, 27-28), which was heard on October 11, 1994. At that hearing the prosecutor promised that the witnesses' names, addresses and phone numbers would be provided to appellant's appointed investigator. (*Id.* at pp. 33-35.) That information was not actually turned over to the defense until November 1995. (1RT 3-4.)

nothing more than a red herring. The fact of the matter is that the prosecution had in its possession contact information for exculpatory witnesses that it simply refused, without justification, to turn over to the defense. By the time the information was turned over (only after repeated motions and complaints by the defense) it was stale, and the surviving victim – an eyewitness to the crime whose testimony could potentially have exonerated appellant of the murder – had disappeared, and was believed to have left the country. At this point, appellant had been in pretrial custody for nearly 15 months. The prosecution also took 14 months to decide whether to seek the death penalty against appellant, and even after it decided to do so, dragged its feet in turning over discovery of aggravating evidence it planned to introduce in the penalty phase. As appellant argued to the trial court on December 18, 1995, when he refused to waive time:

> I shouldn't be compelled to give up my constitutional rights because the prosecutor hasn't done his duty in disclosing the discovery to my attorney . . . I would like to move for dismissal for the simple fact that we are prejudiced because my attorney cannot preside with this matter and investigate effectively and prepare a proper defense for me. Because of the prosecutor we have been completely patience (sic) over and over again in the request for discovery.

(1RT 38-39.)

Respondent fails to show that the trial court had good cause for continuing the trial over appellant's objection beyond the statutory period, because it cannot refute appellant's claim that the delay was engendered by "either the willful oppression or neglect of the state or

its officers." (*Jones v. Superior Court* (1970) 3 Cal.3d 734, 738.) Because the delay was attributable to the fault or neglect of the state, the only available remedy was dismissal under Penal Code section 1382, subdivision (a). (*People v. Johnson* (1980) 26 Cal.3d 557, 570, 572-573.) Respondent has also failed to rebut appellant's further claim that he is entitled to reversal of his conviction and death sentence, because his state and federal constitutional rights to a speedy trial were violated.

B. Respondent has Ignored the Facts and the Law in Arguing That the Trial Court Properly Denied Appellant's Motion to Dismiss Pursuant to Penal Code section 1382, subdivision (a)

Respondent contends that the court properly continued the trial over appellant's objection and refusal to waive time, because trial counsel needed more time to prepare, which constituted "good cause." (RB 66.) Respondent merely parrots the trial court's flawed analysis, and – like the trial court -- completely ignores the fact that defense counsel was *forced* to request a continuance of the trial due to the prosecution's unjustified delay in (1) complying with its discovery obligations and (2) making a decision whether to seek a death sentence. (See AOB 36-58.) As stated above, and in appellant's opening brief, "good cause" cannot be found for delay attributable to the fault or neglect of the prosecution. (*People v. Johnson*, *supra* 26 Cal.3d at p. 570; *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 94-95; see AOB 68-74.) Without good cause for the delay, the court had no choice but to dismiss the case, and its failure to do so was error. (*People v. Wilson* (1963) 60 Cal.2d 139, 151 [Penal Code section 1382, subdivision (a) is mandatory].

C. Appellant Established a Violation of His Right to a Speedy Trial Guaranteed by Article I, Section 15, Clause.1 of the California Constitution

Respondent appears confused about what is required to establish a violation of the *state* constitutional right to a speedy trial, as compared to the showing required to establish a violation of the separate *federal* constitutional right. (RB 67.) Respondent relies on *People v. Harrison* (2005) 35 Cal.4th 208, 227 and *People v. Seaton* (2001) 26 Cal.4th 598, 633, in support of its argument that appellant failed to establish a violation of his *state* constitutional right to a speedy trial. However, those cases addressed alleged violations of the respective defendant's *federal* constitutional right to a speedy trial.

Decisions of this Court make clear that the state constitutional speedy trial right is construed and implemented by Penal Code section 1382 (*People v. Martinez* (2002) 22 Cal.4th 750, 766), and that "a trial delayed more than 60 days is *prima facie* in violation of the defendant's constitutional right." (*Sykes v. Superior Court*, *supra*, 9 Cal.3d at p. 89.) Because the trial in this case was delayed more than 60 days, over appellant's objection, and without good cause, appellant's right to a speedy trial guaranteed by the California Constitution was violated.

Contrary to respondent's argument (RB 78-82), appellant has also demonstrated that the trial court's error in denying his motion to dismiss was prejudicial. (See AOB 75-78.) In his opening brief, appellant cited this Court's acknowledgment in *People v. Wilson, supra*, 60 Cal.2d at pp. 152-153, that a defendant can establish that

violation of his rights under Penal Code section 1382 and article I section 15, clause 1 of the California Constitution was prejudicial, if the state would be barred upon dismissal from refiling the charges, either because the statute of limitations had expired *or because dismissal of the charges would bar refiling under Penal Code section 1387.* Because the charges against appellant had already once been dismissed and refiled due to a violation of his rights under Penal Code section 859b, the state was barred under Penal Code section 1387, subd. (a) from refiling them a second time. (See AOB 76-77.) Respondent offers two arguments in response to this, the first of which is plainly absurd, and the second of which is unsupported by any authority.

Respondent first claims that whether or not the charges could be refiled does not show how appellant suffered prejudice. (RB 78.) This argument completely ignores *People v. Wilson*, *supra*, and the additional authority discussed by appellant in his opening brief, which establishes that the statutory and (state) constitutional violations were prejudicial, because refiling of the charges against appellant would have been barred under section 1387. (See AOB 76-77.)

Respondent secondly disputes appellant's claim that the charges could not have been refiled, arguing that the dismissal of the charge under Penal Code section 859b, pursuant to the mandate of court of appeal, resulted from "excusable neglect" on the part of the trial court. (RB 78-79.) Respondent notes, as did appellant in his opening brief, an exception to the bar against a second refiling of the charges, set forth in Penal Code section 1387.1. Pursuant to this provision, the state can refile the charges a second time, if (1) the offense involved is a "violent felony," and (2) if either of the

dismissals were due solely to *excusable neglect* on the part of the court, prosecution, law enforcement agency or witnesses. (Penal Code §1387.1, subds. (a) and (b), emphasis added.) The statute further provides that "[i]n no case shall the additional filing of charges provided under this section be permitted where the conduct of the prosecution amounted to bad faith." (*Ibid.*) The prosecution bears the burden of proving "excusable neglect." (*Miller v. Superior Court* (2000) 101 Cal.App.4th 728, 747.)

Respondent would have this Court deem "excusable neglect" (1) the Municipal Court's error in continuing the preliminary hearing over appellant's objection and without his waiver of time, in violation of Penal Code section 859b, and (2) and the Superior Court's error in denying appellant's subsequent motion to dismiss for violation of his rights under that provision, which resulted in the Court of Appeal's issuance of an extraordinary writ. (RB 79.) However, respondent offers no authority to support the proposition that an erroneous application of the law by a court constitutes "excusable neglect," and to appellant's knowledge none exists.

"Excusable neglect," has the same established meaning in the Penal Code as it does in other codes, and is defined as "neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." (*People v. Wood* (1993) 12 Cal.App.4th 1139, 1149.) Civil cases applying the excusable neglect standard confirm that *counsel's* ignorance of law, especially settled law, simply does not constitute excusable neglect. As one court has stated, "the determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. . . . Although an honest mistake of law is a valid ground

for relief where a problem is complex and debatable, *ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief* [on the basis of excusable neglect]."(*Community Redevelopment Agency v. Maynard* (1967) 248 Cal.App.2d 164, 174, emphasis added.) Accordingly, ignorance of law regarding settled bright-line timeliness requirements does not constitute excusable neglect. (*Chase v. Swain* (1858) 9 Cal. 130, 136-137 [ignorance of law regarding time to file answer does not constitute excusable neglect]; *Munoz v. California* (1995) 33 Cal.App.4th 1767,1778 [ignorance of six month claims filing requirement does not constitute excusable neglect].)

Under these authorities, the lower courts' misunderstanding of settled bright-line black letter law regarding the timeliness of a preliminary hearing cannot be considered excusable neglect. The civil cases remind that a finding of excusable neglect amounts to relief from default. It is not enough to establish an error; the proponent of the finding must also establish that the individual committing the error acted with reasonable diligence under the circumstances. (*Munoz v. California*, supra, 33 Cal.App.4th at p. 1784.) The failure to ascertain basic speedy trial requirements cannot be considered reasonable in the face of appellant's repeated demands for a speedy trial.
A court's commission of legal error would not qualify as "excusable neglect" under this definition.

Significantly, respondent does not argue that the prosecutor's prolonged and persistent refusal to comply with his discovery obligations constituted "excusable neglect." Indeed, appellate decisions make clear that the prosecution must be able to demonstrate its exercise of reasonable diligence in order to establish

"excusable neglect," something in cannot do in the instant case. (Compare, e.g., *People v. Massey* (2000) 79 Cal.App.4th 204, 211 [absence of witness requiring dismissal of case constituted "excusable neglect," because reasonable efforts had been made by prosecution to secure witness's attendance and thus there had been no failure by prosecution to perform]; *Tapp v. Superior Court* (1989) 216 Cal.App.3d 1030, 1036-1037 [prosecutor's failure to follow technical requirements of Penal Code section 1050, by submitting unverified letter in lieu of a sworn affidavit in support of motion for continuance beyond statutory time period constituted "excusable neglect"].) Accordingly, refiling of the charges under section 1387.1 would not be permissible, because *neither* dismissal would have resulted solely from "excusable neglect, as that provision requires.

Appellant additionally argued that the violation of his state speedy trial rights was prejudicial because it resulted in the loss of critical exculpatory evidence. (AOB 77-78.) Respondent makes a number of assertions in response, all of which are specious and completely without merit.

Respondent notes that when the prosecution first made discovery available to the defense appellant was representing himself, and argues that appellant has not shown that the prosecution failed to give him witness contact information. (RB 79.) This claim borders on the outrageous, first because respondent knows (or at least should know) that pro per defendants are precluded by statute from personally receiving the addresses and telephone numbers of victims and witnesses (Pen. Code §1054.2, subd. (b)), and second, because defense counsel made an *ample* record of the fact that the witnesses' contact information had been redacted from the discovery

provided to the defense, a point which was conceded by the prosecutor. (See 1RT A-27 -A-37.)[2]

Respondent next tries to shift blame to appellant for the fact that the surviving clerk, Somphop Jardensiri, disappeared before the defense could interview him. Respondent states that there "is no evidence that appellant made any efforts to find Jardensiri while appellant was in charge of his case for over three months." (RB 80.) This, however, ignores the fact that the prosecution had failed comply with its statutory obligation to furnish the defense with the information necessary to locate this witness. Furthermore, since Jardensiri was a material witness (*People v. Wilks* (1978) 21 Cal.3d 460, 468 [materiality is shown where it appears from the evidence presented that there is a reasonable possibility the informant could give evidence on the issue of guilt which might result in a defendant's exoneration]), the prosecution had an enhanced obligation to make him available to the defense. (See *Eleazer v. Superior Court* (1970) 1 Cal.3d 847, 851; *Cordova v. Superior Court* (1983) 148 Cal.App.3d 177, 185-187.)

Finally, respondent disputes that Jardensiri was a material witness, arguing that there was reason to believe his testimony would not have been exculpatory. However, the fact that Jardensiri gave

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[2] The record reflects appellant filed his first discovery motion, in pro per, in September 1994, shortly after he was arraigned. (RT, 1994 Proceedings, 20, 27-28.) At the hearing on that motion, held on October 11, 1994, appellant specifically complained that the names addresses and phone numbers of the witnesses had been redacted from the police reports. (RT, 1994 Proceedings, 33-35) Although the prosecutor represented that this information would be provided to appellant's investigator (*ibid*), it appears from the record that the prosecutor never actually complied with that representation.

exculpatory information to the police is undisputed, and respondent has no basis to suggest that his testimony at trial would have been materially different. The test of materiality, as noted in the paragraph above, is only whether there is a *reasonable possibility* that the witness could give evidence concerning the issue of guilt that might result in the defendant's exoneration, and does not involve consideration of whether the witness's testimony might ultimately be contradicted or refuted by other evidence.

Respondent also speculates that Jardensiri might not have cooperated with the defense had he been located. While this is a possibility, it does not alter the fact that he was a material witness, and that he could have been subpoenaed by the defense to testify. Moreover, even assuming that his testimony had differed substantially from what he told the police, the defense could still have introduced the latter as a prior inconsistent statement. (Evid. Code §§ 1235 and 770.) In any event, if the state deliberately impedes a defendant's access to a material witness, by failing to disclose information that will allow the defense to locate that witness, the state should not be permitted to argue that its malfeasance was nonprejudicial to the defense

D. Appellant Has Also Shown Federal Constitutional Error Requiring Reversal of his Conviction and Death Sentence

Respondent also attempts to refute appellant's claims that he is entitled to reversal because his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution was violated, and because his right to due process of law under both the state and federal constitutions was violated as a result of the delay

caused by the prosecution's dilatory conduct.

Applying the four-part test enunciated in *Barker v. Wingo* (1972) 407 U.S. 514, 530, respondent contends that the delay in this case was not uncommonly long given the complexity of the case. (RB 68-69.) However, as appellant pointed out in his opening brief, the charges involved ordinary street crimes, and the length of time it took to prepare the case for trial, had far less to do with its complexity than the prosecution's unjustified delay in (1) complying with it's discovery obligations and (2) reaching a decision whether to seek the death penalty.[3] Indeed, defense counsel repeatedly complained to the court that he was unable to prepare for either the guilt or penalty phase due to the prosecution's failure to provide the discovery he needed to conduct his investigation. (1RT A-8 - 38.) Under the circumstances, appellant was subjected to inordinate delay sufficient to trigger the speedy trial analysis set forth in *Barker v. Wingo*, *supra*.

Respondent next asserts that appellant was more to blame for the delay than the prosecution. (RB 69-77.) This argument is absurd and flies in the face of the appellate record. There is simply *no* evidence that appellant "intentionally tried to inject error and delay into the proceedings," as respondent contends. (RB 69.)

Respondent unfairly seeks to attribute the delay that occurred to appellant's invocation of his right to self-representation, and suggests that appellant only invoked that right as a ploy designed to

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[3] Appellant had been in custody for over a year before the prosecution made its decision to seek the death penalty (CTSupp.III 8, 1RT 1), for over 15 months before the prosecution turned over witness contact information (1RT 3-4), and for approximately 20 months before the trial court ruled on his motion to dismiss. (1CT 206, 1RT 96-100.)

create error and delay the proceedings. (RB 70.) However, the record reflects that appellant's requests for self-representation were prompted by his dissatisfaction with his public defender's representation, and his frustration with the court's refusal to appoint different counsel, *not* by a desire to delay the proceedings or to somehow "inject" error into them. (See 1RT A-38.) In any event, appellant's pro per status in no way relieved the prosecution of its discovery obligations. Moreover, the fact that *some* discovery had been provided to appellant during the time he was pro per (RB 70), does not establish that there was adequate compliance by the prosecution.

Even assuming that appellant's brief periods of pro per status somehow impeded the progress of the case, this does not explain why the prosecution failed for nine months to comply with the public defender's repeated discovery demands after he had been reinstated as appellant's defense counsel. It also does not explain why the trial court took no action to enforce such compliance. (See AOB 73-74, fn. 24.) Indeed, the record plainly establishes that the prosecution, without justification, resisted complying with its discovery obligations, and that *this*, and *not* appellant's conflicts with his public defender *or* his vacillation over whether to represent himself, caused the delay. (See AOB 34-62.) Respondent attempts to justify the prosecutor's failure to disclose witness contact information on the grounds that the witnesses were afraid of appellant and did not want their contact information disclosed. (RB 74.) Although the prosecutor initially offered this as an excuse (1RT A-28), he later recanted and agreed to turn the information over to defense counsel. (1RT A-74 - A-75.)

Respondent's additional arguments attempting to shift blame for the delay to appellant also do not withstand scrutiny. For example, there is no evidence that appellant's alleged "contumacious" behavior (RB 73) played any role in delaying the trial. In fact, some of the conduct respondent complains of occurred *after* the court had continued the trial beyond the statutory period over appellant's objection, and none of it caused the trial to be delayed. For example, respondent cites an alleged threat appellant made to Angela Toler *during trial* as evidence of appellant's attempt to delay the proceedings. (RB 73.) Neither this alleged incident or appellant's alleged assault upon the bailiff, also cited by respondent as evidence of intent to delay, have any bearing on the issue of delay. While respondent points out that appellant refused to come to court on a couple of occasions because he did not want to wear a stun belt (RB 73), this has also has nothing to do with the fact that the trial was delayed for months due to the fact that the defense was stymied in its investigation by the prosecution's failure to provide discovery.

In addition, the delay caused by the late discovery of the public defender's conflict of interest (RB 73-74) was not appellant's fault, and was due at least in part to the prosecution's lack of diligence in complying with its duties under *Giglio v. United States* (1972) 405 U.S.150, 154 and *Bagley v. United States* (1985) 473 U.S. 667, 682. (AOB 63.)

Respondent's suggestion that the prosecution was diligent in its efforts to furnish the defense with discovery on the Oregon cases it intended to introduce as aggravating evidence in the penalty phase, is also refuted by the record. First of all, the prosecutor waited for more than a year to decide it would seek the death penalty against

appellant, during which time appellant obviously could not prepare for a penalty phase. (1RT 1-2.) When it turned over the police reports on it had received from the Oregon authorities, the names and addresses of the witnesses had all been redacted, so appellant still could not prepare. (1RTA-27.) Furthermore, as of December 1995, the prosecutor had not yet commenced its own investigation of the Oregon offenses, and indicated that it would not be ready to do so for at least a month. (1RT 34-36.) Defense counsel advised the court on May 3, 1996, that he still had not received any of the discovery related to the Oregon cases that the court had ordered the prosecution to turn over by February 5, 2006. (1RT 82-83, 87-88.) No reasons – "legitimate" or otherwise – for this lack of compliance were offered by the prosecutor.

Contrary to respondent's assertion (RB 77), the record fails to disclose any legitimate reasons for the prosecution's delay in turning over discovery. It further fails to establish that appellant was responsible for causing any delay in the trial.

Moreover, respondent's claim that appellant did not invoke his right to a speedy trial until after all discovery had been complied with (RB 77-78), is not only refuted by the record as discussed above and in appellant's opening brief, it also does not alter the fact that the state's dilatory conduct impeded appellant's ability to investigate and prepare his defense, and that it resulted in the loss of potentially

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exculpatory evidence.[4]

The delay which occurred in this case was undeniably attributable to the state's lack of diligence both in complying with its discovery obligations and in reaching a prompt decision regarding whether to seek a death sentence. Furthermore, appellant has shown that the delay resulted in the disappearance of a critical defense witness, thereby rendering appellant unable to adequately prepare his defense. As the Supreme Court observed in *Barker v. Wingo*, *supra*, such delay "skews the fairness of the entire system," and requires reversal. (407 U.S. at p. 532.)

E. Conclusion

For all of the reasons discussed above and in appellant's opening brief, the trial court erred in finding good cause to continue the trial beyond the statutory period over appellant's objection, Under the circumstances presented, the court had no choice but to dismiss the case. The court's failure to dismiss was clearly prejudicial. By virtue of the state's dilatory conduct, appellant deprived was deprived not only of his statutory right to a speedy trial, but also of his state and federal constitutional rights to a speedy trial and to due process of law.

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[4] The fact that appellant did not renew his speedy trial demand after the court ruled against him on that issue should not defeat his claim. A defendant is not expected to renew a motion the court has categorically denied in order to preserve a claim of error. (See, e.g., *People v. Dent* (2003) 30 Cal.4th 213, 219 [defendant did not abandon self-representation demand by failing to reassert it after it was categorically denied].)

II.

TRIAL COURT COMMITTED REVERSIBLE ERROR UNDER *PEOPLE V. MAR* IN FORCING APPELLANT TO WEAR A STUN BELT DURING TRIAL

A. Introduction

A trial court must find "manifest need" to order the use of a REACT belt and a "showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record." (*People v. Mar* (2002) 28 Cal.4th 1201,1217, quoting *People v. Duran* (1976) 16 Cal.3d 282, 291-92.) Respondent claims that the trial court met these requirements in the instant case, and "acted within its discretion when it ordered the appellant to wear the stun belt." (RB 94.) However, because there is no evidence in the record of "manifest need" for the use of such a restraint, respondent's claim has no merit.

A trial court is also required to "base its determination [of manifest need] on *facts*, not rumor and innuendo". (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218, quoting *People v. Cox* (1991) 53 Cal.3d 618, 651-652.) As appellant pointed out in his opening brief, the trial court heard no testimony on the issue of restraints. (AOB 99.) Therefore, the trial court had no facts on which to base its ruling, only the allegations of an incident that the court was "told" had occurred. (1RT 20-21.) As appellant establishes below and in his opening brief, this was clearly not enough to meet the standards set forth in *Mar*.

Respondent asserts that even if "the trial court was required to have a more extensive on-the-record showing of manifest need, then . . . the record at trial clearly justifies the trial court's decision to

require the stun belt." (RB 98 - 105.) In other words, respondent suggests that it is permissible for a court to order a defendant to wear a stun belt *without a showing of manifest need on the record*, with nothing to support the ruling but mere hope that by the end of the proceedings its decision will be justified. This assertion, obviously contrary to *Mar*, is not supported by any legal authority and should be given no weight.

Finally, respondent contends that even if error, forcing appellant to wear the stun belt was not prejudicial because appellant "did not testify at either the guilt or the penalty phases of the trial," and because "there was no evidence in the record that the stun belt affected appellant's demeanor at any time." (RB 107.) However, the United States Supreme Court has acknowledged that "*at all stages of the proceedings*, the defendant's behavior, manner and facial expressions, and emotional responses, or their absence combine to make an overall impression on the trier of fact." (*Riggins v. Nevada* (1992) 504 U.S. 127, 142, emphasis added.) Statements made by appellant and his attorney in opposition to the court's order that appellant wear a stun belt, coupled with the fact that appellant initially refused to come to court if forced to wear the belt, demonstrate that being forced to wear the belt had an adverse psychological impact on appellant. (See AOB 87-95.) Under the circumstances, it is inconceivable that use of the belt did not significantly interfere with appellant's ability to maintain a positive demeanor and to participate in his defense. The fact that appellant did not testify, therefore, does not serve to distinguish the instant case from *Mar*.

The trial court violated the appellant's Fifth, Eighth and Fourteenth Amendment rights, and corresponding state constitutional

rights under article I, sections 7 and 15, when it forced appellant to wear a REACT belt during his trial. Under the harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, the state must prove beyond a reasonable doubt that use of the stun belt did not contribute to the verdict obtained in this case, which it has not done, and cannot do. (*Deck v. Missouri* (2005) 544 U.S. 622, 634; *U.S. v. Durham* (11th Cir. 2002) 287 F.3d. 1297; see also *Riggins v. Nevada*, *supra*, 504 U.S. at p. 137.) Appellant's conviction and death sentence must therefore be reversed.

B. Manifest Need For Restraints Was Not Established By The Record

Respondent states that the trial court "determined there was manifest need to physically restrain appellant after the trial court determined he attacked a deputy [sheriff][5], and also when it determined appellant was an escape risk considering his propensity for violence and the courtroom's poor security design. Both these grounds are a proper basis for requiring physical restraints." (RB 94.) What respondent fails to recognize, however, is that the trial court's "determination" of manifest need was not adequately supported by the record.

(1) Appellant Was Not an Escape Risk

Respondent relies on *People v. Mar*, *supra*, in which this Court acknowledged that the possibility of escape may constitute "manifest need." (28 Cal.4th at pp.1216-1217.) However, respondent fails to mention that each of the 'escape risk' cases cited in *Mar* involved

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[5] Respondent is referring to the court bailiff. (1RT20-21; see AOB 86-87.)

defendants who either had previous histories of escape, or had expressed intentions to try to escape:

> Numerous cases indicate what circumstances will demonstrate such a [manifest] need. (See *People v. Kimball* [(1936)] 5 Cal.2d 608, 611 [55 P.2d 483] [defendant expressed intent to escape, threatened to kill witnesses, secreted lead pipe into courtroom]; *People v. Burwell* (1955) 44 Cal.2d 796, 806 [279 P.2d 744] [defendant had written letters stating that he intended to procure a weapon and escape from the courtroom with the aid of friends]; . . . *People v. Burnett* (1967) 251 Cal.App.2d 651, 655 [59 Cal.Rptr. 652] [evidence of escape attempt]; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-863 [21 Cal.Rptr. 120] [defendant attempted to escape from county jail while awaiting trial on other escape charges].)

(*Ibid.)* To justify the imposition of physical restraints, there must be specific evidence of an attempt or "an announced intention to escape." (*People v. Cox*, *supra*, 53 Cal.3d 618, 708; 09 P.2d 351, 367, citing *People v. Duran*, *supra*, 16 Cal.3d 282 at p. 292). In *Cox*, the trial court decided to order shackling because there of rumors that the defendant would try and escape. (*People v. Cox, supra,* 53 Cal.3d 618). This Court held that the shackling was error because there was no evidence to show manifest need, and reiterated that the court below was "obligated to base its determination on facts, not rumor and innuendo". (*Id.* at p. 652.) The court also noted the *Duran* admonition against a "'general policy' to restrain all persons charged with capital offenses." (*People v. Cox, supra,* 53 Cal.3d 618, 652, citing *People v. Duran, supra,*16 Cal.3d 282, 293.)

In the instant case, the trial court did not even hear rumors that the defendant would be attempting to escape. Even so, the court decided that a stun belt was in order, merely because:

> I don't want any gunfire in this courtroom. This is an extremely serious case. The security of this building is deplorable. There are doors right, left and center. And I don't want any escape and I don't want any incident at all. The react belt in this case is the ideal solution and is ordered for this defendant. . . . There was an incident within the last week, I think in this county, where a defendant, being dressed in street clothes, just walked out and through the building. The fact of being in street clothes makes an escape more attractive. I have to take some security measures.

(1RT 170-173.) The court cited no reason for its fear that there would be gunfire in the courtroom and failed to explain why this case was any more serious than other capital cases. Ordering a stun belt based on the reasons cited is akin to adopting a general policy to shackle all defendants charged with a capital crime -- all of whom are accused of having a "propensity for violence" – a practice expressly condemned by both *Duran* and *Cox*, as noted above. (*People v. Cox, supra,* 53 Cal.3d 618, 652, citing *People v. Duran, supra,*16 Cal.3d 282, 293; see also *People v. Slaughter* (2002) 27 Cal. 4th 1187, 1212 [improper to shackle defendant at penalty phase of capital trial based on mere assessment that defendant had "nothing to lose by attempting to escape"].)

The trial court thus abused its discretion when it ordered that appellant be fitted with the stun belt because he was an escape risk. The trial court's ruling was both unsupported by any evidence and contrary to law. This error violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, and requires reversal.

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(2) The Trial Court Failed to Create a Record of Manifest Need Before Forcing Appellant to Wear a REACT Belt

To the extent that the trial court based its ruling on the alleged altercation between appellant and the court's bailiff, the ruling was still erroneous because the court failed to create a record of manifest need as required by this Court. In *People v. Mar*, *supra*, this Court held that:

> [W]hen the imposition of restraints is to be based upon conduct of the defendant that occurred outside the presence of the court, sufficient evidence of that conduct must be presented on the record so that the court may make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for such restraints; the court may not simply rely upon the judgment of law enforcement or court security officers or the unsubstantiated comments of others.

(28 Cal.4th at p. 1221.) "The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct [...is] an abuse of discretion." (*People v. Cox*, *supra*, 53 Cal.3d at p. 651, quoting *People v. Duran, supra,* 16 Cal.3d at p. 291.) Respondent argues that "the trial court expressly created a record regarding its order requiring appellant to wear the stun belt." (RB 95.) However, the record does not support respondent's argument.

Even though "no formal hearing as such is necessary . . ., as noted above, the court is obligated to base its determination on facts, not rumor and innuendo." (*People v. Cox*, *supra,* 53 Cal.3d at pp. 651-652.). "The record must demonstrate that the trial court

independently determined *on the basis of an on-the-record showing* of defendant's non-conforming conduct that 'there existed a manifest need to place defendant in restraints." (*People v. Mar*, *supra*, 28 Cal.4th at p. 1218 (internal citation omitted), emphasis added.)

The trial court did nothing more than recite the following statement for the record: "[O]n September 27th, when the hearing in this court was concluded, *I was told that the following occurred . . .*" (1RT 20, emphasis added.) The court then repeated what it had heard from unidentified sources. This was not evidence. It was rumor and hearsay that was dictated into the record. If trial courts were allowed to simply read what they had heard into a record and have that be sufficient evidence to order a stun belt, then the holdings of *Mar*, *Cox* and *Duran* would become meaningless.

Respondent also points to an "incident report written by Deputy Janulis, who reported that he witnessed appellant assaulting Deputy McCaleb in lockup." (RB 95, citing 2CT 454-460.) Respondent would have this Court assume, without any support from the record, that the trial court was aware of this document. Even if such an assumption is made, respondent has conceded that "the court's determination of manifest need cannot rely exclusively on jail or court security personnel." (RB 92.) A trial court's complete reliance upon a single report filed by a security officer is substantially the same as relying exclusively upon said officer's unsworn testimony. (See *U.S. v. Durham, supra*, 287 F.3d 1297, 1307 [trial court failed to make required factual findings where it made a decision to use a stun belt on the basis of unsworn statements of a deputy marshal]; *Gonzalez v. Pliler* (9th Cir.2003.)341 F.3d 897, 902, quoting *People v. Mar*, *supra*, at p. 1221 [court may not simply rely upon unsubstantiated comments

of others].)

Respondent further suggests that there was no error because the trial court's decision was ultimately vindicated by appellant's behavior during the trial. (RB 98.) However, *People v. Mar* makes it abundantly clear that a trial court cannot order a defendant to wear a stun belt without *first* making a factually-supported determination of manifest need, and simply hope that such action is justified after the fact. Respondent has not cited -- and cannot cite -- any other authority to support its claim.

By ordering the appellant to wear a stun belt without a record to support such a decision, the trial court abused its discretion. The court's error deprived the appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, and requires reversal.

C. The Trial Court (1) Failed to Consider the Physical Dangers Inherent in Use of the REACT Belt, and to Warn Appellant of Such Dangers; (2) Failed to Consider the Psychological Impact of Wearing the REACT Belt, and (3) Failed to Consider Less Restrictive Alternatives to Physical Restraints

Respondent has not addressed any of appellant's argument at AOB 100-104, wherein appellant established that the trial court improperly compelled appellant to wear the REACT belt, without first considering (1) the dangers inherent in use of the REACT belt, and apprising appellant of those dangers; (2) the harmful psychological impact of wearing the belt; and (3) use of less draconian security measures. Although respondent acknowledges that such analysis was mandated by this Court in *People v. Mar* , *supra*, 28 Cal.4th at pp. 1225-1230 (RB 93-94), respondent does not even attempt to

refute appellant's claim that it was not conducted by the trial court in this case prior to issuing it's order compelling appellant to wear a REACT belt during trial.

It is abundantly clear from *Mar*, and the precedent upon which it relies, that use of physical restraints – especially a stun belt – is to be a measure of last resort, when no other security measures will reasonably suffice.[6] Frankly, a fair reading of the record and the court's remarks reflect that the court's order may have been motivated more by outrage over appellant's alleged assault of her bailiff, than by a sincere, reasoned belief that such draconian means of restraint were actually necessary to maintain courtroom security and order during trial.

While the REACT belt may not have been visible to the jury,"in view of the potentially significant psychological effects of the use of a stun belt, . . . any presumption that the use of a stun belt is always less onerous or less restrictive than the use of more traditional security measures is unwarranted." (*People v. Mar, supra,* 28 Cal.4th at p. 1228.) It is apparent from appellant's statements to the court that wearing the belt made him nervous and upset, yet instead of acknowledging his concerns and fully apprising him of the risks

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[6] (See also *Morgan v. Bunnell* (9th Cir.1994) 24 F.3d 49, 51, quoting *Jones v. Meyer* (9th Cir.1990) 899 F.2d 883, 885 [First, "the court must be persuaded by compelling circumstances 'that some measure was needed to maintain the security of the courtroom.' Second, the court must 'pursue less restrictive alternatives before imposing physical restraints.'"]; *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 636 [Due process requires the trial court to engage in an analysis of the security risks posed by the defendant and to consider less restrictive alternatives before permitting a defendant to be restrained during trial].)

involved, the court erroneously minimized them and ignored appellant's obvious fear and agitation. (See 1RT 171.)[7] Appellant's trial counsel also complained to the court that use of the stun belt was making it difficult for him to establish a productive relationship with his client. (1RT 51-52.) However, the court showed little, if any, concern that the "stun belt imposes a substantial burden on the ability of a defendant to participate in his own defense and confer with his attorney." (*People v. Mar, supra*, 28 Cal.4th 1201, 1220, fn. 4, citing *U.S. v. Durham*, *supra*, 287 F.3d 1297, 1306.)

The trial court was also not concerned about the potential for pain caused by stun belt. Despite the defendant's protests that he was "uncomfortable based on his belief that the stun belt would be activated not only when 'he act[ed] badly,' but also when the security officer used poor judgment and incorrectly perceived that appellant was 'acting badly'" (1RT 170-171), the court told the appellant that "the stun belt would only be activated under limited circumstances." (*Ibid.*) When the trial court later asked appellant to choose between traditional shackles and the stun belt (1RT 173), this false assurance misled appellant (through his attorney) to settle for the stun belt as the misperceived lesser of two evils. (*Ibid.*) This Court observed in *Mar* that "the risk of accidental activation is one that should be considered by the trial court, and *should be brought to the attention of any defendant who is asked to express a preference regarding the use of such a stun belt over a more traditional security restraint.*" (28

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[7] In *Hawkins v. Comparet-Cassani* (9th Cir.2001) 251 F.3d 1230, 1239, the court noted that "the psychological toll exacted by such constant fear [of activation] is one of the selling points made by the manufacturer of the belt."

Cal.4th at p. 1229, emphasis added.) In this case, the defendant was not warned of the possibility of accidental activation, and the concerns he voiced in this regard were dismissed out of hand.

Furthermore, the court did not consider additional security personnel, or even a waist chain and leg shackles hidden from the jury as possible alternatives to the stun belt. There is no reason to believe that any of these measures would have been ineffective. Indeed, appellant came to court several times after the alleged altercation with the bailiff without the REACT belt. Appellant appeared in court without restraints on December 18, 1995 and February 5, 1996. (1RT 25-41,48.) On March 28, 1996, the appellant appeared before the court in waist and ankle chains (1RT 66.). On August 13, 1996, the appellant was unrestrained but escorted by four deputies. (1RT 169.) There were no incidents of violence or indications that the security measures being used were inadequate in any of these appearances. Accordingly, the court's insistence on employing a device that would potentially deliver a 50,000 volt shock lasting 8 to 10 seconds to appellant, possibly without any fault of his own, defied justification, and failed to conform to the standards set forth in *Mar:*

> [I]n view of the number of accidental activations, we conclude that a trial court should not approve of the use of this type of stun belt as an alternative to more traditional physical restraints if the court finds that these features render the device more onerous than necessary to satisfy the court's security needs.

(28 Cal.4th at 1206.) Reversal is required, because the court's order

violated his right to due process of law and a reliable guilt and sentencing determination.

D. Appellant is Not Required to Show That Use of the REACT Belt in This Case Affected the Outcome Of the Trial. The Burden is on Respondent To Prove That the Court's Error in Requiring Use of the Belt Without a Proper Determination of Manifest Need was Harmless Beyond a Reasonable Doubt, Which Respondent Has Not Done and Cannot Do

In *People v. Mar*, *supra*, this Court made the following observation:

> Because its psychological consequences pose a significant risk of impairing a defendant's ability to participate in his or her defense, a court order compelling a defendant to wear a stun belt at trial over objection bears at least some similarity to the forced administration of antipsychotic medication to a criminal defendant in advance of, and during, trial.

(28 Cal.4th at p. 1227, citing *Riggins v. Nevada*, *supra*, 504 U.S. at p. 135.). Much like antipsychotic drugs that affect the defendant's demeanor and his ability to participate in his own defense throughout the trial, stun belts also "impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury." (*People v. Mar*, *supra,* 28 Ca. 4th at p. 1226.) Given the similar impact of these two security measures, this Court should apply the same standard of review to the present case that was applied by the United States Supreme Court in *Riggins v. Nevada, supra*.

Riggins did not have to show actual prejudice; i.e., that there was a reasonable probability that the result would have been different had he not been given the drugs. The Supreme Court in that case held as follows:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. . . . [T]he precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

(504 U.S. at p. 137.) It was enough that the "error may well have impaired the constitutionally protected trial rights" of the petitioner. (*Ibid.*) In *Deck v. Missouri*, *supra*, 544 U.S. at p. 635, the Supreme Court made clear that to constitute a due process violation, shackling error would be subject to the same prejudice standard as involuntary medication error. The Court noted that shackling, "'like the consequences of wearing prison clothing' or of forcing [the defendant] to stand trial while medicated – those effects 'cannot be shown from a trial transcript.' *Riggins, supra*, at 137." (*Ibid.*) Accordingly, the Court held that "[t]he state must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' *Chapman v. California*, *supra,* 386 U.S. 18, 24." (*Ibid.*)

Appellant urges this Court to find *per se* reversible error when trial courts force defendants to wear stun belts without any showing of manifest need. "[T]he evolving standards of decency that mark the progress of a maturing society" show widespread rejection of the use

of this device as an implement of torture. (*Atkins v. Virginia* (2002) 536 U.S. 304, 311, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100-101; see, e.g., *U.S.A.: The Stun Belt - Cranking Up the Cruelty*," Amnesty International webcite, [www.amnestyusa.org]; see also Russev, "*Restraining U.S. Violations of International Law: An Attempt to Curtail Stun Belt Use and Manufacture in the United States Under the United Nations Convention Against Torture*" (2002) 19 Ga.St.U.L.Rev. 603.) However, at a minimum, it is clear that because appellant has shown federal constitutional error, this Court must apply the *Chapman* prejudice standard.

Respondent contends that the error in this case was not prejudicial because appellant's stun belt was not visible to the jury, and "there was no evidence on the record that the stun belt affected appellant's demeanor at any time." (RB 107.) However, as this Court recognized in *People v. Mar*, "such a restraint upon a defendant during a criminal trial '*inevitably* tends to confuse and embarrass [defendant's] mental faculties'" (28 Cal.4th at p. 1219, emphasis added.) Further, this Court recognized that "the psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer . . ., may vary greatly depending upon the personality and attitude of the particular defendant.." (*Id* at p. 1226.)

During the penalty phase of the instant case, appellant allegedly wrote out and displayed a threatening sign in court. It was also alleged that he silently mouthed threats to the witnesses against him during the proceedings. This conduct was introduced as aggravating evidence. during the penalty phase, and respondent contends it demonstrated that appellant was not nervous or distracted by having to wear a REACT belt. (See RB 107.)

However, it is equally possible that the appellant was acting out *because* of the stun belt. As noted above, this Court has already recognized that individuals react differently to anxiety and stress. (*People v. Mar*, *supra*, 28 Cal.4th at p.1226.) Furthermore, "[e]mpirical research indicates that most habits of violence and aggressive demeanor are learned defensively - usually in childhood and often in response to . . . threatening circumstances defendants certainly did not choose and over which they had little or no control." (*Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* (1997) 49 STNLR 1447, 1471.) Undoubtably, being forced to wear a device like the stun belt was such a circumstance. It is logical that the defendant would revert to his learned defense mechanisms in his anxiety over the belt. Since the behavior in which such defense mechanisms were manifest was introduced in the penalty phase of the trial as aggravating evidence, respondent cannot establish beyond a reasonable doubt that forcing appellant to wear the REACT belt did not contribute to the verdict obtained.

For all of the foregoing reasons and those set forth in his Opening brief, compelled use of the REACT belt in this case violated appellant's state and federal constitutional rights to a fair trial and reliable guilt and sentencing determinations, and requires reversal of appellant's conviction and death sentence.

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III.

APPELLANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE POLICE WHEN THEY DETAINED HIM FOLLOWING A ROUTINE TRAFFIC STOP

A stop made for the purposes of issuing a traffic citation does not, by itself, grant police officers the authority to conduct a search. (*Knowles v. Iowa* (1998) 525 U.S. 113.) In order to conduct a search for weapons after a traffic stop, there must be a reason for the police to believe that the defendant is armed and dangerous. (*Id.* at p. 118) Police officers must be able to point to specific, articulable facts to justify a search. (*Ibid.*, citing *Terry v. Ohio* (1968) 392 U.S. 1, 21.) Despite respondent's assertions to the contrary, the officers in the instant case were unable to fulfill this requirement.

A. The Officers Were Unable to Point to Specific, Articulable Facts to Justify the Protracted Detention and Subsequent Search of the Vehicle in which Appellant Had Been Riding as a Passenger

Respondent argues that "while engaged in stopping appellant's car, Officer Everts observed . . . similarities between the occupants and the murder suspects." (RB 117.) This led to "a reasonable, articulable suspicion that [appellant] might be armed." (*Id.*) Respondent therefore claims that, for the purposes of officer safety, Officers Everts and Moss asked the appellant and his companions to exit the car and searched them (RB 114.) These arguments are not supported by the facts.

Appellant has pointed out in some detail that there were no material similarities between the suspects, as described over the

police radio, and appellant or his companions - apart from the color of their skin. (AOB 115.) The officers were told to look for a dark blue or black compact, with two passengers - a male and a female. Appellant was accompanied by two women and was traveling in a distinctly green Ford Taurus. The descriptions of the suspects' clothing and hair styles also did not match. (*Ibid.*) The officer also "observed appellant move his shoulders back and forth" (RB 114), but it is not clear how moving around in one's seat is "invested with a 'guilty meaning'." (*People v. Dickey* (1994) 21 Cal.App.4th 952, 956 fn.2.)

After hearing the officers testify, the trial court concluded that the officers had shown "some intelligence in thinking that it is likely there would have been at least somebody else in the car to make a quick getaway", that "it was very likely whoever gave the description could confuse cornrows and dread locks", and "certainly they shouldn't refuse to deal with the cars if it were involved in a serious crime because it turns out to be dark green instead of dark blue" (sic). (2RT 291-292.) The trial court based its decision by "taking these facts together." (*Id.*) However, these were not facts at all. They were mere guesses; not rational inferences, but simply conjecture and speculation. As such, the trial court's findings are not supported by substantial evidence and are therefore not entitled to any deference. (*People v. Brown* (1998) 62 Cal.App.4th 493, 496 [in reviewing denial of suppression motion appellate court gives deference to trial court's factual findings when supported by substantial evidence].)

The court erred in holding that the officers' testimony satisfied the requirements of *Terry*, *supra*.

B. The Officers Had No Cause to Go back and Look Inside the Vehicle

Even assuming *arguendo* that the police officers had sufficient articulable facts to justify a pat-down search of the appellant and his companions in the interests of officer safety, Officer Everts exceeded the permissible scope of that search when he returned to appellant's vehicle and looked inside. The Supreme Court "has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." (*Terry v. Ohio, supra,* 392 U.S. at p. 17, citing *Kremen v. United States* (1951) 353 U.S. 346.)

The Supreme Court has also observed that "outside the car, the passengers [are] denied access to any possible weapon that might be concealed in the interior of the passenger compartment." (*Maryland v. Wilson* (1997) 519 U.S. 408, 414). Respondent agrees that "this rule serves the purpose of office protection." (RB 114.) In the instant case, the officers claimed that they had a reasonable suspicion that the appellant was armed. Acting on this suspicion, they removed appellant and his companions from the vehicle and conducted a *Terry* pat-down, which revealed no weapons. (2RT 258.) At this point, concerns for officer safety had been addressed, so there was no reason for a further search.

However, instead of issuing a traffic citation, Officer Everts returned to the car to check out the back seat because he "wanted to see what the defendant was doing with his hands. [...He] wanted to look in and see if [appellant] had put anything on the seat." (2RT 259.) This kind of "'general curiosity' violat[es] the letter and spirit of the Fourth Amendment." (*People v. Dickey, supra,* 21 Cal.App.4th at

p. 954 fn.1.) As discussed above, the scope of a *Terry* search is strictly limited to a search for weapons in order to ensure the safety of the police officer. This is why officers conducting a pat-down cannot constitutionally investigate soft substances underneath the clothing of the defendant, even if the officers suspect that those substances are narcotics. (*Id.*) For the same reason, they are not permitted to detain the subject to search his car during a routine traffic stop. (*Knowles v. Iowa*, *supra*, 525 U.S. at pp. 117-18.)

Clearly, once Everts had made certain that the passengers had no weapons and knew that they had no access to weapons outside the vehicle, he had no right to go back to look for weapons in the car. In so doing, Everts exceeded the scope of a *Terry* search and violated the appellant's Fourth Amendment rights. Accordingly, the fruits of Everts' illegal search should have been suppressed. [8]

Without the seized evidence, there would have been no probable cause for appellant's arrest and subsequent prosecution. The trial court's ruling was therefore prejudicially erroneous and requires reversal of appellant's conviction and death sentence.

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[8] Respondent's argument that the gun was in plain view (RB 114), is misleading. Whether or not Officer Everts was in fact able to see the gun without actually opening and entering the vehicle, the fact remains that he did not see any guns when he came up to the vehicle and forced appellant and his companions out of it at gunpoint. It was only after Everts had detained them and conducted a pat down search – which disclosed no weapons – that he decided to go back to the car to look for weapons.

IV.

THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN PROSPECTIVE JURORS' FROM THE JURY VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND TO A JURY CONSISTING OF A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY

Appellant has argued that the prosecution's peremptory challenge of six African-American prospective jurors was racially motivated, and therefore requires reversal of his conviction and death sentence under *Batson v. Kentucky* (1986) 476 U.S. 79. (AOB 134-158.) The trial court found that a prima facie case of discrimination had been established (11RT 1124), but after the prosecutor offered facially race-neutral explanations for the challenges, the court denied appellant's motion for mistrial. (11RT 1129.) Appellant has shown that the prosecutor's purported justifications were pretextual, in that they were inherently implausible and were unsupported by the record. (See AOB 139-144; 155-156.) Appellant has further demonstrated that the trial court erroneously found that the prosecution had sustained his burden of justification, without conducting a constitutionally adequate evaluation of the prosecutor's proffered explanations. (See AOB 145-149.)

Respondent contends that the facially-race neutral explanations the prosecutor gave for exercising peremptory challenges against each of the six African-Americans were all valid and non-pretextual, but respondent's analysis is shallow and unpersuasive and relies on inapposite case law. Respondent's argument further reveals fundamental confusion as to the correct

legal standards to be applied in resolving a claim of *Batson* error.

Respondent's brief is rife with speculation about what the prosecutor might have been thinking when he struck various jurors. However, such speculation is not germane to the inquiry mandated by *Batson*; i.e., whether the prosecutor's *stated* race-neutral reasons for striking the African-American jurors were sincere, or whether he was simply offering pretexts for what was really a discriminatory motive. The Supreme Court in *Batson* stated that the prosecutor's reasons must be clear and reasonably specific. (476 U.S. at p. 98, fn. 20.) The fact that respondent (and also the trial court) felt compelled to speculate about what those reasons may have been, demonstrates that the prosecutor's actual stated reasons in this case were *not* sufficiently clear and/or specific to pass the sincerity test. (See AOB 147-149, and subsection C of this argument, below.)

A. The Six African-American Prospective Jurors Were Improperly Struck Based Upon Implausible and Fantastic Justifications That Were Pretexts for Purposeful Discrimination

The prosecutor asserted that his primary reason for striking the African-American jurors was that they all had stated that they were neutral in their feelings about capital punishment. (11RT 1124-1128.) In his opening brief (See AOB 141-143), Appellant pointed out that the prosecutor's proffered justification was tantamount to saying that he found the jurors unacceptable because they were unbiased, and was so outrageous as to be inherently implausible, and that the trial court should have been found them to be pretexts for purposeful discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [Implausible or fantastic justifications will be found to be pretexts for purposeful discrimination]; see also *People v. Jones* (1997) 15

Cal.4th 119, 204, dis. opn. of Mosk, J. [justifying strike on basis that juror would abide by oath inherently pretextual].)

Respondent nevertheless contends that a juror's neutral view of the death penalty is a proper basis for the exercise of a peremptory challenge, and cites *People v. Panah* (2005) 35 Cal.4th 395, and *People v. Davenport* (1995) 11 Cal.4th 1171 to support this erroneous view. *Panah* held that when a juror *expresses some reservations* about the death penalty, although they may have nonetheless stated they could impose the death penalty, "neither the prosecutor nor the trial court was required to take the jurors' answers at face value." (35 Cal.4th . at p. 441.) Similarly, in *Davenport*, the Court stated that overall *reservations* about the death penalty provide race-neutral explanations for the use of peremptory challenges. (11 Cal.4th at p. 1202.) Thus, *Panah* and *Davenport* merely stand for the proposition that equivocation about imposing the death penalty constitutes a valid race/gender neutral reason for a peremptory challenge, not that a juror's *neutrality* regarding the death penalty is a race/gender neutral reason.

Unlike the jurors in *Panah* and *Davenport*, the African-American jurors excused by the prosecutor in the instant case did *not* equivocate about their ability to impose the death penalty. They each described their feelings about the death penalty as "neutral," and all unequivocally stated that they would be willing to impose it. The prosecutor's stated race-neutral reason of the jurors' neutrality is therefore inherently suspect.

Respondent's assertion that neutrality is a legitimate race-neutral justification for the use of a peremptory challenge flies in the face of a defendant's constitutional right to an impartial jury. If the

death penalty is imposed by a jury containing even one juror inclined to vote automatically for the death penalty without considering the mitigating evidence, "the State is disentitled to execute the sentence." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729.) The prosecutor explained that what he was trying to do was to "find people who are going to be stronger in their convictions." However, the prosecutor was not entitled to jurors who would automatically impose the death penalty; he was only entitled to jurors who were neutral and fair. The jurors that the prosecutor excluded were all neutral, and clearly indicated that they would follow the law and base their determination upon the evidence.

Respondent evidently sees no problem with the prosecutor's suggestion that when the jurors stated that they were "neutral," what it really meant was that they did not support the death penalty. (5RT 1124-1125.)[9] However, this proposition is not supported by the record, and nothing the jurors said reasonably justifies such a conclusion.

Prospective Juror Gloria Young stated that she was "neither for nor against the death penalty," and described her philosophical opinion towards the death penalty as "neutral."." (2CTSupp.I 301.) Young's answers in her questionnaire further reflect that if chosen as a juror, she would listen to the evidence and determine the sentence of the defendant based upon the evidence presented at trial.

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[9] The prosecutor stated as follows: "I'm also trying to take, you know, some type of read on this neutrality which some of these people have expressed. As I told the court I would prefer not to have anyone who expresses that they are neutral because I have a hard time accepting that we are going to have some absolute neutrality." (*Ibid.*)

(2CTSupp.I 302.)

Prospective Juror Robbie Washington stated that he supported the death penalty when the judge/jury finds the defendant guilty without a reasonable doubt. Washington expressly stated that "I am pro-choice in this respect," indicating that he supported the death penalty. (2CTSupp.I 316.) Washington also maintained that he would decide the case based on the evidence presented at trial. (2CTSupp.I 317.) A person stating that they are "pro-choice" towards the death penalty does not establish that they are disinclined to impose it.

Prospective Juror Ricky Wasp also stated he was neutral and explained: "Sometimes in certain cases I may be in favor of the death penalty, in other cases not so." (2CTSupp.I 331.) He further expressed his belief that if the defendant is found guilty, his punishment should fit the crime. (2CTSupp.I 332.) There was simply no equivocation as to whether Mr. Wasp could impose the death sentence or not. There is also little difference between Wasp and seated Juror Number 9 who stated: "I feel it is needed to fit certain crimes." (1CTSupp.I 135.) Both of these statements reflect the view that certain crimes justify the sentence of death, and do not suggest any ambivalence towards the death penalty. Respondent contends that because Wasp limited application to "certain cases" he might be worse than neutral from the prosecution's perspective. That the prosecutor *may* have been thinking that is pure speculation, since he did not offer that explanation. However even if that was indeed the prosecutor's reasoning it overlooks the fact that the death penalty can only be imposed in "certain cases," and that a prospective juror's indication that he or she would automatically vote for death in every

case would disqualify him on the grounds of bias from serving as a juror.

As to Prospective Juror Darnell Fizer, the prosecutor stated that he believed Fizer had expressed neutrality towards the death penalty. (5RT 1126.) However, Fizer actually stated that he was "moderately in favor" of the death penalty, and further stated, "I believe that some crimes are indeed punishable by death. Sometimes it is necessary." (2CTSupp.I 346.) Thus, even assuming neutrality towards the death penalty were deemed a valid reason for excluding a potential juror, the record does not support the prosecutor's reason for excluding Mr. Fizer.

Prospective Juror Jonathan Seales indicated he was neutral and commented: "Sometimes 'yes' & sometimes "no" -- it depends on the nature of the crime." (2CTSupp.I 361.) On voir dire, Mr. Seales clarified that he was neutral, and that how he would vote would depend on the circumstances presented. He further clarified that he had no preconceived ideas concerning what the nature of the crime had to be before he would consider death as an appropriate sentence. (5RT 1020.) Mr. Seales comments are very similar to the statements made by both Prospective Juror Wasp and seated Juror Number 9. Seales did not equivocate, or express skepticism about whether he could impose the death penalty. He stated that the appropriate sentence depends upon the nature of the crime, which demonstrates that he would have listened to the evidence and the jury instructions and made the individualized determination required by the United States Constitution.

Prospective Juror Stephanie Maston-Hunter also stated that she had no opinion on the death penalty and was neutral.

(10CTSupp.I 2695.) Respondent cites Ms. Maston-Hunter's answer to question 49,[10] where she wrote "why some are put to death and some aren't for somewhat similar crimes" (*ibid.*), as evidence that she may have had deeper reservations about the death penalty than a person who was truly neutral. However, on further inquiry by the court, Maston-Hunter's comment on the juror questionnaire was clarified. Juror Maston-Hunter stated that she did not understand why some people get the death penalty and some do not, but assured the court that she would base any decision wholly on the evidence and law was presented to her in the courtroom. She further clarified that she did *not* feel the death penalty is sometimes *unfairly* applied. (3RT 546-547; 549-550.) Maston-Hunter's comments reflect merely that she was puzzled as to the criteria applied in deciding to impose the death penalty, not that she had any doubts about her ability to impose it.

Not only does the record fail to support the prosecutor's claim that the jurors' expression of neutrality towards the death penalty really meant lack of support for it, but respondent does not, and cannot, refute appellant's argument that "neutrality" is an inherently implausible reason for striking the African-American jurors. The pretextual nature of this reason is further evident from the fact that several of the seated jurors expressed similar views. (1CTSupp.1 135, 165.) A more likely explanation is that the prosecutor thought that the African-American jurors would be less likely to vote for death in *this* case because of sympathy towards a fellow African-American,

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[10] Question 49 asked: "What is your general opinion or feeling about the death penalty?"

not because their neutrality towards the death penalty.[11]

Although prosecutor cited additional facially race-neutral reasons for striking each of the African-American prospective jurors, as appellant argued in his opening brief, these purported reasons were also suspect in that they reflected unfounded concerns or assumptions that had racist overtones. For example, in the case of Darrel Fizer, the prosecutor remarked that the fact he had testified as an alibi witness for a relative (his brother) indicated that Fizer had perjured himself (5 RT 1126), an unsubstantiated assumption indicative of racial stereotyping. (See AOB 144 for full discussion.) The prosecutor also failed to explain how the objectionable characteristics were "related to the particular case to be tried." (*Batson v. Kentucky, supra*, 476 U.S. at p. 98; see also *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 364; [where prosecutor cites certain traits or characteristics as reason for striking juror without explaining how they would render prospective juror unsuitable in case to be tried, he does not satisfy requirements of *Batson]*.)

Respondent attempts to come up with additional reasons why each of the stricken African-Americans would have been

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[11] Of the 12 seated jurors, only two were African-American. Had the prosecutor not challenged the six African-American prospective jurors, African-Americans would potentially have made up a majority of the panel in this case. It is difficult to believe that so soon after O.J. Simpson was acquitted by a predominantly African-American jury in Los Angeles, a prosecutor in that county would have wanted to try a capital case against an African-American defendant with a predominantly African-American jury.

objectionable to the prosecution (see RB 143-247)[12], but even assuming that any of those reasons might arguably have been supportable, legitimate justifications had they actually been cited by the prosecutor, the operative fact here is that they were *not* cited by him and have no relevance to whether the reasons he *did* cite were sincere, which was the issue before the trial court, and now this Court. As appellant noted above, respondent appears to be confused as to the applicable legal standards. The relevant inquiry is the plausibility of the reasons actually cited by the prosecutor for striking a juror.. (*Miller-El v. Dretke* (2005) 545 U.S.231, 251-252.)

In any event, even if some of the reasons actually stated by the prosecutor were legitimate and sincere, a court need not find all nonracial reasons pretextual in order to find racial discrimination. (*Kesser v. Cambra*, *supra*, 465 F.3d at p. 360.) "'If a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.'" (*Ibid.*, quoting Lewis *v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830.) Given the totality of the circumstances herein, it is readily apparent that the reasons given by the prosecutor for exercising six of his 19 strikes against African-American prospective jurors were pretexts for racial discrimination.

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[12] For example, regarding prospective juror Gloria Young, respondent cites Young's father's unsolved murder as justification for excusing her (RB 43), but that was *not* a reason offered by the prosecutor.

B. Comparative Analysis Further Establishes That the Prosecutor's Purported Reasons for Striking the African-American Jurors Were Pretextual

Appellant is mystified as to why, after the United States Supreme Court's decision in *Miller-El v. Dretke, supra* 545 U.S.at p. 241, fn. 2, respondent persists in arguing that this Court should not engage in comparative analysis. (RB 149.) The High Court's decision make clear, once and for, all that comparative analysis is a necessary and appropriate means by which a reviewing court can determine whether the prosecutor's purported reasons for striking minority jurors are sincere and genuine, or whether they are pretextual. (See *Kesser v. Cambra*, *supra*, 465 F.3d 351 at p. 361 ["[I]n *Miller-El* the Court made clear that comparative analysis is required even when it was not requested or attempted in the state court"].) Appellant is aware that this Court has not expressly conceded that comparative analysis is mandated even if it was not requested in the trial court, but notes that the court has in fact conducted that analysis in cases it has decided since *Miller-El* was handed down by the U.S. Supreme Court. (See, e.g. *People v. Guerra* (2006) 37 Cal.4th 1067, 1103.)

A comparative analysis of the answers given by prospective jurors in this case reveals that two of the seated jurors stated that they were "neutral" regarding the death penalty (1CTSupp.1 135, 165), thus undercutting the credibility of the prosecutor's assertion that he struck the six African-American prospective jurors because they were "neutral" in their views regarding the death penalty. Respondent asserts that the two seated jurors in question had particular attributes that made them desirable jurors notwithstanding

their neutrality regarding the death penalty. (RB 155.) Appellant submits that the African-American jurors who were excluded also possessed attributes that should have been desirable to the prosecution in this case. For example Ricky Wasp and Darrell Fizer had both considered working in law enforcement (2CTSupp.1 329, 344), and Gloria young had worked for the postal service for approximately 30 years and was a supervisor. (2CTSupp.1 293.) In addition, as discussed in the opening brief, other characteristics cited by the prosecutor for excluding the African-Americans were shared by jurors whom he did not challenge and who actually served on the jury. (See AOB 155-156.)

A comparative analysis of the other (non-African-American) prospective jurors against whom the prosecutor exercised his peremptory challenges also shows that the prosecutor's purported justifications for striking the black jurors were pretextual. Review of the record reveals that although twelve of the other excluded jurors initially stated in their questionnaires that they were "neutral" towards the death penalty, seven of them -- unlike the excluded African-American jurors -- actually expressed serious reservations about it or were reluctant to impose it except under specific circumstances. Of the five who truly appeared neutral in their views, all but one – Khoai

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Phan, who was also a minority – had either personally been prosecuted for a crime or had a *close* family member who was convicted of one.[13]

Prospective juror Tina Larkin expressed reservations about voting for the death penalty. She stated: "I can vote towards it but am not happy to see something come down to it." (2CTSupp.I 453.) Like the jurors at issue in *Panah*, *supra*, and *Davenport*, *supra*, it was reasonable to conclude from Ms. Larkin's statement that she might be reluctant to impose the death penalty. Again, nothing stated by any of the stricken African-American jurors would support a similar conclusion.

Prospective juror Mary Costello's support for the death penalty was also much more limited than that of the excluded African-American jurors. Ms. Costello commented: "I believe in the death penalty for people like Charles Manson, Bundy, etc." (2CTSupp.I 471.) As respondent correctly observed, this statement reserving the death penalty for only the most infamous of serial killers is inconsistent with neutrality, and can fairly be characterized as a limitation on whether the juror would impose the death penalty. None of the African-American jurors stated that they believed in the death penalty for only the most infamous of serial killers. They all indicated

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[13] The prosecutor did cite the fact that two of the African-American jurors had relatives who had been prosecuted as additional reasons for striking them (although he did not strike Juror C.G. whose cousin had been convicted of aggravated assaulted or Juror F.N., whose son had been a gang member since the ageof 16 and had been convicted of burglary), and the fact that a third had friends who had been arrested and had himself received a misdemeanor conviction. (See AOB 144-145.)

that they were neutral, and could go either way depending upon the evidence.

Prospective juror Janet Wallech stated on her questionnaire that she was moderately *against* the death penalty, not "neutral" towards it. (2CTSupp.I 535-549.) She also felt that the death penalty should not be used a lot. (4RT 671.)

Prospective juror Hedy Grosshandler expressed reservations about whether she could impose the death penalty. She stated that she had mixed feelings towards it. (3CTSupp.I 576.)

Prospective Juror Repeka Penitusi described her feelings about the death penalty as "neutral," but also stated. "I feel that if a person kills just out of hate or for no apparent reason, then death is their punishment. But in general, death penalty does not solve the solutions to the crimes being committed." (3CTSupp.I 791.)[14] This statement shows an underlying reservation about the death penalty, which is clearly distinguishable from the feelings expressed by the excluded African-American jurors.

Prospective juror Ray Davis indicated that he was moderately in favor of the death penalty, but qualified his response as follows: "The death penalty is good when a person can't change." (3CTSupp.I 745.) This statement reflects that Davis might have had some reservations about the death penalty if persuaded that the defendant could be rehabilitated. None of the African-American jurors expressed such qualified views about the death penalty. Prospective juror Marcia Hinman expressed similar views to those of

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[14] Ms. Penitusi's husband had also suffered a criminal conviction for domestic violence. (3CTSupp.I 787.)

prospective juror Davis. She claimed she was neutral towards the death penalty, but commented: "If needed, use it. Need is no hope of renovating thinking of felon/criminal." (Supp. I 3CT 795-809.) Hinman's remarks, like Davis's, indicate that she might well be reluctant to vote for death if she felt there was a possibility of rehabilitation..

Prospective jurors David Dulce, Fred Rassam, David Ridgely, Raymond Bosak and William Nichols, each stated that they were neutral towards the death penalty, and made no other statements indicating otherwise. However, each of these gentlemen had either been criminally prosecuted themselves or had children who had been prosecuted.[15]

Under the circumstances, comparing the excluded African-American jurors to the excluded non-African American jurors certainly does not support the conclusion urged by respondent that the prosecutor's purported non-discriminatory justification for excluding the African-Americans was valid and genuine. Such comparison, in fact, supports the opposite conclusion: that the reasons the prosecutor gave were merely pretexts for a racially discriminatory motive.

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[15] David Dulce assaulted a police officer (3CTSupp.I 718-732); Fred Rassam's son had been prosecuted (3CTSupp.I 596-610); David Ridgley was convicted twice of driving under the influence; (10CTSupp.I 2699-2713); Raymond Bosak was prosecuted for reckless driving (3CTSupp.I 749-753); and William Nichols' son was serving a state prison sentence. (2CTSupp.I 380-394.)

C. Respondent Has Failed to Demonstrate That The Trial Court Fulfilled Its Duty to Conduct A Sincere And Reasoned Evaluation Of The Prosecutor's Reasons For Exercising Peremptory Challenges of the African-American Prospective Jurors

U.S. Supreme Court decisions make clear that it is constitutionally insufficient for the trial court discharge its duties under step three of the *Batson* inquiry in a perfunctory manner. (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp.251-252.) "In deciding if the defendant has carried his burden of persuasion, a court must undertake a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93.)

It is also improper for the trial court to simply offer its own reasons for why a particular juror would be unsuitable or undesirable, because the relevant issue is not whether the prosecutor's decision to strike that is strategically sound, but whether the reason or reasons actually expressed by the prosecutor for striking the juror are valid and sincere. As the Supreme Court declared in *Miller-El*:

> [T]he rule in *Batson* provides an opportunity for the prosecutor to give the reason for striking the juror, *and it requires the judge to assess the plausibility of that reason in light of all of the evidence with a bearing on it*. [Citation omitted.] It is true that peremptories are often the subject of instinct [citation omitted], and it an sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. ***A Batson challenge does not call for a mere exercise in thinking up any rational***

> ***basis. If the state reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.***

(545 U.S. at pp. 251-252, emphasis added; see also *Kesser v. Cambra*, *supra,* 465 F.3d at p.359 [To accept prosecutor's stated non-racial reasons, court need not agree with them. Question is not whether state reason represents sound strategic judgment, but whether counsel's race-neutral explanation should be believed].)

Respondent maintains that because the prosecutor's stated reasons were both inherently plausible and were supported by the record, the trial court was not required to question the prosecutor about them or make detailed findings. (RB 148.) However, even if this were the correct legal standard, the trial court's ruling in the present case fails to comport with it, because as established above, and by appellant's Opening brief, the prosecutor's reasons were neither inherently plausible nor were they supported by the record.

But more to the point, the trial court herein did not conduct any evaluation of the prosecutor's reasons to determine their plausibility, but instead came up with its own reasons for why the six African-American jurors were unsuitable. The court stated, "In each case I have myself seen reasons why there might be an excusal or a challenge." (5RT 1128-1129.)

The judge's only reference to the prosecutor's reasons for striking the juror was when she said, "I agree with counsel's statement on demeanor." (*Ibid.*) As appellant pointed out in his opening brief, the prosecutor never stated that demeanor played any part in his decision to strike any of the African-American jurors, apart

from his remark that prospective juror Washington's attire was sloppy. (5RT 1126.) The court never addressed the prosecutor's primary purported reason – neutrality regarding the death penalty – or any of the other reasons he offered. (See AOB 147-149.)

A finding of discriminatory intent turns largely on the trial court's evaluation of the prosecutor's credibility. (*Mitleider v. Hall* (9th Cir. 2004) 391 F.3d 1039, 1047.) The trial court must not simply accept the proffered reasons at face value; it has a duty to "evaluate meaningfully the persuasiveness of the prosecutor's race-neutral explanation" to discern whether it is a mere pretext for discrimination. (*U.S. v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969.) The trial court must evaluate the prosecutor's proffered reasons and credibility under the "totality of the relevant facts," using all available tools. (*Mitleider*, 391 F.3d at p. 1047.)

Here the court's ruling erroneously focused on its own reasons why the jurors in question might be undesirable, rather than the credibility of the prosecutor's stated reasons. Because the court failed to apply the correct legal standards, it's decision cannot be upheld.

D. Conclusion

The trial court's erroneous denial of appellant's Wheeler/Batson motion deprived appellant of his rights under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky, supra,* 476 U.S. 79), as well as the right under the

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California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258.) Accordingly, appellant's conviction and death sentence must be reversed.

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V.

THE TRIAL COURT'S ERROR IN PRECLUDING CROSS-EXAMINATION OF ANGELA TOLER REGARDING HER MOTIVE IN IMPLICATING APPELLANT AS THE SHOOTER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

Appellant argued in his Opening brief that he was prejudicially deprived of his Sixth Amendment right to confront adverse witnesses and to present his defense, as well as his right to a fair trial and reliable sentencing determination, by the trial court's erroneous ruling that defense counsel could not cross-examine Angela Toler about whether she was aware, at the time she implicated appellant as the shooter, that the second store clerk (Jardensiri) had identified *her* as the shooter. (AOB 159-172.) Toler's likely awareness of this fact was directly relevant to her motive in implicating appellant, yet the court would not allow counsel to bring up Jardensiri's statement on cross-examination because (1) Jardensiri was not himself a trial witness, and his statement was hearsay, and (2) there was nothing in the police reports memorializing the fact that Toler had been informed of Jardensiri's statement to the police. (6RT 1169-1170; 6RT 1251-1252.) As appellant established in his Opening brief, the court's ruling was erroneous because (1) Jardensiri's statement was not being offered for the truth of the matter asserted, but rather as evidence of motive, admissible under Evidence Code section 780, subdivision (f), and (2) defense counsel had a sufficient factual basis to form a good faith belief that Toler knew Jardensiri had identified her as the shooter, irrespective of whether such information was contained in the police reports. The trial court's limitation of counsel's

cross-examination of Toler thus deprived appellant of his Sixth Amendment right to confront the prosecution's star witness regarding a matter establishing her motive to lie in this case. The court's ruling also deprived appellant of his state and federal constitutional rights to present a defense, to a fair trial and to reliable guilt and sentencing determinations. The error was far from harmless, because Toler's likely knowledge that Jardensiri had implicated her as the murderer was critical to show that she had a substantial reason to believe that she was facing a possible death sentence, and that this gave her a compelling motive to shift the blame for Nasser Akbar's murder to appellant. With Toler's testimony discredited, the prosecution would have been left with only Cleavon Knott's identification of appellant as the shooter, which was also substantially impeached.

Respondent does not address the trial court's stated reasons for curtailing defense counsel's cross-examination of Toler, but instead contends that the trial court acted within its discretion to preclude the above-described cross-examination under Evidence Code section 352. Respondent asserts that the court implicitly found that the probative value of the evidence was outweighed by its prejudicial and misleading nature. (RB 164-165.) Respondent further argues that even if the court erred in limiting counsel's cross-examination of Toler, the error was harmless. Appellant will demonstrate below that (1) the court's ruling was not based on Evidence Code section 352; (2) the testimony sought to be elicited could not properly be excluded under section 352; and (3) the court's error in excluding the evidence violated his constitutional rights and was not harmless.

B. The Trial Court Did Not Base Its Ruling on Evidence Code section 352

As set forth in detail at pages 160-161 of appellant's Opening brief, the trial court initially ruled that in his opening statement defense counsel could not mention Jardensiri's statement to the police unless Jardensiri was going to be called as a witness. Although the court did not expressly cite the hearsay rule, the obvious rationale for its ruling was that what Jardensiri allegedly told the police was hearsay; i.e., an out-of-court statement by a non-testifying witness, offered for the truth of the matter asserted. (See 6RT 1169-1179.) When defense counsel later brought up Jardensiri's statement during his cross-examination of Angela Toler, he explained that he was not offering the statement for the truth of the matter asserted, but was instead seeking to cross-examine Toler regarding the circumstances leading her to falsely implicate appellant as the murderer. Nevertheless, the court would not permit counsel to conduct this line of questioning, ruling that it was "purely speculative." (6RT 1252.)

Evidence Code section 352 provides that:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or misleading the jury.

The trial court's exclusion of the above-described testimony cannot reasonably be characterized as a ruling under this provision. The court made no finding concerning the probative value of the evidence in establishing a motive to falsely implicate appellant. Nor did it find

that the excluded cross-examination would necessitate undue consumption of time or a create a substantial risk of prejudice, etc. Moreover, the prosecutor did not object on 352 grounds. His objection was that defense counsel was improperly seeking to introduce statements of a non-testifying witness before the jury – i.e., inadmissible hearsay. (6RT 1253.)

The instant case is thus readily distinguishable from *People v. Singh* (1995) 37 Cal.App.4th 1343, 1381, cited by respondent for the proposition that a court need not expressly state that it is excluding evidence pursuant to section 352 in order to find that it exercised its discretion under that provision. In the *Singh* case, the defendants specifically objected to admission of evidence under section 352, and the court decided to admit the evidence after hearing argument on that objection by both parties. (*Ibid*; accord *People v. Malone* (1988) 47 Cal.3d 1, 21-22 [trial court held to have impliedly weighed prejudice against probative value of evidence where court ruled following defense objection to admission of evidence under Evidence Code section 352].) In the instant case, by contrast, there is no basis in the record upon which to conclude that the trial court was excluding evidence on section 352 grounds.

C. The Evidence Could Not Properly Be Excluded Under Evidence Code section 352

A major disputed issue at trial in this case was whether Angela Toler was telling the truth when she testified that appellant shot Nasser Akbar and then shot out the security camera. The defense theory was that Toler was the actual shooter, and that she was falsely shifting responsibility to appellant in order to avoid the death penalty

or life imprisonment.[16] (See 8RT 1860, 1868, 1871-1892.) Accordingly, Toler's likely knowledge that Jardensiri had identified her as the shooter, was not only directly relevant to, it was also highly probative of, her motive to falsely implicate appellant in order to secure a lesser sentence for herself.

Thus, this is not a case in which a court could properly find that defense counsel was seeking to cross-examine the witness about a collateral matter or one that was otherwise irrelevant to, or marginally probative of, disputed facts. (Compare, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 372-373 [trial court in capital murder case had discretion to bar cross-examination of witness concerning her commission of welfare fraud, a collateral matter]; and *People v. Frye* (1998) 18 Cal.4th 894, 946 [cross-examination of prosecution witness in capital murder case concerning his knowledge of marijuana cultivation was irrelevant to any disputed fact of consequence and therefore properly curtailed].)

The prohibited cross-examination also would not have required undue time consumption, and to the extent the court was concerned that Jardensiri's out-of-court statement might improperly be considered for its truth, the court could have easily prevented that with a limiting instruction, directing the jury to consider the statement only for purposes of assessing Angela Toler's credibility. (See *People v. Noguera* (1992) 4 Cal.4th 599, 623; *People v. Ruiz* (1988) 44 Cal.3d 589, 609-610 [limiting instructions telling jury evidence could only be considered to show defendant's state of mind sufficient

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[16] Toler was allowed to plead guilty to armed robbery and received a 10 year prison sentence in exchange for her testimony. (6RT 1221.)

to prevent jury from drawing improper inference].)

For all of the foregoing reasons, it would have been an abuse of the trial court's discretion to disallow the above-described cross-examination of Angela Toler under Evidence Code section 352.

D. Curtailment of Angela Toler's Cross-Examination Violated Appellant's Constitutional Rights, Including His Right to Confront Witnesses, His Right to Present a Defense, His Right to a Fair Trial and His Right to a Reliable Conviction and Death Sentence

To establish a violation of the Confrontation Clause of the Sixth Amendment, a criminal defendant must show that the prohibited cross-examination would have "produced a significantly different impression of [the witness's] credibility." (*Delaware v. VanArsdall* (1986) 475 U.S. 673, 680.) Undeniably, Toler's awareness that an eyewitness to the shooting had identified *her*, not appellant, as the more culpable of the two perpetrators, would give her a motive to falsely shift blame for the shooting to appellant. Cross-examination seeking to establish this would therefore have produced a significantly different impression of Toler's veracity in implicating appellant as the murderer.

Absent the trial court's ruling, an entire line of questioning would have been conducted demonstrating that Toler had a strong motive, not only to deny her own role in the murder, but also to affirmatively incriminate appellant. When facing a possible death sentence[17], it is one thing to be in jeopardy for being an accomplice to

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[17] Toler admitted that during her interrogation the police told her she could face the death penalty. (6 RT 1276, 1323-1324.)

a murder and quite another to be in jeopardy as the actual killer. If permitted to pursue this line of questioning, counsel would have been able to ask Toler whether she was lying because she feared being charged as the actual shooter, and assuming she denied this, he could then have asked her whether she was aware that Jardensiri identified her as the person who shot at him and Nasser Akbar. All of this would have led the jury to seriously question, if not flatly reject, Toler's version of the events.

Appellant pointed out in his opening brief that the situation herein is materially indistinguishable from *Davis v. Alaska* (1974) 415 U.S.308, in which the Supreme Court held that the defense was unconstitutionally barred from cross-examining a key prosecution witness whom the defense had reason to believe was lying to protect himself. (See AOB 166-168.) As in *Davis*, "the jurors [in the instant case] were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [Toler's] testimony which provided 'a crucial link in the proof . . .of [appellant's] act.'" (*Id.* at p. 317; see also *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p.679 [trial court violated defendant's right of confrontation by precluding all inquiry into possibility that prosecution witness would be biased as a result of State's dismissal of his pending public drunkenness charge].)

The Supreme Court has also explicitly recognized that informant testimony poses serious credibility questions, and that when the prosecution's case turns upon the credibility of an informant, defense counsel must be given the maximum opportunity to test the credibility of that witness. (*Banks v. Dretke* (2004) 540 U.S. 668, 701-702; see also *Lee v. Illinois* (1986) 476 U.S. 530, 541-

542 [defendant must be given full opportunity to confront and cross examine accomplice whose confession incriminates defendant, because such confession is presumptively unreliable].)

As appellant demonstrated in his opening brief, the trial court's preclusion of the above-described cross-examination on hearsay grounds (6RT 1169-1179), and on grounds that it was "purely speculative" – i.e., that defense counsel lacked a sufficient factual basis to pursue such line of questioning (6RT 1252) -- was legally erroneous. (See AOB 163-166.) Proving that Toler knew an eyewitness had told the police she was the shooter, was critical to appellant's defense that Toler was lying when she incriminated him. The trial court's legally erroneous ruling therefore not only violated appellant's right of confrontation, it also arbitrarily deprived him of his Sixth and Fourteenth Amendment right to present his defense and his right to a fair trial. (*Chambers v. Mississippi* (1973) 410 U.S. 284,294-295 [right to confront and cross-examine witnesses essential to due process and a fair trial].) Furthermore, the error undermined the reliability of appellant's conviction and death sentence in violation of his Eighth and Fourteenth Amendment rights. (See AOB 172 for discussion of authority.)

E. The Error Was Not Harmless

Respondent advances several arguments as to why this Court should find the trial court's error harmless, none of which is persuasive. First, respondent asserts that defense counsel was able to conduct sufficient cross-examination of Toler when he asked whether the police informed her that she had been identified as "someone who shot the victim." and she answered "no." However, to say that this one isolated question fairly permitted counsel to explore

Toler's likely awareness that Jardensiri had identified her as the shooter is disingenuous. Review of the record reveals that the prosecutor immediately objected to counsel's question, at which point the parties commenced proceedings outside the jury's presence. (6RT 1250.) During these proceedings the court ruled that counsel could not pursue this line of questioning. (6RT 1252.) When counsel eventually resumed his cross-examination of Toler, he asked no further questions regarding Toler's knowledge of Jardensiri's statement. In deference to the court's ruling, he also offered no argument on this point. Although counsel tried to argue that Toler was lying when she implicated appellant as the shooter, he was prevented from establishing her motive for doing so, as a result of the court's erroneous restriction of cross-examination.

Respondent next contends that the evidence of appellant's guilt as the shooter was strong, but the record demonstrates otherwise. Aside from the testimony of Toler – appellant's alleged accomplice – the only evidence tying appellant to the shooting consisted of (1) the fact that the alleged murder weapon was found in the map pocket in front of where he was sitting at the time of his arrest almost an hour and a half after the crime, and (2) Cleavon Knott's testimony that he witnessed appellant shoot Nasser Akbar.

The location of the alleged murder weapon, in and of itself, did not prove that appellant's guilt as the shooter, particularly since his fingerprints were not found on the gun, and no gunshot residue was found on his hands. (7RT 1559-1561.) Respondent states that Officer Everts, one of the two policemen who stopped the car for an alleged traffic violation, "saw appellant manipulating something right before the stop." (RB 167.) Respondent misrepresents Everts'

testimony, which was simply that Everts noticed appellant's shoulders moving. (6RT 1439.) In any event, Officer Everts' alleged observation is not proof that appellant shot Nasser Akbar.

In addition, Cleavon Knott's testimony that he watched appellant shoot Nasser Akbar was impeached by eyewitness Trena Delaguerra, who testified that Knott's car entered the parking lot driveway *after* the suspects had already left the store (7RT 1688, 1670) and by Officer Brad Scavone, who obtained a statement from Knott at the scene of the crime that he heard the shots as he was about to pull into the liquor store parking lot, after which he saw two people flee from the store. (6RT 1417-1418.) Knott's testimony was further impeached by the numerous inconsistencies between his trial testimony and earlier statements. (See 8RT 1838-1853.) Knott's veracity was also seriously called into question by the fact that he received favorable disposition of outstanding traffic warrants and was not prosecuted for carrying a concealed weapon in his car, as consideration for his cooperation with the prosecution. (6RT 1351, 1354.)

Respondent finally contends that defense counsel was allowed to adequately attack Toler's credibility, and that the prohibited cross-examination was merely cumulative of other impeachment. (RB 171-172.) However, as discussed in detail above, preclusion of this cross-examination barred the defense from establishing Toler's motive to falsely incriminate appellant as the shooter. Thus, contrary to respondent's contention, the court's error in restricting counsel's cross-examination of Toler seriously undermined appellant's ability to impeach her credibility on this critical point.

F. Conclusion

Respondent has failed to refute appellant's claims of prejudicial constitutional error. For all of the foregoing reasons and those stated in appellant's Opening brief, appellant's conviction and death sentence must be reversed.

* * * *

VI.

APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED DUE TO THE COURT'S ERRONEOUS RESTRICTION OF HIS RIGHT TO CROSS-EXAMINE DETECTIVE COLLETTE ABOUT WHETHER COLLETTE WAS AWARE OF SOMPHOP JARDENSIRI'S STATEMENT IDENTIFYING ANGELA TOLER AS THE SHOOTER, AND WHETHER HE AND DETECTIVE WREN CONFRONTED TOLER WITH THAT STATEMENT DURING HER INTERROGATION

As argued in the Opening brief, appellant should have been permitted to cross-examine Detective Collette regarding whether, at the time he and Detective Wren interrogated Angela Toler, he knew that Toler had been identified as the shooter by Somphop Jardensiri, and whether he (Collette) and/or Wren confronted Toler with Jardensiri's statement. The court's erroneous refusal to allow such cross-examination deprived appellant of the ability to effectively challenge the credibility of key prosecution witnesses, and thus violated appellant's constitutional right to confront adverse witnesses and present his defense, as well as his right to a fair trial, and to a reliable guilt and sentencing determination. (See AOB173-180.)

Respondent claims that the trial court did not abuse its discretion in denying appellant's motion to recall Detective Collette to conduct the above-described cross-examination, because the evidence sought to be elicited was irrelevant, and was also hearsay. Respondent further contends that even if the court's ruling was erroneous, the error was harmless. In addition respondent asserts that appellant cannot argue that the court's ruling violated his

constitutional rights, because he did not raise that claim below.

A. The Evidence Sought to be Elicited Was Both Relevant and Admissible to Impeach Detective Collette's Testimony

Detective Collette denied telling Angela Toler she was facing the death penalty, and then stated that he did not believe she was even eligible for the death penalty because she was not the actual killer, but only an accomplice. (7RT1546.)[18] As discussed in the Opening brief, defense counsel asked to reopen his cross-examination of Collette in order to try to establish that, at the time Detectives Wren and Collette interrogated Toler and obtained her "confession," Collette was aware that Jardenisiri had already identified Toler in a field show-up as the shooter. There has never been any dispute that Jardensiri made such identification. There also has never been any dispute that Collette and Wren told Toler that she had been identified as one of the two perpetrators. However, what defense counsel was seeking to prove was that: (1) Collette knew Jardensiri had specifically identified Toler as the *shooter,* so Collette and his partner, Detective Wren, were lying when they denied telling Toler she was facing capital murder charges, and (2) Toler knew that she had been identified as the shooter, so she had a motive to save herself by implicating appellant as the killer and offering to testify against him in exchange for a promise of leniency.

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[18] The issue herein is whether appellant was entitled to conduct cross-examination to establish that Collette's testimony was disingenuous, so it does not matter for purposes of this argument that Collette's alleged "belief" that only the actual killer was eligible to receive a death sentence was also legally incorrect. (Penal Code § 190.2 (a) (17) (A).)

The trial court ruled that since Collette had already testified about what he said to Angela Toler, defense counsel's speculation that he said something else was "irrelevant." (7RT 1592.) But trial counsel was clearly entitled to ask questions aimed at impeaching the credibility of Collette's testimony. (*Davis v. Alaska*, *supra*, 415 U.S. 308, 316 [right of cross-examination encompasses right to ask questions aimed at impeaching credibility of witness]; *District of Columbia v. Clawans* (1937) 300 U.S. 617, 632 [abuse of discretion for court to categorically prevent inquiry into an area bearing on witness's credibility]; *Alford v. United States* (1931) 282 U.S. 687, 692 [defendant not required to show that cross-examination, if pursued, would have brought out facts tending to discredit testimony in chief].) The undisputed fact that an eyewitness to the crime, in a field show-up conducted prior to Toler's arrest, identified Toler as the shooter, contradicted Collette's testimony that the information he had received prior to her post-arrest interrogation was that she was *not* the shooter. The court's ruling that the proffered cross-examination was "irrelevant" was thus patently erroneous, and reflects a fundamental misunderstanding on the part of the court as to the purpose of cross-examination in an adversarial proceeding.

The court's ruling also reflects confusion as to the meaning of "relevant evidence." Evidence Code section 210 defines relevant evidence as evidence "having any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action." Whether or not Angela Toler falsely implicated appellant as the shooter to avoid the death penalty, was clearly a disputed factual issue going to the heart of appellant's defense. Whether Toler knew she had been identified at the time she incriminated appellant, was

directly relevant to the resolution of that disputed issue. (See Argument V, ante.) Consequently, it was very important for the jury to know precisely what the detectives told Toler to induce her cooperation. The fact that an eyewitness had told the police that *Toler* was the shooter was obviously relevant to impeach Collette's testimony that he did not threaten Toler with the death penalty because the information he had at the time he interrogated Toler was that she was *not* the shooter, and he therefore believed she could not be charged with capital murder.

Asking Detective Collette whether he was aware of Jardensiri's identification of Toler as the shooter in the field show-up conducted earlier that evening, was also not prohibited by the hearsay rule. Jardensiri's statement was not being offered for its truth, but rather to contradict Collette's assertion that he did not suspect Toler of having been the shooter. Accordingly, respondent's suggestion that the court was justified in its ruling because defense counsel was attempting to introduce inadmissible hearsay (RB 176), constitutes flawed legal analysis. It is error for a court to exclude as hearsay, evidence offered for the limited purpose of impeachment. (*People v. Archer* (2000) 82 Cal.App. 138, 1392.)[19]

Respondent has summarized defense counsel's cross-examination of Detective Wren and Angela Toler, in an apparent attempt to show that the court's ruling did not impair appellant's ability

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[19] Appellant pointed out in Argument VI, *ante*, that to the extent the court was concerned that Jardensiri's out-of-court statement might improperly be considered for its truth, the court could have easily prevented that with a limiting instruction, directing the jury to consider the statement only for purposes of assessing the credibility of Collette and Toler's testimony.

to elicit the salient details of Toler's interrogation and try to establish her motive to lie. (RB 175-176.) However, without being allowed to confront Collette about his almost certain knowledge that Jardensiri had implicated of Toler as the shooter, the defense was prevented from impeaching the credibility of (1) Collette's testimony that Toler was not suspected of having been the shooter, and (2) his claim, and that of his partner, Detective Wren, that they did not threaten Angela Toler with the death penalty to induce her cooperation. Counsel was unable to do that through the cross-examination he was permitted to conduct.

B. The Court's Erroneous Ruling Violated Appellant's Constitutional Right of Confrontation, His Right to Present his Defense, His Right to a Fair Trial, and His Right to Reliable Guilt and Penalty Determinations

While respondent disputes that the trial court erred when it denied appellant's motion to recall Detective Collette, respondent does not dispute appellant's further claim that the court's ruling, assuming it was erroneous, violated appellant's constitutional right of confrontation, his right to present his defense, his right to a fair trial and his right to reliable guilt and penalty determinations. Respondent merely contends that appellant has forfeited his right to raise these constitutional claims on appeal, because he did not expressly assert them below. (RB 174-175.) Respondent cites *People v. Sapp* (2003) 31 Cal.4th 240, 307 in support of its argument. However, in that case the Court held that Sapp was barred from raising a claim of prosecutorial misconduct because he had not raised and litigated the issue below, which is not the situation presented herein. In the instant case, appellant argued why he should be allowed to conduct

the proffered cross-examination, but did not explicitly articulate constitutional grounds in support of his argument.

In *People v. Partida* (2005) 37 Cal.4th 428, 437-438, this Court held that a defendant may challenge on appeal the erroneous admission of evidence as a due process violation, when that is an additional legal consequence of the error that is encompassed in the objection below. Appellant submits that this rule should also extend to the erroneous *exclusion* of evidence. In the instant case, appellant has established that violation his due process rights, as well as his right of confrontation and right to present a defense were additional legal consequences of the trial court's erroneous restriction, on relevancy grounds, of the proffered cross-examination.

Appellant is aware that in *People v. Lewis*, (2006) 39 Cal.4th 970, 990, this Court declined to extend its holding in *Partida* to the appellant's argument that the trial court's denial of his motion for discovery of police information contained in police personnel files ("*Pitchess* motion") violated his right to compulsory process. However, the posture of that case is materially distinguishable from the instant one. In *Lewis,* the compulsory process theory of error was advanced for the first time on appeal. By contrast, in the instant case, counsel argued that his proffered cross-examination of Detective Collette was relevant impeachment necessary to establish his defense that Angela Toler had been induced to lie about appellant, which is really the essence of a Sixth Amendment confrontation/right to present a defense claim. Therefore, despite the fact that counsel did not explicitly articulate a constitutional basis for his argument, he presented the underlying theory to the trial court.

As appellant has demonstrated above, and in his opening brief (AOB 177-179), the prohibited cross-examination would have produced a significantly different impression of not only Detective Collette's credibility, but also the credibility of Detective Wren and, most importantly, that of Angela Toler, the prosecution's star witness. (*Delaware v. VanArsdall*, *supra*, 475 U.S. at p. 680 [Confrontation Clause violation established if prohibited cross-examination would have produced significantly different impression of witness's credibility].) The trial court's ruling arbitrarily precluded appellant from developing facts critical to his defense that Toler was induced by the detectives to falsely incriminate appellant, in order to avoid being prosecuted for capital murder. (*Chambers v. Mississippi*, *supra*, 410 U.S. 284, 294-295 [arbitrary restriction of defendant's right of cross-examination violates right to a fair trial and to present his defense]; *Depetris v. Kuykendahl* (9th Cir. 2001) 239 F.3d 1057, 1062 [erroneous exclusion of critical defense evidence violates both right to fair trial and right to present a defense].) Because the ruling prevented appellant from subjecting the testimony of these key prosecution witnesses to meaningful adversarial testing, this Court cannot have any confidence that trial in this case produced just and reliable results. (*U.S. v. Cronic* (1984) 466 U.S. 648, 656 [without an opportunity to subject the prosecution's case to the "crucible of meaningful adversarial testing," there can be no guarantee that the adversarial system will function properly to produce just and reliable results].)

Accordingly, appellant's constitutional claims are cognizable on appeal, and require reversal of his conviction and death sentence.

C. Respondent's Claim of Harmless Error Must be Rejected

Respondent argues that "appellant has failed to show prejudice under any standard." (RB 177.) Respondent contends that "it is pure speculation to say that cross-examining Detective Collette would have changed anything about appellant's trial." (*Ibid.*) However, even assuming that Collette denied confronting Toler with the details of Jardensiri's statement (i.e., that she was the shooter), simply asking Collette whether he was aware of those details would have called into question the truth of his testimony that Toler was suspected only of robbery -- not of having been the actual killer -- and would further have created substantial doubt as to the veracity of his claim (and Wren's claim) that they did not threaten Toler with the death penalty to induce her cooperation.[20]

Respondent further asserts that "whether Toler was identified as a mere participant in the robbery, or as the shooter, it seems to respondent that Toler would have the same motive to seek a deal with the prosecution and lay as much blame as possible on her co-perpetrator or some innocent third party." (*Ibid.*) While it is true that Toler was subject to prosecution for capital murder irrespective of whether she was the actual killer, if Detective Collette – an experienced homicide detective – did not even know that, it is extremely unlikely that Toler knew it.[21] Moreover, even though Toler

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[20] Respondent erroneously states that Detective Wren testified that he and Collette did not confront Toler with the fact that she had been identified as the shooter. (RB 177.) The record contains no testimony by Detective Wren on that point.

[21] See 7RT 1546; footnote 20, *ante*.

could have been prosecuted for murder with special circumstances, as appellant pointed out in the previous argument, when one is facing a possible death sentence, it is one thing to be in jeopardy for being an accomplice to a murder and quite another to be in jeopardy as the actual killer. Thus, whether or not Toler had an accurate understanding of the penalties she was facing, she would have known that she stood a better chance at cutting a favorable deal if she succeeded in shifting responsibility for the killing to her co-perpetrator and minimizing her own role in the offense.

Finally, respondent argues that any error was harmless due to strength of the prosecution's case and the "weak efforts of the defense to create reasonable doubt." (RB 177.) As appellant pointed out in the previous argument, there was no physical evidence showing that appellant ever shot, or even touched, the gun alleged to have been the murder weapon. The prosecution's case therefore depended entirely on Toler's testimony and the testimony of Cleavon Knott. Knott's testimony was substantially impeached by testimony establishing that he did not enter the parking lot until after the shooting, and that his traffic citations and outstanding bench warrants were dismissed as a reward for his cooperation. (See Argument V, p. 60, *ante*.) In addition, Toler's testimony would also have been substantially impeached had the court not improperly restricted the cross-examination of both Toler and Detective Collette.

Thus, under either the standard of prejudice set forth in *Chapman v. California*, *supra,* 386 U.S. at p. 24, or that set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, appellant is entitled to reversal of his conviction and death sentence.

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VII.

ADMISSION OF THE IRRELEVANT AND HIGHLY PREJUDICIAL SKI MASK AND JACKET EVIDENCE DEPRIVED APPELLANT OF A FAIR TRIAL AND RELIABLE GUILT AND SENTENCING DETERMINATIONS

Appellant argued that the admission of evidence that a ski mask and black corduroy jacket with the letter "F" embroidered on the front, were found in a plastic bag in the trunk of the car in which he was riding as a passenger at the time of his arrest, deprived him of a fair trial and reliable verdicts in violation of his 8th and 14th Amendment rights. The evidence was admitted to prove appellant's identity as the perpetrator of both the Edge robbery and the capital crime. Because there was no ski mask used by the perpetrators of *either* crime, and because no eyewitness described a jacket similar to the one found in the trunk, the evidence was irrelevant, and the court erred in allowing the prosecutor to introduce it. Admission of the evidence, coupled with the prosecutor's argument that the presence of the bag with the ski mask and jacket showed that appellant was planning to dispose of items used to commit robberies, was highly prejudicial and fatally undermined the fairness of appellant's trial and the reliability of the verdicts against him. (See AOB 181-187.)

Respondent claims that the presence of the black jacket was relevant because it tended to connect appellant to the Edge robbery. (RB 185.) However, Edge testified only that the man who robbed him wore "dark clothes." (6RT 1200.) He made no mention of a jacket with the letter "F" on the front, nor did he even say that the robber wore a jacket. Thus, nothing apart from the fact that the jacket was

dark in color – a generic characteristic applicable to outerwear carried by thousands, perhaps millions, of people in the trunks of their cars – would tend to connect appellant to that crime.

Respondent virtually concedes that the ski mask had no relevance to establish appellant's identity as the perpetrator of either crime, other than the fact that it was found in the same bag as the jacket. (RB 185.) But since the jacket was not distinctive enough for a rational fact-finder to infer that it was worn by the perpetrator of the Edge robbery, the presence of the two items in the same bag does not "have any tendency in reason to prove a disputed fact of consequence to the determination of" this case. (Evid. Code §210.)

Appellant observed in his opening brief that there was a substantial question as to whether these items even belonged to him, since (1) people other than appellant had been driving the car, and (2) there were other items found in the trunk, such as diapers and baby clothes, that obviously did not belong to appellant. (See AOB 184-185.) Appellant further pointed out that the district attorney, in seeking to introduce this evidence, mistakenly believed Knott had testified that the male perpetrator wore a black jacket. (7RT 1426-1427; 8RT 1908.)[22] Apart from this flawed theory of relevance, the only other theory under which the evidence could conceivably have been relevant was to show that appellant had used them, or was planning to use them, to commit other crimes. However, Evidence Code section 1101, subdivision (b) prohibits admission of evidence of other crimes to prove criminal disposition.

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[22] As appellant noted in his opening brief, Knott did not describe the male perpetrator's clothing (AOB 184.). Angela Toler testified that appellant was wearing a black t-shirt. (6 RT 1239.)

In support of his relevancy argument, respondent cites *People v. Darling* (1989) 210 Cal.App.3d 910, 912-914, a case upholding admission of a screwdriver found in a burglary defendant's pocket that had not been used in the commission of the charged burglary. In that case, the defendant testified that he was intoxicated on alcohol and heroin, and his defense was that he was unable to form the requisite intent to steal. He also testified that he had found the screwdriver earlier that morning. (*Id.* at p. 912.) The court of appeal noted that the only disputed fact in the trial was whether the defendant formed the intent to commit a felony (larceny) when he entered the victim's garage, and that the fact that the defendant had traveled to a distant neighborhood with a screwdriver in his pocket, was circumstantial evidence of his intent to commit a burglary or burglaries. The court accordingly held that the evidence was relevant to the issue of intent. (*Id.* at pp. 913-914.) Significantly, however, the court observed that different rules apply when the evidence of burglary tools is introduced to prove that the defendant is the burglar (i.e., where the disputed issue, as in the instant case, is one of identity.) In that situation, the evidence is only admissible if the tools were likely used in the commission of the burglary. (*Id.* at p. 913.) Because the issue herein was identity – not intent – respondent's reliance on *Darling* as authority for admissibility of the ski mask and jacket evidence is misplaced.

For the same reason. respondent's reliance on *People v. Wilson* (1965) 238 Cal.App.2d 446, 462-464, is also unavailing. In that case, the admission of evidence that the defendant was carrying a bag containing plastic strips was upheld, because these strips could have been used by the defendant to gain illegal entry into the

apartment building (*Id.* at pp. 462-263.) Other "burglary tools" contained in the bag (gloves, pen-lights, watch cap and bolt cutters) were admissible, even though they could not have been used to commit the crime, because the defendant's possession of them was relevant to prove his felonious intent, a disputed issue in that case. (*Id.* at p. 464.)

The situation presented in the instant case is analogous to those cases finding reversible error where the trial court admitted irrelevant evidence of the defendant's possession of weapons that were not used in the commission of the crime. (See, e.g., *People v. Riser* (1956) 47 Cal.2d 566, 556-577 [where murder weapon, which was never recovered, was a .38 caliber revolver, evidence that defendant possessed two other .38 caliber revolvers at the time of the crime – neither of which could have been the murder weapon -- was irrelevant to prove that defendant had committed crime. Admission constituted reversible error because jury was exposed to improper, highly prejudicial propensity evidence]; *People v. Archer* (2000) 82 Cal.App.4th, 1380, 1392 [knives that were determined not to have been the murder weapons, were irrelevant to show planning or availability of weapons. and their admission constituted reversible error].)

Just as improper inferences regarding the defendant's criminal propensity were likely drawn from the evidence of weapons possession in each of the above-cited cases, the jury in the instant case undoubtedly drew similar inferences from the irrelevant ski mask and jacket evidence that the prosecutor argued were proof of appellant's identity as the perpetrator of both crimes.

Where irrelevant – yet highly inflammatory-- character evidence

is improperly admitted, reversal is required, because the defendant has been denied a fair trial. (*Acala v. Woodford* (9th Cir.2003) 334 F.2d 862, 886-888 [evidence that defendant's parents owned two sets of unused kitchen knives manufactured by same cutler that manufactured probable murder weapon was irrelevant and its admission deprived defendant of a fair trial]; *McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, 1382-1383 [prejudicial due process violation requiring reversal where prosecution was allowed to introduce evidence of appellant's possession of knife that was not the murder weapon].)

Respondent erroneously contends that appellant forfeited his right to raise a due process claim on appeal, because his objection below to the admission of the ski mask and jacket evidence did not assert a constitutional basis. (RB 182-183.) However, this Court recently held in *People v. Partida , supra,*37 Cal.4th 428, 437-438, that a defendant may challenge the erroneous admission of evidence as a due process violation, when that is an additional legal consequence of the error that is encompassed in the objection below. As appellant demonstrated above and in his opening brief, the trial court herein not only erred in admitting irrelevant and highly inflammatory character evidence, but its admission of that evidence rendered appellant's trial fundamentally unfair, and also undermined the reliability of the jury's guilt and penalty verdicts. Both of those verdicts must therefore be reversed.

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VIII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DISMISSED JUROR BELL FOR CAUSE

As set forth in the opening brief (AOB 188-197), the trial court granted the prosecution's challenge for cause of prospective juror Joyce Bell based on her stated views regarding the death penalty. A prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties. (*Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Cunningham* (2001) 25 Cal.4th 926, 975). In other words, even a juror who is morally or philosophically opposed to the death penalty may serve in a capital case, as long as that juror is able to set aside her personal beliefs in order to follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; *People v. Stewart* (2004) 33 Cal.4th 425, 446.) As appellant demonstrated in his opening brief, nothing that Juror Bell stated, either in her questionnaire or during voir dire, even remotely suggested that she would automatically reject death as a possible penalty in this case. Instead, she stated that how she would vote:

> would depend on what I heard in the courtroom. It's hard to say that yes or no when I don't know [what the evidence would be].

(5RT 891.) The trial court's granting of the prosecution's for-cause challenge of Bell was therefore error requiring reversal of appellant's death sentence.

Respondent's argues that Bell gave equivocal and inconsistent responses during voir dire, from which the trial court implicitly

determined she was biased and that her beliefs would substantially impair the performance of her duties as a juror. (RB 194.) Arguing that "a reviewing court must defer to trial court's (sic) determination of a prospective juror's state of mind where a prospective juror gives equivocal and conflicting statements regarding their inability to render a death verdict," respondent contends that Bell was properly excused, citing *People v. Maury* (2003) 30 Cal.4th 342, 377. (RB 193.)

However, unlike the situation in *Maury,* there is no evidence in the instant record that Bell gave *any* answers that could reasonably be construed as reflecting an inability or unwillingness to consider death as a possible sentence. (See *People v. Heard* (2003) 31 Cal.4th 946, 964-966 [trial court's determination that juror's views would prevent or substantially impair performance of duties must be fairly supported by record].) In *Maury*, five of the six excluded jurors at issue initially expressed strong opposition to the death penalty. (30 Cal.4th at pp. 377-379.)[23] In the instant case, by contrast, Juror Bell initially stated that she was "neutral" towards the death penalty. (8CTSupp.1 2211; 5RT 889.) Only when pressed by the court to take a position one way or the other, at the urging of the prosecution and over defense objection, did Bell say "I guess I'm against it." (5RT 892.) More importantly, unlike all of the excluded jurors in *Maury* who expressly stated they did not think they could impose the death penalty (*ibid*), Juror Bell made no statement indicating doubt as to her ability to do so. Again, as noted herein above and in appellant's

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[23] The sixth juror initially could not say whether he had strong feelings about the death penalty because he had never been asked about the subject before. However, upon reflection, he stated that he could not vote for death. (30 Cal.4th at p.379.)

opening brief, all Bell stated in that regard was that she could not say how she would vote without hearing the evidence.

Respondent makes much of Bell's statement that she "would vote against the death penalty if she were forced to vote." (RB 195). However, respondent has taken Bell's statement out of the context in which it was made. As appellant noted in his opening brief, a complete and faithful reading of the record reveals that after Bell had indicated -- both on her jury questionnaire, and during voir dire -- that she would not automatically vote for or against the death penalty (5RT 889-890), the trial court expanded the discussion beyond the context of this specific trial, and asked Bell for her *philosophy* regarding the death penalty. (AOB 190-91, quoting 5RT 890-891.) Bell hesitated and then replied, "Well, I suppose if I - if I was forced to say - to vote one way or another I would vote against it." (5RT 891.) It is readily apparent that upon being repeatedly pressed for her opinion, and seeing that the court was dissatisfied with the answer that she was neutral in her feelings about the death penalty, Bell felt *forced* to take a position for or against it. Her use of the word 'vote' in response to the court's questions was a statement of her political opinion; i.e.,how she would vote if the death penalty were on the ballot, and was obviously not intended to express how she would decide the instant case if selected as a juror.

Indeed, as noted above, when the court asked Bell if she would definitely vote against death in this case, Bell responded that her judgment would depend on what she heard in the courtroom. (*Id.*) At this point, the court reminded Bell that she had previously said that she would vote against the death penalty. Bell started to explain her answer, but the court cut her off. However it is readily apparent that

while Bell decided that she was philosophically opposed to the death penalty, there was no evidence before the court establishing that Bell's personal views would impair her ability to sit on the jury and follow the law. *(People v. Heard*, *supra*, 31 Cal.4th at p. 958 [the real question is whether the juror's views about capital punishment would prevent or substantially impair the juror's *ability to return a verdict of death in the case before the juror*].) As appellant pointed out in his opening brief, assuming that the court viewed Bell's answers as inconsistent, it could have, and should have, allowed her to clarify her position, instead of cutting her off when she attempted to do so. (See AOB 197, fn. 92; *People v. Stewart*, *supra*, 33 Cal.4th at p.447 [court must elicit information from prospective jurors sufficient to determine whether juror suffers from disqualifying bias].)

Because the record contradicts the trial court's "implicit" determination of excludable bias, it's exclusion of Juror Bell for cause cannot be upheld and requires reversal of appellant's death sentence. (*Gray v. Mississippi* (1987) 481 U.S. 648, 660 [erroneous exclusion for cause of qualified, scrupled juror requires automatic reversal of penalty verdict].)

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IX.

THE TRIAL COURT'S IMPROPER INQUIRY INTO THE CONTENT OF THE JURY'S DELIBERATIONS AND ITS SUBSEQUENT REMOVAL OF A HOLDOUT JUROR REQUIRES REVERSAL OF THE PENALTY VERDICT

A. Introduction

This Court held in *People v. Cleveland* (2001) 25 Cal.4th 466, that it is reversible error for a trial court to remove a juror during deliberations without evidence establishing to a demonstrable reality that the juror has either refused to deliberate or abide by the court's instructions, or has otherwise committed misconduct. The Court made clear that it is improper for a trial court to remove a juror simply because he or she refused to acquiesce in the verdict agreed upon by the other jurors ; i.e., that he or she is a "holdout" juror. (25 Cal. 4th at p. 486.) The Court also acknowledged that majority jurors may easily misconstrue a minority juror's refusal to vote with the minority as a refusal to deliberate, and that juror's different view of the case as a refusal to follow the court's instructions (*Ibid.*; see also *People v. Engelman* (2002) 28 Cal.4th 436, 446), which is precisely what occurred herein during penalty phase deliberations.

In the instant case, the trial court improperly removed a minority juror – Juror No. 5 -- who had participated in the penalty phase deliberations, based strictly on the collective *opinion* of the majority jurors that he was categorically opposed to the death penalty and would never consider voting for it under any circumstances. Contrary to respondent's assertion (RB 211), the record in this case does *not* show that Juror No. 5 harbored a disqualifying bias against

the death penalty that prevented or substantially impaired his ability to fairly decide the appropriate penalty. The record shows only that Juror No. 5 felt that he could not vote for death *in good conscience*, because the evidence did not warrant imposition of a death sentence in *this case*, and that the other jurors, frustrated by Juror No. 5's refusal to go along with them, misinterpreted his unwillingness to sentence appellant to death as a "conscientious objection to the death penalty" that made him unable to deliberate.

Respondent argues that the trial court's finding that Juror No. 5 was unable to deliberate due to a general conscientious objection to the death penalty, was a credibility determination that is binding on this Court. (RB 210.) However, respondent is mistaken as to the applicable standard of review, which is (1) that substantial evidence must support the trial court's ruling, and (2) that the juror's inability to perform as a juror must appear in the record as a demonstrable reality. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 474; *People v. Marshall* (1996) 13 Cal.4th 799, 843.)[24] As appellant demonstrates below and in his opening brief (AOB 198-227), Juror No. 5's inability to perform as a juror does *not* appear in the record as a demonstrable reality. The trial court therefore abused its discretion in excusing Juror No. 5. It also violated the secrecy of jury deliberations by asking questions aimed at eliciting information concerning the jurors' thought processes in reaching their penalty determination. Under the

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[24] In her concurring opinion in *People v. Cleveland*, Justice Werdeger stated that "a stronger evidentiary showing than mere substantial evidence is required to support a trial court's decision to discharge a sitting juror." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 488 (conc. opn. of Werdeger, J).)

circumstances, appellant's death sentence must be reversed.

B. The Trial Court Abused Its Discretion By Accepting as Fact the Unsupported Subjective Opinions of the Other Jurors That Juror No.5 Would Automatically Vote Against the Death Penalty Regardless of the Evidence

Appellant established in his opening brief that there is no evidence in the record that Juror No. 5 ever *stated* that he was philosophically or morally opposed to the death penalty, or that he had a "conscientious objection" to it. What Juror No. 5 reportedly said was that he was conscientiously objecting to imposition of the death penalty *in this case*. (10RT 2315-2316.) When asked whether Juror No. 5 was not voting for the death in this case because he had a conscientious objection to the death penalty, Juror No. 10 replied, "Well no, not exactly," and then explained as follows:

> He did apply it to this case. He stated – he said he believed in the death penalty and that – *he said he believed in the death penalty but he couldn't apply it in this case.* In other words, he couldn't consider any of the information we had before us, any of the evidence that has been presented, any of our deliberation for or against the death penalty because he was conscientiously opposed to the death penalty *in this case*.

(10RT 2317, emphasis added.) Juror No. 5, when interrogated by the court, emphatically denied that he had a "conscientious objection to the death penalty such that [he would] not impose it no matter what evidence or information [he was] given." (10RT 2292-2293; see AOB 119-200.) Juror No. 5 explained to the court that "in this particular case, I thought there was a choice of death or life without possibility

of parole . . . *and I tried to make an evaluation from the evidence that was presented* and that is what I came up with the life position without possibility of parole." (10RT 2293, emphasis added.) The facts of the instant case are thus distinguishable from those in *People v. Samuels* (2005) 36 Cal.4th 96, 132, in which this Court found substantial evidence supported the trial court's decision to excuse a juror during penalty deliberations. In that case, the juror in question wrote a letter to the court requesting removal because she had come to realize that she had substantial questions about her ability to vote for the death penalty even if she was convinced of its appropriateness in that case.

Respondent cites *People v. Keenan* (1988) 46 Cal.3d 478,532, in support of its claim that Juror No. 5 was properly removed due to his "disqualifying bias." (RB 211.) While *Keenan* states that a deliberating juror who asserts that he or she cannot vote for death under any circumstances may be removed for "actual bias," the record in the instant case fails to show that Juror No. 5 possessed such a bias. The other cases cited by respondent are completely inapposite, with the exception of *People v. Cleveland*, *supra*, which fully supports appellant's claim of reversible error. (*People v. Maury, supra*, 30 Cal. 4th 342, 377 [prospective juror who stated that he believed voting for the death penalty was tantamount to committing murder was properly excused during jury selection]; *People v. Boyette* (2002) 29 Cal.4th 381, 461-463 [juror who informed the court prior to penalty deliberations that he doubted his ability to be fair and impartial was properly dismissed and replaced with an alternate];*People v. Nessler* (1997) 16 Cal.4th 561 [defendant entitled to new trial where juror was influenced by extraneous information

about the defendant, and had such bias been disclosed during jury selection, it would have supported challenge for cause].)

A careful reading of the record in the instant case (10RT 2292-2327), reveals that the other jurors (1) disagreed with Juror No. 5's conclusion regarding the appropriate sentence in this case; (2) felt that Juror No. 5 had not articulated a sufficient rationale for his position; and (3) on this basis, collectively concluded that Juror No. 5 must be unwilling to consider death as a sentencing option due to a general, conscientious objection to the death penalty.

What transpired in the instant case bears substantial similarity to the situation in *People v. Cleveland, supra*, where the majority jurors complained that [dissident] "Juror No. 1 does not show a willingness to apply the law." This Court found in *Cleveland* that the jurors' opinion concerning Juror No. 1 was unsupported by the record, which revealed that Juror No. 1 viewed the evidence differently from the way the other jurors viewed it. As the Court observed, "[Juror No. 1's] methods of analysis differed from those of his fellow jurors, and his approach to deliberations apparently frustrated his other colleagues." (25 Cal. 4th at p. 486.)

In the present case, it is also readily apparent that Juror No. 5's approach to the deliberations frustrated his colleagues. This is evident from the jury' foreman's comments:

> We had extensive conversation about his reasoning behind his decision, and everyone in the room gave extensive reasons for their decision, and his decision was not backed up by anything. It was more of a feeling that he said he had in spite of all evidence and facts that were presented. We tried asking him why, what

> would make him consider an alternative to his decision, and he couldn't or wouldn't come up with any reasonable foundation for – well for his decision.

(10RT 2294.) The foreman also complained that:

> From the very beginning of the penalty phase Juror Number 5 has stood out in the group, has continually attempting (sic) to discuss facts not in evidence. He is hunting in areas that we have no understanding or knowledge of, trying to bring things in that really are not there, what-ifs, histories, potential circumstances. And whenever that is done, someone will mention that this is not available to us and not for our consideration. I believe he is allowing his projections of those facts that are not in evidence to form a picture of him that is not anywhere – is not necessarily reality.

(10RT 2301.) As appellant pointed out in his opening brief (AOB 220-221), *Cleveland* makes clear that the fact Juror No. 5 discussed matters the other jurors considered irrelevant and adopted an unreasonable interpretation based on his own personal opinion, and refused to respond to specific questions posed by other jurors did not constitute a failure to deliberate. (25 Cal. 4th at p. 486; see also *People v. Engelman*, *supra*, 28 Cal.4th at p. 446 ["It is not required that a juror deliberate well or skillfully"].)

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Although the trial court found that Juror No. 5 had failed to deliberate (10RT 2328), the statements of his fellow jurors quoted above plainly refute that finding. In addition to the jury foreman, Jurors No. 1 and 6 also expressly confirmed that Juror No. 5 had participated in the deliberations. (10RT 2304, 2309.)[25] Moreover, as noted in the opening brief, the jury's note to the court stated that Juror No. 5 was "unable to *continue* to deliberate." (10RT 2323, emphasis added.)

As in *Cleveland* (25 Cal. 4th at p. 436), the trial court's questioning of the jurors revealed that it was the conclusion arrived at by Juror No. 5 – and not a failure on his part to deliberate -- that was at issue. Accordingly the record does not establish to a demonstrable reality that Juror No. 5 failed to deliberate.

Neither does the record support the trial court's conclusion that Juror No. 5 was not truthful in his jury questionnaire, in which he stated that he was moderately in favor of the death penalty, and believed in the death penalty, "if warranted." (CT Supp. I, 74.) Contrary to the court's finding (10RT 2334), Juror No. 5 never made an "unequivocal admission to the other jurors" that he had a conscientious objection to the death penalty. As discussed above, and in appellant's opening brief, the trial court simply accepted as fact the majority jurors' unsupported *opinion* that Juror No. 5 had such objection, based upon their dissatisfaction with the decision he arrived at with respect to penalty. Although the jury's note implied that Juror No. 5 had decided that he was conscientiously opposed

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[25] Jurors No. 3, 4, 7, 8, 9, 11 and 12 were not specifically asked about this.

to the death penalty (10RT 2323), the subsequent proceedings made clear that what Juror 5 was actually saying was that he could not conscientiously support a death sentence in *this case*. Furthermore, the record establishes that the note was composed by the majority, and Juror No. 5 only ultimately acquiesced in its wording to avoid further confrontation by the other 11 jurors. (10RT 2292, 2304. 2325-2326.)

Respondent asserts that Juror No. 5 was "properly removed for misleading the trial court and the parties in his juror questionnaire and on voir dire that he could give equal consideration to the death penalty by setting aside his personal feelings about capital punishment." (RB 211.) First, in order to qualify for service on a capital case jury, it is not necessary that a potential juror be willing to give "equal consideration" to the death penalty. (*People v. Kaurish* (1990) 42 Cal.3d 648,699 [juror whose personal opposition towards the death penalty may predispose him to assign greater than average weight to mitigating factors may not be excluded, *unless* that predilection would actually prevent him from engaging in weighing process and returning capital verdict]; *People v. Stewart*, *supra,* 33 Cal.4th 425, 447 [prospective juror may not be excluded simply because conscientious views would lead him to impose higher threshold before voting for death or because such views would make it very difficult for juror ever to vote for death].) Second, Juror No. 5's statement that he believed in the death penalty, if warranted, was consistent with his stated position during deliberations; i.e., that he did not feel a death sentence was warranted in this case. His position was also not inconsistent with his negative response to the question, asked of him by the court on

voir dire, whether he had "such a conscientious objection to the death penalty that you would automatically vote against death even if you actually felt death was the appropriate decision based on all the facts and the law." (3RT 764.) Juror No. 5 was not asked by either the court or attorneys to elaborate regarding his views on capital punishment during voir dire.

Also unsubstantiated by the record is the court's finding that Juror No. 5 "would automatically vote for death regardless of what the evidence showed, unless a child were the murder victim." (*Ibid.*) Although one juror said that Juror No. 5 indicated he would vote for the death penalty if a child were murdered (10 RT 2), Juror No. 5 denied that he had said that this would be the *only* circumstance under which he would consider voting for death (10RT 2325), and the court did not ask any of the other jurors about this.[26]. However, the jury foreman reported that when presented with *different scenarios*, Juror No. 5 said he would consider voting for death. (10RT 2297.) In any event, it is apparent that the court's conclusions were influenced by the subjective opinions of others rather than by an objective review of the facts.

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[26] **The Court**: On your questionnaire form you have said that you believe in the death penalty and you are moderately in favor of it. But apparently you said to the other jurors that you would only consider it in the death of a child, is that the case?

Juror No. 5: Well, they were trying to come up with examples of when I would consider it. *That was just one of the things that I mentioned that, you know, I would consider.* They were basically trying to fish for the reasons why I didn't agree with 11 jurors.

(10RT 2326, emphasis added.)

C. The Trial Court's Inquiry Regarding the Jury's Discussions Violated the Sanctity of the Jury's Deliberations

Respondent quotes the statement of this court in *Cleveland*, *supra*, that "[t]he need to protect the sanctity of jury deliberations . . does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (RB 213, quoting 25 Cal. 4th at p. 476.) However, respondent cannot reconcile what the trial court did in appellant's case with this Court's directive that any inquiry into allegations of jury misconduct during deliberations:

> should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise commit misconduct, and no other proper ground for discharge exists.

(*People v. Cleveland*, *supra*, 25 Cal. 4th at p. 485.)

As appellant argued at length in his opening brief (AOB 233-237), the court's inquiry should have ceased once it determined that Juror No. 5 had in fact participated in the deliberations by listening to the views of other jurors and expressing his own views, and that he had not "expressed an intention to disregard the court's instructions or otherwise commit misconduct." (*Ibid.*) The court nevertheless asked open-ended questions of the jurors designed to elicit responses revealing information about the jury's deliberations and Juror No. 5's thought processes.

For example, instead of simply asking whether Juror No. 5 had listened to the other jurors and discussed his own views, or whether he had actually expressly stated that he was philosophically or morally opposed to the death penalty, the court asked the jury foreman, "What is it about Juror No. 5's conduct that led you to say he is not deliberating as opposed to that he is disagreeing with others?" (10 RT 2294.) This question elicited a response describing the jury's deliberative process and Juror No. 5's deficient reasoning. (10RT 2294-2295.) The court also improperly asked the jurors to reveal their discussion with Juror No. 5 about circumstances warranting the death penalty (10RT 2296; 2310; 2325), and improperly asked jurors to comment on whether it appeared to them that he was "expressing opinions on the instructions of law and the evidence." (10RT 2304.)

In her concurring opinion in *People v. Williams* (2001) 25 Cal.4th 441, 464, Justice Kennard cautioned that "[t]o permit intrusive inquiries into a juror's reasoning would violate the secrecy of jury deliberations and invite trial judges to second-guess and influence the work of the jury." (See also *People v. Engelman*, *supra*, 28 Cal.4th at p.443 [no one, including trial judge, has right to know how juror deliberated].) In *Williams*, Justice Kennard made special note of the fact that the trial court's questioning of the juror at issue exceeded the limited scope permissible, because it elicited information regarding the juror's view as to whether the defendant should be acquitted or convicted. However, since the scope of the court's inquiry had not been raised in the defendant's petition for review, this Court could not rule that issue in its opinion. Nevertheless, Justice Kennard observed that "'[w]here duty and

authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils – protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity." (*People v. Williams*, *supra*, at pp. 464-465 (conc. opn. of Kennard, J.), quoting *U.S. v. Thomas* (2d Cir. 1997) 116 F.3d 606, 623.)

The trial court's intrusive inquiry in this case violated the sanctity of the jury's deliberations, and improperly influenced the outcome of those deliberations. Consequently, the penalty verdict reached by the jury cannot be upheld.

D. Conclusion

The trial court's improper interrogation of the jurors regarding their deliberations and its subsequent removal of a deliberating, minority juror deprived appellant of his right to have his trial completed by a particular tribunal, his Sixth and Fourteenth Amendment rights to a full and fair trial by an impartial jury, his due process rights grounded in the entitlement to procedures mandated by state law, and his Eighth Amendment right to a reliable sentencing determination in a capital case. As appellant demonstrated in his opening brief, the error requires reversal of appellant's death sentence. (AOB 227-231.)

* * * *

CONCLUSION

For all the foregoing reasons and those discussed appellant's opening brief, appellant's conviction and death sentence must be reversed

Dated: December 21, 2006

Respectfully submitted

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the Deputy State Public Defender assigned to represent appellant, Darrell Lee Lomax, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer generated word count, I certify that this brief excluding the tables and certificates is 25,115 words in length.

Dated: December 21, 2006

Jessica K. McGuire

JESSICA K. MCGUIRE

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Darrell Lee Lomax***
Case Number: **Superior Court No. NA023819**
Supreme Court No. S057321

I, the undersigned, declare as follows:
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **December 21, 2006**, at Sacramento, California.

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