In the Supreme Court of the

State of California

People of the State of California, Plaintiff and respondent, v. Alex Dale Thomas, Defendant and appellant.	No. S093456

Appellant's Reply Brief

Automatic Appeal From A Judgment Of Death
Of The Superior Court Of The State Of California,
County Of Sonoma
Honorable Wilfred J. Harpham, Judge
No. SCR-29622

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Introduction

A jury convicted appellant Alex Thomas of first degree murder and rape, and found that the murder occurred in the course of the rape. Thomas was sentenced to death and to 25 years to life for rape under the Three Strikes law. (30 RT 8990.)

On April 4, 2008, Thomas filed his opening brief on appeal. Respondent filed its brief on February 27, 2009. Appellant now submits his reply brief.

In this brief, appellant addresses some but not all of the

arguments made in the respondent's brief. Appellant neither concedes nor waives any claims. Some issues are fully joined by the briefs already on file and will not benefit from further briefing. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn.3 [failure to respond to argument is not waiver], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13.)

Many claims were raised in the opening brief. For clarity, this reply brief tracks those claims in the same order they were raised in the opening brief and uses the same paragraph number. Thus, the paragraph numbering here is not consecutive.

Argument

I. The Striking Of Jurors Who Opposed The Death Penalty In Principle, But Who Swore They Could Follow The Law And Consider Death As A Sentence, Denied Alex Thomas His Right To An Impartial Jury Taken From A Fair Cross-Section Of The Community.

A. The jury in a capital case cannot be limited to those who will impose death without hesitation.

The jury in a capital case cannot be limited to only those people who unequivocally support the death penalty. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) Those who oppose the death penalty, and who might be reluctant to impose it in all but the most serious cases, are also qualified to sit as jurors. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) Under the Sixth and Fourteenth Amendment, a person opposed to the death penalty in principle but able to set aside those beliefs and impose it if warranted in the case before him or her cannot be excluded from a capital trial unless the record proves the person's beliefs will "substantially impair" his or her ability to impose the death penalty. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

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B. Juror No. 6-353 consistently and unequivocally stated she could impose the death penalty.

Juror No. 6-353 (hereafter "Juror 6-353") consistently and unequivocally stated she would follow the law as given to her by the court. Not once did she say she would never impose the death penalty, or automatically vote for life without parole, or be unable to follow the court's instructions and consider both sentence choices. The juror generally preferred a sentence of life without the possibility of parole over the death penalty, but she described plausible, not uncommon circumstances under which she could impose a sentence of death.

In the written questionnaire, the juror noted she was "moderately against" the death penalty and "strongly in favor" of life without the possibility of parole. (12 CT 2469-70.)[1] She belonged to a church (the "Movement of Spiritual Inner Awareness"), but the church was non-traditional and took no

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[1] The words "moderately against" were not her own; she chose this answer this answer from a list. The other choices were "strongly in favor," "moderately in favor," "neutral," and "strongly against." (12 CT 2469.)

position on the death penalty. (12 CT 2470.) Her religious beliefs did not prevent her from sitting in judgment of another person. (12 CT 2471.) She did not believe that the death penalty should be imposed "automatically" in circumstances similar to those in this case. (12 CT 2471.) She did not know if she would always vote for life without parole "regardless of the facts and circumstances." (12 CT 2472.) She would not "always" vote for death. (12 CT 2473.) She had no "concerns or reservations" about sitting as a juror in this capital case. (12 CT 2473.)

In voir dire, she stated she "lean[ed] very strongly towards wishing there were not a death penalty," but she also believed that "you have to work with the system and the laws of the land as they stand." (15 RT 4504.) The court pressed her on this point:

> "The court: It would be your duty as a juror to accept the law as I read it to you at the end of the trial in either phase, guilt phase or the other. [¶] Now, some jurors and some people take the position philosophically that they don't care what the law is and they don't care what the judge tells them. If I don't like it, I won't apply it, and I will do justice under my own system. [] [¶] Are you that kind of person that you would say I don't like that rule, so I am not going to bother with it?
>
> The juror: No. I don't believe I have the right to say that."

(15 RT 4506.)

Juror 6-353 repeated she "could follow the rules that were given to me." (15 RT 4507.) She said it was not "outside the realm of possibility" for her to impose the death penalty, although she thought it would be "unlikely" that she would "get there." (15 RT 4508.) She clarified this by saying she could impose the death penalty if the accused had made choices that showed he lacked "a real sense of humanity" and would be a threat to others in prison if incarcerated. (15 RT 4509.)

Despite her steady assertion that she could impose death, the trial judge found there was not a "reasonable possibility" the juror could impose the death penalty. The court said, "Her total philosophy and her body language told me she's substantially impaired and prevents her from following the law and she is excused for cause." (15 RT 4511.)

1. Notwithstanding the deference owed to the trial court's determination, the record does not support a finding of substantial impairment.

A trial court's finding of bias will be upheld only if supported

by substantial evidence. (*Wainright v. Witt, supra,* 469 U.S. at 426-430.) This Court has articulated two approaches to the review of for-cause challenge rulings.

In general, the court "review[s] the record to determine if it fairly supports the trial court's determination" that the challenged juror's views on the death penalty "would have prevented or substantially impaired the performance of [his or her] duties as a juror." (*People v. Bramit* (2009) 46 Cal.4th 1221, 1233.) However, the nature of review depends on the juror's answers to question in voir dire. "[I]f the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding. If there is no inconsistency, the only question being whether the juror's responses in fact demonstrated an opposition (or bias in favor of) the death penalty, we will not set aside the court's determination if it is supported by substantial evidence and hence not clearly erroneous." (*People v. Cooper* (1991) 53 Cal.3d 771, 809; *People v. Gordon* (1990) 50 Cal.3d 1223, 1262 (same); *People v. Wash* (1993) 6

Cal.4th 215, 254 (same); *People v. Bramit, supra,* 46 Cal.4th at p. 1235 (same).)

Here, Juror 3-653's attitude toward the death penalty was clear and unequivocal. In such a case, the "need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9, 20; *People v. Lewis* (2008) 43 Cal.4th 415, 483.)

Respondent argues that the juror's statement that "I don't believe it's out of the realm of possibility to decide that was the proper penalty, but it's unlikely I would get there" shows it was not a "realistic possibility" for the juror to impose death. (RB at p. 28.) Although the juror used those words, her explanation of what those words meant to her contradicts the conclusion that respondent now draws. The juror explained it was "unlikely" she would impose death unless certain circumstances were present, but the circumstances she described are not rare, they are in fact

present in a great majority of death penalty cases, including this one. (15 RT 4509.)

The question is not whether it would be difficult for the juror to impose death; the question is whether she could impose death in the case before her. (*People v. Lewis, supra,* 43 Cal.4th at p. 487.) Juror 6-353 explained the death penalty was appropriate if the defendant had made "such bad choices" that he no longer had a "sense of humanity" and would be a threat to others if incarcerated. (15 RT 4509.) Thus, she articulated the very considerations that a juror in a capital case should make under the Eighth Amendment. As this Court has noted, the Eighth Amendment requires "not simply a finding of facts which resolves the penalty decision, 'but . . . the jury's moral assessment of those facts as they reflect on whether [a] defendant should be put to death . . . .'" (*People v. Brown* (1985) 40 Cal.3d 512, 540 [citation omitted].)

Thus, Juror 6-353's personal standards for imposing death are not so demanding that they would rule out the death penalty in

this case. The juror articulated reasonable grounds for the imposition of the death penalty. Indeed, the grounds for death she described are the very reasons for imposing death that the prosecutor argued to the jury. (29 RT 8569-8572.) This is significant because the "crucial inquiry is 'whether the juror's views about capital punishment would prevent to impair the juror's ability to return a verdict of death *in the case before the juror.*'" (*People v. Lewis, supra,* 43 Cal.4th at p. 487, quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 45, fn.16, italics in original.)

Moreover, a prospective juror cannot be excluded for cause simply because his or her threshold for imposing the death penalty is higher than other jurors. Indeed, a juror who would find it "very difficult" to impose the death penalty is not subject to challenge for cause. "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude *him from engaging in the weighing process and*

returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) "A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart* (2004) 33 Cal.4th 425, 447; see also *People v. Martinez* (Aug. 13, 2009) ___ 4th ___ (2009 WL 2461761) [dis. opn. of Moreno, J.].) "A prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror to ever impose the death penalty." (*People v. Stewart, supra,* 33 Cal.4th at p. 447.)

Respondent compares this case to *People v. Jones* (1997) 15 Cal.4th 119 but the comparison fails. (RB at p. 29.) There, a prospective juror named Beeler stated his religious beliefs

prevented him from imposing the death penalty but then, under questioning from defense counsel, he allowed that he might be able to impose death on someone like "Charles Manson." (15 Cal.4th at p. 165.) Later, Beeler conceded that his beliefs about the death penalty "strongly impaired" his ability perform his duty as a juror. (*Ibid.*) This Court held there was no error in excusing Beeler for cause because he "repeatedly indicated" that his beliefs about the death penalty "substantially impaired" his ability to impose the death penalty in the case before him. (*Ibid.*)

Jones is not similar to this case. Juror 6-353 did not "repeatedly indicate" that her beliefs "substantially impaired" her ability impose the death penalty. She said she was "moderately against" the death penalty and could impose it if certain circumstances were met; the circumstances she described are arguably present in the majority of death penalty cases. She did not limit her ability to impose the death penalty to a once-in-a-lifetime type of killer such as Charles Manson (as in *Beeler*), but instead outlined specific factors she would consider to determine if the death penalty was

appropriate. "[J]urors cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 522, fn.21.) As it applies to capital cases, the essence of the Eighth Amendment is the requirement that each juror be free "to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider . . . ." (*People v. Brown, supra,* 40 Cal.3d at p. 540.)

Accordingly, the views expressed by Juror 3-653 provided no reason to disqualify her from the jury.

2. Deference is not abdication of the duty to review; the trial court's bare reference to Juror 6-353's "body language" does not demand deference when the record otherwise fails to support the ruling.

The trial court judge gave two reasons for excusing Juror 6-353: her "total philosophy" and "body language." As shown above, her "philosophy" in no way impaired her ability to follow the law and impose the death penalty if warranted. As for body language, a standardless criterion that invites mischief, the court did not say

what it was about the language of her body that supported his finding that the juror was unfit for service. Given the importance of obtaining a fair cross-section of jurors in a capital case, this Court cannot simply rubberstamp the trial court's ruling based on the naked, unexplained reference to "body language."

Imposing death in a capital case is a normative decision. Although the jury's discretion is guided by the enumerated circumstances in mitigation and aggravation, the weight each juror gives to those factors is discretionary and subjective. (See *People v. Boyde* (1988) 46 Cal.3d 212, 253 [a juror in a capital case is "free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider"].) If the accused is to be judged by a fair cross-section of the community, then the jury must be comprised not only of those who favor the death penalty and would apply it without hesitation, but also those who generally disfavor the death penalty and would apply it sparingly. (See *Wainwright v. Witt, supra,* 469

U.S. at p. 460 (dis. opn. of Brennan, J.).)[2] Given the importance of obtaining a cross section of jurors, both to the defendant and to a society interested in imposing a fair system of capital punishment, the decision to excuse a facially-qualified juror must rest on an adequate record. A bare reference to "body language" is not an adequate record; the Court owes it no deference when the juror's verbal statements show no basis for a cause challenge.

This Court has held as much in the context of reviewing peremptory challenges to jurors based on race. "Notwithstanding the deference we give to a trial court's determination of credibility and sincerity, we can *only* do so when the court has clearly expressed its findings and rulings and the bases therefore." (*People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn.5.) Thus, "simply saying that a peremptory challenge is based on 'her demeanor' without a

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[2] Justice Brennan wrote: "Broad death-qualification threatens the requirement that jurors be drawn from a fair cross section of the community and thus undermines both a defendant's inherent interest in a representative body and society's interest in full community participation in capital sentencing. (*Wainwright v. Witt, supra,* 469 U.S. at p. 460 (dis. opn. Brennan, J.), citing *Witherspoon v. Witt, supra,* 391 U.S. at p. 519, fn.15.)

fuller explanation of what the prospective juror was or was not doing provides no indication of what the prosecutor observed, and no basis for the court to evaluate the genuineness of the purported non-discriminatory reason for the challenge." (*People v. Allen* (2004) 115 Cal.App.4th 542, 551.)

There is no clue as to what the juror's "body language" told the trial court. The record does not explain what she was doing or not doing, or when she was doing or not doing it. It is difficult to understand how her demeanor would even affect the trial court's assessment of bias because the juror's articulate explanation of her beliefs was reasonable, credible and unambiguous.

When a prospective juror's words alone do not disqualify her from service in a capital case, the decision to strike her from the jury cannot be insulated from review by the trial court's bare reference to demeanor or body language. The trial court must make a reasonably specific explanation of its reasoning in order to permit meaningful appellate review. Without such an explanation, it cannot be said that the record "fairly supports" the trial court's

finding of bias. (*People v. Bramit, supra,* 46 Cal.4th at p. 1233.)

C. Juror 74's hesitation in answering questions about the death penalty did not establish cause to dismiss her.

Juror No. 74 ("Juror 74") felt the death penalty was appropriate in some cases. (9 RT 2624.) She would not vote automatically for either life or death. (9 RT 2610.) She had no religious opposition to the death penalty. (9 RT 2625.)

Respondent argues the challenge for cause was properly granted because she "hesitated" when asked if she could impose the death penalty and then said, "I don't know." (RB at 36, citing 9 RT 2627-28.) But the juror rationally explained that the decision to impose death is a "very heavy question." (9 RT 2623.) It is improper to limit a capital jury to only those people who quickly and eagerly profess an ability to sentence a person to death. "[N]either nervousness, emotional involvement, not inability to deny or confirm any effect whatsoever [of the possibility of the death penalty] is equivalent to an unwillingness or an inability to on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty."

(*Adams v. Texas* (1980) 448 U.S. 38, 50.) "[T]o exclude all jurors who would in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." (*Ibid.*)

Juror 74 repeatedly stated she could impose the death penalty and be fair to both sides. (9 RT 2622-23.) Despite the juror's stated ability to impose the death penalty, the court again relied on "body language" to sustain the challenge. For all the reasons stated above (see argument I (B)(2)), the bare reference to "body language" is not substantial evidence of bias when the record otherwise shows the juror is capable of following the law and imposing the death penalty.

D. The improper exclusion of jurors requires reversal.

The exclusion of jurors who are merely reluctant to impose the death penalty, but who could follow the law and vote for death if they believed it was warranted, is improper and makes for a jury predisposed to impose the death penalty. In this case, the court's

removal of qualified jurors violated Thomas's rights under the Sixth, Eighth, and Fourteenth Amendments. Because the improper exclusion of even one juror is reversible per se, the judgement of death must be reversed. (*Davis v. Georgia* (1976) 429 U.S. 122, 123.)

II. The Court Erred In Denying The *Batson* Motion; The Erroneous Reliance On The Absence Of A "Pattern" Of Peremptory Challenges To African-American Jurors Was Not Reasonable.

After excusing jurors for hardship and cause challenges, a single African-American juror remained in the jury pool. (15 RT 4587.) The prosecutor promptly exercised a peremptory challenge to this juror. (16 RT 4614.) The defense objected under *Batson* and *Wheeler*.[3] The court asked the prosecutor to explain why he struck the juror. The prosecutor offered facially race-neutral reasons. (16 RT 4622.)

Under *Batson*, the trial court was then required to decide whether the defense had proved "purposeful racial discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 767.) The court must make a "sincere and reasoned attempt to evaluate the prosecutor's explanation." (*People v. Hall* (1983) 35 Cal.3d 161, 167-68; accord *People v. Silva* (2001) 25 Cal.4th 345, 385.) Here, the court

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[3] *Batson v. Kentucky* (1986) 476 U.S. 79 & *People v. Wheeler* (1978) 22 Cal.3d 258.

stated, "Essentially there needs to be a pattern of discrimination in the exercise of a challenge which is patently or clearly - I suppose the pattern is to assist in deciding whether it's because of the person's race." (16 RT 4628-29.) The court then denied the motion, stating, "It's real difficult because there is only one black on the panel, but I - there is just lots of reasons I think besides being black that a challenge could be exercised, and, of course, obviously there is no pattern or systematic exclusion because we don't have enough people to create that kind of - obviously it does not prohibit nor prevent the motion on either side." (16 RT 4630-31.)

The court's analysis was constitutionally flawed. The court's statements indicate that although the court believed a *Batson/Wheeler* motion was viable even if there was only a single member of a cognizable group in the jury panel, the court wrongly believed that the absence of a "pattern of discrimination" could be considered in assessing whether the peremptory challenge was motivated by race. But a showing of systematic exclusion is not required to establish a *Batson/Wheeler* violation. "California law

makes clear that a constitutional violation may arise even when only one of several members of a 'cognizable' group was improperly excluded." (*People v. Montiel* (1993) 5 Cal.4th 877, 909.) "A *Wheeler* violation does not require 'systematic' exclusion." (*People v. Arias* (1996) 13 Cal.4th 92, 136; see also *Batson v. Kentucky, supra,* 476 U.S. at p. 95 [systematic exclusion not required].)

In *People v. Reynoso* (2003) 31 Cal.4th 903, this Court found no error where a trial court judge used the term "systematic exclusion" to deny a *Batson/Wheeler* motion. (*Id.* at p. 927, fn.8.) The Court stated that courts have used the term as "shorthand" for *Wheeler* error. (*Ibid.*; but see *People v. Reynoso, supra,* 31 Cal.4th at p. 934 (dis.opn. of Kennard, J.)[noting that the Court disapproved of the term "systematic exclusion" in *People v. Feuntes, supra,* 54 Cal.3d 707, 716, fn. 4 and has never used it since as "shorthand" for a *Wheeler* violation].)

Reynoso is distinguishable. There, the trial judge used the term "once in passing" when denying the motion. (31 Cal.4th at p. 927, fn.8.) Here, in contrast, the trial court expressly stated that the

defense needed to show a "pattern of discrimination." (16 RT 4628.) In denying the motion, the court stated there was "no pattern or systematic exclusion." (16 RT 4630.) Thus, it appears the court decided the issue, at least in part, on this erroneously high standard. A reviewing court owes deference to a trial court's ruling on a *Batson/Wheeler* motion, but no deference is due when the trial court relies on an erroneous legal standard. (See *Johnson v. California* 2005) 545 U.S. 162, 170; *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1197.)

Accordingly, the court erred in denying the motion. Reversal is required.

III. The Court Erred In Denying The Motion To Suppress Thomas's Statements To The Police.

A. Thomas Was In Custody For *Miranda* Purposes When He Was Questioned After Being Locked In The Backseat Of A Patrol Car For 25 Minutes, Surrounded By Police Officers, And Could See He Was The Only Witness Detained In This Fashion.

The facts are undisputed. Shortly after the sheriff's deputies arrived at the scene, one of them told Thomas he was going to be "detained" for questioning. (5 RT 1315.) The deputy escorted Thomas to a patrol car, one of six patrol cars in the immediate area, and locked him in the backseat. (5 RT 1317.) Although there were many witnesses at the scene, including other janitors, the police forcibly detained only Thomas. The other witnesses were permitted to stand outside. (5 RT 1336, 1346.)

The deputy told Thomas he had to wait in the patrol car because he was going to be questioned by detectives who were not yet at the scene. (5 RT 1315.) In fact, Thomas was questioned by Officer Michael Abbot, who was already at the scene and who had given the order to detain Thomas. (5 RT 1350, 1354.)

Thomas remained in the locked patrol car for 25 minutes. (5 RT

1359.) Officer Abbott, who by this time had learned that the victim was dead and he was dealing with a homicide, questioned Thomas outside the car. (5 RT 1375.) There is no evidence the police informed Thomas that he had *not* been arrested or that he could decline to answer questions. The trial court ruled Thomas was detained for investigation and was not in custody for *Miranda* purposes. (5 RT 1396-97.) The court erred.

Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda v. Arizona* (1966) 384 U.S. 436, 444.)

There are limited instances in which a person is stopped by police and is not free to leave, but is not "in custody" for *Miranda* purposes. A *Terry* stop (see *Terry v. Ohio* (1968) 392 U.S. 1) is not

custody. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 439.) A traffic stop is not custody. (*Id.* at pp. 441-442.) A border detention is not custody. (*United States v. Leasure* (9th Cir. 1997) 122 F.3d 837, 840; *United States v. Butler* (9th Cir. 2001) 249 F.3d 1094, 1098 [noting that special rules exist for border stops].)

However, an investigative detention becomes custodial when coercive circumstances exist. Courts look to a variety of circumstances to determine if there was custody for *Miranda* purposes; no one factor is dispositive. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) The relevant circumstances may include:

- whether contact was initiated by the police and whether the suspect agreed to the interview;
- whether the expressed purpose of the interview was to question the person as a suspect or witness;
- the location of the interview;
- whether the police informed the suspect he was under arrest;
- whether the police informed the suspect that he was free to end the interview and leave;

- whether the suspect's was forcibly detained;
- the length of the detention and interview;
- the number of police officers involved in the detention or interrogation;
- whether the police accused the suspect of committing the crime;
- whether the questioning was aggressive, confrontational, or accusatory; and,
- whether the suspect was arrested at the end of the interrogation.

(See *People v. Aguilera* (1996) 51 Cal.App. 4th 1151, 1162; see also *United States v. Bassignani* (9th Cir. 2009) 560 F.3d 989, 994. [listing factors to consider].) In this case, Thomas's severe cognitive limitations must also be considered. (But see *People v. Leonard* (2007) 40 Cal.4th 1370, 1400 [noting that neither the United States Supreme Court nor this Court has decided whether factors such as the suspect's age, intelligence or disabilities are relevant to the custody analysis]; see also *Yarborough v. Alvarado* (2004) 541 U.S.

652 [five justices agree that age is a relevant factor in at least some situations].)

As applied here, these factors weigh in favor of a finding of custody. The police initiated the contact. An officer escorted Thomas to a patrol car and locked him inside it for at least 25 minutes. Thomas was not free to leave. Many police officers were at the scene. Thomas was never told that he was free to leave and, in fact, could not leave. The interrogation lasted another 30 minutes, making the entire detention and interrogation period one hour. Thomas was not released after being questioned but was locked in the patrol car again. Although the police did not tell Thomas he was a suspect, it would have been obvious to Thomas that he was the only person forcibly detained by the police. The police let all of the other witnesses remain free before questioning; only Thomas was separated from the others and locked in a patrol car. (*United States v. Beraun-Panez* (9th Cir. 1987) 830 F.2d 127, 131 [noting that *Miranda* holds that separating a person from others is psychologically coercive].) All of these circumstances show the sort

of detention and coercive atmosphere that are the hallmarks of custodial interrogation. A reasonable person in Thomas's position would have understood he was in custody and required to answer the officer's questions.

Respondent relies on two cases, *In re Joseph R.* (1988) 65 Cal.App.4th 954 and *People v. Forster* (1994) 29 Cal.App.4th 1746. (RB at pp. 51-52.) Both are distinguishable.[4]

In *Joseph R.*, a police officer received information that a boy in a plaid shirt had been throwing rocks at bus. The officer saw a boy fitting that description through the window of a house. The officer knocked on the door and informed the boy's mother, who had answered the door, of his suspicion that her son had been throwing rocks. The boy and a friend came outside. Joseph denied knowing of any rock throwing. The officer handcuffed him and

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[4] Respondent also cites *Adams v. Williams* (1972) 407 U.S. 143, 146 for the proposition that "a detention for the purpose of maintaining the status quo may be reasonable depending on the circumstances." (RB at p. 52.) The question *Adams* was whether the detention was reasonable under the Fourth Amendment, not whether the defendant was in custody for *Miranda* purposes. The fact that a detention may be justified does not excuse the police from complying with *Miranda*.

put him inside the patrol car for five minutes. The officer returned, took off the handcuffs and told Joseph he did not have to talk to him, but he wanted to ask a few questions. During the ensuing interview, Joseph made an incriminating statement. (65 Cal.App.4th at p. 957.)

Here, in contrast, Thomas was detained for 25 minutes before he was questioned. He was not in front of his house, but at the scene of a crime, surrounded by police officers. He was not told he was free to leave or to end the interview. And he was not being questioned about rock throwing, but about a homicide, a far more serious crime. The circumstances surrounding Thomas's detention are more coercive than those presented in *Joseph R.*

People v. Forster, supra, 29 Cal.App.4th 1746 is also factually dissimilar to the present case. There, the defendant was stopped at a border point of entry. The inspector suspected defendant was drunk and asked him to get out of his car. Defendant was brought to the security office and asked to wait there until the Highway Patrol officer arrived. Defendant waited for an hour. He was not

locked in a room or handcuffed. When the Highway Patrol officer arrived, he questioned defendant about where he had been and whether he had been drinking. Defendant admitted he had drunk four beers. Defendant was arrested and convicted of drunken driving. (29 Cal.App.4th at pp. 1750-1751.) The court ruled that under the totality of the circumstances the defendant was not in custody notwithstanding the hour-long detention, which the court found to be "reasonable." The court noted especially that the defendant's freedom of movement was not detained in any way; he was free to walk out of the office at any time. (*Id.* at pp.1753-1754.)

Here, in contrast, Thomas was singled out for forcible detention. He was never free to leave. He was surrounded by law enforcement officers at all times. Further, whether the detention was "reasonable" is not part of the custody calculus. The question is not whether the police have a good reason to detain a suspect; the question is whether the suspect is in custody when he is interrogated. *Forster's* reliance on the reasonableness of the

detention makes the court's holding unreliable, especially in light of *Berkemer v. McCarty, supra,* 468 U.S. 420.

In *Berkemer,* the Supreme Court held that questioning by a police officer in a routine traffic stop was not custodial interrogation under *Miranda.* (*Berkemer, supra,* 468 U.S. at p. 437.) Significantly, the Court noted that the usual traffic stop was "temporary and brief," lasting "only a few minutes." (*Id.*) In the case before it, the Court observed that "[o]nly a short period of time elapsed between the stop and the arrest." (*Id.* at p. 441.) The Court contrasted the brevity of the detention with a Pennsylvania case in which a driver was held to be in custody for *Miranda* purposes where he was detained for one-half hour, part of the time in a patrol car, while waiting for an officer to question him concerning the circumstances of an accident. (*Id.* at p. 441, citing *Commonwealth v. Meyer* (Pa. 1980) 412 A.2d 297, 307.)

In a later case, the Supreme Court noted that the Pennsylvania case (*Commonwealth v. Meyer, supra*) "involved facts which we implied might properly remove its result from *Berkemer's*

application to ordinary traffic stops; specifically, the motorist in *Meyer* could be found to have been placed in custody for purposes of *Miranda* safeguards because he was detained for over half an hour, and subjected to questioning while in the patrol car." (*Pennsylvania v. Bruder* (1988) 488 U.S. 9, 11, fn.2.)

Thus, the United States Supreme Court has twice noted that questioning following a half-hour detention in a patrol car required *Miranda* warnings. This case also involves a half-hour detention in a patrol car which, along with the other circumstances, demonstrates that a reasonable person in Thomas's position would not have felt free to end the questioning and leave the scene. (*Thompson v. Keohane, supra,* 516 U.S. at p. 112.) Under this standard, Thomas was in custody for *Miranda* purposes. As a matter of law, the court erred in ruling otherwise.

B. The Error Was Prejudicial.

Respondent contends that even if the admission of Thomas's statements was error, the error was harmless beyond a reasonable doubt. (RB at p. 53.) Respondent claims the statements were not

incriminating and the evidence of his guilt was overwhelming. (RB at p. 53.)

Respondent's argument fails to account for several points raised in the opening brief. First, there is no difference between exculpatory and inculpatory statements. "If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used . . . to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication." (*Miranda v. Arizona, supra,* 384 U.S. at pp. 476-477.)

Second, the prosecutor in this case believed Thomas's statement to be "highly incriminating." (26 CT 5308.) He told the jury that Thomas's statement was evidence that the defense case was insincere, and that Thomas "lied through and through." (22 RT 6570; 22 RT 6602.)

Third, the evidence of rape was not as "overwhelming" as respondent claims. There was no strong or direct evidence of rape. The physical evidence suggested no rape occurred; there was no

sign of genital trauma or forcible penetration. An expert on sexual assault who spends most of her time in court testifying for the prosecution asserted that the absence of injury was inconsistent with rape. (21 RT 6349-6353.)

Thomas's statement was erroneously admitted. The statement was used to undermine the sincerity and plausibility of the defense of consent. Reversal is required.

VI. The Prosecutor Committed Prejudicial Misconduct In Closing Argument By Informing The Jury That Thomas Would Be Eligible For Parole If The Jury Did Not Find The Special Circumstance Allegation True.

The prosecutor put the issue of punishment directly before the jury in his closing argument. He told the jury in no uncertain terms that if it did not find Thomas guilty of rape and the special circumstance allegation, Thomas "win[s] this case." (22 RT 6602.) The prosecutor stated, "if you don't find him guilty of rape, and don't find the special circumstance to be true, that's a win for Mr. Thomas. Life in prison with the possibility of parole." (22 RT 6602.)

An objection was sustained. (22 RT 6615.) The court admonished the jury not to consider punishment in deciding Thomas's guilt. (22 RT 6620; 29 CT 5914.)

Respondent argues that whether the comments "constituted error is questionable." (RB at p. 76.) But even if error occurred, respondent says, there was no harm. (RB at p. 76.)

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A. The jury was not told in voir dire that Thomas would be eligible for parole if he was acquitted of the special circumstance allegation.

The prosecutor maintained that he committed no misconduct because he did not "intend" to tell the jury to consider punishment and he was not telling the jury anything about sentencing that they had not already learned in voir dire. (22 RT 6618; RB at p. 74.) There are two responses.

First, the intent is irrelevant in deciding a claim of prosecutorial misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822.) The injury to the accused is the same whether the misconduct was intentional or inadvertent. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) Bad faith is not required. (*Ibid.*)

Second, the jury did not learn in voir dire that Thomas would be eligible for release from prison unless the special circumstance allegation was found true. The questionnaire furnished to jurors informed them that the penalty phase of the trial wold occur only if "the jury returns a guilty verdict and a special circumstance finding during the guilt phase." (See, 12 CT 2402 (under the

heading "Issues Related to Capital Punishment").) The jury was then told there would be two choices in the penalty phase: life in prison without the possibility of parole or death. (12 CT 2402.) However, the questionnaire did not address the question of what punishment Thomas would suffer if he was *acquitted* of the special circumstance allegation. Nothing in the record of the voir dire suggests the jury was told that an acquittal on the special circumstance allegation meant that Thomas could be released on parole. In other words, although the jury was told that the sentence options in the penalty phase were death or life without parole, jurors could reasonably believe that life without parole was *also* the sentence for first degree murder without special circumstances and that the penalty phase was to decide only if the death penalty was warranted.

A fair reading of the record leads to the conclusion that the prosecutor purposefully put the issue of Thomas's possible release from prison into the jury's guilt phase deliberations. The explanations offered by the prosecutor for his argument are

irrelevant, unsupported, and disingenuous. (See 22 RT 6618-6619.) This Court has found misconduct where a prosecutor argued to a jury in the guilt phase of a capital trial that a not-true finding on a special circumstance allegation "guaranteed [the defendant] a parole date." (*People v. Holt* (1998) 37 Cal.3d 436, 458, fn. 14.) The prosecutor here used different language but achieved the same end: he told the jury Thomas would be eligible for release into the community if he was acquitted of the special circumstance. Just as in *Holt*, this was misconduct.

B. It was highly prejudicial to tell the jury that a man who admitted murdering an 18-year-old girl to avoid the Three Strikes law would be eligible for parole.

The prosecutor put before the jury the possibility that Thomas would be released on parole, even though he admitted murdering a young girl and had a prior criminal history. Not only was this argument irrelevant to Thomas's guilt or innocence, it was the sort of highly prejudicial argument that leads the jury to decide a case on the basis of emotion rather than evidence. The law requires courts to exclude this sort of evidence or argument, "which

uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Branch* (2001) 91 Cal.App.4th 274, 286; see *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009 [evidence is unduly prejudicial where there is a "likelihood the jury will use it for an illegitimate purpose].)

Nevertheless, respondent argues there was no harm in the prosecutor's loaded remarks because substantial evidence supported the rape allegation, the reference to punishment was brief, and the court cured the problem by reminding the jury to not consider punishment in deciding Thomas's guilt. (RB at pp. 76-77.)

There seem to be as many cases holding that an admonition cures the harm as those holding it does not. (Compare *People v. Stevens* (2007) 41 Cal.4th 182, 205-206 [admonition cured the harm] with *People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [admonition to ignore highly prejudicial evidence has no "realistic effect").) The United States Supreme Court states the issue is whether "the jury can possibly be expected to forget it in assessing the defendant's

guilt." (*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) This is a case where the jury is not likely to be able to put out of its mind the possibility that, unless the jury makes a specific finding, an admitted murderer will be released on parole.

For the same reason, the argument that the reference to punishment was "brief" holds no water. Once heard, it is not likely to be forgotten.

There remains respondent's argument that the evidence of rape was substantial and there is no reasonable probability that a different verdict would have been returned if the misconduct had not occurred. (RB at p. 76.) There was, however, no strong or direct evidence of rape. The physical evidence suggested no rape occurred; there was no sign of genital trauma or forcible penetration. An expert on sexual assault who spends most of her time in court testifying for the prosecution asserted that the absence of injury was inconsistent with rape. (21 RT 6349-6353.) Given the equivocal state of the evidence, it is reasonably probable that the misconduct steered at least one juror to a guilty verdict on

the special circumstance allegation. Given that a hung jury is a "more favorable result," the misconduct is prejudicial. (*People v. Brown* (1988) 46 Cal.3d 432, 471, n.1 (conc. opn. of Broussard, J.).) Reversal of the special circumstance allegation is required.

IX. The Court Erred In Excluding Evidence That Explained Why Certain Family Members Did Not Testify.

In preparation for the penalty phase of the trial, the defense retained Dr. Gretchen White to examine Thomas's childhood and to present her findings to the jury. In his cross-examination of Dr. White, the prosecutor sought to undermine her findings by noting that some of the family members she interviewed did not testify at trial. (28 RT 8270.) From this, the prosecutor suggested that Dr. White's entire testimony was a lie. (28 RT 8284-87.)

The very next day, in response to the prosecutor's cross-examination of Dr. White, the defense notified the court that it intended to call its investigator to explain why these family members did not testify. (28 RT 8417.) The court immediately cut the defense request off; the court stated there was no need for such testimony because the court intended to instruct the jury that neither side is required to call all available witnesses. Moreover, the court assured defense counsel that the prosecutor was not "going to be able to argue that you should have had all those people here." (28 RT 8418.) The prosecutor did not disagree.

Just the opposite; the prosecutor confirmed the jury would be instructed that neither side is required to call all available witnesses. (28 RT 8418.) Thus, assured by both the court and the prosecutor that there was no need to explain the absence of people who Dr. White interviewed and who might be expected to testify, the defense attorneys did not call the defense investigator to testify.

Incredibly, after adopting the court's position that he would not be able to argue that the defense "should have had all those people here," the prosecutor argued the exact opposite: the failure to call these witnesses rendered the defense case "unreliable" because the jury had not heard from the "best witnesses." (29 RT 8606.)[5]

On appeal, Thomas claims the court's denial of the request to call the defense investigator was error that denied Thomas a fair and reliable penalty phase trial. (AOB at p. 123.) Respondent asserts:

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[5] Appellant also argues this argument constituted misconduct. (See Argument X(A).)

- The court made no ruling, erroneous or otherwise, because the defense made no formal motion to call its investigator. (RB at p. 89.)
- If there was a motion, it came after the defense rested and was therefore untimely. (RB at p. 90.)
- Thomas was not denied the right to rebut the prosecution arguments because his request to call the investigator was untimely. (RB at p. 91.)
- The proffered testimony of why certain family members did not testify was not "mitigating" evidence. (RB at p. 91.)
- The proffered testimony was "a secondary point" and its exclusion did not violate Thomas's right to present a defense. (RB at p. 92.)
- Any error was harmless. (RB at pp.92-93.)

A. Defense counsel's statement that it was his "intent" to call the defense investigator "to testify" was understood by the court to be a request put the investigator on the stand.

Respondent's argument rests on a cramped view of what constitutes a "motion." To say that defense counsel did not move

to call its investigator is to ignore the record. Defense counsel stated "it was my intent to call our investigator, Tom Johnson, . . . just to make a record not for any particular purpose but to make a record of what we had done to secure the attendance of these people and some of them are very ill, of course some of them are dead, and there are just a whole variety of problems with getting the witnesses to come . . . ." (28 RT 8417-18.) The defense was entitled to explain why certain witnesses were not produced, to forestall any question which might arise in the minds of the jury as to why they did not testify. (*People v. Lyons* (1958) 50 Cal.2d 245, 266; *People v. Schunke* (1934) 140 Cal.App. 544, 549 [reversible error to exclude testimony explaining why important alibi witness could not be produced].) However, the court decided the investigator's testimony was irrelevant because the jury would be instructed that neither side was required to call all witnesses and, in any event, the prosecutor was not "going to be able to argue that you should have had all those people here." (28 RT 8418.)

A motion or objection need not take any particular form. It is

sufficient if it informs the court of the issue to be decided. "An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide." (*People v. Scott* (1978) 21 Cal.3d 284, 290.) "In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented." (*Ibid.*, see *People v. Bolinski* (1968) 260 Cal.App.2d 705, 722 [defendant should have called his objection a motion to strike; issue preserved for appeal where "record revels that both parties as well as the court" were aware of the precise issue being raised.].)

Here, the record demonstrates the court understood the defense request. The court responded there was no need to call the investigator because the court "wasn't suggesting that counsel is going to be able to argue that you should have had all those people here." (28 RT 8418.)

Thus, defense counsel made a request and the trial court, aware of what the defense was seeking and why, denied the request. Nothing more is needed to preserve the issue for appeal. Given

the trial court's statements, any further request would have been futile. An attorney is not required to do futile acts in order to preserve issues for appeal. (*People v. Arias, supra,* 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.)

B. The motion was not untimely; it would have been an abuse of discretion to deny a motion to reopen the defense case for one witness.

Dr. White testified on October 3. During her cross-examination, the prosecutor insinuated that her conclusions were faulty because they were based on information from people who did not testify at trial. (28 RT 8269-71.) The next day, October 4, the defense played the videotaped examination of Ruthie Mack and then rested. (28 RT 8367.) The prosecution presented a rebuttal witness. (28 RT 8368.) The court adjudicated some other matters outside the presence of the jury, then excused the jury for the day. (28 RT 8410.) The parties began a discussion of jury instructions. Shortly into the discussion, the defense stated it wished to call its investigator to testify. (28 RT 8417.) Respondent contends this request was untimely and would have been denied. (RB at p. 90.)

Not only is this wrong, but respondent cannot object on timeliness grounds for the first time on appeal. The prosecutor did not object on timeliness grounds, the court never addressed the issue, and the motion to reopen was never held to be untimely. Instead, the court ruled the testimony was irrelevant because there was no need to explain why certain witnesses did not testify. (28 RT 8417.)

Moreover, it would have been an abuse of discretion to deny a motion to re-open the case. "In determining whether a trial court has abused its discretion in denying a defense request to reopen, the reviewing court considers the following factors: '(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.'" (*People v. Jones* (2003) 30 Cal.4th 1084, 1110, quoting *People v. Funes* (1994) 23 Cal.App.4th 1506, 1520.)

Here, the request to reopen came on the very same day the

defense had rested, and within a very short time of when the prosecution rested. The witness would have been brief. There was no lack of diligence in presenting the testimony; the defendant could not have known the prosecutor would attack Dr. White's conclusions by pointing to the absence of witnesses until it happened, and Dr. White testified only the day before. The investigator's testimony was significant. Under the *Jones* test, a motion to re-open to allow the investigator to testify would have been granted.

C. Evidence that certain witnesses could not come to court was critical to the defense to rebut the prosecutor's argument that the defense case was fraudulent and to allow the jury to give effect to the mitigation evidence presented.

Thomas argued in his opening brief that the exclusion of the investigator's testimony violated his right to rebut the prosecution's case, to present a defense, and to present mitigating evidence. (AOB at pp. 131-135.) As to the right to rebut the prosecution, respondent states that the motion to re-open was untimely and therefore no error occurred. (RB at p. 91.) Thomas addressed the timeliness issue above.

Respondent argues there was no error because the investigator's testimony was "secondary" to the mitigation evidence presented by the defense, and not "mitigating evidence" in itself. (RB at pp. 90-92.) Respondent suggests there can only be federal error in excluding evidence if the court "completely exclude[d] evidence of appellant's defense." (RB at p. 92, citing *People v. Boyette* (2002) 29 Cal.4th 381, 428.) This argument fails.

First, the court excluded *all* of the investigator's testimony. Second, what matters is not the *amount* of evidence excluded but the importance of the evidence to the defense. "The Supreme Court has made clear that that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." (*Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062.) "The Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485.) "Our cases

establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

On appeal, the State minimizes the significance of testimony that would have explained why some of Thomas's family did not testify, yet at trial the prosecutor turned the absence of these witnesses into a critical issue. According to the prosecutor, the "key" to the defense case was Dr. White (29 RT 8600), but Dr. White could not be believed because she based her conclusions on "unreliable sources," i.e., unsworn testimony. (29 RT 8606.) If the jury accepted this argument (and there is no reason to believe it did not), then the defense's failure to explain why certain witnesses did not testify was fatal.

Respondent claims the investigator's testimony would not have been mitigating evidence. (RB at p. 92.) Once again, respondent's view of the evidence is too narrow. The right to present mitigating

evidence under *Lockett v. Ohio* (1978) 438 U.S. 586 necessarily includes the right to present this evidence free of impediments that would impede the jury's ability to give effect to such evidence. It is not enough "simply to allow the defendant to present mitigating evidence to the sentencer." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 318.) There must not be any impediment to the sentencer's full consideration and ability to give effect to the mitigating evidence. (*Id.* at pp. 327-328.) The court's exclusion of evidence offered to explain the absence of witnesses was a major impediment to the jury's full consideration of the mitigating evidence.

Respondent argues the prosecutor was entitled to argue the inference to be drawn from the absence of certain witnesses. (RB at p. 93.)[6] This is true but beside the point. The issue here is whether the court erred in denying Thomas the opportunity to present evidence to explain why these witnesses were absent. Allowing

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[6] However, as argued in the misconduct section, the prosecutor's argument was not fair comment on the evidence because he had reason to believe that the witnesses were absent from trial for reasons other than antipathy to Thomas. (See Argument X(A), *infra*.)

speculation why certain witnesses did not testify but excluding *evidence* to explain their absence is a serious due process violation. "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." (*United States v. Nixon* (1974) 418 U.S. 683, 709.)

The court erred in excluding this evidence. The prosecutor exploited the error exhaustively and therein lies the prejudice. This is discussed next.

X. The Prosecutor Twice Committed Misconduct By Arguing "Facts" He Knew To Be Untrue.

A. The prosecutor argued that the defense was unbelievable because certain witnesses refused to testify in Thomas's defense when the prosecutor knew that the defense had offered to present testimony to explain the absence of those witnesses.

As noted above, Thomas's counsel told the court he wanted to call the defense investigator to testify and explain to the jury the reason certain witnesses were not called to testify in the defense case. (28 RT 8417.) The court immediately stated that calling the investigator would be unnecessary because the court was not going to allow the prosecutor to argue "that you should have had all those people here." (28 RT 8418.) The prosecutor agreed; he said the jury should be instructed that "neither side is required to call all witnesses." (28 RT 8418.) Evidently believing that the court and prosecutor meant what they said, defense counsel did not call the investigator to explain that various members of Thomas's family could not testify because they were ill, dead, or otherwise unavailable.

In closing argument, the prosecutor reversed course. He did not

argue that neither side was required to call witnesses; instead, he argued the defense case was "unreliable" because the jury had not heard "from the best witnesses on this point." (29 RT 8606.) The prosecutor even claimed that the only reason the witnesses were not present was because they "didn't care enough about Alex Thomas." (29 RT 8677.) "If there were witnesses out there who had good things to say about Alex Thomas, they would have been here. What you can infer from their absence is they didn't care enough about Alex Thomas to be here." (29 RT 8677.) The prosecutor argued there was no reason for the witnesses to be absent, since the defense could have issued subpoenas to secure their attendance. (29 RT 8677.)

Respondent argues a party may legitimately comment on the "state of the evidence," and that such argument is only misconduct when the witness is unavailable. (RB at p. 98.) Appellant does not dispute that, in general, a party may comment upon the opposing party's failure to call logical or necessary witnesses. (See *People v. Ford* (1988) 45 Cal.3d 431, 448.) The misconduct here is that the

prosecutor sucker punched the defense by remaining silent when the court told the defense it would not be necessary to call a witness to explain why certain witnesses did not testify because the court was not going to allow the prosecutor to argue "that you should have had all those people here." (28 RT 8418.) Respondent conspicuously avoids any mention of the court's ruling in its brief, but the court made the statement, the prosecutor heard it, and yet did not object or in way indicate that he intended to argue exactly what the court had just said he could not argue.

Whether the prosecutor's action is characterized as a wilful refusal to abide by the court's ruling, or a deceptive tactic amounting to misconduct, it undermined the reliability of the penalty trial. Dr. White's account of Thomas's background and upbringing was strong mitigating evidence. Although the prosecutor had the right to argue against Dr. White's testimony, he did not have the right to tell the jury that certain people did not testify because "they didn't care enough about Alex Thomas to be here" when (a) he did not know that to be true, (b) he had reason

to believe it was not true and, (c) he knew that, but for his silence in the face of the court's ruling, the defense was ready and able to put on evidence to show it was not true. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570 (misconduct for prosecutor to argue against the admission of evidence and then to argue incriminating inferences from the absence of that very same evidence); *United States v. Reyes* (9th Cir. 2009) 577 F.3d 1069, 1077 ("improper for the government to present to the jury statements or inferences it knows to be false or has very strong reason to doubt").)

Moreover, a criminal trial is not a shell game. The government cannot abuse the judicial process by first advocating one position, and later, if it becomes beneficial, asserting its opposite. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) "'Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' " (*Ibid.*) "Judicial estoppel is intended to protect against a litigant playing

fast and loose with the courts." (*Russell v. Rolfs* (9th Cir. 1990) 893 F.3d 1033, 1037.)[7]

The decision to sentence a man to death should turn on facts, not on the clever games of attorneys. If the prosecutor intended to discredit Thomas's mitigation defense by pointing to the absence of logical witnesses, he should have revealed his intention when defense counsel raised the issue of calling his investigator to testify. Having failed to do so, he was estopped from taking a contrary position later in the trial.

This misconduct injured the defense. Error in the penalty phase is prejudicial if there is a reasonable possibility such error affected

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[7] California, along with numerous other state and federal courts, recognize the doctrine of judicial estoppel. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 118; *Yniquez v. Arizona* (9th Cir. 1990) 939 F.2d 727, 738; *United States v. $405,089.23* (9th Cir. 1994) 33 F.3d 1210, 1222, fn.12.) Judicial estoppel applies when " '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]' " (*Thomas v. Gordon, supra*, 85 Cal.App.4th at p. 118; quoting *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950, 957 and *Jackson v. County of Los Angeles*, supra, 60 Cal.App.4th at p. 183.)

the verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) Such a possibility exists here.

The case was close; the mitigating evidence was substantial. Thomas was brain damaged from birth. (27 RT 7960.) IQ scores from childhood, ranging from 58 to 68, show his mental functioning has always been impaired. Other tests of cognitive ability reveal that Thomas is in the very lowest percentiles of the entire population. (27 RT 7943.) The jury deliberated for three days. (29 RT 8768-30 RT 8845.)

The misconduct undermined the credibility of the entire defense case in mitigation. The prosecutor argued that the defense cherry-picked the evidence and failed to produce material witnesses who would have contradicted the defense's portrayal of Thomas's life. Given the pervasive effect of the misconduct, and the closeness of the penalty trial, there is a "realistic possibility" that the error contributed to the death verdict. This is especially true given that, in assessing prejudice, "a hung jury is a more favorable verdict." (*People v. Brown, supra,* 46 Cal.3d 432, 471, fn.1 (conc. opn. of

Broussard, J.).) Reversal is required under California law and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. Although the court instructed the jury not to draw any inference from Vincent McCowan's refusal to testify, the prosecutor told the jury that McCowan was afraid to testify and Thomas was "proud of it."

Here the prosecutor committed misconduct in two ways. First, although the court instructed the jury not to draw any inference from McCowan's failure to testify (26 RT 7681), the prosecutor urged the jury to infer that McCowan was too frightened of Thomas to appear in court and offer testimony against him (29 RT 8676). Second, the prosecutor committed misconduct because he knew that McCowan refused to testify not because he was afraid of Thomas, but because he wanted an earlier release from prison in exchange for his testimony. (23 RT 6946.)

Respondent argues that while in jail Thomas slashed McCowan with a sharp object and that Thomas admitted the deed to a reporter in the course of this trial. (RB at pp. 100-101.) Thus, respondent argues, it was rational for the jury to infer that

McCowan was afraid of Thomas, and proper for the prosecutor to urge the jury to draw that inference. (RB at p. 101.) Further, respondent says there can be no harm because the court instructed the jury not to draw any inferences from McCowan's failure to testify. (RB at p. 101.)

But the fact the prosecutor asked the jury to ignore the court's instruction is the problem, not the solution. The court's instruction was based on the fact that there was no evidence before the jury as to why McCowan refused to testify, and thus no rational inferences could be drawn from his refusal. The jury did not see or hear McCowan's refusal. Nor did the jury know anything of the circumstances surrounding the alleged jail assault and there is no way of telling who provoked the incident - Thomas may have been acting in response to a threat from McCowan.

Thus, the prosecutor's violation of the court's instruction was itself misconduct, which was then compounded by an argument urging the jury to draw an inference that the prosecutor knew to be false. (See *Miller v. Pate* (1967) 386 U.S. 1, 3-7 [prosecutor commits

misconduct by arguing inferences he knows to be false]; *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 968.) Respondent claims the prosecutor's argument was fair comment. (RB at p. 101.) It was not.

This misconduct is also prejudicial. The prosecutor relied heavily on the specter of Thomas's future dangerousness in closing argument. (See 29 RT 8572, 8676.) The improper argument that Thomas had so intimidated McCowan that he refused to testify was not only inflammatory in itself, it served as circumstantial evidence that McCowan believed Thomas could be a danger to him in prison. If McCowan believed that Thomas could and would harm him in prison, how could the jury believe otherwise? The prosecutor's argument, made in violation of the court's charge to the jury, and without a shred of evidentiary support, was prejudicial error. Reversal is required.

XII. The Court Erred In Admitting Ricardo Jones's Prior Testimony; The Prosecution Did Not Prove Jones Was Unavailable To Testify.

A. The prosecutor knew Jones was a flight risk when the subpoena was first served, but made no effort to secure his attendance at trial.

The court allowed the prosecution to read into the record the prior testimony of Ricardo Jones on the ground that Jones was "unavailable" as a witness under Evidence Code section 240, subdivision (a)(5).) (25 RT 7506.) Jones's prior testimony identified Thomas as the man who shot and killed Daniel White, a crime to which Thomas pleaded guilty to manslaughter. However, the prosecutor used Jones's testimony to argue that Thomas in fact committed a far more serious crime: deliberate and premeditated murder. Jones's testimony was critical to this argument; Jones was the only witness to the shooting and the prosecutor could not make the argument without his testimony. (25 RT 7571.)

The prosecutor knew from the beginning that Jones was a substantial risk to disappear. The prosecutor admitted he "always had [] doubts as to whether or not [Jones] would appear." (23 RT

6832.) The prosecutor also knew that:

- Jones was under a body attachment order when he testified the first time, at the Daniel White preliminary hearing.
- Jones had already stated he would not cooperate.
- Jones was an alcoholic.
- Jones was "not reliable." (23 RT 6832.)

The prosecutor served a subpoena on Jones and simply hoped he would appear for trial despite knowing that the chances Jones would obey the subpoena were almost nil. A reasonable person, knowing what the prosecutor knew at the time he served the subpoena, would have taken steps to make sure Jones did not disappear in the few weeks remaining before trial.

This is not hindsight. It is a legal requirement that existed well before this trial. In 1986, 14 years before this trial, the California Supreme Court ruled that the "obligation to use reasonable means to procure the presence of the witness includes not only "the duty to act with due diligence in attempting to make an absent witness present" but also "the duty to use reasonable means to prevent a

present witness from becoming absent." (*People v. Louis* (1986) 42 Cal.3d 969, 991[citation omitted].) In other words, it is insufficient to serve a subpoena on a party when there is good reason to believe the person will not obey the subpoena. It is not enough to search for the missing person after they have predictably disappeared.

Respondent claims the prosecution was "not required to take extensive preventative measures to secure Jones's attendance." (RB at 110.) Respondent cites *People v. Wilson* (2005) 36 Cal.4th 309, which itself cites *People v. Louis, supra,* 42 Cal.3d 969, the case relied upon by Thomas in his opening brief. Thus, the parties agree on the controlling authority.

Wilson, citing *Louis,* holds that the prosecution is not required to take a witness into custody "absent knowledge of a 'substantial risk that this important witness would flee.'" (36 Cal.4th at p. 342.) Here, the prosecution had such knowledge.

The facts of *Wilson* are not similar to the facts of this case. In *Wilson,* the defense argued that the prosecution was lax for failing

to locate and detain a witness in November 1992, 15 months before the trial began. The Court rejected this argument, holding there was no evidence that the prosecution knew at that time the witness was a "substantial risk" to disappear. (*People v. Wilson, supra,* 36 Cal.4th at p. 342.)

That is not the case here. Here, the prosecutor "always" had doubts whether the witness would appear. In this case, the witness was contacted not 15 months before trial, but just weeks before the trial began. Instead of simply serving a subpoena on a witness that was an obvious threat to disappear, a reasonably prudent prosecutor would have taken the witness into custody, at least for the purposes of a conditional examination.

But of course the prosecutor here had no incentive to secure Jones's attendance at trial. Jones's prior testimony fit the prosecutor's needs perfectly. Making sure Jones appeared at trial served only to expose him to cross-examination where he might retract or change his earlier testimony.

This Court must make an independent review of the trial court's

due-diligence determination. (*People v. Wilson, supra,* 36 Cal.4th at p. 341.) Given that the prosecutor knew that Jones was not going to obey the subpoena, the trial court plainly erred in allowing Jones's prior testimony to be read to the jury.

B. Allowing the jury to hear unconfronted, hearsay testimony that Thomas committed first degree murder was prejudicial error.

In the White case, Thomas was convicted of voluntary manslaughter. The prosecutor, however, used Jones's hearsay prior testimony to argue to the jury that Thomas in fact committed a more serious crime: deliberate and premeditated murder. Without Jones's hearsay testimony, this argument could not have been made. To be sure, a Thomas's prior criminal record was substantial, and the jury would have learned of the manslaughter conviction even without Jones's testimony, but even a lay juror can see that a deliberate and premeditated murder is a far more serious crime than manslaughter. An allegation of deliberate and premeditated murder should not rest on hearsay, especially in a capital case, especially when the prosecution was knew of the

significance of the evidence and the obvious risk that the witness would disappear without testifying.

Further, the absence of cross-examination in this case prevented the defense from drawing out of Ricardo Jones his observations of Thomas's demeanor and appearance during the White incident. Defense counsel in the White case had no motive to elicit from Jones evidence of Thomas's state of mind, such as drug use, intoxication, or emotional or mental disturbance, that could have been used in the penalty phase of the capital case to mitigate Thomas's culpability for the White homicide.

As discussed above, the penalty trial was a close case. The mitigation evidence was extremely strong. In a close case, every piece of evidence is critical. Here, the erroneous admission of Jones's hearsay testimony allowed the jury to conclude that Thomas had committed the deliberate and premeditated murder of Daniel White. Given the materiality of Jones's hearsay testimony, its erroneous admission cannot be deemed harmless. Reversal is required.

Conclusion

For the reasons stated above, and in the opening brief, the judgment and penalty must be reversed.

Date: 10/5/2009 Respectfully submitted,

Robert Derham

Attorney for appellant Alex Dale Thomas

Word Count

I certify there are 13,681 words in the appellant's reply brief and the brief complies with the word-number limit set forth in rule 8.630.

Robert Derham

CERTIFICATE OF SERVICE

I, Robert Derham, am over 18 years of age. My business address is 400 Red Hill Avenue, San Anselmo, CA 94960. I am over 18 years of age; I am not a party to this action. On October _____, 2009, I served the **Appellant's Reply Brief** upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Anselmo, CA, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October _____, 2009, in San Anselmo, California.

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