IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

KENNETH RAY BIVERT

Defendant and Appellant

S099414

Monterey County Superior Court No. SS991410
The Honorable Wendy C. Duffy, Judge

APPELLANT'S REPLY BRIEF

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THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. KENNETH RAY BIVERT Defendant and Appellant	S099414

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant Kenneth Ray Bivert hereby reaffirms the arguments made in his opening brief on appeal and responds to some of the arguments contained in respondent's brief. As will be explained, this court should reverse not only the judgment of death, but also appellant's convictions.

ARGUMENT

I.

THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY BY DENYING APPELLANT'S MOTION TO HAVE SEPARATE JURIES FOR THE GUILT PHASE AND THE PENALTY PHASE OF HIS TRIAL

The trial court denied appellant his constitutional rights to a fair trial and a fair and impartial jury under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, section 16, of the California Constitution by denying his request for a different jury in the penalty phase of his trial.

The prosecution had one very strong factor in aggravation to present in the penalty phase – appellant's three prior murders. The defense had one very strong factor in mitigation to present in the penalty phase – the fact the victim was a child molester. Because of the court's ruling denying separate juries (31 RT 6003-6004; 64 RT 12,604-12,605), the prosecution was able to ask the prospective jurors about their view of the appropriateness of a death sentence for the murderer of a child molester but, because such questioning would have prejudiced appellant in the guilt phase of the trial, the defense was unable to ask the prospective jurors if they would automatically vote for death in any penalty phase in light of

appellant's prior murder convictions.

As this court has stated, "Recent decisions of this court have emphasized the importance of meaningful death-qualifying voir dire." (*People v. Stitely* (2005) 35 Cal.4th 514, 539.) Because the trial court's ruling denying separate juries resulted in appellant being unable to ask prospective jurors whether his prior murder convictions would cause them to automatically vote for the death penalty, appellant was deprived of meaningful voir dire.

As detailed in appellant's opening brief (AOB 55-56), the prosecution discovered that certain prospective jurors who were generally strongly in favor of the death penalty would not be jurors desired by the prosecution in a case where the victim was a child molester. But, while the prosecutor was able to "weed out" jurors who would give appellant's mitigation serious consideration, appellant's trial counsel, who were concerned about having jurors who would participate in the guilt phase of the trial learning about appellant's prior murder convictions of which evidence could be presented only in any penalty phase, could not ask questions that focused on those convictions. As a practical matter, appellant's counsel could not ask prospective jurors how appellant's status as a juvenile at the time of the prior murders, or his drug use some time prior to the murders which apparently resulted in a personality change (64

RT 12,667-12,668, 12,675-12,676), might affect their approach to the case.

Like the trial court, respondent relies on this court's decision in *People v. Nicolaus* (1991) 54 Cal.3d 551. (RB 15.) In *People v. Nicolaus, supra,* 54 Cal.3d at page 573, this court suggested that defense counsel who were concerned about alerting prospective jurors to prejudicial evidence during voir dire could ask prospective jurors if they would automatically vote for the death penalty in the event there was a true finding about a broad range of special circumstances. In accordance with this awkward recommended procedure, appellant's counsel at times asked prospective jurors whether they would automatically vote for the death penalty in the event of a true finding of a broad range of special circumstances, which included the special circumstance of prior murder convictions. (36 RT 7093-7094, 7100-7101, 7139-7140, 7146; 37 RT 7250-7251, 7273-7274; 38 RT 7491-7492; 39 RT 7681-7682; 40 RT 7898; 41 RT 8079; 42 RT 8283-8285; 43 RT 8480-8481; 44 RT 8676-8677.)

Only once did any of these questions prompt any meaningful answers from the prospective jurors as to the special circumstance of a prior murder conviction. Specifically, as discussed at pages 77 to 78 of appellant's opening brief on appeal, Prospective Juror no. 8, when asked if a true finding of any listed special circumstances would cause him to necessarily vote for the death penalty, questioned why someone previously

convicted of murder would have the "opportunity" to kill again. (36 RT 7093-7094.)

Although the California Legislature has expressed a preference for single juries in capital cases, trial courts retain the discretion to empanel a separate jury for the penalty phase of a capital case "for good cause shown." (Pen. Code, § 190.4, subd. (c)); *People v. Yeoman* (2003) 31 Cal.4th 93, 119.) But even though a trial judge has broad latitude in structuring and conducting voir dire, a defendant's Sixth Amendment right to an impartial jury and Fourteenth Amendment right to due process require that the court ask sufficient questions during voir dire so that "fundamental fairness" is guaranteed. (*Mu'min v. Virginia* (1991) 500 U.S. 415, 425-426 [114 L.Ed.2d 493]; *Turner v. Murray* (1986) 476 U.S. 28, 36, fn. 9 [90 L.Ed.2d 27]; *People v. Wilborn* (1999) 70 Cal.App.4th 339, 345-348.) Appellant's case is distinguishable from his court's decision in *People v. Nicolaus, supra,* 54 Cal.3d 551, because, in appellant's case, not only were defense counsel prevented from conducting a meaningful voir dire about how appellant's prior murder convictions, which were the key factor in aggravation, might influence a decision in the penalty phase, but the prosecution was able to freely voir dire the jury concerning the sole circumstance of mitigation of any substance.

In any event, opinions by other state courts address this

problem in a more compelling fashion than *Nicholas*, which should be reconsidered. In *State v. Beigenwald* (1991) 126 N.J. 1, 594 A.2d 172, the Supreme Court of New Jersey held:

> Because of the prejudice that could be engendered by *voir dire* prior to the guilt phase about a defendant's other murder convictions that are not otherwise admissible as evidence during that portion of the case, *see Evid.R.* 55, that questioning should almost invariably come only after a jury has found a defendant death eligible. See *State v. Pinnell* (1991) 311 Or. 98, 121, 806 P.2d 110, 116 (finding that "objective of a bifurcated trial was thwarted" by *voir dire* before guilt phase that "implied that defendant had previously been convicted of other crimes").

(*Id.* at pp. 44-45.)

The New Jersey Supreme Court stated that a defendant's right to voir dire prospective jurors about prior murder convictions "most likely will require a two-jury system for all capital cases in which the State seeks to prove that factor." (*Id.* at pp. 43-44.) Such a statement rings true even more in the present case, where the trial court's denial of the motion for separate juries resulted in the prosecution's being able to voir dire prospective jurors on the overriding factor in mitigation (that the victim was a child molester) while appellant's trial counsel were unable to voir dire the prospective jurors on the overriding factor in aggravation (the three prior murders). Under the particular facts of this case, the trial court's denial of a separate jury for the penalty phase of the trial resulted in a denial of appellant's right to a fair trial and a fair and impartial jury.

II.

BY GRANTING THE PROSECUTION'S MOTION TO EXCUSE PROSPECTIVE JUROR NO. 3 FOR CAUSE, THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY

By granting the prosecution's motion to excuse Prospective Juror no. 3 for cause because of her views concerning the death penalty, the court violated appellant's federal constitutional rights to an impartial jury, due process of law, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Although Prospective Juror no. 3 at times gave conflicting answers, it ultimately became clear that she would have based her vote in any penalty phase of the particular facts of the case.

As appellant acknowledged in his opening brief on appeal (AOB 66), Juror no. 3's answers in the juror questionnaires concerning the death penalty were contradictory and indicated confusion on her part. (4 CT 1085-1089.) When first questioned during voir dire, Juror no. 3 stated she was in category three of the court's four categories for death penalty qualification – that is, she believed in the death penalty, but could not personally vote for it. (36 RT 7049.) However, later, when asked by the court whether, if she could vote for a verdict of guilty in the trial of

someone who had killed a child molester, Juror no. 3, who considered child molesters to be "monsters" (4 CT 1089) answered, "I don't know. I don't know. I'll be honest with you, I don't know." (36 RT 7088.) Concerning whether she believed that the death penalty would not be appropriate for someone who had taken the life of a child molester, Juror no. 3 answered, "Probably. Probably." (36 RT 7088-7089.)

Then, the prosecution referred to Juror No. 3's agreement in the juror questionnaire with the statement, "If the murder victim was a child molester, that fact alone would prevent me from voting for the death penalty" (4 CT 1089), and asked Juror no. 3 if that answer was accurate. (36 RT 7089.) Juror no. 3 explained, "You know, I'm kind of – maybe a not sure would have been good there. I really can't answer that question. Honestly, I can't." (36 RT 7089.) Juror no. 3 still agreed with her statement that child molesters were "monsters." (36 RT 7090.)

The court then excused the prospective juror for cause on the motion of the prosecution, making a finding that "because of her views as she stated . . . she would be prevented or substantially impaired from being neutral." (36 RT 7090.) The prosecution exhausted later all its peremptory juror challenges. (45 RT 8853.)

Appellant and respondent agree that the standard as to whether a prospective juror should be excused for cause due to his or her

position as to the death penalty is whether the prospective juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (See *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841].) However, the parties disagree whether Prospective Juror no. 3 fell within the above category.

Respondent cites various cases, including the recent United States Court decision of *Uttecht v. Brown* (2007) ___ U.S. ___ [127 S.Ct. 2218, 167 L.Ed.2d 1014] for the proposition that, when a prospective juror gives equivocal or conflicting answers, the trial court's assessment is generally binding on appeal. (RB 16.) However, in *Utrecht*, the United States Court explained:

> 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 . . . .

(*Id.* at p. 2221.)

Therefore, a reviewing court should examine equivocal statements and determine for itself whether they actually represent a real ambiguity in the juror's views or may have been just concessions wheedled out of the juror.

Juror no. 3 ultimately explained that, in the appropriate case, she could vote for the death penalty of the murderer of a child molester – notwithstanding her general position that murders of child molesters usually

would not call for the death penalty. (36 RT 7088-7089.) The fact that Juror no. 3 maintained her position that child molesters were "monsters" (36 RT 7090) did not logically contradict the clear implication that she could vote for the death penalty for the killer of a child molester. In the words of *Wainwright v. Witt, supra*, 469 U.S. at page 424, her views would not have "prevent[ed] or substantially impair[ed]" her performance as a juror.

Appellant's case contrasts with numerous cases where it was held that a prospective juror who appeared equivocal or provided conflicting responses was properly found to be substantially impaired in his or her duties as a juror because, in those cases, the prospective juror ultimately expressed the view that he or she would not or could not impose the death penalty. (See e.g., *Wainwright v. Witt, supra*, 469 U.S. at p. 415 [the prospective juror had personal beliefs against the death penalty that she believed would interfere with her judging guilt or innocence]; *People v. Kaurish* (1990) 52 Cal.3d 697, 697-700 [although in the abstract the juror would endeavor to follow the judge's instructions, when confronted with the prospect of voting for the death penalty, the juror repeatedly expressed an inability and unwillingness to do so]; *People v Wharton* (1991) 53 Cal.3d 522, 587-589 [although the juror did not unequivocally rule out voting for the death penalty, his answers showed that it was only a

theoretical possibility and he was skeptical about it being possible]; *People v. Frierson* (1990) 53 Cal.3d 730, 742-743 [the prospective juror responded, "I think so," to a question about whether he would refuse to vote for death regardless of the evidence]; *People v. Breaux* (1991) 1 Cal.4th 281, 310 [similar]; *People v. Cooper* (1991) 53 Cal.3d 771, 809-810 ["I cannot do it," "I will not do it"]; *People v. Livaditis* (1992) 2 Cal.4th 759, 772 [the juror was willing to consider the death penalty in other cases, although he was opposed to death in this case]; *People v. Hill* (1992) 3 Cal.4th 959, 1003-1005 [after extensive questioning, the prospective juror did not think he could render a verdict that would put the defendant to death].)

Because the erroneous excusal of even one juror in violation of the *Wainwright v. Witt* standard constitutes grounds for an automatic reversal of the penalty phase of a capital trial (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668 [95 L.Ed.2d 622]; *People v. Ashmus* (1991) 54 Cal.3d 932, 962), this court should reverse the judgment of death in appellant's case.

III.

BY DENYING APPELLANT'S MOTION TO EXCUSE PROSPECTIVE JUROR NO. 8 FOR CAUSE, THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

By denying the challenge for cause of Prospective Juror no. 8, who would have been biased in favor of a death verdict in any penalty phase of appellant's trial, and thereby forcing appellant to exercise a peremptory challenge as to that prospective juror, the court violated appellant's state and federal constitutional rights to an impartial jury, due process of law, and a reliable penalty determination, under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

As detailed in appellant's opening brief on appeal (AOB 76-77), Prospective Juror no. 8, in his juror questionnaire, indicated he was a very strong supporter of the death penalty. (4 CT 1145, 1147.) However, the prospective juror also indicated that he would not automatically vote for the death penalty. (4 CT 1147-1148.) During voir dire, Prospective Juror no. 8 stated that, although he did not personally agree with the way the death penalty functioned, he would follow the court's instructions concerning how to impose a penalty. (36 RT 7092, 7094, 7147-7148.)

But, in response to a question from appellant's trial counsel, the juror said that, if he were appellant, he would not feel comfortable

having a juror like him. (36 RT 7148.) Prospective Juror no. 8 expanded:

> If I were a person like Mr. Bivert and he is found guilty . . . of this crime beyond all reasonable doubt and all the evidence is such that the instructions are that this is a death penalty case and I would be responsible for making a decision in that matter, if all the evidence points to him, *he knows I'm going to vote for the death penalty.* Or at least he should based upon what he heard me say in this court today.

(36 RT 7148-7149, emphasis added.)

After giving Juror no. 8 another explanation of the procedure involved in the case, Juror no. 8 claimed he must have misunderstood the question of appellant's counsel and said he would discuss with the jurors which penalty to impose. (36 RT 7150.) But he added:

> Since he already knows that I am strongly in favor of the death penalty, doesn't mean I would automatically go for it [*sic*]. But since he knows that, he wouldn't want to take a chance on me being on this jury. At least I hope he wouldn't.

(36 RT 7150-7151.)

Appellant later challenged Prospective Juror no. 8 for cause. (36 RT 7159.) The court denied the challenge, stating that, although Juror no. 8 "strongly" supports the death penalty, the juror stated that he would follow the law. (36 RT 7164.) Thereafter, appellant was forced to use a defense peremptory as to Juror no. 8. (45 RT 8845.) Appellant later exhausted all his peremptory challenges. (45 RT 8852.)

As discussed in Argument II, *ante*, the standard as to whether a prospective juror should be excused for cause due to his position

regarding the death penalty is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424.) In making that determination, a prospective juror's answers at voir dire should be considered in their entirety. (*People v. Carpenter* (1997) 15 Cal.3d 312, 358.)

Respondent argues that Juror no. 8 simply "had strong opinions regarding the death penalty" (RB 20) and he merely observed that "he would not be comfortable with someone one like himself on the jury if he were appellant" (RB 24). In so arguing, respondent does not appreciate the import of the prospective juror's statement that, "[I]f all the evidence points to [appellant's guilt], he knows I'm going to vote for the death penalty." (36 RT 7148-7149.)

The trial court should have known that, just as he had stated, Juror no. 8 "[was] going to vote for the death penalty" in any penalty phase. As discussed in Argument II, *ante*, although a trial court's assessment of a prospective juror's conflicting answers during voir dire is generally binding on appeal, "[t]he 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 . . . ." (*Uttecht v. Brown, supra,* 127 S.Ct. at p. 2221.) In the present case, there was no real ambiguity in the views of

Juror no. 8. In any penalty phase of the trial he unquestionably would have voted for the death penalty.

In determining if a prospective juror has a bias, a trial court must "be zealous to protect the rights of an accused." (*Dennis v. United States* (1950) 339 U.S.162, 168 [94 L. Ed. 734].) The trial court failed to do so in appellant's case. By refusing to grant the defense challenge for cause, the court violated appellant's constitutional rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

Finally, respondent argues that appellant has waived his claim of error as to this juror by failing to object to the jury as finally constituted, even though he exercised all of his peremptory challenges. (RB 26-27.) But jury selection is a complex process, especially when few or no peremptory challenges remain. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221.) Appellant's trial counsel may have been concerned that, if the juror selection process continued, a juror even worse than Juror no. 8 may have been seated. Moreover, as this court has stated, "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of . . . fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) Accordingly, this court should not find that this claim of error has been waived.

IV.

THE COURT VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY ADMITTING IRRELEVANT AND PREJUDICIAL EVIDENCE THAT APPELLANT WAS A WHITE SUPREMACIST

Over both written and oral objections by appellant's trial counsel (3 CT 763-765; 45 RT 8821-8822), the court allowed the prosecution to introduce evidence that appellant was a racist based on the rationale that such beliefs were relevant to appellant's motivation to kill Leonard Swartz, despite the fact that both appellant and Swartz were White (50 RT 9902-9904).[1] But, if appellant did in fact kill Swartz, he did so because Swartz was a child molester, and not because he was motivated by any racist beliefs. Evidence that appellant harbored racist beliefs was therefore irrelevant. Additionally, the irrelevant evidence of racist motivation, coupled with the prosecution's use of the evidence in argument to the jury, was so inflammatory that it denied appellant his right to due process and a fair trial under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and, therefore, both his death sentence and his underlying convictions must be reversed.

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[1] Rick Dixon, whom appellant allegedly stabbed with the help of another inmate, was also White. (47 RT 9226, 9254.) The prosecution did not argue that appellant's attack on Dixon was racially motivated.

Only relevant evidence is admissible at a trial. (Evid. Code, § 350; *People v. Babbit* (1988) 45 Cal.3d 660, 681.) In appellant's case, the trial court allowed the admission of irrelevant racist evidence. Any racist beliefs appellant may have held were in no way relevant to any motive to kill Swartz. Swartz was White, just as appellant is. According to the culture among inmates at Salinas Valley State Prison, inmates of one race bore the responsibility of dealing with problem members of that race. (3 CT 647; 47 RT 9232.) Therefore, prison culture, not racist beliefs, motivated any attack appellant committed on Swartz.

Moreover, even relevant evidence is inadmissible over defense objection if prejudice from that evidence outweighs its probative value. (Evid. Code, § 352.) Even if any evidence of appellant's racist beliefs was somehow relevant, the court abused its discretion by admitting such prejudicial evidence over appellant's objection.

Where a defendant's federal constitutional right to a fair trial is not implicated, the standard for review where evidence has been incorrectly admitted is that of *People v. Watson* (1956) 46 Cal.2d 818, 835-836, i.e., whether it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Champion* (1995) 9 Cal.4th 879, 919.) However, the federal constitutional guarantee of due process is violated when a trial court admits

evidence, whether relevant or not, that is so inflammatory as to prevent a fair trial. (See, e.g., *Duncan v. Henry* (1995) 513 U.S. 364, 366 [130 L.Ed.2d 865] [a claim challenging a violation of due process must allege that the admission of evidence was so inflammatory as to prevent a fair trial]; *Romano v. Oklahoma* (1994) 512 U.S. 1, 12-13 [129 L.Ed.2d 1] [the admission of irrelevant evidence violates due process if it so infected the proceeding with unfairness as to render the jury's determination a denial of due process].)

The Ninth Circuit Court of Appeals has adhered to this standard by consistently holding that admission of irrelevant evidence violates due process if its admission rendered the trial unfair. (See, e.g., *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384 [due process is violated if contested evidence is not relevant to an essential element of the prosecution's case and renders the trial fundamentally unfair]; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 [due process is violated "if there are no permissible inferences the jury may draw from the evidence" and the testimony is "of such quality as necessarily prevents a fair trial"].)

Other circuits have similar formulations for analyzing due process violations. (See, e.g., *Bounds v. Delo* (8th Cir. 1998) 151 F.3d 1116, 1119 [state court evidentiary errors violate due process when they were "so conspicuously prejudicial or of such magnitude as to fatally infect

the trial and deprive the defendant of due process"]; *Dunnigan v. Keane* (2nd Cir. 1998) 137 F.3d 117, 125 [prejudicial evidence that is not probative of an essential element in the case violates due process when it is extremely unfair]; *Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 968-69 [the admission of irrelevant and prejudicial evidence deprived defendant of due process].)

In general, a defendant is denied a fair trial when improper evidence misled a jury, clouded its deliberations, or otherwise distracted the jury from carefully analyzing relevant evidence. (See *McKinney v. Rees*, *supra,* 993 F.2d at p. 1385 [admission of irrelevant evidence violates due process when it served to prey on the jury's emotions, making it likely that they would avoid careful analysis of relevant evidence and convict on an improper basis]; *Martin v. Parker* (6th Cir. 1994) 11 F.3d 613 [due process is violated when inflammatory remarks "invoke emotions which may cloud the jury's determination of the defendant's guilt"]; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972 [due process was violated where a review of the record strongly suggested that the contested evidence was intended to prejudice the defendants rather than address its proffered purpose].)

As this court has stated, "Theories of master racism are inherently evil." (*Deronde v. Regents of University of California* (1981) 21 Cal.3d 875, 905.) Evidence of irrelevant racist attitudes, such as occurred

in this case, can result in constitutional error. For example, in *Dawson v. Delaware* (1992) 503 U.S. 159 [117 L.Ed.2d 309], the United States Supreme Court held that the admission of irrelevant evidence that a defendant was a member of the Aryan Brotherhood prison gang violated the defendant's constitutional rights. (*Id.* at pp. 165-168)

Respondent tries to distinguish *Dawson* by arguing, "Unlike *Dawson*, appellant's belief system was directly tied to his motive for the murder of Leonard Swartz." (RB 30.) But, as discussed above, any racist beliefs on the part of appellant were irrelevant. If appellant believed that White inmates should kill White child molesters, he was merely subscribing to the prison culture according to which prison inmates dealt with problem members of their own race (3 CT 647; 47 RT 9232) and that belief did not logically imply in any way that appellant was a White supremacist.

The prosecution, in an attempt to have the jury view appellant as an evil person, persistently tried to show that appellant was a racist. This irrelevant and inflammatory evidence, along with the prosecution's frequent citing of the evidence in its opening statement and argument to the jury, permeated the entire trial and denied appellant his constitutional rights to a fair trial.

At the outset of its opening statement to the jury, the prosecution stated that appellant had assigned himself the mission to "clean

up the trash that white people let slide these days." (46 RT 9004-9005.) During its presentation of evidence, the prosecution attempted to paint appellant as a racist. Rick Dixon, who testified he was stabbed by appellant and inmate Steve Petty, stated appellant was in charge of the "woods," or White inmates, in the building where the stabbing occurred. (47 RT 9229.) According to Dixon, appellant had earlier asked him to stab a child molester in order to earn the respect of the "woods." (47 RT 9226-9227, 9254.) Over defense objections, Sergeant Jose Rocha testified both that a "peckerwood" is a White supremacist in the prison system and that the term "peckerwood" means a White inmate who is a "bleed off" of the Aryan Brotherhood prison gang.[2] (53 RT 10,478, 10,481.)

This court has stated, "As we have explained, trial courts must exercise caution in admitting evidence that a defendant is a member of a gang because such evidence may be highly inflammatory and may cause the jury to "jump to the conclusion" that the defendant deserves the death penalty." (*People v. Gurule* (2002) 28 Cal.4th 557, 653-654.) The implication that appellant belonged to the Aryan Brotherhood or a similar

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[2] Rocha's testimony may not even have been true. Not only did defense expert James Esten, a retired former Department of Corrections program administrator, testify that the term "peckerwood" means nothing other than a White male (55 RT 10,850-10,851), but Dixon also testified that "woods" simply meant White inmates (47 RT 9254).

group was both irrelevant and prejudicial.

Inmate C testified that appellant told him that one of his missions in prison was to "clean up" all the "trash" and "scum" that White people now let "slide by." (51 RT 10,019.) Appellant would tell young White inmates new to prison "what the white race is all about and what they should do." (50 RT 9876.)

Most harmful of all the testimony concerning appellant's beliefs about race was Inmate P's testimony that appellant told him he was targeting child molesters, Blacks, and rats. (52 RT 10,279-10,280.) The testimony to the effect that appellant was targeting Black inmates was not only both irrelevant and prejudicial, but even the prosecution did not believe it to be true. In its written opposition to the defense motion to exclude evidence of any racist beliefs on appellant's part, the prosecution admitted that appellant "never expressed any desire to kill members of other races, and there is no evidence whatsoever that he desires to do so." (3 CT 649.) Inmate P further testified that appellant told him of a "sort of Hitler concept" that the gene pool should be cleansed of all persons with any type of defect. (52 RT 10,285.)

In its argument to the jury after the close of evidence in the guilt phase, the prosecution continued to emphasize appellant's alleged racist beliefs. The prosecution argued that, while appellant was motivated

to kill Swartz in part to get status and in part to get transferred to Pelican Bay State Prison, part of appellant's motivation was to "clean the gene pool" in accordance with his "white supremacist philosophy." (57 RT 11,233-11,234.) Even though the statement appellant had made in a letter to another inmate, "I haven't had a smoke in ten days, yet I still would gladly beat a Muslim to death with a sack full of pork chops for a cigarette" (53 RT 10,479), was obviously a joke, the prosecution argued that the statement demonstrated appellant's White supremacist philosophy. (57 RT 11,265.) In its argument in the penalty phase of the trial, the prosecution continued to portray appellant as a racist, stating appellant was motivated to kill Swartz by his "twisted white supremacist prison philosophy." (66 RT 13,010.)

In arguing that the evidence concerning appellant's alleged racist beliefs was relevant, respondent concedes that the murder of Swartz was not a "hate" crime "in the usual sense," but then goes on to argue that the murder was racially motivated "as it came about due to appellant's desire to cleanse the White gene pool." (RB 27-28.) Respondent concurs with the trial prosecutor's statement that attempting to understand appellant's motivation for killing Swartz without considering appellant's racist beliefs was "analogous to claiming an understanding of why Hitler wished to eradicate Jews without considering Hitler's views on the Aryan

race" (3 CT 645-646). (RB 28.)

But Hitler's racist anti-Semitic beliefs underpinned his desire to kill Jews. Any desire on appellant's part to kill White child molesters, which simply conformed to a common belief among inmates (47 RT 9232), had no logical connection with appellant's beliefs concerning non-Whites. It did not imply that appellant was a White supremacist and believed that Whites were superior to members of any other race. Indeed, in written pleadings before the court, the prosecution acknowledged that each racial group in prison was responsible for "'cleaning their own house.'" (3 CT 647.)

Because there is widespread agreement in American society that racist beliefs are evil (*Oyama v. California* (1948) 322 U.S. 633, 673-673 [68 S.Ct. 269, 92 L.Ed. 249] ["[T]he majority of the inhabitants of the United States, and the majority of those in California, reject racism and all of its implications."]), the evidence of appellant's alleged racist beliefs was not only irrelevant, but it was inflammatory – especially the evidence, which the prosecution acknowledged to the court was incorrect (3 CT 649), that appellant included Black inmates among his targets. (52 RT 10,279-10,280.)

There exists a reasonable possibility that the result of the trial would have been different in both the guilt and penalty phases if the court

had excluded the irrelevant and inflammatory evidence that appellant was a White supremacist. The prosecution's evidence that appellant killed Swartz consisted principally of the testimony of prison inmates or parolees, all of whom had multiple prior felony convictions and most of whom were given consideration by the prosecution in exchange for their testimony, rendering their testimony suspect.

After Swartz was stabbed, a correctional officer performed a positive Hemastix presumptive test for blood on appellant's hands (49 RT 9634-9636, 9638; 53 RT 10,431) and DNA testing later revealed the presence of blood consistent with Swartz's blood on appellant's pants (54 RT 10,703-10,705, 10,710; 55 RT 10,803-10,804). But, someone else could have stabbed Swartz and Swartz's blood could have been transferred to appellant during the confusion that ensued following the stabbing. The prosecution used evidence that appellant was a White supremacist to overcome the deficiencies in its case.

Furthermore, the admission of the irrelevant and prejudicial evidence concerning appellant's alleged racist beliefs harmed appellant in the penalty phase of his trial by making him appear to be an evil person.

V.

THE COURT ERRED BY INSTRUCTING THE JURY WITH A VERSION OF CALJIC NO. 3.20 (CAUTIONARY INSTRUCTION – IN-CUSTODY INFORMANT) WHICH SPECIFICALLY EXCLUDED FROM THE AMBIT OF THAT INSTRUCTION THE INMATES WHO CLAIMED TO BE PERCIPIENT WITNESSES

In instructing the jury in the guilt phase of the trial, the court gave CALJIC No. 3.20, which read, in relevant part, as follows:

> The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling the witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in this case.
>
> "In-custody informant" means a person, *other than a codefendant, percipient witness*, accomplice, or coconspirator whose testimony is based upon statements made by a defendant while both the defendant and the informant are held within a correctional institution.
>
> Inmates D, C, J, R and P are in-custody informants.

(4 CT 1016; 58 RT 11,457-11,458; emphasis added.)

Prior to the court's instructions to the jury, appellant's trial counsel asked the court to modify the instruction to include Inmates A, F, and G, who claimed to have been percipient witnesses to the murder, within its ambit. (56 RT 11,014-11,017.) Inmates A, F, and G received benefits

from the prosecution, consisting of favorable housing in prison, in exchange for their testimony. (50 RT 9915, 9917-9918; 51 RT 10,032, 10,064.) None of the three inmates told authorities about what they had allegedly observed until considerably after the date of the murder. (48 RT 9250-9521; 50 RT 9913, 9918; 51 RT 10,031, 10,062; 53 RT 10,467-10,468.)

Appellant's trial counsel pointed out that those three inmates were, from the jurors' prospective, in-custody informants as much as witnesses Inmates D, C, J, R, and P, who were identified as such by the court, and that excluding those inmates from the ambit of the instruction would imply that the testimony of those three inmates need not be viewed with caution. (56 RT 11,016-11,017.) The court refused the defense request, noting that Penal Code section 1127a, subdivision (a), did not include percipient witnesses in its definition of "in-custody informants." (56 RT 11,017-11,018.) By denying the defense motion to include within the ambit of CALJIC No. 3.20 the testimony of Inmates A, F, and G who claimed to have been percipient witnesses to the murder, the trial court improperly enhanced that testimony and thereby deprived appellant of his rights to a fair capital trial under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, section 7, subdivision (a), and Article I, section 16, of the California Constitution.

Appellant recognizes that an informant's testimony is not

inherently unreliable (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250, fn. 13) and that a court does not have a sua sponte duty to instruct jurors that the testimony of an in-custody informant must be viewed with caution (Pen. Code, § 1127, subd. (b)). But, because it gave an instruction on informant testimony, the court was obliged to explain the relevant law clearly to the jurors and not mislead them. (See *People v. Saddler* (1979) 24 Cal.3d 671, 681 [a trial court has the duty to refrain from giving confusing instructions to a jury].)

The jury in appellant's case, which had been instructed that inmates D, C, J, R, and P (but not inmates A, F, and G) were in-custody informants, would have logically applied the common-sense maxim "inclusio unius est exclusio alterius" to understand that the latter three inmates were not to be considered in-custody informants because they had not been included in the court's listing. In *People v. Castillo* (1997) 16 Cal.4th 1009, the California Supreme Court described the maxim "inclusio unius est exclusio alterius"as a "deductive concept" that is "commonly understood." (*Id.* at p. 1020.) The instruction therefore was confusing the jury. It incorrectly implied that the testimony of Inmates A, F, and G, should not be viewed with the same caution as that of the other inmate witnesses. By refusing to modify the instruction as the defense requested, the court, in effect, improperly "vouched" for the credibility of those three

witnesses.

The Legislature enacted Penal Code section 1127a because:

> Numerous county jail informants have testified to confessions or admissions allegedly made to them by defendants while in custody. . . . Snitches are not persons with any prior personal knowledge of the crime. . . . They testify only that a defendant made an inculpatory statement to them while in proximity in the jail or place of custody. [¶] [Such persons] gather restricted and confidential information by duplicitous means and thereby lend the credibility of corroboration to wholly fabricated testimony.

(Assem. Com. on Public Safety, Rep. on Assem. Bill No. 278 (1989-1990 Reg. Sess.) as amended May 4, 1989; see *People v. Jones* (1988) 17 Cal.4th 279, 323 (concurring opn, Mosk, J.).)

It is important to take into account in appellant's case that inmates A, F, and G, who claimed to have seen appellant attack the murder victim, gave statements to authorities only well after the attack occurred. (48 RT 9250-9521; 50 RT 9913, 9918; 51 RT 10,031, 10,062; 53 RT 10,467-10,468.) Therefore, as opposed to being ordinary eyewitnesses, Inmates A, F, and G were just as much in-custody informants or "snitches" as Inmates D, C, J, R, and P, whom the court identified as in-custody informants and who claimed to have heard admissions from appellant. Just as Inmates D, C, J, R, and P, Inmates A, F, and G were vulnerable to state pressure to come forward with testimony favorable to the prosecution. Those latter three inmates were the type of "snitches" with which the Legislature was concerned in enacting Penal Code 1127a, just as much as

"snitches" who testify only about an alleged admission heard while in custody.

In arguing that the court acted properly, respondent relies upon the fact that, as the court noted, Penal Code section 1127a, subdivision (a), states that, for the purpose of a cautionary jury instruction, the term "in-custody informant" refers to "a[] person . . . other than a . . . percipient witness . . . whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." (RB 31-32.) But appellant's constitutional rights to a fair capital trial trump a state statute. (*Gooding v. Wilson* (1972) 405 U.S. 418, 531 [92 S.Ct. 1103].)

As discussed at pages 99 to 100 of appellant's opening brief, the testimony of Inmates A, F, and G was simply devastating to appellant's defense. All three inmates received some benefit in exchange for their testimony. (50 RT 9915, 9917-9918; 51 RT 10,032, 10,064.) By refusing appellant's request to amend the jury instruction dealing with in-custody witnesses, and thereby enhancing the testimony of Inmates A, F, and G who claimed to be percipient witnesses, the trial court rendered appellant's trial fundamentally unfair and violated appellant's federal and state constitutional rights.

VI.

IN LIGHT OF *ROPER V. SIMMONS* (2005) 543 U.S. 551 [161 L.ED.2d 1], APPELLANT'S DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE APPELLANT WAS GIVEN THAT SENTENCE PRIMARILY AS A RESULT OF MURDERS HE COMMITTED WHEN HE WAS A JUVENILE

Under recent United States Supreme Court authority, appellant's death sentence is unconstitutional because it was imposed primarily due to murders he committed when he was a juvenile. In *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1], the United States Supreme Court held that, under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, imposing the death penalty on offenders who were under the age of 18 years when their crimes were committed would constitute cruel and unusual punishment. (*Id.* at p. 578.) But appellant is facing execution mainly because of the three murders which appellant committed when he was a juvenile[3] – not because he killed a child molester in prison. Applying the plain language of *Roper v. Simmons*, appellant's

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[3] Appellant was born on January 7, 1970. (61 RT 12,019; amended prob. rep. 2 [attached to second supp. CT].) The murders of Steve Patton, Raymond Rogers, and Dawn Rogers were committed in September of 1987. (64 RT 12,625, 12,634, 12,647, 12,656-12,657.) Appellant did not turn 18 years old until January 7, 1988.

judgment of death must be reversed.

In *Roper v. Simmons, supra,* 543 U.S. 551, Simmons was sentenced to death for a murder he committed when he was 17 years old. (*Id.* at p. 555.) In reversing the death sentence, a majority of the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits capital punishment for offenders under 18 years old. (*Id.* at pp. 556-558.) The court stated that juvenile offenders have less culpability than adults and, therefore, cannot with reliability be classified among the narrow category of the worst offenders who may constitutionally be subjected to capital punishment. In making that holding, the court noted that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults," that juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and that "the character of a juvenile is not as well formed as that of an adult." (*Id.* at pp. 568-570.) The court stated, without any type of qualification, that the Eighth and Fourteenth Amendments of the Constitution "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (*Id.* at p. 578.)

According to respondent, appellant is asking this court to "expand" *Simmons* (RT 33) or create an "extension" of that decision (RB

37). However, it would be more accurate to state that appellant is merely asking this court to apply the clear wording of *Simmons*. In any event, although there may be differing opinions as to how to label *Simmons's* effect on appellant's judgment of death, it is clear, as noted above, that the United States Supreme Court in that opinion flatly held that the Constitution "forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (*Roper v. Simmons, supra,* 543 U.S. at p. 578.) There can be no reasonable difference of opinion as to the meaning of that ruling – a person cannot constitutionally be sentenced to death for crimes committed when that person was under 18 years of age.

Neither can a reasonable dispute exist as to the proposition that appellant was sentenced to death primarily due to the murders he committed when he was a juvenile. The trial court instructed the jury that it could consider both the charged offense *and* appellant's prior murders in determining which penalty to impose. (66 RT 13,030-13,031.) In its argument to the jury in the penalty phase of the trial, the prosecution repeatedly emphasized that appellant had committed four murders in all. (66 RT 13,006 [appellant "[has] taken four lives thus far"]; 13,008 [under the court's instructions, the jury was to "consider" and "take into account" the three prior murders]; 13,009 [the factors in aggravation include the three

prior murders]; 13,012 [there was no evidence that appellant was impaired when he committed the prior murders]; 13,013 [the prior murders were "grizzly" and committed "in cold blood"]; 13,015 [appellant murdered Steve Patton for "the sheer thrill of it" and the murders of Ray and Dawn Rogers were "horrific"]; 13,016 [after "coldy [blowing] [Dawn Rogers's] head off," appellant "[jiggled]" part of her brain which had landed on his foot "like Jello" and kicked it off into the river]; 13,017 [appellant committed the three prior murders]; 13,018 [appellant is "a four time murderer"].)

Accordingly, respondent's statements that "[t]he jury returned a verdict of death for the murder of Leonard Swartz" (RB 2, 33) are inaccurate. In capital trials, people commonly speak of a jury returning a death verdict for the charged offense. But a penalty phase of a capital trial can involve evidence of offenses which was inadmissible in the guilt phase because jurors can consider uncharged violent offenses committed by a defendant to determine if the death penalty is warranted. (Pen. Code, § 190.3, subd. (b).) When no evidence of other offenses is admitted in the penalty phase of a capital trial, it is accurate to say that the jury returned the death penalty based for the charged offense. It is *not* accurate to make such a statement in situations where the jury considered evidence of other offenses. In such situations, it is more accurate to say that the jury returned

a death verdict "for the charged offense and other offenses committed by the defendant."

The prior murders that appellant committed when he was a juvenile were more of a factor in the jury's reaching its death verdict than the murder of Leonard Swartz. The murders committed when appellant was a juvenile involved three victims, as opposed to just a single victim. If appellant in fact killed Swartz, he did so because Swartz was a child molester. In contrast, the evidence did not suggest that the three other murder victims were anything other than completely innocent victims.

The murders appellant committed as a juvenile were more aggravated than the murder of Swartz in other aspects. Appellant killed Steve Patton because he wanted to use his truck to rob a bank. (64 RT 12,630.) After appellant and Inmate T damaged Patton's truck (64 RT 12,654), they then took the car belonging to Raymond and Dawn Rogers for the purpose of robbing a bank. (64 RT 12,659.)

By far the most inflammatory testimony relating to any of the four murders was the testimony of Inmate T that, after part of Dawn Rogers's brain landed on appellant's foot, appellant "was making comments that this is kind of cool, jiggling it round [*sic*] like it was Jello or something on the edge of his shoe." (64 RT 12,663.) Appellant flicked the piece of Dawn Rogers's brain into the water. (64 RT 12,663.) When leaving the

murder scene in the Rogers's car, appellant "was acting completely normal, if not even jovial." (64 RT 12,664.)

Accordingly, appellant was sentenced to death primarily because of the murders he committed while he was a juvenile. It is inaccurate to state that appellant was sentenced to death for the murder of Leonard Swartz. The murder of Swartz was the murder charged in the indictment, but that murder alone did not account for appellant's judgment of death. As discussed in Argument I, *ante*, the prosecution was concerned that prospective jurors would not vote for the death penalty for someone who killed a child molester. Many people would tend to share the opinion of Prospective Juror no. 3 (discussed in Argument II, *ante*) that child molesters are monsters (36 RT 7090). In general, it can be said that people view the murder of someone because he was a child molester as less serious than other murders and, therefore, less deserving of the death penalty.

As appellant pointed out in his opening brief on appeal (AOB 106-108) and as respondent points out in its brief (RB 35-37), since *Roper v. Simmons* was decided, certain courts have held that the introduction of offenses committed when the defendant was a juvenile is proper in the penalty phase of a capital trial. Those decisions are simply wrong. *Simmons* holds that the Constitution "forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were

committed." (*Roper v. Simmons, supra,* 543 U.S. at p. 578.) Under the clear language of *Roper v. Simmons*, crimes committed when a defendant was a juvenile are inadmissible in the penalty phase of a capital trial because a defendant cannot constitutionally be executed for such crimes.

In *England v. State* (2006) 940 So.2d 389, the defendant asked that his death sentence be reversed because the trial judge based two aggravating factors on felony convictions committed when the defendant was a juvenile. As appellant did (AOB 107), respondent quotes the following language from the Supreme Court of Florida in that case (RB 35):

> In *Roper,* the United States Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper,* 543 U.S. at 578, 125 S.Ct. 1183. The Court provided a bright line rule for the imposition of the death penalty itself, but nowhere did the Supreme Court extend this rule to prohibit the use of prior felonies committed when the defendant was a minor as an aggravating circumstance during the penalty phase.

(*Id.* at p. 407.)

But in that case, as in *Melton v. State* (2006) 949 So.3d 994, 1020, where the Florida Supreme Court quoted the above language from its decision in *England*, the Florida Supreme Court was not faced with a situation such as appellant's, in which the death penalty was imposed primarily due to murder committed when the defendant was a juvenile. If the Florida Supreme Court had to confront a situation in which juvenile

offenses constituted the primary basis for a judgment of death, it might well have given the matter more consideration and reached a different result.

In any event, the Florida Supreme Court was simply wrong. *Simmons* teaches that the Constitution "forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." (*Roper v. Simmons, supra,* 543 U.S. at p. 578.) Allowing a death sentence to be based substantially, or even in part, on offenses committed when a defendant was a juvenile would violate the above rule. Appellant therefore believes that, under *Simmons*, offenses committed when a defendant was a juvenile are inadmissible in the penalty phase of a capital trial. In any event, in a case such as appellant's, where the juvenile offenses were more serious than the charged murder, *Simmons* mandates a reversal of the judgment of death.

Respondent also relies on *State v. Davis* (Tenn. 2004) 141 S.W.3d 600. (RB 35.) But, as respondent acknowledges (RB 35), *Davis* was decided before *Simmons* and turned on an interpretation of state law.

In arguing that appellant's death sentence was constitutional, respondent cites *Witte v. United States* (1995) 515 U.S. 389 [132 L.Ed.2d 351], which held that the United States Constitution allows prior offenses to be used to increase punishment under recidivism statutes. (RB 34.) Appellant has no quarrel with the general rule stated in *Witte* and agrees

that, in non-capital cases, offenses committed by a defendant when he or she was a juvenile can constitutionally be used to increase punishment. But "the penalty of death is different in kind from any other punishment imposed upon our system of justice." (*Gregg v. Georgia* (1976) 428 U.S. 153, 188 [49 L.Ed.2d 859].) The clear language of *Simmons* simply does not permit the death penalty for offenses committed when a defendant was a juvenile.

Respondent relies on California Constitution, article I, section 28, subdivision (g), which allows the use of any prior conviction, whether sustained as a juvenile or as an adult, to enhance a sentence. (RB 34.) But the United States Constitution, as construed by *Simmons*, prevails over the state Constitution or any state law. (U.S. Const. art. VI, § 2 [the federal Constitution is "the supreme law of the land"]; *Gooding v. Wilson, supra,* 405 U.S. at p. 531.)

Finally, respondent objects that this court's acceptance of appellant's position would frustrate a jury's ability to determine whether a particular defendant is "the worst of the worst" and would place someone such as appellant, who committed prior murders, on "an equal footing" with a defendant who committed his first murder as an adult. (RB 37.) However, as explained in *Simmons*, because juvenile offenders are simply not as culpable as adults, the Constitution forbids the imposition of the

death penalty on offenders who were under the age of 18 when their crimes were committed. (*Roper v. Simmons, supra,* 543 U.S. at p. 578.)

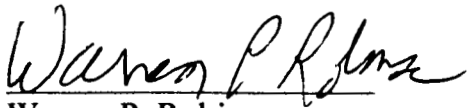
In conclusion, the jury surely chose the death penalty for appellant primarily because of the three shocking murders he committed while he was a juvenile, as opposed to the single murder of a child molester he committed in prison. Following the holding in *Roper v. Simmons* that the imposition of the death penalty for crimes committed when the defendant was a juvenile violates the Eighth Amendment, this court must reverse appellant's death sentence.

CONCLUSION

Accordingly, for the reasons stated, this court should reverse the judgment of the trial court.

Dated: July 7, 2008.

Respectfully submitted,

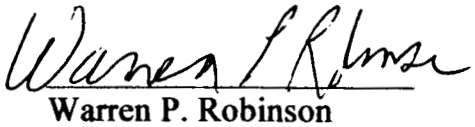


Warren P. Robinson

CERTIFICATE OF COMPLIANCE

Based on the word count of the computer program used to prepare this document, I certify that this brief uses a 13-point Times New Roman font and contains 9,024 words.

Dated: July 7, 2008.



Warren P. Robinson

DECLARATION OF PROOF OF SERVICE BY MAIL

Case Name: People v. Kenneth Ray Bivert Case Number: S099414

I declare that I am over 18 years of age, a resident of San Diego County, and not a party to the above case. My business address is 15412 Caldas De Reyes, San Diego, CA 92128-4456. I served appellant's reply brief on each of the following addressees by placing a copy of that document in a separate envelope for each addressee, sealing the envelope, and then depositing the envelope in the United States mail with the postage fully prepaid in San Diego, California, on July 22, 2008:

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

Dated this 22nd day of July 22, 2008, in San Diego, California.

Barbara J. Zinker