IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVE WOODRUFF, Defendant and Appellant.	)))))))))	No. S115378 APPELLANT'S OPENING BRIEF **DEATH PENALTY CASE**

Automatic Appeal from the Superior Court of California, County of Riverside
(Case No. RIF095875)

The Honorable Christian Thierbach, Judge

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II. INTRODUCTION

"I just don't understand." Steve Woodruff made that statement – or variations of it – as least six times on the record before and during his death-penalty trial in Riverside County Superior Court.

Mr. Woodruff did not understand his defense attorney's inexperience, unethical behavior and incompetence, which resulted in suspensions from the State Bar of California both before and after Mr. Woodruff's trial. Mr. Woodruff did not understand why the trial judge asked him repeatedly to waive his right to conflict-free counsel. Mr. Woodruff did not understand why the prosecutor said so many bad things about his defense attorney.

With an IQ as low as 66, Mr. Woodruff lacked the capacity to comprehend that his trial was a sham in every phase, violating his rights to a fair trial and due process of law. And, with a third-grade reading level, Mr. Woodruff was not even aware of the court reporter's contribution to the sham, using a "cut-and-paste" shortcut that cast doubt on the accuracy and reliability of the entire trial transcript.

In this brief, appellate counsel argues that Mr. Woodruff's lack of understanding, defense counsel's incompetence, the prosecutor's misconduct, and the trial judge's failure to take corrective action combined to produce a grossly unfair trial. As a result, Mr. Woodruff is entitled to a new trial with competent defense counsel and an unbiased judge.

III. STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code § 1239, sub. (b).)[1]

[1] All statutory references are to the California Penal Code unless otherwise indicated.

IV. STATEMENT OF THE CASE

On January 17, 2001, the Riverside County District Attorney filed a two-count felony complaint against appellant, Steve Woodruff. (CT 1:1-2.)[2]

Count 1 charged Mr. Woodruff with the murder of Charles Douglas Jacobs III, with the use of a firearm, for the purpose of avoiding or preventing a lawful arrest or perfecting an escape. Additionally, Count 1 alleged the victim was a peace officer engaged in the performance of his duties and the murder was committed while Mr. Woodruff was lying in wait. (CT 1:1; Pen. Code §§ 187, 12022.53, sub. (d), 1192.7 sub. (c)(8), 190.2, sub. (a)(5), (a)(7), (a)(15).)

Count 2 charged Mr. Woodruff with the attempted murder of Benjamin Baker with the use of a firearm. (CT 1:2; Pen. Code §§ 664/187, 12022.53, sub. (c), 1192.7, sub. (c)(8).)

Also on January 17, 2001, Mr. Woodruff appeared before Riverside County Superior Court Judge Christian Thierbach for arraignment. The judge appointed the Riverside County Public Defender's Office to represent Mr. Woodruff. Arraignment was continued one week at the request of Deputy Public Defender Gordon Cox. (CT 1:1-2, 9.)

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[2] "CT" citations refer to the clerk's transcript on appeal, "RT" citations to the reporter's transcript on appeal, "SCT" citations to the supplemental clerk's transcript on appeal, and "SRT" citations to the supplemental reporter's transcript on appeal. "PRT" citations refer to the preliminary reporter's transcript of proceedings on January 17 and 24, and February 6, 2001.

On January 24, 2001, Mr. Woodruff appeared again before Judge Thierbach for arraignment, represented by Cox. Private attorney Mark Blankenship made an oral motion to substitute in as attorney of record. Judge Thierbach asked if Blankenship had been retained by Mr. Woodruff or his family. When Blankenship answered yes, the judge granted the motion. At Blankenship's request, the judge continued arraignment two weeks to February 6, 2001. (CT 1:10; PRT 3-6.)

On February 5, 2001, the Riverside County District Attorney's Office filed a notice of intention to seek the death penalty. (CT 1:11.)

On February 6, 2001, Mr. Woodruff pleaded not guilty to all charges and denied all enhancements. A preliminary hearing was scheduled for March 8, 2001. (CT 1:14; PRT 13, 17.)

A special grand jury was convened on March 1 and 2, 2001. (CT 1:37.) On March 2, 2001, an indictment charged Mr. Woodruff with the murder of Jacobs, with use of a firearm, and with committing the murder for purposes of preventing arrest or perfecting escape. The indictment alleged the killing was of a peace officer in performance of his duties and Mr. Woodruff was lying in wait. (CT 1:15-16.) The indictment also charged Mr. Woodruff with the attempted murder of Baker, a peace officer performing his duties, with use of a firearm. (CT 1:16.)

On August 17, 2001, trial prosecutor Michael Soccio filed a request for inquiry and waiver regarding Blankenship's qualifications to try a

death-penalty case. (CT 2:351-357.) At a hearing on the request on September 14, 2001, Judge Thierbach said he had "very, very serious concerns" about Blankenship's preparation. (RT A:60.) Nonetheless, the trial judge said he did not have the power to relieve Blankenship and would not relieve him. (RT A:63.)

Time qualification of jurors began March 18, 2002. (CT 2:414; RT 1:140.) From four panels of prospective jurors that day, 154 prospective jurors were time-qualified for a two-month trial. (RT 1:341.) The judge asked his clerk to get another panel of 50 prospective jurors for the following morning (RT 1:342), from which 29 prospective jurors were time-qualified, for a total of 183 prospective jurors. (RT 1:374.)

At a discovery hearing after time-qualification concluded, the trial judge determined that Blankenship was not prepared for trial. (RT 1:419.) The judge excused the time-qualified jurors and ordered his staff to call each of them. (RT 1:457.)

Time-qualification of potential jurors began again the morning of November 7, 2002, and took most of the day. (RT 2:626-801.) Four panels of potential jurors were questioned for hardships. The judge said 159 potential jurors from the four panels completed questionnaires, which he considered "a comfortable number." He excused the fifth panel without time-qualifying its members. (RT 2:796; CT 17:4873-74.)

Jury voir dire was November 19 and 20, 2002. Twelve jurors and five alternates were selected and ordered to return on December 3, 2002. (RT 3:868-1082; CT 17:4978-4881.)

The trial started on December 3, 2002. (RT 5:1260A.) The jurors and alternates were sworn in. The first two prosecution witnesses testified. (RT 5:1263-1264; CT 17:4990.)

The prosecution called 28 witnesses at the guilt phase, before resting on January 14, 2003. (RT18:3931; CT 18:5236.)

Beginning January 15, 2003, the defense presented six witnesses in the guilt phase over four days: one of Mr. Woodruff's neighbors (RT 19:3948); one of Mr. Woodruff's brothers (RT 19:4021); a police detective (RT 19:4074); two mental health experts (RT 21:4327, 4497); and Mr. Woodruff. (RT 20:4129.) The defense rested on January 22, 2003. (RT 22:4702.)

In rebuttal, the prosecution called two witnesses: a radiologist on January 22, 2003 (RT 22:4701); and a psychologist on January 23, 2003. (RT 23:4837.)

The jury retired to deliberate at 11:27 a.m. on January 28, 2003. At 2:30 p.m., the jurors indicated they had reached a verdict. The jury had found Mr. Woodruff guilty of all charges and enhancements and had found all special circumstances to be true. (CT 19:5392-5393; RT 25:5272-5275.)

The jurors and alternates were ordered to return to court the next morning for the retardation phase. (CT 19:5393; RT 25:5277.)

On January 29, 2003, as the retardation phase was about to begin, Blankenship told the trial judge he did not have any witnesses ready. (RT 25:5281-5282.) Proceedings adjourned to the following Monday. (RT 25:5291.)

On February 3, 2003, psychologist Curtis Booraem testified for the defense that Mr. Woodruff's IQ score was 66, indicating mild mental retardation. (RT 26:5298.) No other witnesses testified at the mental retardation phase. The jurors retired to deliberate at 11:26 a.m. and at 1:30 p.m. indicated they had reached a verdict. (CT 19:5405.) The jury concluded that Mr. Woodruff was not mentally retarded. (CT 19:5406.)

The penalty phase began February 4, 2003. (CT 19:5407.)

The prosecution presented 14 penalty-phase witnesses. At the prosecution's request, the trial judge granted immunity from prosecution to penalty-phase witness Dennis Smith for his testimony concerning events at a liquor store in Riverside in 1989. (RT 26:5495.) The judge said Smith did not waive his attorney-client privilege from Blankenship's prior representation of him. (RT 26:5497-5498.) The judge said Blankenship could impeach Smith with past convictions involving moral turpitude, but could not solicit information derived while representing Smith. (RT 26:5499.)

The judge allowed Pomona police officer Richard Machado to testify about the substance of a statement taken on December 23, 1999, from Eddie Phillips, who was hospitalized following a gunshot wound. (RT 27:5556-5558.) The prosecutor had told the court, outside the presence of the jury, that Phillips, also known as Mario Brooks, was unavailable to testify at the penalty phase because he was hospitalized in Mississippi after suffering a psychotic breakdown. However, the jury never heard of Brooks' mental condition. (RT 26:5352-5353, 5464; RT 27:5550-5551; CT 19:5463.)

Four witnesses testified for the defense at the penalty phase (RT 27: 5634, 5669, 5676, 5683), three of whom had also testified in the guilt phase. (RT 19:4021; RT 21:4327, 4497.) The prosecution offered no rebuttal witnesses.

The jury retired to deliberate in the penalty phase at 2:13 p.m. on February 6, 2003. (CT 19:5473.) While the jurors deliberated, the jury foreperson sent notes requesting the video of Mr. Woodruff's questioning by two homicide detectives (CT 19:5467) and a read-back of Mr. Woodruff's testimony. (CT 19:5468.) Both requests were granted. (CT 19:5467, 5468.) The jury foreperson also sent a question to the trial judge asking what would happen after the verdict, as some jurors were willing to talk with family members, attorneys and the media, but some jurors were not willing to do so. The trial judge replied in writing that "anyone who

does not wish to talk to the attorneys, media, et al will not be required to do so and will be free to leave." (CT 19:5469.)

At 4:40 p.m. on February 6, 2003, the jurors indicated they had reached a verdict. The verdict, which was read in open court with the jurors present, fixed the penalty at death. The trial judge set sentencing for March 21, 2003, with the defense's motion to reduce penalty due by March 5, 2003. The jurors were excused. (CT 19:5474.)

In court on March 21, 2003, the trial judge said he had received a motion from Blankenship requesting a continuance. (RT 28:5781.) Over the prosecution's objection, the judge continued sentencing to April 17, 2003. (RT 28:5783, 5785.) Blankenship agreed to file his motion for new trial by April 4, 2003. (RT 28:5786.)

On April 16, 2003, Blankenship filed a motion for new trial. (RT 28:5483; CT 19:5483-5509.) In the motion, Blankenship made six[3] allegations:

1. The evidence was insufficient to support the conviction or the death penalty (CT 19:5489-5490);
2. The trial court erred in denying the defense request to play for the jury portions of Mr. Woodruff's interview with homicide detectives (CT 19:5491);

[3] The allegations in the motion are numbered I, II, III, III, IV and V.

3. The prosecutor engaged in misconduct when he waved a piece of paper in front of the jurors (CT 19:5491-5492);
4. The prosecutor engaged in misconduct in demanding the removal of a juror who was likely to be sympathetic to the defense (CT 19:5492-5494);
5. The prosecutor violated the requirements of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194; 10 L.Ed.2d 215] in failing to disclose impeachment evidence regarding two prosecution witnesses (CT 19:5494-5497); and
6. The prosecutor engaged in prejudicial misconduct in presenting the penalty-phase testimony Dennis Smith, which was of "practically zero probative value." (CT 19:5497-5498.)

At the hearing on April 17, 2003, Blankenship said he had left out of the written motion for new trial the issue of separate juries at the guilt and retardation phases, which the judge had denied pretrial. (RT 28:5793-5794.)

The judge denied the motion for a new trial. (RT 28:5811.)

Also on April 17, 2003, the prosecution presented unsworn testimony of five witnesses in opposition to the automatic motion under Penal Code section 190.4 for reduction of sentence: Charles Jacobs Jr., the victim's father (RT 28: 5817-5819); Cathy Miller, the victim's mother (RT 28:5819-5822); Tamara Jacobs, the victim's widow (RT 28:5822-5825);

Tara Schofield, the victim's sister (RT 28-5825-5827); and Yvonne Baker, the wife of Officer Ben Baker. (RT 28:5827-5831.)

Blankenship presented unsworn testimony of Mr. Woodruff's brother John Woodruff (RT 28:5831-5834) and Mr. Woodruff in support of the automatic motion for reduction of sentence. (RT 28:5834-5838.)

After reviewing the crime and the factors in mitigation, the trial judge denied the automatic motion for reduction of sentence. (RT 28:58510.)

The trial judge sentenced Mr. Woodruff to 20 years in prison for unlawful discharge of a firearm (RT 28:5850-5851); 15 years to life for attempted murder of a police officer (RT 28:5851); 25 years to life for the use of a firearm in killing Jacobs (RT 28:5859); and death for first-degree murder, with three special circumstances. (RT 28:28:5854.)

On June 13, 2003, the prosecutor and Blankenship appeared in court for the record correction hearing under Penal Code section 439.54. The trial judge said he had received a declaration from the prosecutor seeking certain record changes. Blankenship requested an extension of time to file corrections because he said the transcripts were about five feet tall. (RT 28:5861.) The judge reset the record correction hearing for two weeks later – June 27, 2003. (RT 28:5862.)

Blankenship was absent from the record correction hearing on June 27, 2003. Instead, another attorney made a special appearance on his behalf.

Blankenship had submitted a declaration saying he had "performed the tasks required for certification of the record in this case. The reporter's transcripts are complete and accurate as they stand[,] requiring no corrections on my part[.]" (1SCT 1:41.)

The trial judge ordered the additions and corrections requested by the prosecutor to be made, and then certified the record as complete. (RT 28:5863.)

V. STATEMENT OF FACTS

People v. Woodruff is a Riverside death-penalty case with a mentally limited defendant who thought his volunteer attorney had been sent by a "higher up," even though the attorney had never tried a murder case and was on probation with the State Bar of California after a suspension for incompetence and unethical behavior. It is a case in which the prosecutor made a record of defense counsel's ineffective assistance, and then took advantage of it. It is a case in which the prosecutor tried to remove the first eight black jurors, and defense counsel resisted removing any of them, including one who said his mind was already made up that the defendant was guilty and deserved to be executed. It is a case in which the trial judge, a former prosecutor, observed that defense counsel was "in over your head," but insisted he was powerless to do anything about it other than to secure waivers of the defendant's rights. It is a case in which the court reporter, whose marriage to a deputy district attorney was performed by the trial judge, cut and pasted portions of the trial transcript and purported that what happened in one place in the record happened identically in other places as well. It is a case in which the defendant said repeatedly that he did not understand what was happening.

A loud radio

When Steve Woodruff was arrested for the murder of a Riverside police officer on January 13, 2001, he was 37 years old. He had never held a job for more than 13 months. His longest job had been more than a decade earlier, bundling newspapers at the Riverside Press Enterprise, a daily newspaper he was incapable of reading with his third-grade reading level. He had suffered head injuries as a young adult. Sometimes he had lived in his car. For most of his adult life, he had survived by staying with a succession of girlfriends subsisting on welfare. (RT 1:415; RT 20:4281; RT 22:4547, 4561-4563, 4634; RT 23:4875.)

At the beginning of 2001, Steve Woodruff was living with his girlfriend Brendie Bischoff and their 4-year-old daughter, Brianna Woodruff, in the downstairs unit of a two-story, 90-year-old house on Lemon Street, a few blocks north of downtown Riverside. His mother had lived in the upstairs unit for eight years. Mr. Woodruff, his girlfriend and their daughter had moved to Lemon Street about five months earlier, when his younger brother John Woodruff and his family had moved out. (RT 20:4130-4131; RT 27:5655.)

The brothers had agreed that some family member needed to live in the house to keep an eye on their mother, Parthenia Carr, who had been involuntarily hospitalized after a mental breakdown in the mid-1990s and had lived on disability income since then. (RT 10:2278, 2281-2282; RT

27:5656-5657.) Mrs. Carr was known in the neighborhood as "Miss Polly," who liked to sit on the landing outside her front door and play "oldies music" on her radio at full volume. (RT 5:1364; RT 8:1822, 1826; RT 10:2310; RT 19:3949.) On the sunny afternoon of Saturday, January 13, 2001, Miss Polly played her radio on the landing. (RT 10:2310.)

Holly Menzies owned the home next door to Miss Polly. Ms. Menzies lived in the downstairs unit, had tenants living upstairs, and had listed the property for sale. (RT 5:1301-1303, 1308.) Miss Polly's loud radio had led to numerous disputes with Ms. Menzies. In the last several months, several calls had been made to the police, which sometimes quieted things down. (RT 5:1308, 1330, 1349-1350.) On the afternoon of January 13, 2001, Ms. Menzies called the police again. (RT 5:1308.)

Benjamin Baker was a 25-year-old rookie Riverside police officer, four weeks off probation, working the day shift on the downtown beat. (RT 5:1441, 1446, 1447.) Baker was dispatched to respond to the loud-radio complaint 13 minutes after Ms. Menzies' call. (2SCT 2:325[4].) Baker was less than three miles away when he received the radio dispatch. (RT 5:1449-1450.) He arrived in a few minutes. As he drove along Lemon Street, Baker spotted Miss Polly's white radio on the landing at the top of an exterior flight of stairs. (RT 5:1452.)

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[4] "2SCT 2" refers to the second volume of the Second Supplemental Clerk's Transcript on Appeal.

Baker parked his police cruiser in front of Ms. Menzies' house and walked next door, where he saw two small children playing on the downstairs porch. (RT 5:1450, 1454.) The screen door was closed, but the main door was ajar. He could see someone moving about inside. Baker asked if the person had called the police. A male voice from inside said no. Baker asked if it was his radio. The voice said it was his mother's. (RT 5:1455.)

Baker left the porch and went up the exterior stairs. (*Ibid.*) When he reached the top, he turned off the radio and knocked on the door. Baker would recall: "Polly Carr opened the main door and opened the screen door, and she began screaming and yelling, saying that it was her radio, it's her property. I have no right to touch her radio, that type of thing." Baker told Miss Polly that her neighbors had complained about the radio. She continued yelling. He considered her out of control. (RT 5:1456.)

Baker radioed for the assistance of a supervisor. (RT 5:1457.) Miss Polly reached down and turned the radio back on, full volume. (RT 5:1459.)

Baker went next door to talk with Ms. Menzies. Baker asked if Ms. Menzies would sign a citizen's arrest form. (RT 5:1314.) She signed, but asked if she could talk to Miss Polly to try to resolve the situation informally. (RT 5:1315.) Baker said he thought that was not a good idea,

but he followed Ms. Menzies up the stairs to Miss Polly's landing. (RT 5:1460, 1462-1463; RT 6:1466-1467.)

When Ms. Menzies reached the landing, she turned down the volume on the radio. (RT 5:1315.) Miss Polly opened the door, and yelled at Ms. Menzies to get off her porch. Ms. Menzies left and went home. (RT 5:1316.) Baker grabbed Miss Polly by the right wrist to place her under arrest. (RT 6:1469-1471.)

Another of Miss Polly's sons, Claude Carr, had been asleep in her guest bedroom. Hearing a disturbance at the front door, he went out to see what was happening. (RT 10:2267, 2530.) With Carr now confronting him, Baker released his grip on Miss Polly's wrist, and she backed up into her house. (RT 6:1472-1473; RT 11:2551.) Baker was about to arrest Carr for interfering in the arrest of his mother when Baker heard a voice from downstairs shouting that the officer better not touch "my momma." (RT 6:1474.) Baker made an "11-11" call on his police radio – officer needs immediate assistance. "I had three people there who weren't happy with me, and I decided I needed some backup there real quick." (RT 6:1476.)

Within a couple minutes, Detective Charles Douglas Jacobs III arrived in his police cruiser. (RT 6:1479.) Through the front window of the downstairs apartment, Mr. Woodruff could see Jacobs park in front of the house, get out of the car and run toward the stairs. (RT 20:4177-4178.) As Jacobs went up the stairs, Baker came down. (RT 6:1480.) Baker briefed

Jacobs on the situation: An uncooperative woman upstairs was refusing to turn her radio down; a son approached Baker upstairs; and another guy with a threatening voice was in the downstairs unit. Baker suggested they wait for the police supervisor to arrive before arresting Miss Polly. (RT 6:1481-1482.)

From inside his apartment, Mr. Woodruff could hear the officers talking. He said he heard one officer say, "I thought you was gonna wait for a sergeant," and the other officer say, "I ain't waitin' on nobody." (RT 20:4258.) The two officers climbed the stairs. (RT 20:4180.) Mr. Woodruff went to a bedroom closet, got a handgun and placed it on top of his television. (RT 20:4181, 4183.)

When Baker and Jacobs approached the top of the stairs, they told Miss Polly she was being arrested for disturbing the peace. According to Baker, he grabbed Miss Polly's right wrist; Carr tried to grab Baker; Jacobs grabbed Carr by the left wrist; Miss Polly pulled away from Baker; and Baker let go of Miss Polly so he could assist Jacobs with Carr. (RT 6:1483-1485.)

Mr. Woodruff heard his mother say, "You're hurtin' me." He grabbed the handgun from on top of the television and went out on the porch. (RT 20:4186-4190.)

Neighbor Mark Delgado testified that he was in his driveway washing his wife's car the entire time Baker was across the street. (RT

7:1819.) Delgado said Mr. Woodruff came out onto the porch carrying a handgun in his right hand, went over to the staircase, held the gun up, fired twice, and walked back into the house. (RT 7:1829-1830.)

Ms. Menzies said she watched from her bathroom window, though she could see only the legs from the knee down of three people on the landing. (RT 5:1316.) She said she heard Carr call out, "No, don't," and then she heard gunshots. (RT 5:1318.) She testified that she initially thought a police officer had shot one of her neighbors. (RT 5:1411.)

Baker said he heard a gunshot, let go of Carr, dropped his handcuffs, grabbed his gun, and saw Mr. Woodruff's gun pointed in his direction. Baker said he fired twice, entered Miss Polly's apartment, and then reached out and fired a third shot. (RT 6:1487-1490.)

When the shooting stopped, Baker saw Jacobs lying on his back just inside Miss Polly's apartment, his feet still on the landing. Blood was gushing from Jacobs' nose. (RT 6:1490-1491.) Baker made a call on his police radio of "11-99," officer down. (RT 6:1491-1492.)

Soon, officers responding to the earlier 11-11 call arrived from all directions – city police officers, and also California Highway Patrol officers, sheriff's deputies and university and community college police officers. (RT 8:1962-1963; RT 12:2757.) Three Riverside officers took positions behind palm trees in front of the house. (RT 8:1963; RT 10:2191.)

In a few minutes, from inside the downstairs unit a voice called out, "Hey, I'm coming out." (RT 10:2193.)

After firing the shots up the stairs, Mr. Woodruff had gone back inside his apartment, had gotten a rifle from the pantry and had returned to the front door. When he looked out, he saw police officers everywhere. He took off all his clothes so the officers would know he was unarmed, threw the rifle out the front door, shouted, "I give up," and crawled out naked. (RT 20:4195-4196.)

Officers surrounded Mr. Woodruff, handcuffed his hands behind his back, and placed him in a police cruiser. (RT 12:2675-2676.) He was taken to the detective bureau, where he was given an orange jumpsuit. (RT 10:2236.) The officer who drove him to the detective bureau testified that Mr. Woodruff volunteered statements that he did not mean to kill the officer – he just panicked. He said he did not want the officer to die. (RT 10:2198-2199, 2229.)

An ambulance took Jacobs to Riverside Community Hospital, where he was pronounced dead at 3:07 p.m., about 40 minutes after the shooting. The cause of death was determined to be a penetrating gunshot wound to the head that entered the left nostril and lodged in the right rear of the skull. (RT 12:2761-2763; RT 18:3920; CT 2:570.)

Defense counsel

When Mark Blankenship volunteered to represent Steve Woodruff in his capital murder case, Mr. Woodruff thought "there is a higher up that sent Mr. Blankenship to me." (RT A:62.)

Defense and prosecution experts would later agree that Mr. Woodruff had low intelligence – their only dispute was how low. The defense expert calculated Mr. Woodruff's IQ as 66, mildly mentally retarded. (RT 22:4543.) The prosecution expert rated Mr. Woodruff's IQ as 78, borderline but still well below average. (RT 23:4901.)

Because of his mental limitations, Mr. Woodruff had no way of knowing or appreciating just how unqualified his attorney was to represent him. When Blankenship volunteered to represent Mr. Woodruff pro bono, Blankenship was on probation with the State Bar of California, having been reinstated to practice just three months earlier after completing a six-month suspension for incompetence and unethical behavior. Blankenship was primarily a civil practitioner and had never tried a murder case, let alone a death-penalty case. (RT A:33; RT 15:3299.)

At Blankenship's second appearance on Mr. Woodruff's behalf, February 6, 2001, the trial judge confronted Blankenship in chambers with what the judge characterized as "courthouse gossip and speculation" regarding Blankenship's suspension from practice. (PRT 8.) Blankenship

confirmed his previous six-month suspension but said he had been readmitted to practice with five years' probation. (PRT 8-9.)

Trial prosecutor Michael Soccio had his own concerns, which grew over time. After seven months of dealing with Blankenship on pretrial matters, Soccio filed a written request for the trial court to inquire into Blankenship's competence to try a capital case and for the trial court to obtain waivers from Mr. Woodruff of his right to effective assistance of counsel. (CT 2:351-356.)

Five times before the trial began, the trial judge sought to have Mr. Woodruff waive his rights to effective assistance of counsel and/or conflict-free counsel. (RT A:61-62; RT 1:451; RT B:483-484, 486, 585.) A sixth waiver inquiry came during the guilt phase of trial, when the judge halted the proceedings to ask Mr. Woodruff if he wanted to continue the trial with Blankenship as his counsel. The judge told Mr. Woodruff: "I believe your case was prejudiced extremely" by Blankenship's cross-examination of the prosecution investigator, in which Blankenship solicited the investigator's opinion that the defendant was guilty and the reasons for that opinion. (RT 16:3610-3618.) At no time did the judge inquire into Mr. Woodruff's competence to waive his constitutional rights, in spite of Mr. Woodruff's repeated statements that he did not understand what the judge was saying to him. (RT A:57; RT B:483; RT 16:3612.)

Mental retardation

Eight months after taking the case, without conducting any investigation into Mr. Woodruff's mental state, Blankenship declared at a hearing that his client was competent and did not have an insanity defense at all. Blankenship told the court: "I haven't evaluated that issue, and I don't intend to." (RT A:44.)

However, nine months later, Blankenship came into court and announced that he needed to make a motion to dismiss the death penalty in light of *Atkins v. Virginia*[5], an opinion the United States Supreme Court had just issued holding that mentally retarded defendants could not be executed. (RT B:510.)

In the meantime, four days before the scheduled start of jury selection, Blankenship had contacted a potential defense expert by telephone for the first time. Blankenship asked Dr. Curtis Booraem, a clinical psychologist, to conduct a standard psychological evaluation. Booraem specialized in sexual dysfunction and had never evaluated anyone at a jail. (RT 22:4536, 4592-4594.) At trial, Booraem testified that he had been given no reason to suspect Mr. Woodruff was mentally retarded before he saw him. (RT 22:4536.)

[5] (2002) 536 U.S. 304 [122 S.Ct. 2242].

Booraem's approach was to evaluate Mr. Woodruff first with a 567-question MMPI[6] test, which was read to Mr. Woodruff by Blankenship's paralegal because of Mr. Woodruff's inability to read. Booraem administered the WAIS-III[7] intelligence test himself. (RT 1:415.)

Booraem's preliminary assessment was that Mr. Woodruff had a full-scale IQ of 69, indicating that he was mildly mentally retarded. (RT 22:4542.) Two months later, after re-evaluating his data, Booraem revised his assessment down three points. (RT 22:4543.)

Prosecution psychologist Dr. Craig Rath testified in the guilt phase that he did not use the MMPI in evaluating Mr. Woodruff, calling that test "totally inappropriate" for someone thought to be mentally retarded because it requires a sixth- or seventh-grade reading level to be valid. (RT 23:4896-4897.) Five months after Booraem's testing, Rath also administered the WAIS-III to Mr. Woodruff, although studies had indicated that repeat test results after such a brief interval would be invalid. Nonetheless, Rath assessed Mr. Woodruff as having a full scale IQ of 78, above the cutoff for mental retardation. (RT 23:4901; CT 17:4849.)

The day before the retardation phase was scheduled to begin, Blankenship told the trial court he had four witnesses: Mr. Woodruff's mother and brother John Woodruff, and experts Booraem and Dr. Joseph

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[6] Minnesota Multiphasic Personality Inventory
[7] Wechsler Adult Intelligence Scale, third edition

Wu, all of whom had testified in the guilt phase. (RT 25:5269.) However, with the court in session and the retardation phase about to begin, Blankenship told the trial judge he did not have any witnesses ready to testify. Blankenship said John Woodruff did not want to testify because he did not want to say negative or detrimental things about his brother; Mrs. Carr felt the same way. Blankenship said Wu was in Italy and would not return until the next week, which was when Booraem had expected to testify also. (RT 25:5281-5282.) With no defense witnesses available, the trial adjourned to the following Monday. (RT 25:5291.)

Ultimately, Booraem was the only witness to testify at the retardation phase. He repeated his conclusion that Mr. Woodruff's IQ score was 66, mildly mentally retarded. (RT 26:5298.) Booraem also testified that Mr. Woodruff had adaptive deficits in communication, academic performance and work performance. (RT 26:5305.)

The prosecution called no witnesses at the retardation phase. (RT 26:5325.) In closing argument, prosecutor Soccio appealed to the jurors' prejudices about mental retardation: "If a person doesn't look retarded or act retarded, it's because they're not retarded. It doesn't take any professional to let you know that." (RT 26:5344.) The jury deliberated about two hours before concluding that Mr. Woodruff was not mentally retarded. (CT 19:5405.)

Penalty phase

The penalty phase began the day after the retardation phase. (CT 19:5407.) The prosecution presented 14 penalty-phase witnesses. They testified to police calls involving Mr. Woodruff and his girlfriends in 1988 and 1999 (RT 26:5409-5415, 5424-5427), an exchange of gunfire in a liquor store parking lot in 1989 (RT 26: 5443-5445, 5468-5471, 5502-5506; RT 27:5574), a traffic stop outside Phoenix, Arizona, also in 1989 (RT 26:5509; RT 27:5564-5565), a fight in a pizza parlor parking lot in 1993 (RT 26:5379-5381, 5394-5397), and a shooting incident outside a Pomona home in 1999. (RT 26:5526-5528; RT 27:5556-5560.) Only the Arizona traffic stop had resulted in Mr. Woodruff's arrest. (RT 27:5564-5565.)

One of the witnesses to the liquor store incident, Dennis Smith, testified that he got in a fight with two men and then exchanged gunfire with them in the parking lot while Mr. Woodruff was inside the store. (RT 26:5503.) Because Blankenship had previously represented Smith on other charges, the trial judge would not allow Blankenship to impeach Smith with any information he had learned while representing Smith. (RT B:584-585.)

The prosecution had planned to call as a penalty-phase witness the alleged victim of the Pomona incident, whom the prosecution identified as Mario Brooks, also known as Eddie Phillips. However, the prosecutor told the court outside the jury's presence that Brooks was unavailable to testify

because he was hospitalized in Mississippi after suffering a psychotic breakdown. (RT 26:5352-5353, 5364-5365, 5464; RT 27:5545-5547.)

In the absence of Brooks, the judge allowed Pomona police officer Richard Machado to testify over defense objection that on December 23, 1999, he took a statement from Eddie Phillips, who was hospitalized for a gunshot wound. Machado said Phillips told him that while he sat in the passenger seat of a van, Mr. Woodruff approached with an object, possibly a bottle, and tried to hit him. Machado said Phillips said Mr. Woodruff and another male or two tried to open the van door to pull Phillips out, but he backed the van out of the driveway, hit another vehicle, ran away and called the police. Machado said he did not know if Phillips and Brooks were the same person. (RT 27:5557-5561.)

Before presenting the defense case in the penalty phase, Blankenship told the trial judge he was having difficulty getting family members to show up at the courthouse. He said he thought they believed it was futile to testify. (RT 27:5626.)

Four witnesses testified for the defense at the penalty phase. Mr. Woodruff's brother John Woodruff testified that Steve Woodruff was five years older than John and they had different fathers. John Woodruff said he remembered their mother asking Steve to help John with his homework, but Steve was unable to do so because he could neither read nor write. (RT 27:5637-5638.) John Woodruff said when they were adults, if Steve

needed a form filled out or needed something read, he would ask John to read it, mostly dealing with bills. (RT 27:5645-5646.)

Psychiatrist Joseph Wu testified that in his opinion Mr. Woodruff had a brain injury, in what Blankenship characterized as "his lobes," as a result of being run over by a car in 1995. (RT 27:5676.)

Psychologist Curtis Booraem testified that Mr. Woodruff had the mental age of someone 9 or 10 years old. (RT 27:5683.) Booraem said in his experience as a psychologist, children of that age should not possess dangerous weapons because they generally do not understand consequences – they see weapons as toys. (RT 27:5686.) Booraem said that even though Woodruff engaged in a terrible act, when he was doing it he did not appreciate that it was even criminal; he was just reacting, and was unable to conform his behavior to the law. (RT 27:5687-5688.)

At the conclusion of Booraem's testimony, the defense rested. The prosecution offered no rebuttal and rested also. (RT 27:5691.)

The jury deliberated in the penalty phase for about two and a half hours before reaching a death verdict. (CT 19:5473-5474.)

On April 17, 2003, Judge Thierbach sentenced Mr. Woodruff to death. (RT 28:5854.) The judge said one penalty-phase witness's testimony "suggests Mr. Woodruff to be nothing more than a street thug who will resort to violence in an effort to get what he wants." The judge said the

shooting of Mario Brooks in 1999, testified to by Officer Machado, demonstrated Mr. Woodruff's history of violent conduct. (RT 28:5848.)

State Bar

The State Bar of California suspended Blankenship from practice for nine months on February 24, 2006. The State Bar's web site explains: "Blankenship stipulated to 17 acts of misconduct in seven cases. Six cases involved his failure to perform legal services competently, and he abandoned his client in the seventh." Four of the cases involved legal services that Blankenship failed to perform for other clients from 2001 to 2003 while he also represented Mr. Woodruff. Blankenship resigned from the State Bar on September 14, 2006, with charges pending. (See State Bar of California, Attorney Search, Mark Irvin Blankenship -- #130506, http://members.calbar.ca.gov/fal/Member/Detail/130506.)

Cut and Paste

While reading the trial transcript during record correction, appellate counsel discovered errors in the judge's instructions to potential jurors in time qualification that were repeated before subsequent panels. A closer examination revealed that entire transcript passages were identical – errors and all. This "cut and paste" pattern appeared in the instructions in the March 2002 time qualifying of jurors and again when time qualifying was repeated in November 2002. The most flagrant passage was in what the

judge purportedly said to the fourth and final panel of potential jurors, the afternoon of November 7, 2002:

> You are the first of potentially five panels of jurors this size who will be in this courtroom throughout the day. And those of you who survive this process that you go through this morning will be asked to fill out a detailed questionnaire ...

(RT 2:761, lines 13-21 (Emphasis added).)

Appellate counsel challenged the veracity of the reporter's transcript in a motion for new trial, filed in the trial court on November 21, 2008, in conjunction with an alternative motion to correct, augment and settle the record. In a hearing March 12, 2009, on the motion for new trial, a Riverside County deputy district attorney disclosed that the court reporter at trial "is married to an assistant district attorney ... within our office." (SRT 5-6, March 12, 2009.) The trial judge responded with mock surprise: "She is, really? I performed the ceremony. I know." (SRT 6, March 12, 2009.)

At that hearing, the trial judge acknowledged "there are undoubtedly examples of cut-and-paste and so on" in the trial transcript. Nonetheless, the trial judge concluded, "there is no showing of deliberate falsification of anything in any of the transcripts," and denied the motion for new trial. (SRT 14, March 12, 2009.)

On January 8, 2010, the trial judge certified the transcript to be "complete and accurate" over appellant's continuing objection. (SRT 2-3, January 8, 2010.)

VI. CLAIMS FOR RELIEF

A. Pretrial

CLAIM A1: Trial judge failed to protect Mr. Woodruff's constitutional rights to fair trial, assistance of counsel, due process.

From the outset of Mr. Woodruff's case, Judge Christian Thierbach was aware that defense counsel Mark Blankenship was "in over your head" and unqualified to try a death-penalty case. Nonetheless, the trial judge failed to intervene, instead allowing an incompetent attorney to try a death-penalty case of a mentally deficient client.

Additionally, the trial judge repeatedly made comments on the record that misled the inexperienced defense attorney into thinking he had a high threshold for obtaining co-counsel in the capital case. As a result, Blankenship did not request co-counsel and tried the case by himself, although he had never before tried a murder case, let alone a death-penalty case.

Trial prosecutor Michael Soccio, having made a record of Blankenship's incompetence, twice asked the trial judge to obtain pretrial waivers from Mr. Woodruff of his constitutional right to effective assistance of counsel. However, the trial judge did not actually ask Mr. Woodruff to waive his right to effective assistance either time; he merely asked Mr. Woodruff if he desired to keep his attorney and whether he was comfortable with how his case was being handled. Both times the trial

judge made inadequate inquiries into the defendant's comprehension of his constitutional rights and how defense counsel's actions were jeopardizing them.

As a result of (a) the trial judge's failure to intervene to protect Mr. Woodruff's constitutional rights, (b) the trial judge's misleading description of the threshold for obtaining co-counsel, and (c) the trial judge's inadequate inquiry into Mr. Woodruff's understanding of his rights, Mr. Woodruff was denied his state and federal constitutional rights to a fair trial, effective assistance of counsel, the heightened reliability required in death-penalty proceedings, and due process of law.

Facts

Less than a month after Mr. Woodruff's arrest, Judge Thierbach was already aware that Blankenship "had a problem with the State Bar and, in fact, had your license suspended for a time." (PRT 7.) Blankenship had appeared to come out of nowhere to represent Mr. Woodruff pro bono, a week after the county public defender's office had been appointed. (PRT 1, 3.) Judge Thierbach, who considered himself familiar with the lawyers who regularly practiced criminal law in Riverside County, said he had never met Blankenship before he became Mr. Woodruff's attorney. (RT A:36; PRT 8.)

At an in camera hearing February 6, 2001, Judge Thierbach confronted Blankenship with what the judge characterized as "courthouse

gossip and speculation." Blankenship confirmed that he had served a six-month suspension from practice and was on probation for five years.[8] (PRT 8-9.)

Trial prosecutor Soccio had concerns of his own. At the second post-indictment hearing, March 8, 2001, Soccio said he wanted to put on the record that he had spoken with defense counsel "and inquired as to whether or not he'll be seeking second-chair *Keenan*[9] counsel." The prosecutor said "rumor has it" that Mr. Woodruff could not afford to pay for a private attorney. "At some point those issues need to be addressed, whether there will be another attorney coming on or whether it will be a request for the Court to appoint someone to assist." (RT A:6.)

Blankenship told the court a request for *Keenan* counsel was "a concept that's novel to me, Your Honor, but I would like to evaluate that, and perhaps after consultation make that request." (RT A:7.)

The trial judge said he expected Blankenship to learn from his research that "the justification for appointing second counsel – or as it's

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[8] Blankenship was suspended from practice for six months on April 23, 2000, having stipulated to 10 counts of misconduct in three cases. Blankenship resigned from practice with charges pending, effective September 14, 2006, having stipulated to 17 acts of misconduct in seven cases, including failure to represent six clients competently and abandonment of the seventh client. (See http://members.calbar.ca.gov/search/member_detail.aspx?x=130506.)

[9] The option of appointment of co-counsel in death-penalty cases was authorized by *Keenan v. Superior Court* (1982) 31 Cal. 3d 424 [180 Cal.Rptr. 489, 640 P.2d 108], and subsequently was codified under Penal Code section 987, subdivision (d).

referred to, *Keenan* counsel, is limited to some rather narrowly defined situations, particularly regarding the complexity of the case, the types of issues that will be raised during the course of the case, and various related factors." (*Ibid.*)

After seven months of interaction with Mr. Woodruff's defense counsel, Soccio raised his concerns in writing about Blankenship's lack of competence. On August 17, 2001, the trial prosecutor filed a six-page "Request for Inquiry and Waiver Regarding Attorney's Qualifications." (CT 2:351-356.) The request asked for an on-the-record hearing "regarding attorney Mark Blankenship's qualifications to try a capital case." The request asked the trial judge to "inquire as to whether or not the defendant is fully informed about Mr. Blankenship's history and legal experience and that the defendant is making an informed and intelligent decision in his selection of his attorney." (CT 2:351.) The prosecutor suggested that Blankenship "does not have extensive criminal trial experience" and asked the court to inquire whether Blankenship had tried a murder case or a case with special circumstances or a death-penalty case. "The prosecutor in this matter is concerned about statements that Mr. Blankenship has made that may, in fact, indicate the lack of ability to try this case." (CT 2:354.)

Among the prosecutor's concerns were:

- Blankenship had "inquired as to why he would need an investigator in this case. He went on to ask what kind of things the investigator might do."

- Blankenship "said that he had no funds available to pay for discovery. The prosecutor advised him that he could apply for some monies from the court and that other seasoned criminal defense lawyers in the courthouse could advise him on how to do that. He was not aware that he could ask for any assistance."

- Blankenship had told the prosecutor that he had not picked up discovery from the district attorney's office because he had no funds.

- Blankenship had not acted on the prosecutor's suggestion that he consider asking the court to appoint a second counsel who was familiar with capital litigation.

- Blankenship had said at the last court hearing that he would not attend a capital litigation seminar that he had previously said he planned to attend.

- Blankenship did not provide reciprocal discovery, did not inquire about further discovery from the prosecution or "other action that would normally accompany capital litigation."

(CT 2:355.)

The prosecutor asked the trial judge to advise Mr. Woodruff that Blankenship had been suspended from the practice of law "for lack of competence." The prosecutor also asked the trial court to obtain a waiver from Mr. Woodruff concerning Blankenship's suspension from practice. (CT 2:355-356; RT A:65.)

At a hearing on the prosecutor's request, Soccio said he filed the request for waiver of Mr. Woodruff's right to effective assistance "after deliberating with myself for months as to whether or not it was the proper thing to do based on some concerns, especially because this is a capital

case. ... [I]t appeared to me, as we were moving along over the last few months, that certain events were either not taking place that you would normally expect to see in capital litigation, or some things were happening that seemed out of character." (RT A:29-30.)

Blankenship characterized the prosecutor's motion as "specious." (RT A:31.) However, Blankenship acknowledged that he previously had "trouble with the State Bar," had been suspended from practice, and was on probation. He said he had not handled a capital case, so he felt the need to obtain additional counsel. (RT A:33.)

Judge Thierbach observed that it was "kind of a unique situation" because Blankenship was "neither appointed nor retained," but pro bono, "handling this out of the goodness of your heart, I guess." (RT A:34.)

The trial judge asked Blankenship a series of questions about his failure to file motions normally filed in death-penalty cases (motion challenging sufficiency of the evidence, motion for change of venue, motion for *Pitchess v. Superior Court*[10] discovery), about whether he had sought co-counsel, whether he had considered an insanity defense, whether he had consulted with mental health professionals, and whether he had conducted a penalty-phase investigation – none of which Blankenship had done. The judge also inquired about Blankenship's failure to request

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[10] (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305], subsequently codified in California Evidence Code sections 1043-1047.

investigative funds, which the trial judge said "would be not only ineffective assistance of counsel but downright criminal." (RT A:35-51.)

The trial judge asked if Blankenship had talked to anyone about becoming co-counsel. Blankenship said he had not done so, but he asked the court, "Is there a way that I can bring in another counsel, I guess a *Keenan* counsel, however that is defined, and this Court can compensate that counsel in a manner that doesn't condition his compensation on reporting to the Court as to what he's doing?" (RT A:39.) The judge replied that *Keenan* counsel could be appointed if procedures regarding requests for second counsel were followed. (RT A:39-40.)

Blankenship never requested the appointment of *Keenan* counsel. He represented Mr. Woodruff by himself throughout the trial. (RT A:33; RT 15:3299.)

After Judge Thierbach finished questioning Blankenship about his preparations for the case, the judge quoted at length from this Court's opinion in *Smith v. Superior Court* (1968) 68 Cal.2d 547 [68 Cal.Rptr. 1, 440 P.2d 65], and paraphrased the Court of Appeal holding in *People v. Escarcega* (1986) 186 Cal.App.3d 379 [230 Cal.Rptr. 638], both cases involving limitations on a trial judge's ability to remove incompetent counsel over defense objections. (RT A:51-57.)

The trial judge said the decision about whether Blankenship remained as defense counsel belonged to Mr. Woodruff, whose intelligence

level, according to subsequent test results, was either mildly mentally retarded or borderline. The trial judge said he did not have the power to relieve defense counsel and would not relieve him. (RT A:63; RT 22:4543; RT 23:4901.)

Six months later, after two days of time-qualifying of potential jurors, the trial judge learned that the defense psychologist had conducted preliminary psychological testing of Mr. Woodruff only the previous day and might need another month to analyze the data and determine if further testing was necessary. (RT 1:414-417, 426.) The trial judge expressed his frustration with Blankenship's lack of preparation, and said he would not want to be in position to sentence someone to death "who went into trial inadequately prepared. I admire your zealousness and your desire to defend this man, and this is nothing personal against you, but I think you're in over your head here." (RT 1:419.)

Soccio listened to Blankenship speak for what the prosecutor characterized as 30 minutes in defense of the "tactical" nature of his actions. The prosecutor then concurred with the judge's view:

> I don't think anybody could look at the record in this case, any reviewing court, and not, at least on its face, believe that Mr. Blankenship is in over his head or there's ineffective assistance of counsel if you just read what has occurred.

(RT 1:429-430.)

Soccio asked the trial judge "to take a waiver again from Mr. Woodruff regarding representation." (RT 1:432.) The prosecutor said he had "no desire to interfere" if the defendant was pleased with his representation, but he felt an ethical duty "to make sure the proceedings go the way it should and Mr. Woodruff is protected." (RT 1:432-433.) The prosecutor said that being on the verge of trial, with a mental health expert's report yet to be completed, "I think adds error to this that's almost unfixable without a significant continuance." (RT 1:433.) The prosecutor asked the trial court to get "a knowing and informed waiver" from the defendant. (*Ibid.*)

Judge Thierbach, addressing Blankenship, said he felt it necessary "to attempt to ensure Mr. Woodruff is afforded the protections to which he is entitled," or "at least make an effort to have him understand that there are certain things that could have been done on his behalf that haven't been because of tactical decisions" by defense counsel. (RT 1:439-440.) The things the judge said Blankenship had not done that should have been done included:

- A motion attacking the makeup of the grand jury that issued the indictment;
- A motion challenging the sufficiency of the testimony that was presented before the grand jury;

- A motion challenging the sufficiency of the evidence for at least one of the special circumstances; and
- A motion for change of venue.

The judge added that until recently, no request had been made for funds to retain experts, and there was no indication that any experts were even considered. (RT 1:440.) Nonetheless, the trial judge said his interpretation of state case law led him to conclude that "I cannot remove counsel of a defendant's choice. And that's fine. And I don't intend to do so." (RT 1:441.)

Discussion

a. Failure to intervene

The trial judge was wrong about his assertion that he lacked authority to do anything about Mr. Woodruff's representation by incompetent counsel. The United States Supreme Court made clear more than 40 years ago that trial courts do have the authority to protect defendants' Sixth Amendment right to effective assistance. "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and ... judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (*McMann v. Richardson* (1970) 397 U.S. 759, 771 [90 S.Ct. 1441].)

More recently, the Supreme Court has said the Constitution permits states to insist upon representation by counsel for those mentally competent enough to stand trial but who are not mentally competent to conduct trial proceedings by themselves. (*Indiana v. Edwards* (2008) 554 U.S. 164, 178 [128 S.Ct. 2379, 171 L.Ed.2d 345].) To rule otherwise, the Court said, would undercut "the most basic of the Constitution's criminal law objectives, providing a fair trial. As Justice Brennan put it, '[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.'" (*Id.*, at pp. 176-177, quoting *Illinois v. Allen* (1970) 397 U.S. 337, 350 [90 S.Ct. 1057], Brennan, J., concurring.) "[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." (*Sell v. United States* (2003) 539 U.S. 166, 180 [123 S.Ct. 2174, 156 L.Ed.2d 197].) Criminal proceedings must not only be fair, they must "appear fair to all who observe them." (*Wheat v. United States* (1988) 486 U.S. 153, 160 [108 S.Ct. 1692, 100 L.Ed.2d 140].) And, because of the "qualitative difference" between a death sentence and a prison term, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978].)

With incompetent counsel representing him, Mr. Woodruff had a trial that both appeared to be unfair and was unfair, a trial that lacked the

reliability required in death-penalty cases. The prosecutor recognized the unfairness and brought it to the attention of the trial judge. The trial judge also recognized the unfairness but washed his hands of the issue.

The trial judge said he did not have the power to remove defense counsel for incompetence, even though he had "very, very serious concerns." (RT A:60, 63.) The judge relied on *Smith v. Superior Court*, *supra*, 68 Cal.2d 547, in which this Court said "the defendant's right to counsel requires that his advocate, whether retained or appointed, be free in all cases of the threat that he may be summarily relieved as 'incompetent' by the very trial judge he is duty-bound to attempt to convince of the rightness of his client's cause." (*Smith*, at p. 562.) Not only did *Smith* prohibit trial judges from removing "incompetent" defense counsel, this Court said broadly that "we cannot exclude an attorney from participating in a particular case." (*Smith*, at p. 560, fn. 5.)

However, 14 years after *Smith*, this Court suggested the holding of *Smith* may have been limited to the peculiar facts of that case, which involved "an unreasonable sua sponte conclusion by the trial court that counsel was incompetent; there we saw no need for removal. Though we stressed defendant's repeated objections to recusal, the issue of waiver of effective assistance never arose." (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 620, fn. 12 [180 Cal.Rptr. 177, 639 P.2d 248].)

In *Maxwell*, this Court said when "an adequate waiver of defendant's effective-assistance rights cannot be obtained on the record, the court must presume that he has not knowingly and intelligently chosen to proceed with retained counsel. [Citation omitted.] The court may then protect the record and defendant's right to effective assistance by requiring counsel's withdrawal." (*Maxwell*, at p. 620.)

In Mr. Woodruff's case, the trial judge, fully aware that defense counsel was "in over your head" in trying a death-penalty case, nonetheless neglected his obligation to protect the defendant's rights to a fair trial, effective assistance of counsel, fair and reliable guilt and penalty determinations, and due process of law.

b. Assistance of co-counsel

An indigent criminal defendant has a statutory right to a second attorney in a capital case in the discretion of the trial court under Penal Code section 987, subdivision (d). (*People v. Doolin* (2009) 45 Cal.4th 390, 431 [87 Cal.Rptr.3d 209, 198 P.3d 11].) "In ruling on an application for second counsel, the trial court must be guided by the need to provide a capital defendant with a full and complete defense." (*Id.*, citing *Keenan v. Superior Court*, *supra*, 31 Cal.3d at p. 431.)

The appointment of second counsel in capital cases is not "limited to some rather narrowly defined situations," as the trial judge in this case suggested to defense counsel at the pretrial hearing. (RT A:7.) To the

contrary, in *Keenan v. Superior Court*, this Court envisioned a broad right to such assistance. Noting that it can be an abuse of discretion for a trial court to deny a request for second counsel, this Court said, "If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the [trial] court should rule favorably on the request. Indeed, in general, under a showing of genuine need, ... a presumption arises that a second attorney is required." (*Keenan*, 31 Cal.3d at p. 434.)

In *Keenan*, this Court said a trial court abused its discretion in not appointing co-counsel because of "the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the extensive pretrial motions, as to some of which review would be sought in the event of adverse rulings." (*Id.*)

In this case, it would have been an abuse of discretion not to appoint second counsel for Mr. Woodruff because of the inexperience of defense counsel, who was totally unfamiliar with capital trial procedure; and the complexity of the issues, which included scientific testimony to mental retardation and brain injury, as well as other criminal acts alleged as aggravating factors at the penalty phase. An experienced death-penalty trial lawyer would have found the assistance of second counsel to be valuable. For an inexperienced practitioner, such assistance was necessary.

For the trial judge to discourage defense counsel from even asking for assistance, based on a skewed interpretation of the law, was an abuse of discretion. In failing to make the request anyway, defense counsel provided prejudicially ineffective assistance. (*Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052]; *People v. Lewis* (1990) 50 Cal.3d 262, 288 [266 Cal.Rptr. 834, 786 P.2d 892].)

c. Inadequate inquiry

The trial judge concluded that Mr. Woodruff had made a "sound and informed decision" to continue with Blankenship's representation based on Mr. Woodruff's utterance of the single-word answer "Yes," to the question whether he was "comfortable with the way your case is being handled." (RT 1:451.) The judge had made no attempt to determine whether Mr. Woodruff's "Yes" contained any real understanding of his actual predicament.

The courts "indulge every reasonable presumption against the waiver of fundamental rights." (*Glasser v. United States* (1942) 315 U.S. 60, 70 [62 S.Ct. 457, 86 L. Ed. 680].) Before a defendant waives a fundamental right, such as the right to the effective assistance of counsel, the trial court must determine that the defendant has "competently and intelligently waived his constitutional right, [or] the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 468

[58 S.Ct. 1019; 82 L. Ed. 1461].) The right to counsel is "a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard." (*Edwards v. Arizona* (1981) 451 U.S. 477, 483 [101 S.Ct. 1880, 68 L.Ed.2d 378].)

For a court to allow a defendant to waive the right to effective assistance of counsel without a showing that the waiver was knowing and intelligent would be tantamount to allowing a defendant who is not competent to put on his own defense to assert the right to self-representation, which the Supreme Court said "undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Indiana v. Edwards*, *supra*, 554 U.S. at pp. 176-177.) Such a proceeding would not meet the requirement of heightened reliability of guilt and penalty determinations in a death-penalty case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

In another context, this Court has held that before a trial court accepts a defendant's waiver of a constitutional right, the trial court "must assure itself that (1) the defendant has discussed the potential drawbacks ... with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences ... in his case, (3) that he knows of his right ... and (4) that he voluntarily wishes to waive that right." (*People v. Bonin* (1989) 47 Cal.3d 808, 837 [254 Cal.Rptr. 298, 765 P.2d 460], citing *People v. Mroczko* (1983) 35 Cal.3d 86, 110 [197

Cal.Rptr. 52, 672 P.2d 835]; *Glasser v. United States*, *supra*, 315 U.S. at p. 71.)

In this case, the trial judge made no such inquiry. The trial judge made no attempt to determine Mr. Woodruff's mental ability to knowingly and intelligently waive his rights, nor did he appoint independent counsel to represent those rights while defense counsel vigorously defended his own competence to try a death-penalty case.

Only at trial was it revealed that Mr. Woodruff's intelligence was in the range from mildly mentally retarded, according to a defense expert (RT 22:4532, 4543), to borderline but learning disabled, according to a prosecution expert. (RT 22:4532, 23:4902.) In either assessment, Mr. Woodruff did not understand the concepts of "waiver," "conflict," and "effective assistance." He did not knowingly and intelligently waive his rights because he did not understand what such an action meant.

In all of the respects mentioned in this claim, the combination of (a) the trial judge's failure to intervene to protect Mr. Woodruff's rights, (b) the trial judge's misleading description of the threshold for obtaining co-counsel, and (c) the trial judge's inadequate inquiry into Mr. Woodruff's understanding of his rights denied Mr. Woodruff his state and federal constitutional rights to a fair trial, effective assistance of counsel, the heightened reliability of guilt and penalty determinations required in death-penalty cases, and due process of law under the Sixth, Eighth and

Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 17 and 29 of the California Constitution. Consequently, Mr. Woodruff's convictions and sentences should be overturned. He should be granted a new trial with competent counsel.

CLAIM A2: Trial judge failed to inquire into defendant's competence to stand trial.

Despite substantial evidence of the defendant's incompetence to stand trial, the trial judge failed to declare a doubt about Mr. Woodruff's competence to stand trial and failed to conduct a competency hearing, which violated Mr. Woodruff's constitutional rights to a fair trial, reliable determinations of guilt and sentencing in a death-penalty case, and due process of law.

Facts

The trial judge's suspicions about Mr. Woodruff's mental competency to stand trial should have been aroused as early as the second court hearing, on March 8, 2001, when defense counsel Mark Blankenship said the defendant wanted the court to entertain a request for bail, even though counsel acknowledged that "this is a no-bail case." (RT A:6.)

Six months later, Mr. Woodruff's mental limitations became clearer. During the trial judge's lengthy explanation of case law, the judge urged the defendant to listen to what he was saying. The defendant replied, "I don't understand nothin' you sayin', Judge. ... I'm not a lawyer, you know. I'm listening. I just don't understand." (RT A:57.)

At the same hearing, the trial judge asked the defendant if he wanted to continue with defense counsel, despite the judge's doubts about counsel's ability to try a death-penalty case. The defendant's reply

indicated a belief that his volunteer attorney was a gift from God: "Yes. I'll assure you, Judge, that, you know, there is a higher up that sent Mr. Blankenship to me, and he must be the one to represent me, you know, because there's someone over you and that you work for. So, I really don't understand what is really going on here, anyway, you know." (RT A:61-62.)

The prosecutor noted, "Mr. Woodruff repeatedly said he doesn't understand what's going on here, which is going to read poorly in the record." (RT A:64.)

At trial, in cross-examination of the defendant on January 16, 2003, the prosecutor asked, "have you understood what's going on today in this courtroom?" Mr. Woodruff replied: "Somewhat." (RT 20:4221.) Mr. Woodruff said he could read and write "A little bit." (RT 20:4225.) Mr. Woodruff said he went to the law library once while he was in jail, but "you don't understand what I was readin'. That's why I stopped. ... I ain't go but one time." (RT 20:4226.)

Defense expert witness Curtis Booraem, a clinical psychologist, testified at the guilt phase on January 22, 2003, that his testing indicated Mr. Woodruff had a full-scale IQ of 66, meaning mildly mentally retarded, and a "verbal comprehension index" of 61, meaning Mr. Woodruff had great difficulty in verbal comprehension. (RT 22:4543-4544, 4605.)

Discussion

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 171 [95 S.Ct. 896].) "[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." (*Id.*, at p. 172, citing *Pate v. Robinson* (1966) 383 U.S. 375 [86 S.Ct. 836, 15 L.Ed.2d 815].)

California Penal Code section 1367, subsection (a), says, "A person cannot be tried or adjudged to punishment while that person is ... unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." If a trial judge has a doubt about the mental competence of the defendant, Penal Code section 1368, subsection (a), requires the judge to "state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent."

This Court has held, "Failure to declare a doubt and to conduct a competency hearing when there is substantial evidence of incompetence requires reversal of the judgment." (*People v. Blair* (2005) 36 Cal.4th 686, 711 [31 Cal.Rptr.3d 485, 115 P.3d 1145].) To be found competent to stand

trial, the defendant must have "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and ... a rational as well as a factual understanding of the proceedings against him." (*Id.*, quoting *Dusky v. United States* (1960) 362 U.S. 402 [80 S.Ct. 788, 4 L.Ed.2d 824].)

Before and during his trial, Mr. Woodruff repeatedly said he did not understand the proceedings. He demonstrated his lack of understanding by his words and actions during trial. Mr. Woodruff's lack of verbal comprehension meant that he could sit in the trial and hear the words spoken, but they had no meaning to him. As he said in a pretrial hearing when the judge asked him to pay attention, "I'm listening. I just don't understand." (RT A:57.)

Because of his lack of understanding, Mr. Woodruff needed help to avoid a travesty of justice. Defense counsel and the trial judge failed to provide that help, as required by statute and constitutional principles. As a consequence, Mr. Woodruff was denied his rights to a fair trial, reliable determinations of guilt and sentencing in a death-penalty case, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, sections 7, 15, 17 and 29 of the California Constitution. Mr. Woodruff's convictions should be overturned. The case should be remanded to the trial court for a competency determination.

CLAIM A3: Trial judge solicited three pretrial waivers of right to unconflicted counsel without showing defendant made knowing, intelligent and voluntary choice; defense counsel violated duty of loyalty.

The trial judge elicited from Mr. Woodruff three waivers of the right to unconflicted counsel regarding defense counsel Mark Blankenship's prior representation of two prosecution witnesses without establishing that Mr. Woodruff understood what rights he was giving up or why.

In none of the three instances did the trial judge inquire about Mr. Woodruff's understanding of the concepts of "waiver" or "detrimental" or "conflict of interest." In none of the instances did the trial judge explain the full consequences of giving up the rights, or the full consequences of proceeding with conflicted counsel. In none of the instances was Mr. Woodruff offered independent advice, and in none of the instances was Mr. Woodruff asked if he had discussed the conflicts with his attorney.

In eliciting the waivers, the trial judge denied Mr. Woodruff his state and federal constitutional rights to counsel, a fair trial, reliable determinations of guilt and sentence, and due process of law.

By representing multiple conflicting interests simultaneously, defense counsel Mark Blankenship violated his duty of loyalty to Mr. Woodruff, which also denied Mr. Woodruff his state and federal constitutional rights to counsel, a fair trial, reliable determinations of guilt and sentence, and due process of law.

Preliminary facts

At a hearing March 22, 2001, to set a trial date for Mr. Woodruff, Blankenship purported to represent not only Mr. Woodruff, but also his mother, Parthenia Carr, and brother Claude Carr. Blankenship asked the trial judge whether a motion to consolidate Mr. Woodruff's trial with those of his mother and his brother would be viable, as they "were my primary witnesses in that matter and the charges arise out of the same transactions," the attempted arrests of Parthenia Carr and Claude Carr and the resulting shooting of one of the arresting officers. (RT A:9.)

The trial judge said he did not think Blankenship had standing to make such a motion: "I would assume they are represented by counsel." (*Ibid.*) Blankenship said he represented Mr. Woodruff's mother and would have to get conflict waivers to consolidate the trials. (RT A:9-10.) The judge noted, "There's obviously a conflict." The judge said Blankenship could make the motion, but he would be inclined to deny it. (RT A:10.) No such motion was made.

Facts of first waiver

Mr. Woodruff's trial counsel represented Mr. Woodruff's mother at her trial in September 2001 on misdemeanor charges of disturbing the peace and resisting arrest from the same incident that resulted in the murder charge against Mr. Woodruff. Mrs. Carr was convicted of both misdemeanor charges. (RT A:38; RT 10:2251-2252, 2286; RT 11:2411; RT

12:2833-2834.) Mrs. Carr testified at Mr. Woodruff's trial that she went to jail on October 29, 2001, and got out on July 24, 2002. (RT 11:2432.)

At a pretrial hearing on May 7, 2002, the trial judge in this case asked Mr. Woodruff about what the judge called "a housekeeping issue" – "whether you are willing to waive any potential conflict of interest that may exist based upon Mr. Blankenship's representations of your mother." The judge asked if Mr. Woodruff understood. Mr. Woodruff shook his head no. The judge then asked if Mr. Woodruff understood that his mother had been charged with disturbing the peace and resisting arrest. Yes. If he understood that she went to trial. Yes. (RT B:483.) If he understood that Blankenship represented his mother at trial, and some evidence may have been produced that conflicted with Mr. Woodruff's interests. (RT B:483-484.) Yes. The judge's inquiry continued:

COURT:	[I]f you want Mr. Blankenship to continue representing you, you have to waive, or agree that even if there was a conflict of interest in his representation of your mother, you're willing to waive, or give up, any right to contest that conflict. Do you understand that?
WOODRUFF:	Yes.
COURT:	Okay. And are you willing to waive, or give up, any right to argue any conflict of interest –
WOODRUFF:	Yes, sir.
COURT:	– that may exist?
WOODRUFF:	I'm satisfied with Blankenship.
COURT:	All right. The Court accepts that as a waiver of conflict of interest.

(RT B:484.)

Facts of second conflict waiver

Immediately after the trial judge's ruling that Mr. Woodruff had waived the conflict from Blankenship's representation of Mr. Woodruff's mother, the prosecutor asked for a waiver from Blankenship's prior representation of prospective penalty-phase witness Dennis Smith. (RT B:484-485.)

Blankenship told the court he understood the subject matter of Smith's proposed testimony had nothing to do with Blankenship's former representation of Smith. Blankenship said he had represented Smith at two trials and had been relieved in February 2002. (RT B:485-486.)

The trial judge then inquired of Mr. Woodruff:

COURT:	Mr. Woodruff, Mr. Soccio indicates if we get to a penalty phase, he intends to call Mr. Smith to testify. Now, I don't know what Mr. Smith is going to testify to, but it has been represented that there may be a conflict of interest based upon the fact that Mr. Blankenship once represented Mr. Smith. There may have been some issues that arose that may conflict with your best interest, and so all I need to simply ask you again as with respect to your mother: Do you waive, or give up, any right to contest an issue related to a conflict of interest based upon Mr. Blankenship's prior representation of Mr. Smith?
WOODRUFF:	I am satisfied.
COURT:	I will take that as a "yes."
WOODRUFF:	Yes.
COURT:	You waive any conflict of interest?
WOODRUFF:	Yes.
COURT:	The Court will accept that waiver.

(RT B:486.)

Facts of third conflict waiver

At a pretrial hearing on October 11, 2002, prospective prosecution penalty-phase witness Dennis Smith, who was in custody, appeared with his attorney, Pierpont Laidley, and declined to waive attorney/client privilege regarding Blankenship's representation of Smith in two prior criminal cases. (RT B:583-584.)

The trial judge then turned to Mr. Woodruff and explained that if Smith were to testify against him at the guilt phase or penalty phase, Mr. Woodruff's attorney would be obligated to try to discredit Smith.

COURT:	... But because he has represented Mr. Smith and Mr. Smith does not wish to waive his attorney/client privilege, Mr. Blankenship would not be able to make those inquiries on your behalf, and that would be – could be detrimental to you, detrimental to your defense. Do you understand that?
WOODRUFF:	Yes.
COURT:	Knowing that, knowing that potentially a prosecution witness could not be discredited by your attorney because of this thing we call the "attorney/client privilege," is it still your desire to have Mr. Blankenship continue to represent you in this case?
WOODRUFF:	Yes.
COURT:	All right. I think this is the third time I've taken a waiver from him, and I'm satisfied that he understands what he has done.

(RT B:584-585.)

Representation of daughter

At a pretrial hearing on December 2, 2002, Mr. Woodruff's daughter Brianna, then 6 years old, was questioned by the trial judge and both

attorneys to determine her competency to testify at trial. Before Brianna was brought into the courtroom, Blankenship objected to her appearance in court:

> I feel compelled to intervene on behalf of Brianna because there's no one, other than her and her mother ... I am concerned we're not watching out for the child's interest at all. ... I think that there could be longstanding and irreparable consequences based on the child, based on what's happening today, on the eve of trial, having her come in, being placed on the witness stand, and talk about a very tragic event that occurred when she was four.

(RT 4:1230-1231.)

The prosecutor suggested an alternative to Brianna's testimony in open court – that Blankenship stipulate to the admission of the tape and transcript of Brianna's interview with a police investigator on the night of the shooting, and then she would not have to testify at all. (RT 4:1232.)

Blankenship appeared amenable to such a solution, as long as someone could lay the foundation for the tape recording, although it was "not clear to me what my answer is to that at this point." (*Ibid.*) The judge interrupted Blankenship:

> Let me tell you what your response is and maybe we cannot discuss this to any great length. There's no way in the world you're gonna stipulate to that. Because if you do, you're not gonna have a chance to cross-examine her. ... I don't know what she is gonna say, but I guarantee if you enter into a stipulation like that, which I'm not gonna accept if you do – that will be Issue No. 1 before the Supreme Court, if it ever gets that far –

(RT 4:1232-1233.)

After hearing Brianna answer questions, the judge determined she was competent to testify because she knew the difference between telling the truth and telling a lie. (RT 4:1247.) However, neither party called Brianna to testify at trial.

Discussion

Before a criminal defendant can waive a fundamental constitutional right, that waiver must be voluntary, knowing and intelligent (*Miranda v. Arizona* (1966) 384 U.S. 436, 444 [86 S.Ct. 1602]), and "must be unambiguous and 'without strings.'" (*People v. Mroczko*, *supra*, 35 Cal.3d at p. 110, citing *United States v. Dolan* (3d Cir. 1978) 570 F.2d 1177, 1181, fn. 7; *United States v. Bernstein* (2d Cir. 1976) 533 F.2d 775, 788, cert. den. (1976) 429 U.S. 998 [50 L.Ed.2d 608, 97 S.Ct. 523].)

One of those fundamental constitutional rights is the Sixth Amendment right to counsel. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342 [83 S.Ct. 792].) Where such a right to counsel exists, "there is a correlative right to representation that is free from conflicts of interest." (*Wood v. Georgia* (1981) 450 U.S. 261, 271 [101 S.Ct. 1097], citing, *e.g.*, *Cuyler* v. *Sullivan* (1980) 446 U.S. 335 [100 S.Ct. 1708; 64 L.Ed. 2d 333]; *Holloway* v. *Arkansas* (1978) 435 U.S. 475, 481 [98 S.Ct. 1173].)

In *Cuyler v. Sullivan*, the Supreme Court said a defendant could demonstrate a Sixth Amendment violation by showing that (1) counsel "struggle[d] to serve two masters" and (2) the actual conflict adversely

affected counsel's performance. (*Cuyler v. Sullivan*, 446 U.S. at pp. 349, 350.)

Where a conflict of interest causes an attorney not to do something, this Court "examine[s] the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 418, quoting *People v. Cox* (2003) 30 Cal.4th 916, 948-949 [135 Cal.Rptr.2d 272, 70 P.3d 277].)

This Court has held that before a trial court accepts a waiver of a conflict of interest offered by a defendant, the trial court "must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837.)

To obtain relief, a defendant must show that his trial attorney labored under "an actual conflict of interest," meaning "a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties." (*Mickens v. Taylor* (2002) 535 U.S. 162, 171 [122 S.Ct. 1237].) "A defendant who shows that a conflict of interest actually affected

the adequacy of his representation need not demonstrate prejudice in order to obtain relief." (*Cuyler v. Sullivan*, *supra*, 446 U.S. at pp. 349-350.)

In this case, Mr. Woodruff's trial counsel labored under actual conflicts of interest that adversely affected his representation of Mr. Woodruff, conflicts that suggested he was tone deaf to the very concept of conflict of interest. When he volunteered to represent Mr. Woodruff at his capital murder trial, Blankenship was on probation with the State Bar of California following a suspension from practice for incompetence. (RT A:65, RT 14:3264; CT 2:355-356.) After volunteering to represent Mr. Woodruff, Blankenship also volunteered to represent Mr. Woodruff's mother on her misdemeanor charges arising out of the same incident. Blankenship implicitly offered also to represent another son, Claude Carr, if he faced charges. (RT A:9-10.) Later, Blankenship purported to represent Mr. Woodruff's daughter, regardless of the effect of that representation on Mr. Woodruff's interests. (RT 4:1230-1232.)

Regarding Dennis Smith, Blankenship's conflict of interest ill-served both clients. In a pretrial hearing for Mr. Woodruff, Blankenship told the trial court that he began representing Smith in March or April of 2001 (RT B:579), which was months after he had begun representing Mr. Woodruff in this case.[11] Smith, aware that the prosecution was trying to get

[11] Blankenship's first court appearance on Mr. Woodruff's behalf was at arraignment on January 24, 2001. (CT 1:10.)

him to testify against Mr. Woodruff at the penalty phase of the murder trial, had alerted the court at the start of each of his trials to his attorney's conflict of interest. (RT B:580.) After Smith was convicted, his successor counsel Pierpont Laidley filed motions for new trials, citing *Holloway v. Arkansas*, *supra*, and alleging that Smith's misdemeanor convictions for fraud and being a felon in possession of a firearm should be set aside because of Blankenship's conflict of interest when he represented Smith. (RT B:579-581, 588.)

In Mr. Woodruff's case, Blankenship's duty of loyalty to Smith prevented Blankenship from properly impeaching Smith with what he had learned in confidence about Smith's prior criminal record. Smith declined to waive his attorney/client privilege regarding that representation when the trial judge asked Smith if he would waive the privilege in Mr. Woodruff's case. (RT B:584.)

Even if Blankenship had wanted to impeach Smith with what Blankenship had learned about him during their attorney/client relationship, the trial judge in Mr. Woodruff's trial would not allow Blankenship to do so. Once Smith had declined to waive the privilege, the trial judge advised Mr. Woodruff that Blankenship "would be unable to make inquiry of Mr. Smith regarding specific criminal conduct. Even if it may have occurred, even if he knew it occurred, he couldn't do that." (RT B:586.)

Blankenship's actions regarding his conflicting relationships indicated that his real interest was for neither Smith nor Woodruff, but for himself. "Mr. Blankenship is not telling the truth" about his representation of Smith, attorney Laidley told the trial court in Mr. Woodruff's case after Smith had declined to waive his attorney/client privilege and after Mr. Woodruff had waived his counsel's conflict of interest. "I don't think he's fully described all that happened. For example, whether how much he knew about the conflict in this case, the potential for conflict, and whether he properly advised Judge Magers in going ahead with those trials." (RT B:588.)

Laidley told the trial judge in Mr. Woodruff's case that although Laidley did not know if he had standing to raise his concerns, he understood that one of the issues at trial would be whether Mr. Woodruff was sufficiently mentally competent to face the death penalty. "Well, in a sense, to allow him, without having that issue fully cleared, to waive conflict, which is a very complex concept, seems to me in and of itself is a conflict. It immediately vitiates that defense." (RT B:590.)

The judge and prosecutor both told Laidley they "appreciate[d]" his concerns, but Laidley's concerns about Mr. Woodruff's waiver were not addressed on the record. Blankenship offered no response regarding Laidley's concerns about the possible implications of the waiver for Mr. Woodruff. Instead, what Blankenship felt ought to be defended was his

record for truthfulness against what he characterized as Laidley's "deflammatory [*sic*] commentary." With that, discussion of the waiver ended. (*Ibid.*)

That Blankenship's conflicts of interest adversely affected his performance at trial, as required by *Mickens* and *Cuyler*, is clear from the record. In eliciting the waivers anyway, the trial judge failed to perform his duties to protect the defendant's Sixth Amendment rights. Under *Bonin*, the trial court was supposed to make a four-part inquiry before granting a waiver to establish: (1) whether Mr. Woodruff had discussed the potential drawbacks of the conflicted representation with Blankenship, or outside counsel; (2) whether Mr. Woodruff had been "made aware of the dangers and possible consequences" of conflicted representation; (3) whether Mr. Woodruff knew of his right to conflict-free representation; and (4) whether Mr. Woodruff wished voluntarily to waive that right. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837.)

The trial judge made no such four-part inquiry before granting any of the three waivers of conflict of interest. In none of his inquiries did the trial judge ask Mr. Woodruff if he had discussed the potential drawbacks of conflicted representation with Blankenship, nor did the judge offer Mr. Woodruff a chance to discuss the conflict of interest issue with outside counsel. The judge did not explain "the dangers and possible consequences" of conflicted representation, as required in the second part

of the *Bonin* inquiry before obtaining waivers of conflicts involving Blankenship's representation of Mr. Woodruff's mother and cousin on May 7, 2002. The trial judge did make a basic inquiry before securing an additional waiver of the conflict involving Smith at a hearing on October 11, 2002, but did so in language Mr. Woodruff could not understand.

To the two questions – "Do you understand that?" and "... is it still your desire to have Mr. Blankenship continue to represent you in this case?" – Mr. Woodruff simply answered "yes." (RT B:585, 587.) The trial judge did not inquire further.

The trial judge failed to inquire whether Mr. Woodruff's three waivers of his Sixth Amendment right to conflict-free representation were voluntary, knowing and intelligent, as required by this Court, as well as United States Supreme Court precedents. The evidence in the record – including Mr. Woodruff's low IQ scores, low reading level and repeated statements to the trial court that he did not understand what the judge was telling him – suggests that a proper inquiry would have found that the waivers were not voluntary, were not knowing and certainly were not intelligent. Therefore, the waivers were not valid.

That Blankenship's conflicts of interest adversely affected his performance at trial, as required by *Mickens* and *Cuyler*, is clear from the record. As the trial judge pointed out in seeking a waiver of rights from Mr. Woodruff regarding the Smith conflict, Blankenship could not (and did

not) impeach Smith in the penalty phase of Mr. Woodruff's trial with what Blankenship had learned from representing Smith. And, as Laidley pointed out, by placing his client in a position in which Mr. Woodruff had to make a decision about the "very complex concept" of waiving a conflict of interest, Blankenship vitiated the defense of mental retardation.

Because the conflicts adversely affected Blankenship's representation of Mr. Woodruff at all phases of trial, Blankenship's conflicts of interest violated Mr. Woodruff's rights to a fair trial, assistance of counsel, the heightened reliability required in guilt and penalty proceedings in death-penalty cases, and due process of law, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 24 and 29 of the California Constitution.

Mr. Woodruff's convictions must be overturned.

CLAIM A4: Actions of trial judge, defense counsel and prosecutor denied Mr. Woodruff an impartial jury.

Mr. Woodruff was denied an impartial jury by (a) the trial judge's improper exclusion for cause of two qualified jurors based on their questionnaire answers; (b) defense counsel's incompetence and the trial judge's abuse of discretion in allowing a biased juror to be seated; and (c) the prosecutor's purposeful use of peremptory challenges to exclude black jurors.

These actions violated Mr. Woodruff's state and federal constitutional rights to a fair trial, the heightened reliability required in death-penalty cases, due process of law, and equal protection of the laws.

a. Improper exclusion of qualified jurors

Facts

At a pretrial hearing on November 14, 2002, Judge Christian Thierbach sought stipulations from counsel to remove prospective jurors for cause based on the jurors' answers on a 20-page juror questionnaire. (RT 3:802.) The parties stipulated to remove 14 jurors, and the trial judge removed 22 others for cause. (CT 17:4972; RT 3:855.)

Prosecutor Michael Soccio challenged five black jurors for cause – T.B., C.D., E.J., D.K. and L.T. Defense counsel Mark Blankenship would not stipulate to dismissing any of the black jurors. (RT 3:811, 817, 828, 829, 849; CT 17:4972, 4974.)

The trial judge granted the challenge for cause to juror E.J. (RT 3:828), who had answered "no" on the questionnaire to a question about whether he would follow an instruction on the law if it conflicted with his beliefs or opinions. (CT 15:4442,) The trial judge denied the challenges for cause to the other four black jurors, expressing concern about the small number of blacks in the jury pool, which the judge said was 10 percent[12], about the size of the black population in Riverside County. (RT 3:817.)

Juror D.K. had said on the questionnaire that he did not believe in the death penalty, but he indicated it would not be difficult to vote for the death penalty and he said he would follow the law. (CT 10:2926-2927.) After Soccio challenged D.K. for cause, the trial judge asked what harm would it do to bring him in and question him further. The prosecutor replied: "I would suspect the reason is this guy is African-American. Given that I'm already up against that race battle and we haven't even set the trial, if I'm forced to take jurors simply because of their race." (RT 3:830.)

After the hearing, Soccio filed a "Motion to Reconsider Removal of Prospective Jurors for Cause," which asked the trial judge to remove two white jurors who had expressed opposition to the death penalty, as well as all four black jurors who had survived his initial challenges for cause. (CT 17:4971-4977.) "The Court, by attempting to retain African Americans in

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[12] Thirteen of the 159 jurors in the venire identified themselves as black or African-American – 8.2 percent.

the jury pool, has inadvertently placed the prosecution in a disadvantaged position," the motion argued. (CT 17:4971.) "By refusing to exclude potential African American jurors because of their racial background, the court has placed the People in an untenable position. ... [T]he prosecutor will now have to make challenges in front of other prospective jurors risking not only *Wheeler*[13] motions, but also insulting or inflaming other prospective jurors or actual members who are seated in this jury." (CT 17:4972.)

At a hearing on November 19, 2002, defense counsel Blankenship said he had concerns about the "*Wheeler*" implications of the motion. He said he thought the prosecutor had prejudged the jurors before going through voir dire, and if the judge granted the motion, there would be fewer African-Americans on the jury. (RT 3:868-870.) Blankenship also pointed out that the prosecutor's motion did not bring to the trial court's attention that D.K., in his questionnaire, qualified his opposition to the death penalty by saying he would follow the law. (RT 4:1090.) Blankenship characterized the omission as another example of the prosecutor's "advocacy-oriented approach to the exclusion of jurors based on race." (RT 4:1091.)

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[13] *People v. Wheeler* (1978) 22 Cal. 3d 258 [148 Cal.Rptr. 890, 583 P.2d 748].

Notwithstanding the defense objections to the prosecution motion, the trial judge said he had reconsidered his rulings involving prospective jurors W.C., who was white, and D.K., who was black. (RT 3:871,) W.C. had answered "yes" to question 53(c), that it would be difficult to vote for the death penalty in this case (CT 12:3501); D.K. had answered "no" to the same question. (CT 10:2927.) Nonetheless, the trial judge said he did not see a theoretical possibility that either W.C. or D.K. could vote for the death penalty, so he excused both jurors for cause based on their answers on the questionnaire alone. (RT 3:872, 1091.)

Discussion

The United States Supreme Court has held that "the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment." (*Wainwright v. Witt* (1985) 469 U.S. 412, 416 [83 L.Ed. 2d 841, 105 S.Ct. 844], citing *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770].)

In *Witt*, the Supreme Court said "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... 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.'" (*Witt*, *supra*, at p. 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521].)

The Supreme Court went on to say "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. ... [T]his is why deference must be paid to the trial judge who *sees and hears* the juror." (*Witt*, *supra*, at pp. 425-426 [emphasis added].)

The corollary of the *Witt* holding is that deference need not be paid to the trial judge who neither saw nor heard the juror. To be sure, the *Witt* Court literally meant "sees and hears," which is clear from the remainder of the opinion. In a previous case, *Patton v. Yount* (1984) 467 U.S. 1025 [104 S.Ct. 2885], the Supreme Court had said "the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of *demeanor and credibility* that are peculiarly within a trial judge's province." (*Witt*, *supra*, at p. 428 [emphasis added].) More recently, the Supreme Court, citing *Witt*, said, "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218].) "[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial

court's first-hand observations of even greater importance." (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477 [128 S.Ct. 1203].)

This Court has said that a prospective juror "may be challenged for cause based upon his or her views regarding capital punishment *only* if those views would 'prevent or substantially impair' the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*People v. Cunningham* (2001) 25 Cal. 4th 926, 975 [108 Cal.Rptr.2d 291, 25 P.3d 519], quoting *Witt*, at p. 424 [emphasis added].)

In *People v. Stewart* (2004) 33 Cal.4th 425 [15 Cal.Rptr.3d 656, 93 P.3d 271], this Court encountered a factually similar situation to this case in which the trial court erred in excluding jurors for cause, over defense objection, "based solely upon their checked responses and written answers on a jury questionnaire." (*Id.*, at p. 441.)

Of particular concern to this Court in *Stewart* was question No. 35(1)(c) on the juror questionnaire, which asked whether the prospective juror's conscientious opinions or beliefs concerning the death penalty would "prevent or make it very difficult" for the prospective juror "to ever vote to impose the death penalty." (*Stewart*, *supra*, at p. 446.) Even a "yes" answer to that question, this Court concluded, would not be probative of impairment to serve as a juror in a death-penalty case. "[A] prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled – indeed, duty bound – to sit on a capital jury, unless his

or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*Ibid.*)

In Mr. Woodruff's case, the standard was not even "very difficult" but merely "difficult." Question No. 53(c) asked: "If you are against the death penalty, would your opinion make it difficult for you to vote for the death penalty in this case, regardless of what the evidence was?" (CT 10:2927.) Nevertheless, the stricken jurors' answers to Question 53(c) could not have made any difference, because the trial judge excluded for cause W.C., who answered "yes" (CT 12:3501), and also D.K., who answered "no." (CT 10:2927.)

If not that answer, then on what basis did the trial judge remove jurors W.C. and D.K. for cause? The initial part of Question 53 said: "Briefly describe your general feelings about the death penalty[.]" D.K. wrote, "I don't believe in death penalty." (CT 10:2926.) W.C. wrote, "I don't believe in the death penalty." (CT 12:3501.) To Question 53(a), which asked jurors to rate themselves on a scale of 1 to 10 on the death penalty, both circled "1," which corresponded with "strongly against" the death penalty. (CT 10:2926; CT 12:3501.) Question 53(b) asked for a reason for the juror's view of the death penalty. D.K. wrote, "Men are equals only God can make those choices." W.C. wrote: "I don't feel it is right to take someones [*sic*] life away."

Question 53(c), which asked whether it would be difficult to vote for the death penalty, also asked for an explanation. In addition to answering "no," D.K. explained, "I would follow the law." (CT 10:2927.) In addition to answering "yes," W.C. explained, "It is wrong to kill someone."

Question 55 asked the juror to assume the defendant had been convicted of special-circumstance murder. The question asked the juror to check (a), that the juror would always vote for the death penalty; (b), the juror would never vote for the death penalty; or (c), "I would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." W.C. and D.K. both marked answer (c), that they would consider all of the evidence. (CT 10:2928; CT 12:3503.)

The combined answers of jurors W.C. and D.K. suggest that while both strongly opposed the death penalty and W.C. would find it difficult to impose a death penalty, nevertheless both would consider all of the evidence and jury instructions. Thus, the trial judge's decision to remove both jurors for cause, without questioning on voir dire, is not "fairly supported by the record," as required by *People v. Cunningham.*

The trial judge made his ruling on the potential for bias of jurors W.C. and D.K. exclusively based on their juror questionnaires. The trial judge ignored his initial instinct to question juror D.K. on voir dire about his written answers. Instead, bowing to the prosecutor's request for

reconsideration, the trial judge relied on the prosecutor's selective view of the juror's answers. The prosecutor's motion did not mention other D.K. answers, including: "I would follow the law" (CT 10:2927); and D.K. would "consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (CT 10:2928.)

In *Stewart*, this Court said the prosecution, "as the moving party, bore the burden of demonstrating to the trial court that [the *Witt*] standard was satisfied as to each of the challenged jurors." (*Stewart*, *supra*, at p. 445.) In *Stewart*, as here, the prosecution rested its motion "solely upon the prospective jurors' checked answers and brief written comments on the juror questionnaire." (*Id.*, at pp. 445-446.)

However, this Court said in *Stewart*, "Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt*." (*Stewart*, *supra*, at p. 446.) The pertinent question, this Court said, was not whether the juror would find it difficult to impose the death penalty, but whether such a juror could "demonstrate an ability to put aside personal reservations, properly weigh and consider the aggravating and mitigating evidence, and make that very difficult determination concerning the appropriateness of a death sentence." (*Stewart*, at p. 447.)

In this case, jurors W.C. and D.K. both demonstrated such an ability by checking "(c)" as their answer to Question 55. Because of that demonstration, the trial judge erred in dismissing prospective jurors W.C. and D.K. for cause without questioning on voir dire. That error denied Mr. Woodruff his state and federal constitutional rights to an impartial jury, a fair trial, the heightened reliability of determinations of guilt and penalty required in death-penalty cases, and due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 7, 15, 16 and 17 of the California Constitution.

The trial judge's error requires reversal of Mr. Woodruff's death sentence, without inquiry into prejudice. (*Stewart*, *supra*, at p. 454, citing *Davis v. Georgia* (1976) 429 U.S. 122 [50 L.Ed.2d 339, 97 S.Ct. 399]; *Gray v. Mississippi* (1987) 481 U.S. 648 [95 L.Ed. 2d 622, 107 S.Ct. 2045]; *United States v. Chanthadra* (10th Cir. 2000) 230 F.3d 1237.)

b. Biased juror

Facts

Juror No. 3, the only African-American on the jury, identified himself on the juror questionnaire as 31 years old, single, "Afro-American" and a native of Alabama. (CT 6:1740.) He said he worked full time as an order filler for a pharmaceutical company and part time as a hospital security guard. (CT 6:1742.) He said his mother was a correctional officer.

(CT 6:1743, 1747.) He checked the "yes" box that the nature of the charges "would make it difficult or impossible … to be impartial." He explained: "Difficult to be fair. My mother and Uncle are peace Officers." (CT 6:1751.) On the next page of the questionnaire, he wrote: "I am not sure if I can be fair and impartial." (CT 6:1752.) He described his opinion on the death penalty as, "If the defendant is guilty of murder he/she should get the death penalty." (CT 6:1754.)

On voir dire on November 19, 2002, defense counsel Blankenship asked Juror No. 3 if the fact that his mother was a correctional officer would make it "hard for you to be fair in a case involving the death of an officer." (RT 3:989-990.) Juror No. 3 replied: "I'm thinking how I'd be leaning towards, you know, guilt. You know, if, umm, you know, to tell you the truth, I couldn't really tell you if I could [be] fair and impartial." (RT 3:990.) Blankenship asked if the juror could not fulfill his duty because of having a peace officer in the family. The juror replied: "Well, the subject of the case, you know, that's the thing that gets to me, death of a law enforcement officer." (*Ibid.*) Blankenship asked no further questions.

When prosecutor Soccio asked Juror No. 3 about his feelings, the juror replied: "I'd be strongly on the side of him being guilty." (RT 3:1007.) The prosecutor asked how his strong feelings about a police officer dying would impact his ability to be fair. Juror No. 3 said: "It would be difficult to be fair, you know what I'm saying? I'm saying to you that I would try to

be fair. ... You know, but I am not sure if I could." (RT 3:1007.)

No one asked Juror No. 3 on voir dire about the belief he stated on the questionnaire, "If the defendant is guilty of murder he/she should get the death penalty." (CT 6:1754.)

The prosecutor challenged Juror No. 3 for cause, explaining that "he kept talking about how difficult it would be for him to be fair because of law enforcement." (RT 3:1022.) Blankenship objected to the challenge, saying Juror No. 3 "does not even approximate the standard of bias that [prospective juror D.B.][14] developed, and she was allowed to stay." Blankenship also pointed out that Juror No. 3 was African-American. (RT 3:1022.)

The trial judge said he would deny the prosecution's challenge for cause to Juror No. 3 "because I believe his responses, albeit somewhat hesitatingly, indicated that he would do his best to be fair in both the guilt and penalty phases." (RT 3:1023.)

Blankenship said he was puzzled by the prosecutor's challenge, suspecting "the trap has been set. ... What possible reason could Mr. Soccio be interested in dismissing this juror for bias if indeed he is perhaps answering in a way that would be pro prosecution?" (RT 3:1023.)

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[14] The trial judge denied Blankenship's challenge for cause to D.B. after she answered "yes" when the prosecutor asked on voir dire: "Can you be fair and impartial? Can you give both sides your best attention and your ability to be fair?" (RT 3:975.) Blankenship used his first peremptory challenge to remove D.B. (RT 3:976.)

However, Soccio assured the court he was not setting a trap: "I have often stipulated or gone along with for cause people who have stated that they could not be fair, even ones that would appear to be pro prosecution. I assume that Mr. Blankenship did not challenge (JUROR NO.3), in part, because he is African-American, which, again, I think is impermissible to stay on a jury simply because of race. But that's his business." (RT 3:1024.)

In denying the challenge for cause, the trial judge commented that if he had been defense counsel, he would have challenged the juror for cause. Blankenship took exception to that comment:

> It's quite clear to me you've [n]ever been a defense counsel. ... There could be a whole other tactical reason that it could play out in a much later time in this process that has to do with what happened here. ... [T]his juror is perfectly accessible to my opinion, and he has not answered in a way that he could not be fair. And my discernment in picking many juries is I believe he is an appropriate juror that should not be subjected to cause.

(RT 3:1025.) However, other than pointing out that the juror was African-American, Blankenship did not articulate a strategic or tactical basis for his objection to the prosecutor's challenge for cause.

Discussion

The Sixth Amendment to the United States Constitution provides that all criminal defendants "shall enjoy the right to a speedy and public trial, by an impartial jury."

The United States Supreme Court has said the question of an

individual juror's partiality "is plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." (*Patton v. Yount*, *supra*, 467 U.S. at p. 1036.) If the jury includes someone who is not impartial, such a case is among the "very limited class of cases" with structural error "subject to automatic reversal." (*Neder v. United States* (1999) 527 U.S. 1, 8 [119 S. Ct. 1827, 144 L. Ed. 2d 35].) "[T]rying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself." (*Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 755.)

At Mr. Woodruff's trial, the answer to the question raised in *Patton* is clearly no: Juror No. 3 never made a "protestation of impartiality." In fact, he consistently communicated his own belief that he was biased. On the juror questionnaire, he said it would be "[d]ifficult to be fair." (CT 6:1751.) On voir dire, he told defense counsel, "I couldn't really tell you if I could [be] fair and impartial" (RT 3:990); and he told the prosecutor, "I would try to be fair … but I am not sure if I could." (RT 3:1007.)

Even if Juror No. 3 had stated that he could be impartial, such a statement would not "be dispositive of the accused's rights, and it [would remain] open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" (*Murphy v. Florida* (1975) 421 U.S. 794, 800 [44 L. Ed. 2d

589, 95 S. Ct. 2031], quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 723 [81 S.Ct. 1639, 6 L.Ed. 2d 751].)

In Blankenship's voir dire of Juror No. 3, the defense counsel did identify such a presumption of partiality, and the juror never did swear that he could set aside his biases. Instead, Blankenship established that the juror had a mother who was a correctional officer, the juror was "leaning towards ... guilt," he was not certain he could be fair, and the death of a law enforcement officer "gets to me." (RT 3:990.)

The prosecutor, far from rehabilitating Juror No. 3, established further that the juror would be "strongly on the side of him being guilty," that it "would be difficult to be fair" and he was not sure if he could be fair. (RT 3:1007.)

This case involves the peculiar situation of the prosecutor seeking to exclude pro-prosecution Juror No. 3, and defense counsel objecting to the juror's removal for no apparent reason other than the juror was African-American.[15]

The jury voir dire in Mr. Woodruff's trial bears a striking similarity to that in *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, in which a

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[15] Before the start of jury voir dire, Blankenship had declined to stipulate to the removal for cause of another prospective juror who had indicated on the juror questionnaire that he would never vote for the death penalty and would not follow the law if it conflicted with his personal beliefs. Blankenship said: "I can't stipulate on him. He's African-American and–" The judge interrupted and said, "That's fine." The judge granted the challenge. (RT 3:828.)

juror said she had a relative and friends in law enforcement and expressed doubts about her ability to be impartial. On appeal, the Sixth U.S. Circuit Court of Appeals said it was not the juror's doubt about her own impartiality that disqualified her, but "the conspicuous lack of response, by both counsel and the trial judge, to [the juror's] clear declaration that she did not think she could be a fair juror." (*Hughes*, at p. 458.) The Sixth Circuit overturned the conviction, concluding that empaneling one biased juror warranted a new trial. (*Hughes*, at p. 463.)

Like the juror in *Hughes*, Juror No. 3 in Mr. Woodruff's trial had relatives in law enforcement and doubted that he could be fair to the defendant. Also like in *Hughes*, questioning of the juror ended without an attempt by either counsel or the trial judge to rehabilitate the juror.

In *Hughes*, the appellate court said a trial court "may rely upon juror assurances of impartiality in deciding whether a defendant has satisfied his burden of proving actual prejudice." (*Hughes*, at p. 460.) In Mr. Woodruff's trial, Juror No. 3, like the juror in *Hughes*, offered no such assurances of impartiality.

i. *Ineffective assistance*

By insisting that the biased Juror No. 3 ought to be seated on the jury, Blankenship demonstrated a profound lack of appreciation of his proper role at trial. "Among the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense." (*Miller v. Francis* (6th Cir. 2001) 269 F.3d 609, 615.)

Far from ferreting out a biased juror, Mr. Woodruff's defense counsel embraced the biased juror, apparently on the inherently racist theory that all African-American jurors would be favorable to an African-American defendant, even a juror who believed without hearing any evidence that Mr. Woodruff was guilty of murder and therefore deserved to be executed. Such an ill-conceived approach cannot qualify as strategic.

"The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." (*Hughes*, *supra*, at p. 463, citing *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316 [145 L.Ed. 2d 792, 120 S.Ct. 774]; also see *Quintero v. Bell* (6th Cir. 2004) 368 F.3d 892, cert. den. (2005) 544 U.S. 936 [125 S.Ct. 1636, 161 L.Ed.2d 506], citing *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed. 2d 657](failure to object to biased juror is structural error that is per se prejudicial); *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109,

1111 (presence of biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice).)

Mr. Woodruff's defense counsel should have made a challenge for cause to Juror No. 3, because of his family relationships in law enforcement, his doubts about his own ability to be fair, his preconceived notions about Mr. Woodruff's guilt, and his belief that all murderers should be executed. At the very least, defense counsel should have stipulated to the prosecution's challenge for cause to Juror No. 3. Had defense counsel done so, it is inconceivable that the juror would have survived the challenge, because the trial judge consistently followed the parties' stipulations to remove jurors for cause. (See RT 3:802-854.)

Instead, defense counsel failed his most basic of duties, allowing – and even encouraging – a biased juror to be seated. That was not strategic; it was incompetent. As a consequence, Mr. Woodruff was denied a fair trial, assistance of counsel, heightened reliability of guilt and penalty verdicts in a death-penalty proceeding, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, sections 7, 15, 24 and 29 of the California Constitution.

ii. *Abuse of discretion*

The trial judge's characterization of Juror No. 3's position as that he "would do his best to be fair" did not overcome the juror's repeatedly

expressed doubts about his ability to be fair. "For a juror to say, 'I think I could be fair, but ...,' without more, however, must be construed as a statement of equivocation. It is essential that a juror 'swear that [she] could set aside any opinion [she] might hold and decide the case on the evidence.'" (*Miller v. Webb* (6th Cir. 2004) 385 F.3d 666, 675, quoting *Patton, supra*, 467 U.S. at p. 1036.)

Juror No. 3 did not even say he *thought* he could be fair – he said he would *try*. The prosecutor followed up by asking if there was "a but to that," which the juror acknowledged there was. "You know, I have strong feelings about the subject of the case. ... Like, I'd be strongly on the side of him being guilty." (RT 3:1007.)

When the trial court is left with a statement of partiality, as with Juror No. 3, "coupled with a lack of juror rehabilitation or juror assurances of impartiality, [the appellate court is] left to find actual bias. When a trial court is confronted with a biased juror, ... the judge must, either *sua sponte* or upon a motion, dismiss the prospective juror for cause." (*Miller v. Webb, supra*, 385 F.3d at p. 675, citing *Frazier v. United States* (1948) 335 U.S. 497, 511 [93 L.Ed. 187, 69 S.Ct. 201]; also see *United States v. Martinez-Salazar, supra*, 528 U.S. at p. 316 792](trial judge's decision to seat a juror who should have been dismissed for cause requires reversal).) "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial

occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217 [71 L.Ed. 2d 78, 102 S.Ct. 940].)

In Mr. Woodruff's trial, the trial judge failed in his duty to be ever watchful to prevent prejudice to the defendant from the seating of a biased juror. Before denying the prosecution's challenge for cause, the trial judge should have inquired as to whether the juror could promise to be impartial. However, the judge made no inquiry and the juror made no such promise. Instead, Juror No. 3's repeated statements of his belief in Mr. Woodruff's guilt, his doubts about his ability to be fair, and the trial judge's "conspicuous lack of response" to the indications of juror bias, allowed a biased juror to be seated.

Consequently, Mr. Woodruff was denied a fair trial, the heightened reliability of guilt and penalty determinations required in death-penalty proceedings, and due process of law, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 24 and 29 of the California Constitution.

iii. *Automatic vote for death*

No one during jury voir dire – not defense counsel, not the prosecutor or the trial judge – questioned Juror No. 3's assertion in the juror questionnaire that "If the defendant is guilty of murder he/she should get the death penalty." (CT 6:1754.) On its face, the juror's statement is a

statement that the juror would automatically vote for the death penalty, without weighing aggravating and mitigating evidence in the penalty phase, as Penal Code section 190.3 requires.

"A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. ... If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 [112 S.Ct. 2222].)

Any reasonable defense counsel would have questioned Juror No. 3 on voir dire about his beliefs on the death penalty, and whether he would be able to put aside his beliefs and weigh aggravating and mitigating evidence in the penalty phase, as statute requires. However, defense counsel made no such inquiry.

Any responsible trial judge, before denying a challenge for cause to Juror No. 3, would have inquired into whether the juror could follow the law or would hold fast to his belief that a conviction for murder meant that the defendant "should get the death penalty." (CT 6:1754.) However, the trial judge made no such inquiry.

As a result of all of these actions and oversights of the trial judge and defense counsel, a biased juror was seated. As a result, Mr. Woodruff was denied a fair trial, effective assistance of counsel, the heightened

reliability required in a death-penalty case, and due process of law in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 24 and 29 of the California Constitution.

The remedy for these structural errors is clear: Mr. Woodruff's convictions and death sentence must be overturned.

c. Peremptory challenges

i. Trial judge erred in denying first Wheeler motion based on confusion about juror's identity.

Facts

During jury selection on November 19, 2002, defense counsel Blankenship made an oral motion citing *People v. Wheeler*[16], *supra*, 22 Cal. 3d 258. The motion alleged racial discrimination in jury selection after the prosecutor used peremptory challenges to dismiss prospective jurors L.T. (RT 3:976) and S.J. (RT 3:1028), both of whom were African-American. (RT 3:1032-1034.) Defense counsel alleged that the prosecutor had made a disproportionate inquiry into African-American jurors, while seeking to rehabilitate jurors who were not African-American. (RT 3:1033.)

[16] An objection at trial under *Wheeler* preserves a claim on appeal under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (*People v. Lancaster* (2007) 41 Cal. 4th 50, 73 [58 Cal.Rptr.3d 608, 158 P.3d 157].)

The trial judge denied the defense motion without asking the prosecutor to explain his reasons for the peremptory challenges. The trial judge said he did not find a prima facie case of systematic exclusion of African-American jurors. The trial judge said L.T. had had an incident in which someone shot at her house, and she was dissatisfied with the law enforcement response, while S.J. had compared jury duty with a root canal and had said he did not want to be in court. (RT 3:1035.)

However, the trial judge was mistaken in his characterization of S.J., who was not the juror who compared jury duty to a root canal. The juror who made that comparison was D.B. (RT 3:932), a white juror (CT 8:236) who had already been dismissed on a defense peremptory challenge. (RT 3:1029.)

To the contrary, S.J. had said on voir dire that he was willing to serve on the jury if he had to (RT 3:919), and that he believed in some cases the death penalty was justified. (RT 3:945.) In his juror questionnaire, S.J. had said he was 54 years old, a native of Alabama, a "Black American" and an Air Force veteran. He had been married for 20 years, had two children, and had been working as an aircraft mechanic for United Parcel Service in San Diego for 14 years. (CT 8:2175-2197.)

Discussion

The equal protection and due process clauses of the United States Constitution prohibit a prosecutor from excluding qualified and unbiased

persons from the jury on the grounds of race or sex, regardless of the defendant's race and sex. (*Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196]; *J.E.B. v. Alabama* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89]; *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *Batson v. Kentucky*, *supra*, 476 U.S. 79.)

For more than 130 years, the United States Supreme Court has held that a state denies an African-American defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. (*Strauder v. West Virginia* (1880) 100 U.S. 303, 310 [25 L.Ed. 664].)

"When the government's choice of jurors is tainted with racial bias, that 'overt wrong ... casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. ...' [Citation omitted.] That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 238, quoting *Powers v. Ohio*, *supra*, 499 U.S. at p. 412.)

In *Batson v. Kentucky*, *supra*, 476 U.S. 79, the United States Supreme Court described a three-step process for constitutional review of peremptory strikes. First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference

of discriminatory purpose." (*Id.*, at pp. 93-94.) Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. (*Id.*, at p. 94.) Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410; 162 L.Ed. 2d 129], quoting *Purkett v. Elem* (1995) 514 U.S. 765, 767 [115 S.Ct. 1769; 131 L.Ed. 2d 834].)

A prosecutor's use of peremptory challenges to exclude prospective jurors based on race also violates the defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*People v. Bonilla* (2007) 41 Cal. 4th 313, 341 [60 Cal.Rptr.3d 209, 160 P.3d 84].)

In this case, defense counsel properly made out the prima facie case for discriminatory purpose, observing that the prosecutor had made a disproportionate inquiry into African-American jurors and had sought to rehabilitate jurors who were not African-American. (RT 3:1033.) Defense counsel pointed specifically at peremptory challenges used to exclude S.J. and L.T., both of whom were African-American. (RT 3:1034.)

The trial judge failed to take the second *Batson* step of asking the prosecutor his reasons for the peremptory strikes, instead denying the

defense motion on the faulty reasoning that the prosecutor's acceptance of one black juror was enough to refute discriminatory intent. The judge observed that the prosecutor had accepted the panel, including an African-American, Juror No. 3. (RT 3:1034.)

Juror No. 3 was an extraordinary example. (See Claim A4, subclaim (b), *infra*.) He had said on voir dire, "I'd be strongly on the side of him being guilty." (RT 3:1007.) Still, Juror No. 3's selection, notwithstanding his admittedly pro-prosecution bias, was sufficient in the judge's mind to dismiss any allegation of racially discriminatory intent in the prosecutor's jury selection: "It kind of shoots the theory that he's systematically excluding African Americans in the foot." (RT 3:1034.)

In *People v. Snow* (1987) 44 Cal. 3d 216 [242 Cal.Rptr. 477, 746 P.2d 452], this Court rejected the premise, such as the trial judge made in this case, "that if the jury panel contains at least a minimum number of members of the cognizable group to provide defendant a representative cross-section of the community, he cannot complain of the prosecutor's pattern of unlawful discrimination in the use of his peremptory challenges." (*Id.*, at p. 226.) This Court concluded that nothing in its cases or in *Batson* "supports such an analysis." (*Ibid*; also see *Snyder v. Louisiana*, *supra*, 552 U.S. at p. 478 ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose.").)

The trial judge's conclusions about the prosecution's motives for rejecting prospective jurors S.J. and L.T. were also improper. The United States Supreme Court has stressed that trial courts should not "substitute their own speculation as to reasons why a juror might have been struck for the prosecutor's stated reasons." (*Green v. Lamarque* (9th Cir. 2008) 532 F. 3d 1028, 1030, citing *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) This Court has characterized the rule as: "[E]fforts by a trial or reviewing court to 'substitute' a reason will not satisfy the prosecutor's burden of stating a racially neutral explanation." (*People v. Lenix* (2008) 44 Cal. 4th 602, 625 [80 Cal.Rptr.3d 98, 187 P.3d 946].)

Nonetheless, the trial judge in this case speculated about the prosecutor's supposed non-racial reasons for excluding two black jurors, including L.T.'s prior dissatisfaction with law enforcement and an erroneous attribution of a "root canal" remark to S.J. (RT 3:1035.)

In fact, S.J. expressed no reluctance to serve on the jury whatsoever. (See CT 8:2175-2197; RT 3:918-919, 944-945.) S.J. was indistinguishable in any respect except race from Juror No. 7, who was white (CT 7:1832), and Juror No. 12, who was apparently[17] Latino. (CT 7:1924.) All three members of the venire were males in their 50s, with service/repair jobs for major companies. All three ranked themselves "6" on a scale from 1 to 10

[17] Juror No. 12 left blank the section in the questionnaire on race and ethnic origin, but answered elsewhere that his place of birth was Mexico. (CT 7:1924.)

on the death penalty in the juror questionnaire. (CT 7:1846, 1938; CT 8:2191.)

Again, the trial judge did not inquire beyond the first step of *Batson* analysis. Thus, the prosecution was not even required to offer race-neutral reasons for the peremptory challenge to prospective juror S.J.

This Court held in *People v. Lenix*, *supra*, 44 Cal.4th 602, that a reviewing court must engage in comparative juror analysis "when the defendant relies on such evidence and the record is adequate to permit the comparisons." (*Lenix*, at p. 607.) Comparative analysis should include "jury voir dire and the jury questionnaires of all venire members." (*Green v. Lamarque*, *supra*, 532 F.3d at p. 1030.)

In this case, defense counsel alleged disparate treatment of otherwise similarly situated white and black jurors in the prosecution's voir dire. (RT 3:1033.) The trial record includes ample evidence in the voir dire and juror questionnaires to demonstrate similarities between S.J., a black prospective juror who was excused (CT 8:2175-2197), and Jurors No. 7 and No. 12, who were not black and were seated. (CT 7:1830-1852, 1922-1944.)

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

Here, like in *Batson*, "the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action." (*Batson*, *supra*, at p. 100.) In *Batson*, the remedy was to remand for such an inquiry. (*Id.*) Here, the evidence of the prosecutor's discriminatory intent is manifest, including his own words complaining that he was being "forced to take jurors simply because of their race." (RT 3:830.)

If the trial judge had reached the third *Batson* step, as he should have regarding prospective juror S.J., a comparison of the shared characteristics of S.J. with trial jurors Nos. 7 and 12 would have demonstrated that any race-neutral explanation for the exclusion of S.J. would have been pretextual. (*Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251-1252.)

The trial judge was wrong about the facts, and he was wrong about the law. His errors, individually and collectively regarding prospective juror S.J., require reversal of Mr. Woodruff's conviction because Mr. Woodruff was denied a fair trial, due process and equal protection of the laws under the state and federal constitutions.

ii. *Trial judge erred in denying second Wheeler motion with faulty reasoning for concluding prosecutor's reasons for excluding black jurors were race-neutral.*

Facts

Defense counsel's second motion under *People v. Wheeler*[18] concerned the prosecutor's peremptory challenge to prospective juror M.M., a black native of Africa. (RT 4:1137; CT 10:2935.) Following the three-step *Batson* process, the judge properly found a prima facie case of racial discrimination in *Batson*'s first step, and asked the prosecutor to justify the exclusion of M.M. from the jury. (RT 4:1137.)

In the second *Batson* step, the prosecutor said M.M. did his dissertation for a master's degree in sociology on colonization and concluded it was brainwashing to exploit his country. The prosecutor said he had grave concerns about anybody with a social services background serving on the jury. He said he did not think M.M. would make a good juror. (RT 4:1137-1138.)

The trial judge said that to grant the defense motion, he had to find no race-neutral reason for the prosecution's decision to dismiss M.M. from the jury. The judge said he had found a prima facie case that required an

[18] Defense counsel used the word "renew" with respect to his *Wheeler* motion regarding prospective juror M.M., which the trial judge characterized as a motion for mistrial. (RT 4:1135-1139.) By renewing the earlier *Wheeler* motion, defense counsel preserved the claims for appeal. (*People v. Hartsch* (2010) 49 Cal.4th 472, 490 fn. 18 [110 Cal.Rptr.3d 673, 232 P.3d 663].)

explanation, but the prosecutor's explanation gave nonracial reasons and the judge suspected the same juror would have been excluded if white. (RT 4:1139.)

The judge said from his experience, people with social service backgrounds are inclined to hold the prosecution to a higher standard than required by law, something more than proof beyond a reasonable doubt. The judge said he was satisfied that the explanation that the prosecutor gave was race-neutral. The judge noted that an African-American, Juror No. 3, remained on the panel. He said all three of the black jurors excused by the prosecutor via peremptory challenges had been removed for race-neutral reasons. (RT 4:1140.)

Discussion

In the prosecutor's self-described "race battle" over jury selection (RT 3:830), he sought to exclude, via challenges for cause or peremptory challenges, all but one black prospective juror who appeared in the jury box during voir dire. The trial judge's example to the contrary – that the prosecutor had accepted Juror No. 3 – is hardly commendable. The prosecutor had challenged Juror No. 3 for cause because of the juror's expressions of bias (RT 3:1022, 1024), yet accepted him as a juror after defense counsel objected to his removal (RT 3:1022), notwithstanding the juror's statement that he was inclined to believe the defendant was guilty before hearing any evidence (RT 3:990), and he did not believe he could be

impartial because his mother and an uncle worked in law enforcement. (CT 6:1751.)

But the presence on the jury of the admittedly pro-prosecution Juror No. 3 did not in any way negate the harm wrought by the prosecutor's systematic exclusion of other black jurors. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 478.)

The prosecutor's reason for removing prospective juror M.M. was pretextual. The prosecutor pointed to M.M.'s master's degree in sociology and expressed "grave concerns" about his social services work background. (RT 4:1137.) However, the prosecutor did not attempt to remove Juror No. 2, a research associate at the University of California, Riverside (CT 6:1719), or Juror No. 11, a second-grade teacher who had studied psychology. (CT 7:1903.) Juror Nos. 2 and 11 were white. (CT 6:1717; CT 7:1901.)

Nothing about prospective juror M.M.'s occupational or educational background – or his expressed views on the death penalty – distinguished him from Juror No. 2 and 11. What distinguished him was his race – he was black and they were not. That is a constitutionally unacceptable selection criterion.

"If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to

serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

On the juror questionnaire, prospective juror M.M. ranked himself 7 out of 10 on the death penalty, the same as Juror No. 1 (CT 19:5557) and Juror No. 5 (CT 7:1800), and higher than Juror No. 7 (CT 7: 1832) and Juror No. 12. (CT 7:1924.) Prospective juror M.M. wrote on his questionnaire: "I think all right-thinking persons who willfully commit a murder should be held accountable for their action" (CT 10:2949); and, "I think the death penalty is just a form of punishment." (CT 10:2950.) On voir dire, prospective juror M.M. said he would be capable of voting for the death penalty after hearing the facts. (RT 4:1108, 1128.)

The judge's standard for reviewing defense counsel's *Wheeler* motion was erroneous. The appropriate question in a proper *Batson* inquiry was not whether the prosecutor offered a race-neutral reason for dismissing prospective juror M.M. The appropriate question was whether the reason the prosecutor offered was pretextual. (*Batson*, *supra*, 476 U.S. at p. 95.) The prosecutor had characterized jury selection in this case as a "race battle," had attempted to remove all but one black juror from the panel, and had selected white jurors with characteristics similar to those that supposedly disqualified black jurors, including M.M.'s education and occupation.

"The fact that [a proffered] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 248.)

The trial judge abandoned the third step required in *Batson* – weighing the prosecution's reasons for removing the juror against the evidence that those reasons were pretextual. Instead, the trial judge erred in accepting the prosecution's stated reason without scrutiny.

The evidence, which this Court reviews de novo (*People v. Hawthorne* (2009) 46 Cal. 4th 67, 79 [92 Cal.Rptr.3d 330, 205 P.3d 245]), supports defense counsel's characterization of the prosecutor's exclusion of prospective juror M.M. as "the straw that breaks the camel's back ... given the pattern that's gone on through the whole course of this selection." (RT 4:1138.)

The evidence of a pattern of racially discriminatory peremptory challenges by the prosecutor should have required the trial judge to grant defendant's motion for mistrial because of the harm done to Mr. Woodruff in the race-based selection of the jury.

Because the trial judge failed to perform his duty, Mr. Woodruff was denied his rights to a fair trial, the heightened reliability of guilt and penalty verdicts required in death-penalty cases, due process and equal protection of the laws, and to trial by a jury drawn from a representative cross-section of the community, under the Sixth, Eighth and Fourteenth Amendments to

the United States Constitution, and Article 1, sections 7, 15, 17, 24, 29 and 31 of the California Constitution. Therefore, Mr. Woodruff's convictions in this case must be overturned.

CLAIM A5: Trial judge erred in allowing prosecutor's prejudicial insinuation about defendant insisting on right to trial.

During voir dire, the prosecutor falsely insinuated to prospective jurors that Mr. Woodruff had asked for a trial. The trial judge refused to remedy the prejudicial insinuation. The prosecutor's improper comment tainted the trial by allowing the jurors to infer that Mr. Woodruff had other options, such as a plea bargain, that he had declined. As a result, Mr. Woodruff was denied a fair trial and due process of law.

Facts

During voir dire of prospective jurors, the prosecutor asked prospective juror D.M. about her experience as a witness in another case. She said she did not testify; she told the district attorney what she saw and the DA took it to the other attorney. "And the guy said, okay, I did it." (RT 3:1072-1073.)

In jury voir dire at Mr. Woodruff's trial, the prosecutor followed up by asking D.M.: "Do you understand, though that even somebody who did it can ask for a trial? Do you understand that?" "Uh-huh." "That it's a constitutional right for everybody, even if they did it, to ask for a trial? Will you not hold it against the defendant?" "Right." (RT 3:1073.)

Defense counsel objected. The judge overruled the objection. (*Ibid.*)

Defense counsel revisited the issue the following day, outside the presence of jurors. He said Mr. Woodruff had not asked for a trial, the

prosecutor's comments were "a little over the top," and the prosecutor's comments implied that the defendant had been offered a plea bargain, which he had not been offered. Defense counsel objected to the prosecutor's conduct, which defense counsel alleged had prejudiced the jury. "It's very misleading and prejudicial to Mr. Woodruff in light of the panel thinking the reason we're here is Mr. Woodruff asked for this trial." (RT 4:1092.)

The judge said the prosecutor's comments were in the context of "the juror ... saying that a videotape will be nice. And Mr. Soccio's comments to the effect, Hey, even if the guy is caught on tape, a presumption of innocence applies, and you have to follow the law. You are not gonna hold it against the defendant because we're having a trial." (RT 4:1094.)

Defense counsel replied that he did not have "any recollection of ... the context to which you have depicted those comments." (RT 4:1094.)

Indeed, the judge's recollection was faulty. The reference to a videotape occurred in the prosecutor's voir dire of another prospective juror, H.H. In answer to a question about whether he would require the prosecution "to convince you absolutely without any doubt," H.H. asked, "How could you do something like that? If you had a video here to see –" The prosecutor interrupted the prospective juror and H.H. never had a chance to complete the thought. (RT 3:942-943.)

Discussion

The relevant question in a reviewing court's consideration of a claim of prosecutorial misconduct "is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144], quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Under *Darden*, "the first issue is whether the prosecutor's remarks were improper and, if so, whether they infected the trial with unfairness." (*Tan v. Runnels* (9th Cir. 2005) 413 F.3d 1101, 1112.)

Here, the prosecutor's comment in voir dire managed to plant several prejudicial seeds in the jurors' minds before they had heard any evidence, even before they had been empaneled: (1) Even if the defendant "did it," (2) he had a constitutional right to ask for a trial, which (3) the jurors shouldn't hold against him. It is a "straw man" argument because it ascribes to the defendant an action he did not take, to ask for a trial. Implicit in the comment, as defense counsel argued, was the false implication that the defendant had been offered another option – a plea deal that he rejected. Thus planted in the jurors' minds, those false assumptions would color every piece of evidence and every witness's testimony. The jurors would plausibly conclude that even though the defendant was guilty, he had asked for a trial.

The prosecutor's improper comment about the assertion of the Sixth Amendment right to trial, by itself and in combination with the prosecutor's other improper comments that are addressed in other claims, denied Mr. Woodruff his rights to a fair trial, to the heightened reliability of guilt and penalty verdicts required in death-penalty cases, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 17 and 29 of the California Constitution. Mr. Woodruff's convictions should be overturned.

B. Guilt phase

CLAIM B1: Trial judge refused to limit number of uniformed police officers in courtroom, which created intimidating atmosphere.

The trial judge claimed he did not have authority to limit the number of uniformed police officers in the courtroom. As a result, numerous uniformed Riverside police officers sat in the visitors gallery wearing blue wristbands in memory of the victim, creating an intimidating atmosphere that deprived Mr. Woodruff of his state and federal constitutional rights to a fair trial, heightened reliability of guilt and penalty verdicts in a death-penalty case, and due process of law.

Facts

At a hearing December 2, 2002, regarding motions in limine, defense counsel Mark Blankenship requested a court order prohibiting or limiting the presence of uniformed police officers in the courtroom during the trial. Blankenship said an abundance of police officers in the hallway or in the courtroom would be intimidating or distracting and would make it difficult for the jury to do its job. (RT 4:1256.)

Trial Judge Christian Thierbach denied the motion, saying he had no idea whether there was a campaign "to stack the courtroom with uniformed officers. If there is, that's their business and they're gonna have to live with the outcome if something similar happens as it did in the case I was referring to earlier. But for me to issue an order excluding uniformed

officers from attending would be illegal. I don't have authority to do that, so I'm not gonna issue such an order." (RT 4:1258.)

In trial testimony, Officer Benjamin Baker testified that on the day of the shooting, "I had a uniform on like a number of officers do in this room. I had a uniform on." (RT 5:1447.)

In addition to their uniforms, Riverside police officers wore blue wristbands in the courtroom. Officer Lavall Nelson testified that he wore his wristband every day in memory of Jacobs. (RT 10:2247.)

Officer Giovanni Ili also wore a blue wristband while he testified. He said every Riverside police officer was wearing a wristband, which said: "Charles Doug Jacobs, the Third. Born December 29, 1995[19]. End of watch, January 13, 2001, 1428 hours." (RT 12:2686.)

The intimidating atmosphere included not only uniforms and wristbands, but also gestures from the audience. On December 5, 2002, defense counsel complained to the court that Officer Baker's brother, a former police officer, had gestured with his fingers like he was pointing a gun at the defendant as the room was emptying for a recess. (RT 7:1732.) The judge responded that he would ask the sheriff's department to investigate. The judge said he would not tolerate disruptive or intimidating conduct. If he saw it, he said, the person would be removed from the courtroom for the duration of the trial, at least. (RT 7:1733.)

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[19] This refers to the date Jacobs became a Riverside police officer.

Discussion

Notwithstanding Judge Thierbach's claim of powerlessness to control his courtroom, California trial judges "have plenty of tools, including statutes from various codes and rules of court. These statutes and rules give judges adequate authority to control how hearings proceed." (Administrative Office of the Courts, *Courtroom Control: The Basics* (2009).[20])

Trial judges have an obligation to ensure that their courtrooms are free from a coercive or intimidating atmosphere, Justice Kennedy observed in his concurrence in *Carey v. Musladin* (2006) 549 U.S. 70, 80 [127 S.Ct. 649], in which the Supreme Court held that a defendant was not inherently prejudiced when spectators at his trial wore buttons depicting the murder victim. Justice Kennedy explained:

> The rule against a coercive or intimidating atmosphere at trial exists because "we are committed to a government of laws and not of men," under which it is "of the utmost importance that the administration of justice be absolutely fair and orderly," and "[t]he constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding ... culminating with a trial "in a courtroom presided over by a judge."

(*Id.*, quoting *Cox v. Louisiana* (1965) 379 U.S. 559, 562 [85 S.Ct. 476, 13 L.Ed.2d 487].)

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[20] http://www2.courtinfo.ca.gov/protem/courses/cc/html_version/cc2.htm

In *Musladin*, Justice Kennedy encouraged the Supreme Court to adopt "a general rule to preserve the calm and dignity of a court," such as a prohibition on spectators wearing buttons with the victim's image, as was at issue in *Musladin*. Justice Kennedy speculated that the Court may not have had occasion to adopt such a rule because "trial judges as a general practice already take careful measures to preserve the decorum of courtrooms" (*Musladin*, *supra*, at p. 81, Kennedy, J., concurring in judgment), precisely what Judge Thierbach said he was powerless to do.

Before the *Musladin* decision, Supreme Court precedents dating back nearly a century had held that it is a denial of due process of law when "a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice." (*Frank v. Mangum* (1915) 237 U.S. 309, 335 [35 S.Ct. 582]; also see *Moore v. Dempsey* (1923) 261 U.S. 86, 91 [43 S.Ct. 265]; *United States v. Rutherford* (9th Cir. 2004) 371 F.3d 634 (conduct of federal agents who sat directly behind prosecution may have intimidated jury); *Woods v. Dugger* (11th Cir. 1991) 923 F.2d 1454 (large number of uniformed spectators in courtroom, combined with pretrial publicity, deprived petitioner of a fair trial); *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828 (presence of three women inside and outside the courtroom wearing "WAR" (Women Against Rape) buttons apparent to at least three jurors

was so inherently prejudicial that it created an unacceptable threat to defendant's right to a fair trial).)

The Supreme Court's precedents, Justice Kennedy said, required a trial court "to order a new trial when a defendant shows his conviction has been obtained in a trial tainted by an atmosphere of coercion or intimidation similar to that documented in the foregoing cases." (*Carey v. Musladin*, *supra*, 549 U.S. at p. 80, Kennedy, J., concurring in judgment.)

The Supreme Court had previously held that the presence of four uniformed state troopers in the first row of spectators did not present an unacceptable risk of prejudice. (*Holbrook v. Flynn* (1986) 475 U.S. 560 [106 S.Ct. 1340].) Nevertheless, "[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." (*Id.*, at pp. 570-571.)

Mr. Woodruff's chance of receiving a fair trial was severely diminished by the intimidating presence of "a number of officers" in uniform, all of whom wore blue wristbands in support of the shooting victim, a fellow officer, while among their ranks at least one former officer made a hand gesture suggesting he would shoot the defendant.

The officers' behavior, and the trial judge's refusal to control it, interfered with the course of justice and denied Mr. Woodruff his rights to a fair trial, the heightened reliability of guilt and penalty determinations required in death-penalty cases, and due process of law under the Sixth,

Eighth and Fourteenth amendments to the United States Constitution and Article I, sections 7, 15, 17 and 29 of the California Constitution.

The proper remedy for such a trial tainted by intimidation is a reversal of Mr. Woodruff's convictions and a new trial in which intimidation is not allowed.

CLAIM B2: Trial judge created "indelible picture" when he allowed jurors to see photographs of defendant in orange jail jumpsuit.

The trial judge permitted the jurors, over defense objection, to view photographs taken on the day of Mr. Woodruff's arrest in which he wore an orange jail jumpsuit. The judge's abuse of discretion denied Mr. Woodruff his state and federal constitutional rights to the presumption of innocence, a fair trial, the heightened reliability of guilt and penalty verdicts required in death-penalty cases, and due process of law.

Facts

During the testimony of Riverside police officer Lavall Nelson, the prosecutor handed Exhibit 28, a photograph, to the witness and asked if that was how the defendant looked when he was arrested. Defense counsel objected. The trial judge overruled the objection, saying the issue had been litigated at a pretrial hearing. (RT 10:2236.)

Indeed, defense counsel had moved in limine to exclude Exhibits 27 and 28, two photographs taken on the day of Mr. Woodruff's arrest that showed the defendant in an orange jumpsuit. Defense counsel had challenged the use of the photographs on grounds of relevance and that they were more prejudicial than probative under California Evidence Code section 352. (RT 4:1207.) However, the trial judge said he saw nothing prejudicial about either photograph and said he would not exclude the

photographs if they were offered as evidence by the prosecution. (RT 4:1209.)

Discussion

The admission of Exhibits 27 and 28 at trial harmed Mr. Woodruff by etching in the jurors' minds what the Ninth United States Circuit Court of Appeals has characterized as "the indelible picture of the defendant dressed in prison garb." (*Felts v. Estelle* (9th Cir. 1989) 875 F.2d 785, 786.)

When a defendant is forced to wear prison garb at trial, jurors "may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact he poses a danger to the community or has a prior criminal record." (*Estelle v. Williams* (1976) 425 U.S. 501, 518 [96 S.Ct. 1691, 48 L.Ed.2d 126] (Brennan J., dissenting).) This image may create a subtle prejudice undermining the presumption of innocence. (*Id.* at pp. 504-05.) The "constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment" and no state policy is served by compelling a defendant to dress in prison clothing before the jury. (*Id.*, quoted in *United States v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1136.)

A criminal defendant has the right to appear before the jury in civilian clothes instead of jail garb, and violation of this right is of federal constitutional dimensions that cannot be held harmless unless the reviewing court determines that it was harmless beyond a reasonable doubt.

(*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; *In re Avena* (1996) 12 Cal.4th 694, 731[49 Cal.Rptr.2d 413, 909 P.2d 1017].) The trial judge's indifference to the prejudice resulting from the jurors' exposure to the "indelible picture" of Mr. Woodruff in prison garb created a proceeding that did not meet the requirement of heightened reliability of guilt and penalty determinations in a death-penalty case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

At Mr. Woodruff's trial, jurors regularly saw the defendant in court dressed in a suit and tie. (RT 8:1819; 10:2195; 26:5380, 5411; 27:5565.) Nonetheless, during the testimony of Officer Nelson and in deliberations, the jurors were exposed to Exhibits 27 and 28, both of which showed the defendant in an orange jumpsuit. Ostensibly, the prosecutor introduced the photograph to show "the way the defendant looked on January 13, 2001 at the time, or about the time, of his arrest." Officer Nelson confirmed that "[w]ith the *exception* of the jumpsuit," it was the way Mr. Woodruff appeared when he was arrested. (RT 10:2236.) Hence, a photograph of Mr. Woodruff in a jumpsuit was not relevant to show what the prosecutor purportedly intended to show. Instead, the prosecutor's real reason for showing the photograph to the jurors was to plant in their minds the irrelevant and highly prejudicial image of Mr. Woodruff in the orange jumpsuit, which he was not wearing at or about the time of his arrest.

The judge's decision to admit Exhibits 27 and 28, over defense objection, created for the jurors an "indelible picture," which denied Mr. Woodruff his rights to the presumption of innocence, a fair trial, the heightened reliability of guilt and penalty verdicts required in death-penalty cases, and due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 17 and 29 of the California Constitution.

Consequently, Mr. Woodruff's convictions should be overturned.

CLAIM B3: Prosecution witness improperly mentioned defendant's arrest record without being asked.

During defense cross-examination of Riverside homicide detective Keith Kensinger in the guilt phase of trial, the prosecution witness blurted out a reference to the defendant's "previous arrest record," even though no question had been asked about it. This violated Mr. Woodruff's state and federal rights to a fair trial, the heightened reliability of guilt and penalty verdicts required in death-penalty cases, and due process of law.

a. Facts

Detective Kensinger testified that he was assigned on January 13, 2001, to lead the investigation of the shooting death of Detective Charles Douglas Jacobs. (RT 7:1778.) During cross-examination of Kensinger in the guilt phase of Mr. Woodruff's trial on January 6, 2003, defense counsel asked Kensinger if, when Kensinger interviewed the defendant's brother Claude Carr on the day of the shooting, Kensinger thought it relevant that Carr mentioned that his brother was "a family man." Kensinger replied: "He simply states he's a family man. He hasn't done anything wrong. Are we were [sic] talking about what he was like in the past and his previous arrest record?" (RT 13:2950.)

Rather than object to Kensinger's response, defense counsel said, "You know the rules," and then, "You crossed the line here a little bit,"

which prompted the prosecutor to object. The objection was sustained. (*Ibid.*)

Discussion

Not only was Detective Kensinger's answer nonresponsive to defense counsel's question, it was prejudicial to the defense, leaving the impression with the jurors that the defendant had a criminal record, when, in fact, the defendant had never been convicted of a felony. Even if the defendant had had a record of previous felony convictions, such evidence would have been inadmissible under Evidence Code section 1101 to prove his conduct on a specific occasion, until and unless he testified.

The United States Supreme Court has held that testimony such as Kensinger's violates a defendant's right to due process. "[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. ... [T]he Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.'" (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485-486 [98 S.Ct. 1930, 56 L.Ed.2d 468], quoting *Estelle v. Williams*, *supra*, 425 U.S. at p. 503.

This Court has repeatedly held that the "admission of any evidence that involves crimes other than those for which a defendant is being tried

has a 'highly inflammatory and prejudicial effect' on the trier of the fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314 [165 Cal.Rptr. 289].) "[E]vidence of other crimes is inadmissible as regards guilt when it is offered solely to prove criminal disposition because the probative value of such evidence as to the crime charged is outweighed by its prejudicial effect." (*People v. Durham* (1969) 70 Cal.2d 171, 186-187 [74 Cal.Rptr. 262, 449 P.2d 198].) "[E]vidence of other criminal acts having little bearing on the question whether defendant actually committed the crime charged would assume undue proportions and unnecessarily prejudice defendant in the minds of the jury." (*People v. Kelley* (1967) 66 Cal.2d 232, 238-239 [57 Cal.Rptr. 363].) A "witness's volunteered statement can also provide the basis for a finding of incurable prejudice." (*People v. Wharton* (1991) 53 Cal.3d 522, 565 [280 Cal.Rptr. 631].)

In general, when a defendant does not object to the misconduct at trial or ask for the jury to be admonished to disregard the impropriety, the issue is forfeited for appeal. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072 [25 Cal.Rptr.2d 867, 864 P.2d 40].) However, a "defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations omitted.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if 'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Hill* (1998) 17 Cal.4th 800, 820 [72 Cal.Rptr.2d 656, 952 P.2d

673], quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1333 [65 Cal.Rptr.2d 145, 939 P.2d 259], quoting *People v. Price* (1991) 1 Cal.4th 324, 447 [3 Cal.Rptr.2d 106, 821 P.2d 610].)

The prejudice to Mr. Woodruff was heightened by the fact that the witness giving the improper testimony was a high-ranking police officer "whose testimony was likely accorded a high degree of credibility by the jury. [Citation omitted.] Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy." (*Stribbling v. State* (Fla. App. 2001) 778 So.2d 452, 455.) The United States Supreme Court also has found merit in the argument that improper testimony by "police officers is likely to be more damaging to constitutional rights than such testimony by ordinary citizens, because the policeman in uniform carries special credibility in the eyes of jurors." (*Briscoe v. LaHue* (1983) 460 U.S. 325, 342 [103 S.Ct. 1108].)

In Mr. Woodruff's case, no objection, motion to strike or admonition to the jury could have cured the prejudicial effect of Detective Kensinger's gratuitous comment. The jury could not unlearn the detective's suggestion that Mr. Woodruff had an arrest record. Indeed, the detective's comment was consistent with a prosecution strategy of portraying Mr. Woodruff in the worst possible light – not as the family man who was baby-sitting his daughter on the afternoon when Officer Baker first appeared at his front door, but as an outlaw who did not follow society's rules.

The detective's suggestion that Mr. Woodruff had an arrest record undermined the defense strategy of portraying Mr. Woodruff as a family man, concerned about his mother's well being, who carried a gun out onto the porch because he was alarmed by the way two police officers were treating his mother. To insinuate that Mr. Woodruff had a criminal record, to further prejudice the jury against him, was to deny Mr. Woodruff his rights to a fair trial, to the heightened reliability of guilt and penalty verdicts required in death-penalty cases, and due process of law, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, sections 7, 15, 24 and 29 of the California Constitution. This Court should overturn Mr. Woodruff's convictions and order a new trial.

CLAIM B4: Prosecutor engaged in prejudicial misconduct in questioning Mr. Woodruff's mother about convictions from same incident.

On direct examination, the prosecutor improperly questioned Mr. Woodruff's mother about her misdemeanor convictions from the events that resulted in the charges against Mr. Woodruff. The harm was exacerbated when the trial judge allowed the prosecutor to probe further into the fact that the witness had gone to trial regarding those incidents. Mr. Woodruff was harmed further by defense counsel's decision not to seek a mistrial.

As a result of the prosecutor's misconduct, the trial judge's abuse of discretion and defense counsel's ineffective assistance, Mr. Woodruff was denied his state and federal constitutional rights to a fair trial, effective assistance of counsel, heightened reliability of guilt and penalty verdicts in a death-penalty proceeding, and due process of law.

Facts

Mr. Woodruff's mother, Parthenia Carr, was tried in Riverside County Superior Court in September 2001 on misdemeanor charges of disturbing the peace and resisting arrest, as a result of the events that led to Detective Jacobs' death. Mark Blankenship represented Mrs. Carr at trial. She was convicted of both charges. (RT A:38; RT 10:2251-2252, 2286; RT 11:2411; RT 12:2833-2834.)

When Mrs. Carr testified for the prosecution at Mr. Woodruff's trial, prosecutor Michael Soccio asked first about her relationship with Mr. Woodruff and defense counsel Blankenship. Then, over defense objection, the prosecutor began asking Mrs. Carr about her trial:

DA:	In fact, you were convicted of disturbing the peace and resisting a police officer in the performance of his duties, weren't you.
DEFENSE:	Objection – motion to strike.
JUDGE:	The objection is sustained.
DEFENSE:	I'd like counsel to be admonished to not bring it up.
JUDGE:	I sustained your objection.
DA:	Did you go through a trial regarding the events that occurred at your house on January 13th, 2001?
DEFENSE:	Objection – 352.
JUDGE:	Overruled.
WITNESS:	Yes.
DA:	Did you testify at that trial?
WITNESS:	Yes.

(RT 10:2252.)

After the lunch recess, defense counsel asked the trial judge out of the presence of the jury if the judge had any ideas "how we should deal with the fact how [the prosecutor] mentioned the convictions of Ms. Carr in front of the jury, when I think that he probably knows that you really can't do that. ... Seems like we have a bell that we have to unring." (RT 10:2284.)

Soccio argued that he believed he could ask about the resisting arrest conviction because "it involves moral turpitude," although he conceded that he had no authority for that position. (*Ibid.*)

The trial judge said, "[W]hen you talk about misdemeanors for impeachment purposes, we're talking about the conduct not the conviction. The conviction is hearsay. … But the conduct, as long as it involves moral turpitude, is fair game." (RT 10:2285.) The trial judge said disturbing the peace "under no circumstances" is a crime of moral turpitude. The judge said that unless the prosecutor could find authority that resisting arrest was a crime of moral turpitude, he would be willing to instruct the jury to disregard the prosecutor's question about Mrs. Carr's convictions. (RT 10:2286-2287.)

Blankenship said "it feels like prosecutorial misconduct to mention convictions … And to just thrust it into the center in front of jury in this very serious case – with all the trial experience that he has – is very serious, in my opinion, and it shows a lot of intent, because of his background and experience and the effort to say that, Oh, well, I think that this just goes to bias." Blankenship added that "there's a side of me that wants to ask for a mistrial," but he did not want to do that "because I think we're doing great here." (RT 10:2285.)

Discussion

The prejudice from the prosecutor's question was "a bell that we have to unring," in the words of defense counsel. No corrective instruction could have undone the damage to Mr. Woodruff from the prosecutor's question. To "unring" the bell would have required the trial judge to repeat the question, which would have drawn attention to it – effectively ringing it again – and would have exacerbated the harm to Mr. Woodruff.

Furthermore, by allowing the prosecutor to follow up with another question about Mrs. Carr's trial, the judge allowed the jurors to infer the truth of the matter asserted in the question itself – that Mrs. Carr had been convicted of criminal charges resulting from the same events that led to charges against Mr. Woodruff. Having learned that prejudicial fact, the jurors could not unlearn it, nor fail to conclude that if the mother was guilty of a crime, so was the son.

This Court has held that in spite of California voters' approval in 1982 of changes to California Constitution Article 1, section 28, subsection (d), "the fact of conviction of a misdemeanor remains inadmissible under traditional hearsay rules when offered to prove that the witness committed misconduct bearing on his or her truthfulness." (*People v. Wheeler* (1992) 4 Cal.4th 284, 288 [14 Cal.Rptr.2d 418, 841 P.2d 938]; see *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522 [29 Cal.Rptr.3d 586].) In *Wheeler*, this Court declined to create a hearsay exception for misdemeanor convictions,

concluding, "evidence of a misdemeanor conviction, whether documentary or testimonial[,] is inadmissible hearsay when offered to impeach a witness's credibility." (*Wheeler*, 4 Cal.4th at p. 300.)

Even though such evidence regarding Mrs. Carr's convictions might have been relevant, under Evidence Code section 210, nonetheless the potential for prejudice far outweighed any possible probative value, under Evidence Code section 352. A trial court should, and in this case did, "consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Wheeler*, 4 Cal.4th at pp. 296-297.) The trial court ruled that evidence of Mrs. Carr's misdemeanor convictions was inadmissible hearsay that did not involve moral turpitude. (RT 10:2285.)

In *Wheeler*, this Court declined to overturn the appellant's conviction, finding that the claim had been waived by defense counsel's failure to object on that specific ground. (*Wheeler*, 4 Cal.4th at p. 300.) Here, however, Mr. Woodruff's counsel did object to the prosecutor's inquiry in Mrs. Carr's conviction, and sought, to no avail, to have the prosecutor admonished to avoid that line of inquiry as being more prejudicial than probative, under Evidence Code section 352.

Nevertheless, the jury did learn of Mrs. Carr's convictions. The harm to Mr. Woodruff is not just in the improper impeachment of a witness, but more importantly that the jury's knowledge of those

convictions was directly prejudicial to Mr. Woodruff's case, as his mother's convictions involved the same events that led to the charges against Mr. Woodruff.

The harm was done by the prosecutor's leading question, which implied its own answer. Defense counsel was correct in his analysis that the bell could not be unrung. Prosecutorial misconduct harmed the defendant, the trial judge failed to minimize the harm by declining to admonish the prosecutor or limit his questioning on the subject, and defense counsel provided ineffective assistance in failing to move for a mistrial, under the mistaken belief that the trial was going well. To the contrary, such a proceeding does not meet the requirement of heightened reliability of guilt and penalty determinations in a death-penalty case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

As a result of these errors of commission and omission, Mr. Woodruff was denied his constitutional rights to a fair trial, effective assistance of counsel, heightened reliability of guilt and penalty verdicts in a death-penalty case, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 17, 24 and 29 of the California Constitution.

Mr. Woodruff's convictions should be overturned. He should be granted a new trial.

CLAIM B5: Testimony of prosecution's lead investigator was inadmissible and highly prejudicial.

The adversarial process broke down in the guilt phase of Mr. Woodruff's trial when defense counsel Mark Blankenship solicited inadmissible and prejudicial testimony on cross-examination of the prosecution's lead investigator that the investigator believed Mr. Woodruff was guilty and the reasons for that belief.

The prejudice to Mr. Woodruff was exacerbated when prosecutor Michael Soccio took advantage of defense counsel's incompetence and followed up on redirect examination, without objection, with improper questions designed to link the investigator's opinion with other testimony at trial that supported the opinion.

The harm to Mr. Woodruff was further exacerbated by the trial judge's failure to intervene to halt the prejudicial questioning, by the trial judge's solicitation of a waiver from Mr. Woodruff of his constitutional right to effective assistance of counsel after the prejudicial testimony concluded, and by the judge's subsequent decision to allow the prosecutor to elicit hearsay testimony about Mr. Woodruff's criminal history from another witness because "the door is open."

As a consequence of this breakdown in the adversarial process, Mr. Woodruff was denied his state and federal constitutional rights to a fair

trial, to the assistance of counsel, to due process of law and, ultimately, to the heightened reliability necessary in a death-penalty case.

Facts

The trial prosecutor called his lead investigator, Martin Silva, to testify in the guilt phase of Mr. Woodruff's trial on January 9, 2003, about the investigator's supervision of the removal of a section of exterior wood siding from the north wall of the shooting scene 14 months after the shooting. (RT 16:3549-3557.)

Defense counsel questioned Silva on cross-examination and recross examination about Silva's qualifications, about the process of removing the section of wall, about the trajectory of a bullet that passed through the wall, about an X-ray that revealed the presence of the bullet within the wall, and about a forensic technician's extraction of the bullet from the wall. (RT 16:3557-3581, 3586-3589.) On further recross examination, defense counsel asked for the basis of Silva's opinion that the bullet that killed Detective Jacobs did not ricochet. Silva replied that his conclusion was based on "just the physical evidence and the facts." (RT 16:3590.) Defense counsel persisted:

Q. You believe, with everything that you are that Mr. Woodruff fired a bullet that didn't ricochet that hit Mr. Jacobs, don't you?
A. Yes, sir.
Q. Now, but what is the factual basis for your belief?
A. Just the obvious physical evidence and the totality of the circumstances. Both circumstances of

circumstantial evidence, physical evidence, statements by the defendant, statements by the witnesses, the fact that we found a projectile inside Doug, the fact that it was matched up to the Lorcin pistol that was used by Mr. Woodruff, and, I mean, I could go on. There's just the totality of the investigation without a doubt appears to show that that the projectile inside Doug was fired into his head unobstructed.

(RT 16:3591.)

With defense counsel having opened the door, the prosecution walked through it. On redirect examination, the prosecutor elicited from Silva, without defense objection, the bases for Silva's opinion that Mr. Woodruff was guilty of murder:

Q. Mr. Silva, the day you got the call, you didn't have an opinion one way or the other whether the defendant was guilty, did you?
A. No, sir.
Q. After you listened – Did you listen to his interview with Detective Kensinger? Did you monitor that interview?
A. Yes, sir.
Q. And as he talked about going in and getting a gun, loading it, waiting, coming out on the porch, going back and getting the gun, and then shooting and killing the officer, did you think at that point that he did it?
A. Yes, sir.
Q. And as the evidence began to develop over the course of the next year, did some physical evidence come about to also reaffirm your belief? You were asked your opinion today?
A. Yes, sir.
Q. What kinds of things added to the defendant's own admission that he had done this?
A. Well, the big one was the fact that the Department of Justice determined that the projectile inside the victim was an exact match with moral certainty to that

particular gun found inside of Mr. Woodruff's house, which was the 9mm Lorcin.

Q. Also, did you have occasion to listen or talk to Mark Delgado when he described watching the defendant shoot the gun?

A. Yes, sir.

Q. And did you talk to Holly Menzies?

A. Yes, sir.

Q. Did those things play any part in your belief and opinion that this defendant is guilty of murder?

A. Absolutely.

Q. And having investigated six to 700 murders that, since you were asked, do you have any doubt that the defendant's guilty?

A. Absolutely not.

(RT 16:3593-3595.)

Mr. Woodruff's defense counsel returned to the same theme on further recross examination of Silva:

Q. Now, you made a statement, as part of your indication, that Mr. Woodruff is guilty of murder beyond a doubt, talked about the Department of Justice, said the bullet is an exact match to a moral certainty. Do you remember saying that?

A. Yes, sir.

* * *

Q. Did you bring any exculpatory evidence forward, other than the evidence you said you're relying upon, in order to come up with your conclusion that Mr. Woodruff is guilty of murder beyond a doubt?

A. I have found no exculpatory evidence in this case.

* * *

Q. Now, about how long did it take for you to come to the conclusion that Mr. Woodruff ... is guilty of murder?

A. I believe that by the time – Pretty much by the time I left that night, which would have been now the 14th. I was pretty much convinced that – In fact, I was convinced that he was the shooter that killed Doug Jacobs.

Q. And the basis for that belief – And that is the belief that has carried you through all the way to today and enables you to sit on the stand say what you just said upon the direct examination of Mr. Soccio, right?
A. Well, I found nothing contrary to the fact, so, yeah, that's been my belief from the very beginning after seeing the evidence and listening to the evidence.

(RT 16:3595-3599.)

At the conclusion of defense counsel's second recross examination of Silva, the prosecutor said he needed "to reserve on this witness to take a matter up with the Court." (RT 16:3603.) The prosecutor then called an evidence technician to testify briefly about the chain of custody of the wall section that the prosecution had removed from the exterior wall of the Woodruff/Carr residence. (RT 16:3603-3610.)

Following the technician's testimony, the trial judge excused the jurors for the weekend and addressed Mr. Woodruff directly:

> Mr. Woodruff, I want you to listen to me very carefully. I am deeply, deeply troubled by what occurred here over the last half an hour during the cross-examination, redirect and recross of Mr. Silva.
>
> During your counselor's cross-examination and recross-examination of Mr. Silva, he attempted successfully, in my opinion, to show that Mr. Silva had a bias in favor of the prosecution and against you. But in so doing, I will characterize this as inadvertent, I believe your case was prejudiced extremely by Mr. Silva being asked by your counsel and allowed to answer without objection as to his opinion as to your guilt. And in so doing, Mr. Silva not only expressed an opinion but set forth numerous reasons to support that opinion, virtually all of which were inadmissible hearsay. Nonetheless, he was allowed to express that opinion repeatedly in front of the jury.

> Now, your attorney may well be able to argue, and maybe successfully, that such testimony shows a bias on behalf of Mr. Silva, but in my opinion someone who has testified as he does about his experience in investigating some six to 700 homicides, that background alone carries a certain amount of automatic credibility when thinking in the minds of ordinary citizens who are sitting as jurors. And to allow him, with that background, or, for that matter, any witness to express an opinion as to the ultimate question the jury must decide, that is, whether you're guilty or not guilty, is extremely prejudicial to your case, in my opinion.
>
> Now having said that, do you understand what I've just told you?

(RT 16:3610-3611.)

Mr. Woodruff said he did not know what he could do about it. (RT 16:3611.) The judge said he wanted to know if Mr. Woodruff understood. Not really, Mr. Woodruff said. The judge explained that Silva was an experienced homicide investigator. "And when he sat up here and told the jury that he had absolutely no doubt you were guilty of murder ... I'm telling you, in my opinion as a neutral observer here, I think that prejudiced your case." The judge asked if Mr. Woodruff understood. (RT 16:3612.)

Mr. Woodruff said the judge felt what Silva had said had helped him. (RT 16:3612-3613.) No, the judge said, it hurts him. "Oh, it hurts me?" The judge asked: "Well, I'm going to ask you, based on my opinion that that hurt your case, prejudiced your case, do you still wish to continue with this trial with Mr. Blankenship representing you." Mr. Woodruff said he wanted to get it over with – he had been through enough. (RT 16:3613.) The judge asked again if Mr. Woodruff wanted to continue with the trial

and have Blankenship represent him. Mr. Woodruff said yes. (RT 16:3614.)

The judge said he believed Mr. Woodruff had given an appropriate waiver of ineffective assistance. The judge concluded that Mr. Woodruff understood the issues the judge had raised that day and previously. The judge said he believed the waiver and Mr. Woodruff's desire to continue with Blankenship were valid. (RT 16:3618.)

Nonetheless, the judge said he recognized that "what you have here is an ineffective performance of judge. ... I should have cut it off and I didn't. But it may well be that some higher court will review this some day. I don't know. But it's an issue that came up. It concerns me." (RT 16:3620-3621.)

The issue of Silva's testimony resurfaced nearly two weeks later, during the prosecutor's cross-examination of defense expert Curtis Booraem on January 22, 2003. The prosecutor asked Booraem, a clinical psychologist, whether the basis of his opinion that Mr. Woodruff was mentally retarded included a lack of criminal history. (RT 22:4664.) Defense counsel objected that the answer the prosecutor sought would be more prejudicial than probative. The judge denied the objection. (RT 22:4665.) Booraem testified that he was aware of "some scrapes with the law." When the prosecutor then asked what Booraem was aware of, defense counsel objected again. The judge overruled the objection, saying

the "door is open" because the information the question sought had been "brought out by the defense in cross-examination of an earlier witness," a reference to Silva's testimony. (RT 22:4667.)

Discussion

a. Assistance of counsel

The United States Supreme Court has "long recognized ... that the Constitution guarantees criminal defendants ... a fair trial and a competent attorney." (*Engle v. Isaac* (1982) 456 U.S. 107, 134 [102 S.Ct. 1558, 71 L.Ed.2d 783].) In a criminal trial, the Sixth Amendment "requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.' Thus, 'the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.' [Citation omitted.] If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." (*United States v. Cronic*, *supra*, 466 U.S. at p. 654, quoting *United States v. Ash* (1973) 413 U.S. 300, 309 [93 S.Ct. 2568, 37 L.Ed.2d 619].) "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and ... judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (*McMann v. Richardson*, *supra*, 397 U.S. at p. 771.)

Mr. Woodruff was represented at trial by an attorney who had never tried a murder case, let alone a death-penalty case. Additionally, three months before volunteering to represent Mr. Woodruff pro bono, defense counsel had been readmitted to practice on five-year probation after serving a State Bar suspension for incompetence. (RT A:33; RT 15:3299.) Although defense counsel deluded himself into thinking his questioning of Silva had been "very cunning and brilliant" (RT 16:3616) and "like scoring a touchdown after an interception on behalf of Mr. Woodruff" (RT 16:3620), the reality is that defense counsel had abandoned his client's interest for the sake of his own ego fulfillment in his attempts to embarrass virtually every prosecution witness, regardless of the effect on his client's case.

The question is not merely one of *ineffective* assistance of counsel, whether defense counsel's cross-examination of Silva or subsequent failure to object to the prosecution's redirect examination of Silva fell "within the wide range of reasonable professional assistance." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.) Instead, the question here is more fundamental – whether during the testimony of the prosecution investigator Mr. Woodruff had any assistance at all. "That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is

critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." (*Strickland*, at p. 685.)

Here, defense counsel's questioning of the prosecution investigator, and defense counsel's failure to object to the prosecutor's subsequent objectionable redirect examination, was so clearly detrimental to the defendant's interest that the trial judge almost immediately offered the defendant the option of a mistrial and a new trial with different counsel. The trial judge belatedly realized, and admitted on the record, that he should have stopped the prejudicial questioning.

The United States Supreme Court advises that even "the intelligent and educated layman ... requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." (*United States v. Cronic*, *supra*, 466 U.S. at p. 653, fn. 8, quoting *Powell v. Alabama* (1932) 287 U.S. 45, 68-69 [53 S.Ct. 55, 77 L.Ed. 158].)

Here, Mr. Woodruff was neither intelligent nor educated. Testimony indicated that he had a very low IQ and a third-grade reading level. Indeed, he was of such "feeble intellect" that he could not appreciate the harm that

had been done to his case even after the judge tried to explain it to him: "Oh, it hurts me?" (RT 16:3613.)

Yes, it hurt him. Counsel's cross-examination of Silva and the subsequent redirect about the basis for Silva's opinions "severely prejudiced" Mr. Woodruff's case, as the judge advised him, though in language beyond Mr. Woodruff's comprehension.

"[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*United States v. Cronic*, *supra*, 466 U.S. at p. 658.) Rather than subjecting Silva's testimony to meaningful adversarial testing, defense counsel allowed the prosecution witness to express his inadmissible and "very prejudicial" opinion that the defendant was guilty, supported by equally inadmissible reference to hearsay statements. Rather than assist his client, defense counsel aggravated his plight, eviscerating the adversarial process and denying Mr. Woodruff his rights to a fair trial and assistance of counsel, to heightened reliability of guilt and penalty verdicts in a death-penalty proceeding, and to due process of law, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 24 and 29 of the California Constitution.

Mr. Woodruff's convictions should be overturned and he should be granted a new trial with competent counsel.

b. Prosecutorial misconduct

It is misconduct for a prosecutor to elicit inadmissible testimony intentionally. (*People v. Bonin* (1988) 46 Cal.3d 659, 689 [250 Cal.Rptr. 687, 758 P.2d 1217], overruled on another point by *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.)

Generally a defendant may not complain of prosecutorial misconduct on appeal if he failed at trial to object timely to the misconduct or to request a proper admonition. However, a defendant will be excused from the necessity of a timely objection or a request for admonition if either would be futile. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

In the prosecutor's deliberate elicitation of inadmissible evidence in the redirect examination of Silva, an objection to the prosecutorial misconduct would not only have been futile but impossible, given defense counsel's abandonment of the adversarial process. Defense counsel did not just fail to object to the misconduct, he welcomed it.

Prosecutorial misconduct implicates a defendant's federal constitutional rights if it is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Harris* (1989) 47 Cal.3d 1047, 1084 [255 Cal.Rptr. 352, 767 P.2d 619], citing *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643.)

A prosecutor, as the United States Supreme Court famously explained in *Berger v. United* States,

> is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629].)

The prosecutor's use of unfair methods, exploiting the vulnerability of an incompetent defense counsel and a defendant of feeble intellect, deprived Mr. Woodruff of his rights to a fair trial, heightened reliability in a death-penalty proceeding, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 24 and 29 of the California Constitution. Mr. Woodruff's convictions should be overturned.

c. Judicial misconduct

As the trial judge said to Mr. Woodruff in extracting what he perceived to be a waiver of effective assistance, Silva "not only expressed an opinion but set forth numerous reasons to support that opinion, virtually all of which were inadmissible hearsay." (RT 16:3610.)

Under California Evidence Code section 702, subsection (a), "the testimony of a witness concerning a particular matter is inadmissible unless

he has personal knowledge of the matter." Evidence Code section 803 says a trial court "may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion."

Prosecution investigator Silva had no personal knowledge of "the fact that we found a projectile inside Doug, the fact that it was matched up to the Lorcin pistol that was used by Mr. Woodruff" (RT 16:3591), or of Mr. Woodruff's interview with Detective Kensinger, or of "the fact that the Department of Justice determined that the projectile inside the victim was an exact match with moral certainty to that particular gun found inside of Mr. Woodruff's house," or of the eyewitness accounts of prosecution witnesses Mark Delgado or Holly Menzies. (RT 16:3593-3595.) Consequently, because Silva had no personal knowledge of any of those matters, the judge should have excluded all of Silva's extremely prejudicial testimony under Evidence Code section 702, subsection (a).

This Court has held since the early days of California statehood that trial judges have not only the right but also the duty to exclude improper testimony. "The duty of the Court is not confined to passing upon such portions of testimony as may be excepted to, but extends to the preservation of the rights of litigants, and a proper disposition of the matters in controversy." (*Parker v. Smith* (1854) 4 Cal. 105, 106.) Four decades later, quoting the *Parker* decision with approval, this Court concluded,

> If this is the right and duty of the court in a civil case, with much greater reason can it be said that in a trial for murder, in which the life of a defendant is involved, the court ought not to refuse to strike out testimony which is inherently illegal and incompetent, and which, under well-settled rules of law, cannot be received as legal proof of any fact. ... [T]he court ought not to have permitted the defendant to be placed in this position, and should have enforced its previous rulings on its own motion.

(*People v. Wallace* (1891) 89 Cal. 158, 166-167 [26 P. 650]; also see *O'Kelley-Eccles Co. v. State* (1958) 160 Cal.App.2d 60, 65 [324 P.2d 683] (Improper testimony should be stricken or excluded upon objection or on the court's own motion).)

The trial judge abused his discretion when he failed to intervene on his own motion to prevent the jury from hearing what the judge considered "extremely prejudicial" testimony. The trial judge's failure to act denied Mr. Woodruff his rights to a fair trial, heightened reliability in a death-penalty proceeding, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 24 and 29 of the California Constitution. For all of the reasons stated in this claim, Mr. Woodruff's convictions should be overturned and he should be granted a new trial.

CLAIM B6: Prosecutor and trial judge prejudiced defendant by repeatedly mocking defense counsel in front of jury.

The prosecutor and trial judge engaged in prejudicial misconduct by mocking defense counsel Mark Blankenship in front of the jury from the beginning of Mr. Woodruff's trial throughout the guilt phase, thus undermining any credibility defense counsel might otherwise have had with the jury.

Prosecutor Michael Soccio mocked defense counsel's physical appearance (RT 4:1132), accused defense counsel of impropriety in cross-examining a witness (RT 14:3254) and dishonesty in handling evidence (RT 15: 3355), and called defense counsel "shameful" and "despicable" in closing argument. (RT 24:5128; RT 25:5243.)

Judge Christian Thierbach mocked defense counsel's ability to make proper objections (RT 5:1422), defense counsel's ability to ask meaningful questions (RT 14:3144; RT 18:3858-3859), defense counsel's request for an admonition of the jury (RT 14:3186-3187), defense counsel's objection to the trial judge's comment to a witness (RT 21:4444), and what the trial judge characterized as defense counsel's "editorializing" and "argumentative" and "irrelevant" questions in cross-examination of prosecution witnesses. (RT 23:4754-4755; RT 23:4784; RT 23:4909-4910; RT 24:4986-4987; RT 24:4997-4998.)

The pattern of disparaging comments by the prosecutor and trial judge undercut defense counsel's credibility with the jury. As a result, Mr. Woodruff was denied his state and federal constitutional rights to a fair trial, effective assistance of counsel, heightened reliability of guilt and penalty verdicts in a death-penalty trial, and due process of law.

a. Prosecutorial misconduct

Facts

Incident 1: *'Maybe I can get a ponytail'*

Even before the jury had been empaneled, prosecutor Michael Soccio had begun ridiculing defense counsel in front of the jury. On the final day of jury selection, November 20, 2002, the prosecutor asked prospective juror G.M. on voir dire, "would anybody's haircut influence you in any way?" When G.M. said no, the prosecutor commented, "Maybe I can get a ponytail by the end of this trial." Defense counsel Mark Blankenship, who had a ponytail, objected. The objection was sustained. (RT 4:1132.) Although the comment about counsel's ponytail came before the jury was empaneled, all of the trial's jurors were in the courtroom in position to hear it. Both sides accepted the jury within the same trial session, a mere four transcript pages later. (RT 4:1136.)

Incident 2: *'Objection – I'll ask for sanctions'*

In cross-examination of Riverside police detective Ron Sanfilippo on January 7, 2003, defense counsel asked about efforts to retrieve bullets

from a tree and from the ground at the shooting scene. (RT 14:3248-3254.) Blankenship asked if the investigators had looked for a bullet in the ground the same way they looked for a bullet that was found, 14 months after the shooting, in the side of the house. (RT 14:3253.) The prosecutor objected. The objection was sustained. Blankenship then asked if the same group of people looked for the bullet in the ground as had looked for the bullet in the side of the house. The prosecutor: "Objection – I'll ask for sanctions." The judge told the prosecutor: "You'll not do that in front of the jury." The judge then told defense counsel to move on to another area, as he had made his point. (RT 14:3254.)

Shortly afterward, outside the presence of the jury, the trial judge told Soccio: "I don't want to hear motions for sanctions in front of the jury again." (RT 14:3262.) Blankenship noted: "For the record, I think it's prosecutorial misconduct for the prosecutor to ask you to sanction me in front of the jury, especially given the nature of this case." The trial judge did not respond directly to defense counsel's assertion. (RT 14:3263.)

Incident 3: *'I'm sure I'll never see it again'*

On redirect examination of Riverside police detective Ron Sanfilippo on January 8, 2003, the prosecutor asked about a photograph showing toys on the porch of the defendant's residence. Defense counsel objected and the judge said the question was vague, as there were several photographs depicting toys. The trial judge suggested that the photograph

be placed "in front of you," apparently meaning in front of the witness. (RT 15:3354.) The following exchange then occurred:

DA:	I'm sure I'll never see it again.
DEFENSE:	Your Honor, motion to strike as "I'm sure I'll never see it again" comment he made.
DA:	I need the other one on the front porch.
JUDGE:	Referring to – I have II and JJ.
DA:	Your Honor, that's what I'm talking about, trying to find the photos.
DEFENSE:	Motion to strike that, as well.
JUDGE:	Ladies and gentlemen, I'm gonna ask you to leave the courtroom for about five minutes. Don't stray too far. I need to have a little chat with the attorneys.

(RT 15: 3355.)

Out of the presence of the jury, the judge chided both attorneys. He said he had told them both at the start of the trial that he would not tolerate talking back and forth or editorializing, and both continued to disobey his directive. The next time it happened, the judge warned, the attorney would be sanctioned. "Now knock it off, both of you." (*Ibid.*)

Implicit in the prosecutor's comment that "I'll never see it again" was the accusation that defense counsel was hiding or misplacing evidence. The prosecutor had made the same accusation out of the presence of the jury earlier in the day. At that time, the prosecutor said defense counsel had removed two exhibits from court "last night." (RT 15:3300-301.) When defense counsel denied it, the prosecutor said, "That's what I was told this morning by your investigator." The prosecutor said it had happened "on at least two or three occasions, that I'm aware of, where

marked exhibits have left the courtroom in his possession." (RT 15:3301.) Addressing defense counsel directly, the prosecutor said, "You took the incident logs and some other things from the courtroom." (RT 15:3301-3302.) The judge confirmed that one of the clerks had alerted him that morning that "a couple of exhibits were missing." He said in the future nobody would leave the courtroom until all exhibits were accounted for and given to the clerk. (RT 15:3302.)

Incident 4: ***'Shameful' and 'despicable'***

In closing argument at the guilt phase, on January 27, 2003, the prosecutor said the defendant "has cloaked himself in infirmities of people that are legitimate infirmities." (RT 24:5127.) "Mental retardation? How shameful. ... How shameful to pretend to be a member of their population to avoid responsibility. ... And to cloak this trial in the Civil Rights Movement in Mississippi is despicable." (RT 24:5128.)

Incident 5: ***'Shame on them. ... Despicable.'***

Three times in closing argument in the guilt phase, defense counsel accused the prosecution of "dialing into emotions" of its police witnesses. (RT 24:5158, 5179; RT 25:5203.) In response, the prosecutor castigated defense counsel: "[S]hame on them for making any comment about police officers who cried or were tearful about a fallen friend. Despicable. Turned on emotions? Dialed up emotions? How insulting." (RT 25:5243.)

Discussion

State and federal courts have long recognized that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.) "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Espinoza* (1992) 3 Cal.4th 806, 819-820 [12 Cal.Rptr.2d 682, 838 P.2d 204].)

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1200-1201 [116 Cal.Rptr.3d 98].) "An attack on the defendant's attorney can be [as] seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable." (*People v. Hill*, *supra*, 17 Cal.4th at p. 832, quoting what is now 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 592, p. 847.)

This Court has repeatedly held it "improper for the prosecutor 'to ... portray defense counsel as the villain in the case. ... Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.'" (*People v. Redd* (2010) 48 Cal.4th 691,

749 [108 Cal.Rptr.3d 192, 229 P.3d 101], quoting *People v. Fierro* (1991) 1 Cal.4th 173, 212 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

In Mr. Woodruff's trial, the prosecutor repeatedly cast aspersions on defense counsel's appearance, demeanor, competence and integrity. The prosecutor mocked defense counsel's haircut with a gratuitous, sarcastic and irrelevant comment in jury selection, "Maybe I can get a ponytail by the end of this trial." (RT 4:1132.) The prosecutor responded to a defense question of a police detective on cross-examination by demanding sanctions, an extreme and inappropriate response to a question that was at worst repetitive and argumentative. (RT 14:3254.) And, the prosecutor responded to the trial judge's suggestion that he place an evidentiary photograph in front of a witness with the insinuation that defense counsel was hiding or misplacing evidence: "I'm sure I'll never see it again." (RT 15: 3355.)

This Court has held that generally "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." However, a "defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile ... [or] if an admonition would not have cured the harm caused by the misconduct." (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

Defense counsel objected to the comment during jury voir dire and the two comments that occurred during guilt-phase testimony, but the trial judge sustained only the first objection, regarding the ponytail comment. The trial judge did not even acknowledge the other two objections, although he did admonish the prosecutor, out of the presence of the jury, "I don't want to hear motions for sanctions in front of the jury again." (RT 14:3262.)

Defense counsel did not object when the prosecutor called him "shameful" or "despicable" in closing argument. Nonetheless, such objections would have been futile, given the judge's failure to admonish the jury regarding any of the prosecutor's misconduct during witness testimony. Furthermore, the trial judge overruled all seven objections defense counsel did raise during opening and closing arguments (RT 24:5121, 5131; RT 25:5227(2), 5230, 5235, 5244), but sustained all five prosecution objections. (RT 24:5144, 5150, 5156; RT 25:5205, 5206.)

In closing argument, the prosecutor characterized the defense repeatedly as "shameful" and the defense argument as both worthy of shame and "despicable." (RT 24:5128; RT 25:5243.) The common definition of "shameful" is "disgraceful" and "despicable" means "so worthless or obnoxious as to rouse moral indignation." (Merriam-Webster's Collegiate Dictionary (11th ed. 2003).) The prosecutor at Mr.

Woodruff's trial was telling the jury that defense counsel was himself the lowest of the low, beneath contempt.

This Court has repeatedly condemned such argument, ruling that counsel may not "make personally insulting or derogatory remarks directed at opposing counsel or impugn counsel's motives or character." (*Cassim v. Allstate Ins. Co.* (1994) 33 Cal.4th 780, 796 [16 Cal.Rptr.3d 374, 94 P.3d 513], citing *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143 [45 Cal.Rptr. 313, 403 P.2d 721].) "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215 [40 Cal.Rptr.2d 456, 892 P.2d 1199], citing *People v. Harris*, *supra*, 47 Cal.3d at p. 1084.) (See *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *United States v. Rodrigues* (9th Cir. 1998) 159 F.3d 439, 451 ("[W]hen no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instruction is given, the jurors must necessarily think that the false accusations had a basis in fact. The trial process is distorted.").)

At Mr. Woodruff's trial, the prosecutor's repeated disparaging comments about defense counsel represented a pattern of egregious conduct. The prejudice to Mr. Woodruff cannot be clearer: The prosecutor invited the jury to condemn the defense counsel as deserving of moral

indignation. That moral indignation was visited on the client. It denied Mr. Woodruff a fair trial, assistance of counsel, the heightened reliability of guilt and penalty verdicts required in a death-penalty case, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 17 and 29 of the California Constitution.

b. Judicial misconduct

Facts

Incident 1: *'I haven't heard a legitimate one yet'*

On the first day of testimony in the guilt phase, December 3, 2002, during the prosecutor's questioning of the first prosecution witness, Holly Menzies, the prosecutor asked why, before the shooting, Ms. Menzies had thought the defendant might have a gun. Defense counsel objected that the question had been asked and answered. This exchange followed:

JUDGE:	Overruled on that basis.
DEFENSE:	Objection – leading. Objection – vague. Objection – foundation.
JUDGE:	Are you gonna run through the whole evidence codes?
DEFENSE:	Might as well.
JUDGE:	Well, I haven't heard a legitimate one yet, so overruled.

(RT 5:1422.)

Soon after this exchange, the trial judge and the parties went into the judge's chambers to discuss defense counsel's subsequent objection to the

prosecutor's use of a photograph. While in chambers, defense counsel objected to the trial judge's tone in addressing counsel in front of the jury:

> I'm very cognizant of you're able to editorialize in your courtroom and that kind of thing, but ... that you say that every single evidence code objection but I still haven't done one that's correct, or whatever, you know, that's hard for me to live with on the record in front of the jury. Because it feels like it's sort of a chastising of me as counsel.
>
> Now, you may not mean that. It may be in humor, so I am concerned about that.
>
> * * *
>
> But it's hard on me, Your Honor. It's hard on me to hear it because ... not only does it feel bad a little bit inside, you know, but it also, I think, it may affect my defense of Mr. Woodruff. I hope in the future I can perhaps not incur your wrath or behave what I'm doing that's making you sarcastic. That's my perception.

(RT 5:1427-1428.)

The trial judge replied that he "certainly did not intend to be demeaning you. ... But when a lawyer makes an objection that's overruled and then runs through half a dozen or so other reasons for it, I think I was perfectly justified in making the comment I did." (RT 5:1428.) The trial judge added that if counsel had objected that the prosecutor's question of Ms. Menzies had called for speculation, he would have sustained the objection. (RT 5:1428-1429.)

Incident 2: *'I told you I wouldn't hesitate to dress you down'*

At trial on December 12, 2002, in a discussion outside the presence of the jurors, defense counsel again objected that the trial judge had been treating him unfairly during the trial:

> I think if you scrutinize what you were doing, with respect to your objections and also your effort to intervene in my advocacy and the facial characteristics that you exhibit, I think that's not fair to me as counsel, and it's not fair to Mr. Woodruff, and it's interfering with his right to a fair trial. ... I don't like being dressed down in front of the jury. I consider it to be inappropriate, and I consider it to be prejudicial to ... Mr. Woodruff.

(RT 10:2241)

The trial judge responded: "I don't like misbehavior, and I told you at the start of this trial, I told you I wouldn't hesitate to dress you down or embarrass you in front of the jury." (*Ibid.*) The trial judge said defense counsel could be "as zealous and vigorous and as aggressive as you want, but do it professionally." (*Ibid.*) "It's my obligation to control what's going on in this courtroom. If I think you're being unprofessional or acting inappropriately, I'll call you on it." (RT 10:2243.)

Incident 3: *'Obviously they were somewhere'*

At trial on January 7, 2003, during cross-examination of Riverside police officer Donald Goodner, defense counsel asked if Goodner knew whether at the time he heard a commotion on his police radio members of his SWAT team could have been in the vicinity of the shooting scene. Goodner answered that he did not know. Defense counsel persisted:

DEFENSE:	Is it possible that some of them were around the vicinity of Lemon Street at the time of the 11-99, do you know?
WITNESS:	I have no idea.
DA:	Objection – calls for speculation.
JUDGE:	He just answered that he had no idea.

DEFENSE: They could have been anywhere, right?
DA: Objection –
JUDGE: Obviously they were somewhere.

(RT 14:3144.)

Incident 4: ***'I'll do the explaining and you won't'***

At trial, also on January 7, 2003, on direct examination of homicide detective Ron Sanfilippo, the prosecutor asked about Exhibit 83, a photograph of evidence at the shooting scene.

DA: Also showing you People's No. 83 for identification, will you describe what's in this photograph?
WITNESS: This is a brown rifle with a strap. And there's a jammed bullet or round in the chamber.
DEFENSE: Objection – foundation.
JUDGE: Sustained as to the last part about the jammed bullet.
DEFENSE: Motion to strike that.
JUDGE: Granted.
DA: Well, what does it appear to look like to you, the chamber?
DEFENSE: Could you explain to the jury that they're not supposed to listen to that last answer?
JUDGE: I'll tell you what, I'll do the explaining and you won't. The last half of the answer referring to the jammed chamber is ordered stricken. The jury is ordered to disregard it.

(RT 14:3186-3187.)

Incident 5: ***'Come on. If you're going to continue along with this, I'm going to cut you off right now.'***

At trial on January 14, 2003, on cross-examination of prosecution forensics expert Richard Takenaga, defense counsel asked about bullet comparisons.

WITNESS: I look at the magazine. I look at the ammunition. Some information I retrieve is the magazine capacity, how many rounds that particular magazine can hold. I look at the cartridges.

DEFENSE: So – but if the magazine is lost with the cartridges in it, how do you look at the magazine and the cartridges that are lost?

DA: Objection.

JUDGE: What does that have to do with anything? It wasn't lost when he was in possession of it.

DEFENSE: Do you know whether it was lost before you got possession of it?

JUDGE: Come on. If you're going to continue along with this, I'm going to cut you off right now. Let's move on to something probative.

(RT 18:3858-3859.)

Incident 6: ***'And you're testifying. Unless you want to raise your right hand and take the oath, don't do it again.'***

At trial on January 21, 2003, during cross-examination of defense expert Dr. Joseph Wu, the prosecutor asked whether a patient thinking about a particular subject or event would affect certain parts of the brain that would show on a PET[21] scan.

WITNESS: The patient was doing the vigilance task. The vigilance task asks a patient to press a button –

DA: Objection, Your Honor.

JUDGE: Focus your answer directed to the specific question asked, if you can. If you need to explain beyond that, fine. But listen carefully to the question and try to respond directly to it.

DEFENSE: Object, for the record. He's answered the question.

[21] "PET" stands for positron emission tomography, used to produce three-dimensional images of body functions, such as brain function. (RT 21:4333-4341.)

JUDGE: And you're testifying. Unless you want to raise your right hand and take the oath, don't do it again.

(RT 21:4444.)

Incident 7: ***'The only editorializing I have heard is in your statement'***

During cross-examination of prosecution expert Dr. Alan Waxman on January 23, 2003, defense counsel asked if one of the reasons a scientist would add color to a brain image was to make it simple. The prosecutor objected, but the judge allowed the witness to state his opinion.

WITNESS: If I understand your question, you asked me why does Dr. Wu put color into his pictures; is that the question?

DEFENSE: You're getting at it. The question is, isn't putting color in the picture a way to make it easy for people to see the differences in the PET scan?

WITNESS: Well, that's a great point. The answer is that you can see differences. The problem is that if you call those differences abnormal, which is what the trend or tendency is, then you've done a disservice. What the color will do is show the differences. And people don't understand that the differences can be as small as one percent, which is within the range of noise. So you can take noise and make it look different.

DEFENSE: Well, no, let me just – I mean, I would just appreciate if you're able to answer my question. Listen carefully to my question and answer just as best you can. Don't editorialize.

DA: Objection –

JUDGE: The only editorializing I have heard is in your statement. You will conduct yourself professionally. Zealousness is fine. Sarcasm and editorializing is not appropriate.

(RT 23:4754-4755.)

Incident 8: ***'No. He wants to argue with you.'***

On further cross-examination of prosecution expert witness Dr. Alan Waxman on January 23, 2003, defense counsel asked the basis for Waxman's conclusion that age was relevant to determining what a normal brain looked like. Waxman read from a journal article, and then offered an explanation of what the article meant.

DEFENSE: How do you reconcile saying it says as to what it actually says?
DA: Objection – argumentative.
JUDGE: Sustained.
WITNESS: You wanted me to read –
JUDGE: Don't answer that.
WITNESS: I thought he wanted me to read –
JUDGE: No. He wants to argue with you.

(RT 23:4784.)

Incident 9: ***'Ask relevant questions or we'll conclude this faster than you'd like.'***

In cross-examination of prosecution expert witness Dr. Craig Rath on January 23, 2003, Blankenship asked about Rath's testimony on direct examination (RT 23:4863) that he had reviewed the transcript of an evidence tape of an interview between prosecution investigator Martin Silva and the defendant.

DEFENSE: You said you read a transcript of an evidence tape between Martin Silva and the defendant. What tape is that?
WITNESS: I'm sorry?
DEFENSE: What transcript is that?
WITNESS: Discovery page 1475 to 1528.

DEFENSE: Is there some transcript out there involving a conversation between Mr. Silva and Mr. Woodruff?
DA: Your Honor, counsel knows better.
JUDGE: Mr. Blankenship, you know better than that. The objection is sustained. Ask relevant questions or we'll conclude this faster than you'd like.

(RT 23:4909-4910.)

Incident 10: ***'The curtain is about to drop on this act.'***

In further cross-examination of prosecution expert Dr. Craig Rath on January 24, 2003, Blankenship asked about Rath's interview with the defendant.

DEFENSE: At one point, then, he started getting emotional again, right?
WITNESS: Yes.
DEFENSE: And so you're talking about his – You're talking about Brendi, his companion, talking about Brianna, and you're talking about Pete, and he also brings up his mother again, right?
WITNESS: Yes.
DEFENSE: And at that point, did you have feelings – did you interpret that he had loving feelings for his mother?
WITNESS: Yes.
DEFENSE: Did you interpret that he had feelings of wanting to protect her?
DA: Objection – irrelevant.
JUDGE: Sustained.
DEFENSE: May I have a sidebar on that, Your Honor?
JUDGE: No.
DEFENSE: Talked about his mother and the radio?
WITNESS: He did.
DEFENSE: About how important the radio was to his mother?
WITNESS: Yes. It made her happy to listen to her radio.

DEFENSE: Did he relate the playing of the radio to her mental illness?
WITNESS: Yes.
DA: Objection – irrelevant.
JUDGE: Sustained.
DEFENSE: These are facts that you're using to base – These are facts that you're using to make conclusions about Mr. Woodruff, aren't they?
WITNESS: No. That has nothing to do with whether or not he's mentally retarded. I included it in the report so that both sides will understand everything that happened, and you can use it to your advantage or disadvantage. But it's not the basis of determining whether or not he's retarded or not.
DEFENSE: It seems to me your testifying on direct examination, didn't Mr. Soccio spend a lot of time talking about all these apparently irrelevant facts that you got from the interview?
DA: Objection – argumentative.
JUDGE: The curtain is about to drop on this act. Let's start asking some questions leading to probative evidence, or we will cut this off.

(RT 24:4986-4987.)

Incident 11: ***'You're one more argumentative question away from having me close this down.'***

In further cross-examination on January 24, 2003, Dr. Craig Rath agreed with the premise of Blankenship's leading question that some mentally retarded people can be taught survival skills.

DEFENSE: How can you be sure Mr. Woodruff is not one of those people who has terrible intelligence but has learned to survive and has been taught to survive?
WITNESS: Because he isn't taught things like higher level of abstraction which he demonstrated in the testing.

DEFENSE: Again, an example of higher level of abstraction would be?

WITNESS: The answer to, Why do we study history? for example. And I'll look at the exact quote, a raw data from the Wechsler.

DEFENSE: Association. The second that's the Wechsler – I'm sorry, the first one you gave him the second time?

WITNESS: I'm sorry?

JUDGE: You're one more argumentative question away from having me close this down. Think about that during the morning recess, which we will take. Please return, ladies and gentlemen, in 15 minutes.

(RT 24:4997-4998.)

Incident 12: *'[I]f you bring Wu back here to defend his technique, we can bring Waxman back ...'*

After the prosecution completed its rebuttal and rested in the guilt phase, defense counsel told the trial judge in chambers that the defense would recall expert witnesses Wu and Booraem. The judge said he didn't think so; he saw a ping-pong effect of back-and-forth argument. "I mean, theoretically, if you bring Wu back here to defend his technique, we can bring Waxman back and we could be doing this until next year." (RT 24:5011.) The first "we" in the judge's comment refers to the prosecution, an indication that the judge, a former deputy district attorney, still viewed trials from the perspective of the prosecution team. The judge was saying that if he allowed the defense to recall its expert witnesses in rebuttal, then "we," the prosecution, would recall the prosecution rebuttal witnesses and

the case could go on forever. (RT A:41-42; RT 4:1139; RT 20:4224; RT 24:5011.)

Discussion

"Although the trial court has both the duty and the discretion to control the conduct of the trial, the court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." (*People v. McWhorter* (2009) 47 Cal.4th 318, 373 [97 Cal.Rptr.3d 412, 212 P.3d 692].)

"It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial. [Citation omitted.] ... When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client. And the error, where prejudicial, is reversible." (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174-1175 [211 Cal.Rptr. 288].) "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. When 'the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge ... it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary.'" (*People v. Sturm* (2006) 37 Cal.4th 1218,

1233 [39 Cal.Rptr.3d 799, 129 P.3d 10], quoting *People v. Mahoney* (1927) 201 Cal. 618, 626-627 [258 P. 607].)

This Court has adopted the language of the federal appellate courts in ruling that its role is "not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." (*People v. Snow* (2003) 30 Cal.4th 43, 78 [132 Cal.Rptr.2d 271, 65 P.3d 749], quoting *United States v. Pisani* (2d Cir.1985) 773 F.2d 397, 402.)

At Mr. Woodruff's trial, the repeated comments of the trial judge disparaging defense counsel were truly "far beyond the pale of judicial fairness." Ten of the twelve incidents described above involved highly prejudicial comments the judge made in the presence of the jury. The other two – Incidents 2 and 12 – were made in chambers and thus were not directly prejudicial. Nevertheless, those incidents offer evidence of the judge's antagonism toward and contempt for defense counsel, as well as evidence that the trial judge allied himself with the prosecution. Furthermore, Incident 2 demonstrates that defense counsel's attempts to object that the trial judge's sarcastic comments were "prejudicial to ... Mr. Woodruff" fell on deaf ears. Instead of modifying the judge's behavior, defense counsel's objections led to further sarcasm. (RT 10:2241-2243.)

The 10 incidents in the presence of the jury demonstrate that the trial judge expressed sarcasm and scorn to defense counsel from the first day of testimony in the guilt phase (Incident 1, RT 5:1422) to the last day (Incident 11, RT 24:4997-4998). Cumulatively, the trial judge's message to the jury was that defense counsel's questions and objections were without merit, and by extension, his entire case was without merit. Such a proceeding does not meet the requirement of heightened reliability of guilt and penalty determinations in a death-penalty case. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)

As a result of the trial judge's repeated disparaging comments about defense counsel, Mr. Woodruff was deprived of his rights to a fair trial, the assistance of counsel, heightened reliability of guilt and penalty verdicts in a death-penalty trial, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 17 and 29 of the California Constitution.

Mr. Woodruff's convictions should be overturned. Mr. Woodruff should be granted a new trial before a fair and impartial judge in accordance with due process of law.

CLAIM B7: Defense counsel repeatedly misrepresented facts.

Defense counsel Mark Blankenship made numerous false or misleading statements, which diminished the defense's credibility with the trial court and jury and denied Mr. Woodruff his state and federal constitutional rights to a fair trial, effective assistance of counsel, the heightened reliability of guilt and penalty verdicts required in a death-penalty case, and due process of law.

Facts

Falsehoods uttered by defense counsel Mark Blankenship can be found throughout the reporter's transcript of Mr. Woodruff's trial. Blankenship lied about matters large and small. The seven examples cited in this claim share the characteristic of being demonstrably false, capable of being disproved within the record of the trial.

1. ***First receipt of discovery***

At a hearing on March 7, 2002, within two weeks of the scheduled start of jury selection, Blankenship alleged: "I received discovery for the first time last week and got a phone call today saying there's additional discovery." (RT A:97.) Prosecutor Michael Soccio responded: "That's just a false representation – inaccurate, not false." (RT A:97.) Indeed, six months earlier, Soccio's written request for a court inquiry into Blankenship's qualifications said the prosecution had "provided initial discovery to the defense, taking an 'IOU' for the costs since Mr.

Blankenship said that he had no funds available to pay for discovery." (CT 2:355.)

2. *First warning of guilt-phase testimony*

At a hearing on October 11, 2002, regarding the prosecutor's suggestion that he might call prospective penalty-phase witness Dennis Smith to testify at the guilt phase, Blankenship said, "I guess Mr. Soccio is saying it's gonna be a guilt-phase witness. This is the first moment I have heard of that." (RT B:581-582.) The trial judge responded: "No, it wasn't. It was discussed last time." (RT B:582.)

Indeed, at the previous hearing, on September 27, 2002, the prosecutor had said he anticipated Smith would testify "in the penalty phase of this trial, if we get there, or perhaps even in the guilt phase, depending on whether the defendant testifies or not." (RT B:559.)

3. *Mischaracterization of Baker testimony*

At trial on December 5, 2002, Blankenship asked Officer Benjamin Baker on cross-examination if Baker recalled saying he heard a gunshot but wasn't sure where it came from. Baker replied that he could have, that Blankenship could refresh his memory, "but yesterday when you refreshed my memory you lied to me. ... Whenever you said that I called for Officer Jacobs to back me up prior to going to the R.P.'s[22] house, Ms. Menzies. And I said, Well, I don't recall saying that. If that's what I said, that's not

[22] "R.P." is police jargon for "reporting person."

what I meant to say. However, that's not what I said at all. You left a sentence out wherever you refreshed my memory." (RT 7:1715.)

Indeed, in cross-examination of Baker on December 4, 2002, Blankenship had quoted from Baker's interview with Detective Kensinger: "Oh, I know they dispatched Doug Jacobs to back me up for that. Oh, prior to that, whenever I was talking to the lady by myself, prior to the R.P. going over there." (RT 6:1543.)

In the transcript of Baker's interview with Detective Kensinger, the sentence fragment that Blankenship quoted is the middle of a much longer passage. The entire passage makes clear that Baker was saying he called for his supervisor when he had his first confrontation with Mrs. Carr, and he called for backup later, after hearing someone shout at him from downstairs. As the passage begins, Detective Kensinger had just asked about the person in the apartment with Mrs. Carr, her son Claude Carr. Baker replied:

> Yeah he's the ... short guy, black yeah ...
>
> (sound of throat clearing)
>
> um he says uh "get your hands off my Mom" and then at that time another black male sticks his head out from around the corner at the bottom of the stairs, it looked like he was on his porch, he just popped his head out and said, he said "hey don't touch my Mom" and then uh he disappeared and so at that time I called for a back up, eleven-eleven, uh because I had people all around me, I didn't know what was going on so the uh..

(sound of coughing)

> I believe they dispatched, oh I know they dispatched Doug Jacobs to uh back me up for that oh, prior to that, whenever um I was talking to the lady by myself, prior to the RP going over there, um she told me she was going to sue me and this and that and I asked her "would you like to speak to my supervisor" and she said "no" and I went ahead and requested my supervisor 'cause she's saying that she's gonna sue me, this and that, so um prior to that I already had the uh sergeant on his way over. I went over and talked to the RP just like I said and uh and then she was saying that they could resolve it between themselves um I was wanting to wait until the sergeant came because of the uh, if there's gonna be conflict between me and her. If they wanna solve it themselves then that's fine, we're not, we're not needed but uh they didn't solve it themselves so uh. Back to where I was now that we, I told you that the supervisor was enroute um.

(CT 2:529-530 [underlined portion quoted by Blankenship].)

By quoting out of context, Blankenship changed the meaning of "prior to that" and "prior to the RP going over there," which actually referred to events prior to the dispatch of Jacobs, which would have been clearer if Blankenship had read the entire passage – or even the entire sentence.

Confronted with his misrepresentation, Blankenship went on the offensive: "Well, isn't it true, Mr. Baker, that I didn't lie to you, you lied to the jury?" No, Baker said, it's not true. (RT 7:1715.) "Isn't it true that when it comes to lies – Which of your versions of the story would you consider to be the truth?" (RT 7:1715-1716.) The prosecutor objected that Blankenship was being argumentative. The judge sustained the objection. (RT 7:1716.)

4. *More mischaracterization of Baker testimony*

Baker's accusation that Blankenship had lied to him the previous day was in response to an additional question in which Blankenship also misrepresented Baker's testimony: "Isn't it true that you said you heard a gunshot, but you weren't sure where it came from?" (RT 7:1715.)

Repeatedly, Baker had said just the opposite of what Blankenship's question suggested:

- On January 13, 2001, the day of the shooting, Baker told Detectives Kensinger and Shelton: "I heard a uh shot from a gun and I automatically looked right to where it came from and I saw a uh black male adult with a short Afro holding a uh semi-auto handgun pointed up in our direction ..." (CT 2:533.)
- On March 1, 2001, Baker told the grand jury, "I heard a gunshot and I immediately looked down the stairway to where I saw Steve Woodruff earlier, and he was standing there with a gun pointed in my direction." (CT 1:132.)
- On December 4, 2002, on direct examination at Mr. Woodruff's trial, Baker had the following exchange with the prosecutor:

BAKER:	... [A]s I went to place the handcuffs on Claude, I heard a gunshot.
DA:	One shot? Did you tell where the shot

came from?

BAKER: Yeah. I immediately looked at the bottom of the stairs where the shot came from. ... I saw Steve Woodruff holding a handgun in our direction.

(RT 6:1487.)

- Also on December 4, 2002, on cross-examination by Blankenship at Mr. Woodruff's trial, Baker testified, "I heard the shot. I looked to see where the shot had come from." (RT 6:1643.)

5. *Sequence of "stinger balls"*

On January 8, 2003, in cross-examination of Riverside homicide detective Ron Sanfilippo, who supervised evidence collection at the shooting scene, Blankenship asked about "stinger balls" that an officer had tossed onto an interior stairway landing of the Woodruff residence as a diversionary device to flush out other possible suspects. Blankenship asked Sanfilippo: "Now, are those stinger balls, are they – Do you think they would cause a danger to a four year old?" The prosecutor objected that the question was irrelevant. The objection was sustained. (RT 15:3376.)

Among the reasons the question was irrelevant was that the stinger balls were not thrown until *after* Mr. Woodruff's 4-year-old daughter had been removed from the house. Blankenship was aware of the sequence of events – as was the jury – because Officer Kendall Banks had testified the previous day that when the officers entered the house, the first thing they

did was locate and remove the 4-year-old girl, then they searched the downstairs, including the back yard, and only then did Banks order another officer to toss what Banks called a "steam ball" onto the interior stairway landing before the officers attempted to enter the upstairs unit through the interior stairs. (RT 13:3029-3030, 3033.) There was no testimony to a contrary sequence of events.

6. ***Polaroid photographs***

On January 14, 2003, Blankenship cross-examined Richard Takenaga, a forensic analyst for the state Department of Justice, about Takenaga's extraction of a bullet from a section of the exterior wall of the Carr-Woodruff residence. Blankenship asked Takenaga if he had documented the extraction with a video camera. Takenaga replied that he documented the extraction with Polaroid photographs. Blankenship asked if Takenaga made copies of the photographs. Takenaga said he was not sure. Blankenship asked: "So that would mean you're the only person that has the Polaroids at this point?" (RT 18:3822.)

The prosecutor asked for a sidebar. In chambers, outside the presence of the jury, the prosecutor explained that Takenaga's notes "were discovered to the defense. They include xerox copies of the Polaroid photos of them being extracted. The implication from Mr. Blankenship in asking his question is that somehow there's surreptitious withholding of the Polaroids." (RT 18:3823.) "[T]he accusation that he did not provide photos

goes to his credibility, and it's not the truth." (RT 18:3826.)

The judge agreed. He told Blankenship that the prosecutor "is right. The clear implication of the questions is that you were somehow denied access to these photos. One way or the other it's going to come out that you weren't." (RT 18:3827.)

7. *UC Irvine medical records*

On January 21, 2003, on redirect examination of Dr. Joseph Wu, who conducted a PET scan on the defendant, Blankenship asked about medical records the prosecutor had said he had not seen. Blankenship asked: "Isn't it true that I even – Do you have any knowledge that I even allowed you to deliver the records directly to Mr. Soccio?" (RT 21:4464-4465.)

The prosecutor objected and asked for a sidebar. Outside the presence of the jury, the prosecutor said he objected because "neither Dr. Wu nor counsel ever gave me medical records from U.C. Irvine. He stands up in front of the jury, makes those kinds of comments, Didn't I provide the records? when he didn't and neither did Dr. Wu." (RT 21:4465.) "I am saying to then get up and claim like I have it when it wasn't provided by him or the doctor is creating a false impression to the jury. ... The point is, I didn't want again to have something counsel knows full well didn't take place, have it in front of jury, made it look like it did. ... [W]hen he said,

you know, I gave them to him, or whatever words to that effect, that wasn't true." (RT 21:4466.)

The judge told Blankenship that "if you make an inference that somehow you gave it to him or you directed you would ... give it to him and he doesn't have it, I mean, we're getting off in collateral issues and you're creating an impression here that something unsavory is going on. Believe it or not, I spent a lot of time looking at the jury, and they're not buying this stuff." (RT 21:4467.)

Discussion

"The proper standard for attorney performance is that of reasonably effective assistance. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688.)

Blankenship's performance as attorney for Mr. Woodruff was not only unreasonable – it violated the state's rules of ethics and criminal statutes regarding attorney behavior.

This Court has said "the primary purpose of attorney discipline is not the punishment of the attorney; it is the protection of the public, the profession, and the courts." (*In re Nadrich* (1988) 44 Cal.3d 271, 276 [243 Cal.Rptr. 218, 747 P.2d 1146].) An attorney can be disbarred for moral

turpitude after presenting false evidence and committing other acts involving dishonesty in court proceedings, as Blankenship did in Mr. Woodruff's case. (*Snyder v. State Bar of California* (1976) 18 Cal.3d 286 [133 Cal.Rptr. 864, 555 P.2d 1104].)

Rule 5-200 of the California Rules of Professional Conduct requires attorneys to employ "such means only as are consistent with truth" and prohibits an attorney from "mislead[ing] the judge, judicial officer, or jury by an artifice or false statement of fact or law." Business and Professions Code section 6068, subsection (d), includes nearly identical language.

An attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" is guilty of a misdemeanor under Business and Professions Code section 6128.

An attorney's act involving dishonesty constitutes a cause for disbarment or suspension under Business and Professions Code section 6106.

Blankenship violated his ethical duties as a member of the California Bar, as well as his responsibilities under the statutes cited above, by a pattern of lying, deception and bad faith, including misstating when he received discovery and when he learned about possible guilt-phase prosecution testimony, by misrepresenting former statements of a key prosecution witness, by misstating the sequence of events regarding police

use of "stinger balls," by misleading the jury regarding his possession of copies of prosecution photographs, and by misleading the jury regarding discovery of medical records to the prosecution.

Blankenship's egregious misconduct undercut the defense in the eyes of the jury, which could not rely on the veracity of anything Blankenship said. The jury's distrust of Blankenship was visited on his client, as Blankenship's arguments fell on deaf ears, denying Mr. Woodruff the heightened reliability required in death-penalty cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

Blankenship's outrageous conduct denied Mr. Woodruff his rights to a fair trial, effective assistance of counsel, heightened reliability of guilt and penalty determinations in a death-penalty case, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 17, 24 and 29 of the California Constitution.

Mr. Woodruff's convictions should be overturned. He should be granted a new trial with competent counsel.

CLAIM B8: Prosecutor committed prejudicial misconduct by improperly appealing to jurors' emotions with "golden rule" argument.

The prosecutor's guilt-phase closing argument urged jurors to place themselves in the shoes of the victims, prosecution witnesses, the defendant's neighbors and even defense expert witnesses' patients. The highly prejudicial argument denied Mr. Woodruff his state and federal constitutional rights to a fair trial, reliable guilt-phase, retardation-phase and penalty-phase verdicts, and due process of law.

Facts

Prosecutor Michael Soccio's closing argument in the guilt phase followed a pattern: Soccio would describe a situation from the facts of the trial, and then suggest that the jurors consider how they would react in that situation.

In rebutting defense counsel's guilt-phase closing argument that Mr. Woodruff had felt a sense of terror and menace from Officer Benjamin Baker (RT 25:5196, 5197), the prosecutor told the jury:

> "Menacing Ben Baker." I loved that term when the defense used it. If you were gonna be cited for some misdemeanor mild conduct, wouldn't you want to be treated like he treated Parthenia Carr?

(RT 25:5231.)

Next, the prosecutor asked the jurors to put themselves in the shoes of Mr. Woodruff's neighbors:

> How would you like them as your neighbors, the Woodruff/Carr clan? Each of them in trouble with the law. Every day near your bedroom a radio blasts for hours, and it's gone on for years, and you had the gall to call the police three times? Shame on you for wanting peace and quiet in your own home. ... Your neighbors, the Woodruff/Carrs, urinate on trees outside. And you'd like them as a neighbor, to have them play the radio? How comforting.

(RT 25:5232.)

Then, the prosecutor got more specific, asking the jurors to put themselves in the shoes of Holly Menzies, the next-door neighbor who called the police to complain about a noisy radio:

> [W]ouldn't you want to sell your house, too, if you lived there? Would you want somebody out on this stoop listening to Oldies three and four hours a day and drinking beer? No. Would you be accused and faulted for calling the police? Yes, if you were a witness in this trial.

(RT 25:5235.)

Regarding Ms. Menzies' confrontation with Mrs. Carr on the landing of Mrs. Carr's apartment, again the prosecutor asked the jurors to place themselves in Ms. Menzies' shoes:

> Would you want to stay up there with her and a police officer? Who would feel safe? The door had already been pulled away from her. She was already yelled at. Would you stay? Not if you had any sense.

(RT 25:5236.)

In disparaging expert witnesses who had testified for the defense, the prosecutor urged jurors to place themselves in the shoes of the experts' patients:

> Let's talk about the doctors for a minute. You met Einstein the other day. If you had a brain problem or suspected problem, would you want him to be the one to interpret your scan? If you had a child who was sick, would you want Dr. Wu to be the one to take the picture and talk about what it meant?
>
> Would you want Dr. Booraem to be your psychologist?

(RT 25:5244.)

Most prejudicial of all was the prosecutor's suggestion that the jurors place themselves in the shoes of the victims – Detective Jacobs, who was killed by a gunshot, and Officer Baker. As with Ms. Menzies, the prosecutor asked the jurors to imagine they were in the shoes of Officer Baker, at the landing of Mrs. Carr's apartment, confronting Mrs. Carr's younger son, Claude Carr:

> Can you imagine a more deadly place to be trapped with an angry parolee than on a three-foot by six-foot landing, suspended, what, fifteen feet above the ground? Where do you go? Screen door is behind you. The mother is to one side. If you're pushed, hit, you're tall – shorter would have been better up there. Railing at least could have been a little bit safe.

(RT 25:5233.)

And, the prosecutor invited the jurors to imagine the gun had been pointed at them:

> He may have been about as far as I am from you when he shot and killed Doug Jacobs. Is that very far to take a gun and point it at you and shoot?

(RT 25:5239.)

The prosecutor continued with the same theme, placing himself in the role of the killer and the jurors as the victim:

> I just can't say – or I can say it. I can say anything I want, that I was in fear for my life so I had to kill you. Well, number one, it assumes I killed you.

(*Ibid.*)

Discussion

This Court has long disapproved "the so-called 'golden rule' argument, by which counsel asks the jurors to place themselves in the plaintiff's shoes and to award such damages as they would 'charge' to undergo equivalent pain and suffering." (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 182, fn. 11 [53 Cal.Rptr. 129, 417 P.2d 673].) Although *Beagle* was a civil suit involving personal injuries from an automobile accident (*Id.*, at p. 170), California courts have consistently held that appeals to the jurors' sympathy or passions have no place in criminal cases either. (See *People v. Carlin* (1968) 261 Cal.App.2d 30 [67 Cal.Rptr. 557]; *People v. Leach* (1934) 137 Cal.App. 753 [31 P.2d 449]; *People v. Botkin* (1908) 9 Cal.App. 244 [98 P. 861].)

This Court has repeatedly held that a prosecutor's use of a "golden rule" argument in the guilt-phase of a death-penalty case constitutes misconduct:

> During the guilt phase of a capital trial, it is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim: "We have

> settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt."

(*People v. Jackson* (2009) 45 Cal.4th 662, 691 [88 Cal.Rptr.3d 558, 199 P.3d 1098], quoting *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 [17 Cal.Rptr.2d 174, 846 P.2d 756]; also see *People v. Leonard* (2007) 40 Cal.4th 1370, 1406 [58 Cal.Rptr.3d 368, 157 P.3d 973]; *People v. Fields* (1983) 35 Cal.3d 329, 362 [197 Cal.Rptr. 803, 673 P.2d 680].)

Prosecutorial misconduct may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Prosecutorial misconduct violates a defendant's federal constitutional right to due process if the misconduct renders a trial "fundamentally unfair." (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 183.)

This Court has held that although "it is misconduct to appeal to the jury to view the crime through the eyes of the victim," it can be harmless error if the prosecutor's "comments were brief and he did not return to the point." (*People v. Mendoza* (2007) 42 Cal.4th 686, 704 [68 Cal.Rptr.3d 274, 171 P.3d 2].)

In Mr. Woodruff's trial, the impropriety was not limited to a single comment but a pattern of argument. The prosecutor's "golden rule" argument was a recurring rhetorical device, a process of analysis that the

prosecutor encouraged the jurors to use to view virtually all evidence through the eyes of innocents, thus demonizing not only Mr. Woodruff but also the other members of his family. Thus, the prosecutor encouraged the jurors to use not their intellect to analyze facts, but their emotions to find Mr. Woodruff guilty of the most severe charge possible, which made Mr. Woodruff's trial fundamentally unfair.

Throughout the prosecutor's closing argument, he sought to stir up the jurors emotionally, to make them angry at "the Woodruff/Carr clan." Could the jurors imagine being their neighbors? "Each of them in trouble with the law." *They* blast the radio for hours every day; *they* urinate on trees. (RT 25:5244.)

In fact, *they* did no such thing. While the evidence indicates that some members of the family had serious criminal records, Steve Woodruff did not. While the evidence indicates that his mother played her radio loud, Steve Woodruff did not. While the evidence indicates that younger brother Jimmy Taylor urinated in the yard after being detained by police and denied the use of a bathroom (See RT 10:2296), Steve Woodruff did not.

The prosecutor insinuated that the jurors should find Steve Woodruff guilty by association – with his mother's loud radio, with his brothers' criminal records, and with one brother's desperate urination in the yard when police officers would not allow him to go inside and use a bathroom.

This improper prosecution tactic of putting the jurors in the shoes of others – the police officers, the neighbors, even the patients of defense expert witnesses – was intended to inflame the passions of the jurors and unfairly prejudice them against the defendant. Defense counsel did not object but instead sat mute, and there was no curative instruction.

As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless he made a timely objection at trial to the misconduct and requested that the jury be admonished to disregard it. (*People v. Berryman*, *supra*, 6 Cal.4th at p. 1072. Additionally, when the claim focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury applied any of the inappropriate remarks in an objectionable fashion. (*Ibid.*)

However, a defendant will be excused from making a timely objection or a request for admonition if either would be futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159 [51 Cal.Rptr.2d 770, 913 P.2d 980].) The failure to request an admonition also does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1333, quoting *People v. Price*, *supra*, 1 Cal.4th at p. 447.)

Defense counsel's failure to object to the prosecutorial misconduct is excused because of futility – he had already made five objections[23] to the prosecutor's guilt-phase argument, all of them denied. It is implausible under these circumstances to believe that further objections would have been granted.

Furthermore, no admonition could have cured the prosecution's prejudicial strategy. In the highly charged atmosphere of Mr. Woodruff's trial, in which an illiterate and unemployed black man was on trial in the shooting death of a white police officer, there is more than a reasonable likelihood that the jurors did as the prosecutor suggested. The prosecutor's tactic had what this Court has described as "a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*People v. Hill*, *supra*, 7 Cal.4th at p. 847.) As a result of the prejudicial misconduct, the trial did not meet the requirement of heightened reliability of guilt and penalty determinations in a death-penalty case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

Mr. Woodruff was denied his rights to a fair trial, the heightened reliability of guilt and penalty verdicts required in a death-penalty case, and due process of law under the Fifth, Sixth, Eighth and Fourteenth

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[23] Defense counsel had already objected to the prosecutor's arguments at RT 24:5121, RT 24:5131, RT 25:5227 (twice), and RT 25:5230.

Amendments to the United States Constitution and Article 1, sections 7, 15, 17 and 29 of the California Constitution.

Mr. Woodruff's convictions and death sentence should be overturned.

CLAIM B9: Evidence was insufficient to support jury's special circumstance finding of lying in wait.

Evidence presented at trial did not support the jury's "true" finding of the special circumstance that the defendant was lying in wait when he intentionally killed Detective Jacobs. The trial judge erred in failing to reverse the special circumstance finding on his own motion and in denying the defense motion for new trial on the same ground, which violated Mr. Woodruff's state and federal constitutional rights to a reliable sentence and due process of law.

Facts

Among the jury's findings in the guilt phase, on January 28, 2003, was that the special circumstance that the defendant intentionally killed Detective Jacobs while lying in wait, under Penal Code section 190.2, subdivision (a), subsection (15), was true. (CT 19:5392; RT 25:5274.)

The trial judge had given an instruction defining "lying in wait" as "a waiting and watching for an opportune time to act, together with concealment, ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence." (RT 24:5094; see CALJIC 8.25.)

Officer Benjamin Baker testified that well before the shooting of Detective Jacobs, Baker was about to arrest the defendant's brother Claude Carr when he heard Mr. Woodruff shout from below that Baker had better

not touch his mother. Baker testified that all he could see of Mr. Woodruff was his head, which popped out above the stairway railing and then disappeared. Baker testified that he perceived Mr. Woodruff's statement as a threat. (RT 6:1474-1475, 1478.) Baker testified that he made an "11-11" radio call – officer needs immediate assistance – "[b]ecause in that particular situation, Steve Woodruff had said, [']You better not touch my mother.['] And something in his voice made it sound like it was a threat." (RT 6:1476.) Baker testified that when Detective Jacobs arrived on the scene, Baker went down the stairway and met Jacobs in the middle of the stairway. (RT 6:1480.) Baker testified that he explained the situation to Jacobs – an uncooperative woman upstairs was refusing to turn her radio down, a son approached Baker upstairs, and "a guy" in the downstairs unit had said, "You better not touch my mom." (RT 6:1481-1482.)

Defense counsel's motion for new trial, filed April 16, 2003, challenged the sufficiency of the evidence of the lying-in-wait special circumstance. (CT 19:5489-5490; RT 28:5793.) At a hearing on the motion the next day, the trial judge ruled that the evidence was sufficient "to sustain a finding," although the trial judge did not specifically mention the lying-in-wait special circumstance in his ruling. (RT 28:5804.)

Discussion

Under Penal Code section 190.2, the penalty for a defendant found guilty of murder in the first degree is imprisonment for life without possibility of parole or death if one of 22 enumerated special circumstances is found to be true. The jury found true three special circumstance allegations: The murder was committed to avoid or prevent a lawful arrest (Pen. Code § 190.2(a)(5); CT 19:5372, 5392; RT 25:5273); the victim was a peace officer in the performance of his duties (Pen. Code § 190.2(a)(7); CT 19:5373, 5392; RT 25:5273-5274); and the defendant intentionally killed the victim while lying in wait. (Pen. Code § 190.2(a)(15); CT 19:5374, 5392; RT 25:5274.)

The elements of lying in wait are "(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage[.]" (*People v. Sims* (1993) 5 Cal.4th 405, 432 [20 Cal.Rptr.2d 537, 853 P.2d 992], citing *People v. Morales* (1989) 48 Cal.3d 527, 557 [257 Cal.Rptr. 64, 770 P.2d 244]; see *People v. Edwards* (1991) 54 Cal.3d 787, 825 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

Concealment is established by a showing "that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." (*People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31,

814 P.2d 1273], citing *People v. Morales*, *supra*, 48 Cal.3d at p. 555; see *People v. Edwards*, *supra*, 54 Cal.3d at p. 825.) "The required concealment need not be physical. It suffices if the defendant's purpose and intent are concealed by his actions or conduct, and the concealment of purpose puts the defendant in a position of advantage, from which the fact finder may infer that lying in wait was part of the defendant's plan to take the victim by surprise." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140 [17 Cal.Rptr.2d 375, 847 P.2d 55].)

The "substantial" period of watching and waiting need only be minutes. (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 825-826.) "The precise period of time is also not critical. As long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking his victim by surprise." (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1145.)

A criminal conviction based on insufficient admissible evidence to support the jury's verdicts and findings violates the due process clause of the Fourteenth Amendment to the United States Constitution, and Article 1, sections 7, 24 and 29 of the California Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Johnson* (1980) 26 Cal.3d 557 [162 Cal.Rptr. 431, 606 P.2d 738].) Such a proceeding also does not meet the requirement of heightened reliability of

guilt and penalty determinations in a death-penalty case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

In this case, Officer Baker testified that he perceived as a threat Mr. Woodruff's warning that Baker had better not touch Mr. Woodruff's mother. Further, when Detective Jacobs arrived, Baker briefed Jacobs on the situation, including that a relative downstairs posed a threat. Hence, the defendant had not concealed his purpose, since both officers were aware that he represented a threat. Nor had the defendant concealed his location, since he had issued the warning from the same location that he later fired the gun. Additionally, the shooting had not come as "a surprise attack on an unsuspecting victim," since Baker had suspected the defendant represented a threat, which was one of the reasons for Baker's call for assistance. And, Baker had related to Jacobs that someone downstairs had threatened him.

The facts of this case are insufficient for a finding of the special circumstance of lying in wait. Consequently, the evidence is insufficient for the jury's finding that the special circumstance was true. The jury's finding, and the trial judge's decision to uphold it, violated Mr. Woodruff's state and federal constitutional rights to a reliable sentence and due process of law under the Fourteenth Amendment to the United States Constitution and Article 1, sections 7, 15, 17, 24 and 29 of the California Constitution.

The special circumstance of lying in wait should be dismissed. Because the penalty phase was predicated on the special circumstance findings, Mr. Woodruff's death sentence should be reversed. On this claim, this case should be remanded to the trial court for a new penalty phase.

C. Retardation phase

CLAIM C1: Trial court improperly created its own format for mental retardation phase.

The trial court, without guidance from higher courts or the state legislature, arbitrarily established its own format for the mental retardation phase of Mr. Woodruff's trial. The trial judge's makeshift format gave the jury untrammeled discretion, which denied Mr. Woodruff due process of law and equal protection of the laws, and resulted in the type of arbitrary and capricious infliction of punishment that the state and federal constitutions forbid.

Facts

On June 20, 2002, the United States Supreme Court issued its decision in *Atkins v. Virginia*, 536 U.S. 304 [122 S.Ct. 2242], prohibiting the execution of mentally retarded defendants. At a pre-trial hearing for Mr. Woodruff the next day, defense counsel Mark Blankenship said he wanted to set a hearing date for a motion to dismiss the death-penalty charge in light of *Atkins*. (RT B:510.) Blankenship said he would be "willing to take testimony of these doctors in advancement [*sic*] of commencement of the trial," to prevent the unnecessary death-qualification of trial jurors. (RT B:511-512.)

The trial judge said he felt such a motion would be premature and would be more appropriate after a jury convicted the defendant, found

special circumstances to be true, and recommended the death penalty. (RT B:511.)

At the next pre-trial hearing, on July 2, 2002, defense counsel again asked the trial judge "to set some kind of a hearing to deal with that evidentiary matter" regarding the issue of whether Mr. Woodruff qualified as mentally retarded under *Atkins*. (RT B:513.) Blankenship acknowledged that the trial judge was "not inclined to set any sort of evidentiary hearing regarding whether or not Mr. Woodruff is even eligible for the death penalty. ... [I]f Mr. Woodruff is not eligible for the death penalty, I think it would be highly prejudicial to death-qualify jurors and let them think they're perhaps pursuing a death penalty case, when at one point it would be determined that his mental state is such that he fell within the parameters of *Atkins* [*v.*] *Virginia*." (RT B:515.) Defense counsel said the situation was analogous to a motion for summary judgment in a civil case, with no issue of fact regarding Mr. Woodruff's mental state, so "as a matter of law, the death penalty charges can't go forward and they should then be dismissed." (RT B:515-516.)

The trial judge ordered the jail to provide the prosecution's psychologist with access to Mr. Woodruff for appropriate testing. Then, the judge expressed his frustration with the lack of guidance he had received about proper procedure for a mental retardation determination in a death-penalty case:

> I note the Supreme Court – and it is typical of the Supreme Court that they kind of left it up to the states to determine what degree of mental retardation falls within the opinion they issued. They didn't bother to tell us what standard of proof would be required, who would have the burden of proof, and all that good stuff. But that's typical of the United States Supreme Court.

(RT B:516.)

On November 7, 2002, less than five months after the *Atkins* decision, Mr. Woodruff's trial began. The timing of Mr. Woodruff's trial was such that he was the second[24] capitally charged defendant in California to have a mental retardation phase under the vague requirements of *Atkins.*

On the first day of jury selection, defense counsel filed a written motion seeking yet again to prevent the selection of a "death penalty qualified" jury until after the issue of Mr. Woodruff's mental retardation had been determined. (CT 17:4819-4833.) In the motion, defense counsel noted, "This Court has not established a procedure to implement Defendant Woodruff's *Atkins* defense of mental retardation." (CT 17:4821.)

The trial judge denied the motion. The judge said there would be a guilt phase first, and then a mental retardation phase, but "only if the jury finds the defendant guilty of first-degree murder and finds at least one of the special circumstances true." (RT 2:617.) The judge said the same jury

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[24] The first defendant with a mental retardation phase under *Atkins* was Louis Gomez in Imperial County. (Salorio, *Penalty phase in Gomez trial begins Tuesday*, Imperial Valley Press (Dec. 1, 2002); also see RT 2:618, RT 19:4070.)

would decide the question of mental retardation as would make a recommendation on the penalty. (RT 2:617-618.) Again, the judge expressed his frustration with the lack of guidance about how a mental retardation phase ought to be structured:

> I acknowledge for the record that the higher courts have given us absolutely no guidance on this, despite the United States Supreme Court's proclamation in the last paragraph of the *Atkins* opinion that we leave it to the States to determine how we should proceed in these matters. And since the legislature of the State of California has not acted, nor has any appellate court, including the State Supreme Court given us any guidance, I feel this is the fairest and most equitable way to proceed. Obviously, we are breaking new ground here. ... Somewhere down the line I may be proven wrong, but that's why we have higher courts.

(RT 2:618.)

The format for the mental retardation phase of Mr. Woodruff's trial remained unclear even with the trial underway. At a hearing on January 15, 2003, defense counsel proposed merging the guilt and mental retardation phases into a single phase, which "would get us to the two phases a lot quicker. In theory, we can be done with them by the middle of next week." (RT 19:4064.) The trial judge said defense counsel's suggestion was not an option, and he felt that the other possibility, merging the mental retardation and penalty phases, would be prejudicial to Mr. Woodruff. (RT 19:4064-4065.) As an aside, the judge said: "Again, for those armchair quarterbacks who may some day be reviewing all this – my message to you is thanks for the guidance you haven't given us from the U.S. Supreme Court on down to

the California state legislature." (RT 19:4064.) Later in the hearing, the judge said, "I feel a better way to do it – And, as you know, it's only been once in this state and just recently, is to do it with a separate phase on that issue until the trial courts receive guidance from some higher authority." (RT 19:4070.)

Two weeks later, when the judge and both counsel were again discussing possible formats for the mental retardation phase, the judge said:

> I think without guidance from either the Supreme Court, referring to the U.S. Supreme Court, or the state legislature, I think fundamental fairness dictates that the jury not be exposed to the evidence to be exposed and presented in the penalty phase to the extent that may affect their judgment with respect to the retardation issue. Again, so the record is clear, that's why I have separated the retardation phase from the penalty phase.

(RT 25:5284-5285.)

Only two witnesses, both clinical psychologists, gave testimony at trial on the issue of whether Mr. Woodruff was mentally retarded. Dr. Curtis Booraem, who had assessed Mr. Woodruff as mildly mentally retarded, testified for the defense at all three phases of trial. (RT 21:4496-RT 22:4702; RT 26:5298-5324; RT 27:5683-5691.) Dr. Craig Rath, who had assessed Mr. Woodruff as learning disabled but not mentally retarded, testified for the prosecution in the guilt phase only. (RT 23:4856-4927, RT 24:4946-5008.)

Booraem testified that he evaluated Mr. Woodruff at the Riverside

County jail on March 21, 2002. (RT 21:4513; RT 22:4600.) In his initial report, Booraem assessed Mr. Woodruff as having a full-scale IQ of 69. (RT 21:4542.) Booraem's revised conclusion in his final report was that Mr. Woodruff had a full-scale IQ of 66. (RT 21:4543; CT 17:4860.) Booraem testified that IQ scores in the 60s indicated a person who was high-functioning mentally retarded. (RT 22:4603.)

Booraem testified that when Mr. Woodruff was age 16, his math scores were at the third-grade level, his reading scores were at the first-grade level, his spelling scores were at the fourth-grade level, and his general information scores were at the fourth-grade level. Booraem said those scores were consistent with being mentally retarded. (RT 21:4551.)

In rebuttal, Rath testified that he evaluated Mr. Woodruff on August 26, 2002, using the same WAIS-III test Booraem had used five months earlier. (RT 23:4896.) Rath acknowledged that the test manual said the "practice effect" of testing Mr. Woodruff with the WAIS-III a second time in less than a year could raise the full-scale IQ score an average of 5 points.[25] (RT 24:5007.) Nonetheless, Rath said he assessed Mr. Woodruff's full-scale IQ as 78. (RT 23:4901.) Rath said Mr. Woodruff had a learning

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[25] An Oklahoma study published in 2002, the same year Mr. Woodruff was tested and retested, found the "practice effect" of retesting the same subjects with the WAIS-III either three or six months after the initial test raised the full-scale IQ score an average of six points. (Basso, et al., *Practice Effects on the WAIS-III Across 3- and 6-Month Intervals* (2002) 16 Clinical Neuropsychologist 57.)

disability but was not mentally retarded because his personal self-help skills were unimpaired, his socialization was "relatively unimpaired" and his IQ was too high. (RT 23:4902.)

Rath attributed the higher scores in his assessments to having had better rapport with Mr. Woodruff than Booraem had.

> He basically told me that he did not try very hard on Dr. Booraem's test, and that he agreed that if I tested him he would try harder and do a better job because he did not want to be labeled as mentally retarded. ... I think he was embarrassed at the prospect of being labeled mentally retarded and didn't want to do that, so he agreed to try his best for the testing that I did. ... [H]e indicated that he didn't agree with his defense counsel at all. He thought that was a stupid idea for him to be labeled as retarded. He didn't want it, and he doesn't want to be labeled as retarded.

(RT 23:4867.)

Booraem, the only witness to testify for either side in the mental retardation phase of trial, testified that in terms of adaptive functioning, Mr. Woodruff was within the normal range in self-care, home living, social interpersonal skills, health and safety, but "pretty poor" in self-direction and "very poor by history" in academics. (RT 24:5303-5304.) Booraem testified that Mr. Woodruff's biggest limitations were in academics and work. With those limitations, Mr. Woodruff was "by definition" mentally retarded, Booraem said. (RT 24:5305, 5312.)

Defense counsel asked Booraem if, with a margin of error of 5 points in the IQ measurements, Mr. Woodruff would still qualify as mentally

retarded if his full-scale IQ was actually 71, or 5 points higher than Booraem's assessment. The prosecutor objected that the question was irrelevant. The judge sustained the objection, explaining that "the jury will be instructed the standard there applies to the definition of the American Psychiatric Association, which requires an IQ, among other things, under 70." (RT 26:5322.) However, upon further questioning by defense counsel, Booraem testified that the APA definition[26] of mental retardation did not require an IQ under 70, and with the 5-point margin of error could include an IQ as high as 75. (RT 26:5323-5324.)

The trial judge's instruction to the jury closely tracked the wording of Criteria A, B and C of the APA definition. (RT 26:5333-5334.) However, the judge did not explain what the criteria meant, nor did he mention IQ level at all.

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[26] The American Psychiatric Association definition of mental retardation was quoted in *Atkins*, *supra*, 536 U.S. at p. 308, fn. 3:

> "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Discussion

On October 8, 2003, less than six months after Mr. Woodruff was sentenced to death, Governor Gray Davis signed into law Penal Code section 1376, which defined "mentally retarded" for purposes of death-penalty prosecutions as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (Pen. Code § 1376(a).)

The statute provided for what Mr. Woodruff's defense counsel had initially requested, a "hearing without a jury prior to the commencement of the trial. ... If the defendant does not request a court hearing, the court shall order a jury hearing" at the conclusion of the guilt phase, if a special circumstance was found to be true. (Pen. Code § 1376(b)(1).)

Another provision of the statute said, "No statement made by the defendant during an examination ordered by the court shall be admissible in the trial on the defendant's guilt." (Pen. Code § 1376(b)(2).)

This Court subsequently said that Penal Code section 1376 "sets forth the standards and procedures for determining whether a defendant against whom the prosecution seeks the death penalty is mentally retarded within the meaning of *Atkins*." (*In re Hawthorne* (2005) 35 Cal.4th 40, 43 [24 Cal.Rptr.3d 189, 105 P.3d 552].) The *Hawthorne* opinion said postconviction claims of mental retardation should be raised by habeas corpus petition (*Id.*, at p. 47); an IQ of 70 is not the upper limit for mental

retardation because "a fixed cutoff is inconsistent with established clinical definitions" (*Id.*, at p. 48); and mental retardation is a question of fact. (*Id.*, at p. 49.) Later, in *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999 [56 Cal.Rptr.3d 851, 155 P.3d 259], this Court noted that defense experts in that case concluded that flaws in testing "could together or separately result in a score as high as 78 from a mildly retarded person" (*Vidal*, at p. 1006, fn. 4), precisely the score that prosecution expert Rath had said was too high to indicate mental retardation for Mr. Woodruff. (RT 23:4902.)

If Penal Code section 1376 had been enacted a year earlier, the judge in Mr. Woodruff's trial would have had the kind of "guidance" that he sought, the standards and procedures for determining whether Mr. Woodruff was mentally retarded. Defense counsel would have had the authority for the pretrial hearing that he sought before a death-qualified jury was selected. None of the prejudicial statements that the prosecution expert elicited from Mr. Woodruff – e.g., that it was "a stupid idea for him to be labeled as retarded" (RT 23:4867) – would have been admissible in the guilt phase. And, the jury would have had guidance about how to evaluate the importance of the full-scale IQ scores.

Instead, the judge at Mr. Woodruff's trial was compelled to oversee a mental retardation phase without any guidance from the higher courts or the legislature concerning standards and procedures for what that phase should look like, "what standard of proof would be required, who would have the

burden of proof." (RT B:516.) The jurors were instructed to make a decision about whether Mr. Woodruff was mentally retarded with only the most truncated, vague and incomprehensible of descriptions of what mental retardation is. A process so lacking in standards cannot pass constitutional scrutiny.

"[W]here the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments." (*Gregg v. Georgia* (1976) 428 U.S. 153, 195, fn. 47 [96 S.Ct. 2909].)

Because he had no guidance, the trial judge had to divine an ad hoc procedure, a blind guess as to what the *Atkins* decision required. As a result, a jury with standardless discretion determined that Mr. Woodruff was not mentally retarded, despite substantial factual evidence to the contrary. That arbitrary determination made Mr. Woodruff eligible for the death penalty, which the same jury would recommend three days later.[27]

Such standardless decision-making deprived Mr. Woodruff of his rights to a fair trial, the heightened reliability required in death-penalty determinations, due process of law and equal protection of the laws, and against arbitrary, capricious, cruel and unusual punishment under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and

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[27] The jury determined on February 3, 2003, that Mr. Woodruff was not mentally retarded. (CT 19:5406.) The jury recommended a death sentence on February 6, 2003. (CT 19:5474.)

Article 1, sections 7, 15, 17, 24 and 29 of the California Constitution.

The jury's finding that Mr. Woodruff was not mentally retarded should be reversed. Consequently, Mr. Woodruff's death sentence should be overturned. This case should be remanded to the trial court for a mental retardation determination that comports with due process of law. Because the outcome of the retardation phase made possible the penalty phase, Mr. Woodruff's death sentence also should be reversed.

CLAIM C2: Prosecutor made improper argument appealing to jurors' prejudices about retardation; defense counsel failed to object.

The experienced prosecutor committed prejudicial misconduct when he appealed to juror prejudices and stereotypes about mental retardation. Inexperienced defense counsel failed to object. Consequently, the jury's verdict, which was contrary to the evidence presented, denied Mr. Woodruff his state and federal constitutional rights to a fair trial, effective assistance of counsel, the heightened reliability required in a death-penalty case, and due process of law.

Facts

The mental retardation phase of Mr. Woodruff's trial took a portion of one day and only 70 pages of trial transcript. (RT 26:5292-5361.) The defense put on one witness, psychologist Curtis Booraem. The prosecution called no witnesses.

In closing argument, prosecutor Michael Soccio asserted: "If a person doesn't look retarded or act retarded, it's because they're not retarded. It doesn't take any professional to let you know that." (RT 26:5344.)

Defense counsel raised no objection to the comment.

Discussion

Whether Mr. Woodruff meets the legal definition of "mentally retarded" has nothing to do with how he "looks" or "acts." In *Atkins v. Virginia*, *supra*, 536 U.S. 304, in which the United States Supreme Court held that executing a mentally retarded defendant would violate the Eighth Amendment, the Court relied on the definitions of the American Association of Mental Retardation (AAMR) and what the Court characterized as the "similar" definition of the American Psychiatric Association (APA). The AAMR definition, the more concise of the two, said:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

(American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed.1992), quoted in *Atkins*, at p. 308, fn. 3.)

Thus, the three essential criteria for mental retardation were "subaverage intellectual functioning," two or more "adaptive skill" deficits

and onset before age 18.[28] None of these three criteria depended on physical appearance. What is important is how a person thinks. Someone could "look" and "act" like an average person and still meet all three *Atkins* criteria for mental retardation.

The prosecutor in Mr. Woodruff's trial was well aware of the legal definition of mental retardation, as the *Atkins* decision had been issued more than seven months before the mental retardation phase, and yet he urged the jurors to ignore the facts, and the law, and vote in accordance with their prejudices.

More than 75 years ago, the United States Supreme Court commented that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.)

This Court has said, "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the

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[28] Penal Code section 1376, enacted in 2003 after Mr. Woodruff's trial, says "'mentally retarded' means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." In 2005, this Court concluded that post-conviction claims of mental retardation "should be adjudicated in substantial conformance with the statutory model." (*In re Hawthorne* (2005) 35 Cal.4th 40, 44 [24 Cal.Rptr.3d 189, 105 P.3d 552].) The Legislature derived its standard from the AAMR and APA standards quoted in *Atkins*. (*Hawthorne*, at p. 47.)

evidence is misconduct. (Citations omitted.) A prosecutor's 'vigorous' presentation of facts favorable to his or her side 'does not excuse either deliberate or mistaken misstatements of fact.'" (*People v. Hill, supra*, 17 Cal.4th at p. 823, quoting *People v. Purvis* (1963) 60 Cal.2d 323, 343 [33 Cal.Rptr. 104, 384 P.2d 424].)

This Court also has said "mental retardation is a question of fact. (Citations omitted.) It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." (*In re Hawthorne, supra*, 35 Cal.4th at p. 49.)

In *Hawthorne*, this Court relied on the assessments of two mental health experts, one of whom had reviewed "a substantial amount of background material relating to petitioner's upbringing, educational performance, family environment, adaptive behavior, and mental condition[,]" and had conducted a comprehensive neuropsychological evaluation, a mental status examination, and a clinical review. The other expert had interviewed the petitioner and had reviewed data compiled by other experts, including "historical, medical, psychological and educational information." Based on the evidentiary showing, this Court found the petitioner was entitled to an evidentiary hearing on the issue of mental retardation. (*Hawthorne*, at p. 51.)

In *Hawthorne*, this Court said the key to determining mental retardation is "overall capacity." However, when the prosecutor in Mr. Woodruff's trial defined mental retardation as something that could be readily seen, he appealed to the jurors' uninformed stereotypes of what mentally retarded people look like. It was a foul blow, a deliberate misstatement of fact.

"A prosecutor's conduct violates the federal Constitution when it infects the trial with unfairness, and violates state law if it involves the use of deceptive or reprehensible methods of persuasion." (*People v. Booker* (2011) 51 Cal.4th 141, 184 [119 Cal.Rptr.3d 722, 245 P.3d 366].) At Mr. Woodruff's trial, the prosecutor's argument to the jury in the retardation phase infected the trial with unfairness because it urged the jurors to rule against the defendant not on the basis of the evidence presented, but based on the basest of the jurors' prejudices. Such a proceeding does not meet the requirement of heightened reliability of guilt and penalty determinations in a death-penalty case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

To preserve such a claim for appeal, "a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the remark (or conduct) unless such an admonition would not have cured the harm. (Citation omitted.) When the claim focuses on the prosecutor's comments to the jury, we determine whether there was a reasonable

likelihood that the jury construed or applied any of the remarks in an objectionable fashion." (*People v. Booker, supra*, 51 Cal.4th at pp. 184-185.)

Defense counsel Mark Blankenship made no objection to the prosecutor's reprehensible remarks, which was consistent with defense counsel's incompetence in failing to defend and preserve Mr. Woodruff's rights throughout all phases of the trial. In failing to make an objection, Blankenship provided prejudicial ineffective assistance, in that the jury was free to follow the prosecutor's lead and rule against Mr. Woodruff based on bias instead of fact.

There is a reasonable likelihood that the jurors did as the prosecutor urged them to do and ignored the evidence of mental retardation. The jury did find that Mr. Woodruff was not mentally retarded, and reached that decision in no more than two hours of deliberations, including whatever break they may have taken for lunch.[29] (CT 19:5405.)

Nevertheless, an admonition would not have cured the harm. Once the jurors had been encouraged by the prosecutor to ignore the facts and employ their own prejudices about mental retardation, no admonition by the judge could have undone the damage.

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[29] The clerk's minutes indicate the jury retired to deliberate at 11:26 a.m. and announced at 1:30 p.m. that a verdict had been reached. (CT 19:5405.)

As a consequence of the prosecutor's misconduct, and defense counsel's ineffective assistance in failing to recognize and object to the misconduct, Mr. Woodruff was denied his rights to a fair trial, effective assistance of counsel, the heightened reliability required in death-penalty cases, and due process of law, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, sections 7, 15, 17, 24 and 29 of the California Constitution.

Mr. Woodruff was denied a mental retardation phase untainted by prosecutorial misconduct and resulting juror prejudice. Consequently, the jury's finding that Mr. Woodruff was not mentally retarded should be reversed. Because the outcome of the retardation phase made possible the penalty phase, Mr. Woodruff's death sentence also should be reversed.

D. Penalty phase

CLAIM D1: Prosecutor improperly appealed to jurors' biases in penalty-phase opening statement.

The prosecutor committed misconduct in his penalty-phase opening statement by suggesting that jurors could consider their religious values in determining the proper penalty verdict and could properly make up their minds about the penalty without hearing any penalty-phase evidence. Such comments encouraged the jurors to violate their oaths and vote for a death penalty based on prejudice and religious intolerance. As a consequence, Mr. Woodruff was denied his state and federal constitutional rights to a fair penalty phase, the heightened reliability required in death-penalty cases, and due process of law.

Facts

In his penalty-phase opening statement, on February 4, 2003, prosecutor Michael Soccio said one of the aggravating factors the jurors could consider in the penalty phase was the circumstances of the crime. "That's all. That, in and of itself. Doesn't have to say that he had a bad history, doesn't have to have been a bad man, doesn't matter whether he's a Christian, non-Christian. Those things are for you to take and to weigh for yourselves." (RT 26:5378.) The prosecutor concluded his opening statement by advising the jurors that the judge would give them instructions on what to consider. "And then you'll be asked, death or not death. By

then, you'll know, if you don't already, what the correct verdict will be." (*Ibid.*)

Discussion

This Court has said prosecutorial misconduct "implies a deceptive or reprehensible method of persuading the court or jury." (*People v. Price*, *supra*, 1 Cal.4th at p. 448.) This Court also has said a reference to religious authority is improper, in that it "tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1107 [13 Cal.Rptr.2d 511, 839 P.2d 1020].) Prosecutorial misconduct is reversible under the United States Constitution when it "'so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.)

In penalty-phase comments to the jurors in Mr. Woodruff's trial, the prosecutor used the same rhetorical device – paraleipsis – that this Court condemned in *Wrest*: "Repetition of the statement, 'I am not arguing X,' strongly implied the prosecutor was in fact asserting the validity and relevance of X, but, for lack of time, was concentrating on other, presumably more important topics." (*Ibid.*) In this case, the prosecutor's repetition involved his supposed assertions that it "doesn't matter" whether Mr. Woodruff had a bad history, was a bad man or "whether he's a

Christian, non-Christian." However, the prosecutor immediately negated the supposed assertion that those things did not matter by advising the jurors, "Those things are for you to take and to weigh for yourselves." (RT 26:5378.) Thus, the prosecutor was actually saying it was acceptable for the jurors to consider whether they believed Mr. Woodruff was a "Christian, non-Christian," and take that "thing" into account in their decision on the appropriate penalty.

Furthermore, the prosecutor implicitly told the jurors that it was acceptable to make up their minds to vote for the death penalty without hearing any evidence in the penalty phase when he said they would know later in the penalty phase, "if you don't already, what the correct verdict will be." (*Ibid.*)

Such appeals to religious intolerance and prejudice constitute reprehensible prosecutorial misconduct. To suggest that jurors ought to consider whether Mr. Woodruff was a Christian or *non*-Christian in their penalty decision is an outrageous appeal to religious intolerance, and more broadly an appeal for insiders to shun an outsider. To suggest that jurors may have enough information to vote for the death penalty without hearing any evidence regarding aggravating and mitigating factors is to suggest that some crimes carry an automatic death penalty, regardless of evidence in mitigation.

An automatic death penalty was held unconstitutional in *Woodson v.*

North Carolina, *supra*, 428 U.S. 280. In *Woodson*, the Supreme Court said an automatic death-penalty scheme "departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'" (*Id.*, at p. 301, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 100 [78 S.Ct. 590].) Such a proceeding does not meet the requirement of heightened reliability of the penalty determination in a death-penalty case. (*Woodson*, at p. 305.)

At Mr. Woodruff's trial, the prosecutor urged the jurors to adopt such an automatic death-penalty scheme in their deliberations and to vote for death based on the evidence they had heard in the guilt phase alone. By doing so, and by appealing to religious intolerance, the prosecutor denied Mr. Woodruff a fair penalty trial, due process of law and the heightened reliability required in death-penalty determinations under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 17, 24 and 29 of the California Constitution.

This Court has held that generally "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." However, a "defendant will be excused from the necessity of either a timely

objection and/or a request for admonition if either would be futile ... [or] if an admonition would not have cured the harm caused by the misconduct." (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) At Mr. Woodruff's trial, defense counsel made no objection to the two examples of prosecutorial misconduct cited above. However, no instruction could have overcome the prosecutor's insidious suggestion that jurors follow their own biases and ignore any evidence in mitigation. To the extent that defense counsel should have objected to the prosecutor's comments, his failure to do so is another example among many of his prejudicial ineffective assistance, which denied Mr. Woodruff a fair trial and due process of law. (*Strickland v. Washington*, *supra*, 466 U.S. 668.)

Because Mr. Woodruff was denied a fair and reliable penalty phase, both by prosecutorial misconduct and by defense counsel too ineffective to put a stop to it, Mr. Woodruff's death sentence should be overturned. He should be granted a new penalty phase in compliance with state and federal constitutional protections.

CLAIM D2: Trial judge allowed hearsay testimony at penalty phase, which violated Mr. Woodruff's right to confront witness against him.

During the penalty phase, the trial judge allowed the prosecution to present hearsay testimony from two law enforcement officers who had interviewed an absent witness about an alleged prior violent incident. The trial judge would not allow the jury to learn that the absent witness had mental health issues that prevented him from testifying. The judge's errors violated Mr. Woodruff's state and federal constitutional rights to confront a witness against him. These errors also denied Mr. Woodruff the heightened reliability of a sentencing determination required in a death-penalty case, equal protection of the laws, and due process of law.

Facts

Over defense objection on confrontation and due process grounds (RT 27:5538-5545), the trial judge allowed two law enforcement officers to testify at the penalty phase of Mr. Woodruff's trial about what a man had told them about an altercation in Pomona more than three years earlier.

The first of the hearsay witnesses was Pomona police officer Richard Machado, whom the judge allowed to testify at the penalty phase based on Machado's refreshed recollection from a report Machado had written at the time of the 1999 incident. (RT 27:5560.) Machado testified on February 5, 2003, that he had gone to Pomona Valley Hospital on December 23, 1999, to take a statement from a man he identified as Eddie

Phillips, who was being treated at the hospital for a gunshot wound. (RT 27:5557-5558.)

Before Machado testified, the trial judge alerted the jury that Machado's testimony would normally be excluded as hearsay, but he would be allowed to testify under an exception because the declarant was unavailable because he was hospitalized in Mississippi and under doctors' orders not to travel. (RT 27:5556.) The judge denied a defense request to tell the jury that the unavailable declarant, whom the prosecution identified as Mario Brooks, had checked himself into a veterans hospital's psychiatric unit and was placed on a 72-hour hold due to a psychotic episode. (RT 26:5464; RT 27:5545-5547.)

Machado testified that he had no idea whether Eddie Phillips and Mario Brooks were the same person. Machado said his report identified the person making the statement to him as Eddie Phillips and made no mention of Mario Brooks. (RT 27:5561.)

Machado testified that Eddie Phillips told him he had been sitting in the passenger seat of a mini-van when Mr. Woodruff approached and tried to hit him with an object, possibly a bottle. (RT 27:5559.) Machado said Phillips said he had argued with Mr. Woodruff two to three days earlier about a girlfriend and Mr. Woodruff told Phillips they would meet again. Machado said Phillips told him Mr. Woodruff drove a white Mercedes, with "CASH" license plate. (RT 27:5560.) Machado said he checked with

a police dispatcher but could not locate a white Mercedes with such a license plate. (RT 27:5563.)

The trial judge held that the 1999 statements to police were admissible under Evidence Code sections 240 and 1370 because Brooks was unavailable as a witness, even though the statements were "very highly prejudicial hearsay." (RT 26:5535; RT 27:5548, 5552.) The judge said the 1999 statements' trustworthiness was akin to a spontaneous declaration because the statements were made at the time of the incident and were reported to responding law enforcement officers. (RT 27:5552.)

The trial judge limited the admissible testimony to Brooks' purported statement that Mr. Woodruff was the individual who struck him with a bottle, and a description of the injuries he received as a result. (RT 27:5548.) The judge said anything relating to Mr. Woodruff's attempt to strike Brooks and any statements Brooks made identifying Mr. Woodruff, and even an altercation leading up to the incident involving a threat would be admissible. (RT 27:5550.) The prosecutor said Brooks gave later statements with significantly different accounts of what happened in Pomona. The trial judge ruled those statements inadmissible. (RT 27:5552.)

The second law enforcement officer to testify about what he had been told about the Pomona incident was the prosecutor's investigator, Martin Silva. Over defense objection, Silva testified that he had talked with

Brooks in Jackson, Mississippi. (RT 27:5570.) Silva testified that prosecution witness Freddy Williamson had told Silva that Williamson had gone to an address in Pomona with "the person who I knew as Mario Brooks[30]" and two women to buy marijuana. (RT 27: 5572.) Silva testified that Williamson told him Mr. Woodruff "could have been" one of three men who chased Brooks on that occasion. (RT 27:5573.)

When Blankenship sought to offer Brooks' felony record into evidence, the prosecutor questioned the relevance, because the judge had stopped the prosecutor from asking if Brooks and Phillips were the same person. The judge suggested to Blankenship that if he wanted Brooks' criminal record in evidence, he ought to stipulate that Brooks and Phillips were the same person. Blankenship said he would do so. (RT 27:5693.)

Discussion

Among the federal constitutional rights belonging to a criminal defendant is the right "to be confronted with the witnesses against him." (U.S. Const., 6th amend.) The confrontation clause's " ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-

[30] Williamson testified that he knew the person in the Pomona incident only as "Tank." Williamson said he did not know Mario Brooks' legal name until the prosecutor told him. (RT 27:5523.)

examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 61 [124 S.Ct. 1354].)

Where testimonial evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Ibid.*) In *Crawford*, the Supreme Court held that the term "testimony" applied to police interrogations. (*Ibid.*) In *Crawford*, a testimonial statement to police had been admitted at trial against the defendant, despite the fact that the defendant had no opportunity to cross-examine the non-testifying witness. "That alone is sufficient to make out a violation of the Sixth Amendment," the Supreme Court said. (*Id.*, at p. 68.)

That is precisely the circumstance in Mr. Woodruff's case. Over defense objection, the trial judge allowed a Pomona police officer to testify that he took a statement in 1999 from a man named Eddie Phillips. The officer testified that Phillips told him the he had argued with Mr. Woodruff about a girlfriend and two or three days later Mr. Woodruff had tried to hit Phillips with an object Phillips believed to be a bottle. (RT 27:5560, 5562.)

At no time prior to the penalty-phase testimony had Mr. Woodruff had an opportunity to cross-examine Phillips, as required by *Crawford*, because no charges were ever filed in connection with the 1999 incidents. Moreover, more hearsay testimony from two other prosecution witnesses was necessary to make the connection that the Eddie Phillips of the 1999

Pomona police report was in fact Mario Brooks, the witness who became unavailable to testify when he checked himself in to the psychiatric unit of a veterans hospital in Mississippi the night before he was to testify. (RT 26:5523; RT 27:5570-5572.)

Not only did the prosecution use the non-appearance of Phillips/Brooks to introduce his statement about a purported violent act in 1999, but also to introduce other prejudicial information against Mr. Woodruff. (RT 26:5375-5376, 5520.) At closing argument, the prosecutor referred to the alleged Brooks incident as evidence that Mr. Woodruff "hurts people whenever he needs to." (RT 27:5733.)

At Mr. Woodruff's sentencing, the trial judge said the 1999 Pomona incident "demonstrates a history [of] violent criminal conduct by the defendant." (RT 28:5848.) The judge said it was not clear that Mr. Woodruff was one of the shooters of Brooks, but it was clear that Mr. Woodruff uttered an implied threat of force against Brooks two to three days earlier when they argued about Brooks' attempt to become involved with a female friend of Mr. Woodruff. The judge also said the evidence was uncontradicted that on the day of the shooting of Brooks, Mr. Woodruff tried to hit Brooks with a bottle or some glass device and attempted to forcibly remove Brooks from the van in which Brooks was a passenger. (RT 28:5848-5849.)

The trial judge erred in allowing what he characterized as "very highly prejudicial hearsay" to be presented without allowing Mr. Woodruff any opportunity to confront the witness or even to mention that the reason the witness was unavailable was that he was undergoing psychiatric treatment.

The admission of such "very highly prejudicial hearsay" denied Mr. Woodruff his rights to confront a witness against him, to a reliable sentence, to equal protection of the laws, and to due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 7, 15, 17, 24 and 29 of the California Constitution. As a result, Mr. Woodruff's death sentence should be overturned.

CLAIM D3: Trial judge conducted further fact-finding before denying defendant's automatic motion to modify penalty verdict.

The trial judge exceeded his statutory authority by admitting and considering highly inflammatory and prejudicial unsworn testimony at the hearing on the defendant's automatic motion to modify the penalty verdict. The trial judge also improperly considered the probation report in ruling on the automatic motion.

Consequently, the resulting death sentence violated Mr. Woodruff's state and federal constitutional rights to a fair trial, to heightened reliability in sentencing in a death-penalty case, to a sentence limited to factors considered by a jury, and to due process of law.

a. Unsworn testimony

Facts

Judge Christian Thierbach allowed the unsworn testimony of seven persons, four of them relatives of the shooting victim, during the hearing on the automatic motion to modify the penalty verdict on April 17, 2003.

Prosecutor Michael Soccio presented five witnesses, all urging the trial judge to uphold the jury's death verdict. The first witness was Charles Jacobs Jr., the shooting victim's father, who repeatedly used the rhetorical refrain, "Make no mistake, I am angry," to punctuate his emotional comments. Jacobs concluded: "Steven Woodruff murdered my son. As there was no remorse, there will be no forgiveness[,] no compassion, no

nobility. For the maiming of the Baker family, for the murder of my son, for the total destruction of our family, Steven Woodruff must die. Make no mistake, I am angry." (RT 28:5816-5819.)

The second witness was the shooting victim's mother, Cathy Miller, who concluded with a direct appeal to the judge: "Judge Thierbach, I respectfully ask that you honor the recommendation of the jury and impose the death penalty upon this convicted murderer, Steve Woodruff. He is despicable and needs to be punished with this maximum punishment." (RT 28:5822.)

The third witness was the shooting victim's widow, Tamara Jacobs, who said she sat through every day of the trial. "I searched for but never saw that man express one bit of regret or remorse for murdering my husband. I saw him try to make excuses and lie to get himself out of trouble. You were here. You saw it. His only regret is that his life is over. He's right about that. Killing any officer in the line of duty is reason enough to give any person in a civilized society the death penalty." (RT 28:5823.)

The fourth witness was Tara Schofield, the shooting victim's sister. She said Mr. Woodruff had "wreaked havoc on our community and left behind a lot of torn lives and broken hearts. And for that reason, he must be dealt with accordingly." (RT 28:5827.)

The prosecution's fifth and final witness was Officer Benjamin Baker's wife, Yvonne Baker, who spoke to Mr. Woodruff directly: "I just want you to know that I wish in all my heart that my husband had shot you dead. I believe in a life for life, and I don't think you should have the luxury of sitting in that cell while Doug's body lies in his grave. You are the [epitome] of evil, and I can say that I sincerely hate you." (RT 28:5830.)

Mr. Woodruff's brother John Woodruff, as well as Mr. Woodruff himself, spoke in support of the motion to modify the penalty verdict. John Woodruff asked the judge to spare his brother's life, concluding: "I will pray, and I hope that you pray before you take this heavy decision on your shoulder and go to Jehovah God in actual guidancing [*sic*] to him." (RT 28:5834.)

Mr. Woodruff, having testified at the guilt phase that it was Officer Baker's bullet and not his own that killed the victim (RT 20:4213), addressed his remarks to Baker, suggesting Baker "allowed evil to come in your life, and it will destroy you, Baker. ... But it eats you up inside, Baker. Why not [] tell the truth?" (RT 28:5836.)

Baker, sitting in the courtroom during the penalty modification hearing, shouted at Mr. Woodruff: "Look at the evidence. Look at the video. January 13th. ... You were a coward on January 13th." (*Ibid.*)

Judge Thierbach tried to restore order to the courtroom, telling both men to be silent. To Baker, the judge said, "I know how you feel. I don't want to have to ask you to leave, but maintain your composure." (*Ibid.*) The judge turned to Mr. Woodruff and told him, "[I]f you want me to consider anything you have to say, address your thoughts to me; otherwise, I'm gonna cut this off." (*Ibid.*)

Mr. Woodruff was able to complete his comments without further incident, concluding: "I did not kill that man, Your Honor. I did not do it, as God is my witness. That's all I can say." (RT 28:5838.)

The judge offered the prosecutor a chance to argue against the motion, which he declined. (RT 28:5838.) Defense attorney Mark Blankenship addressed the court, urging the judge to modify the verdict. (RT 28:5839-5841.) The prosecutor then asked to speak, saying he had not been in any condition earlier to do so when the judge offered him the opportunity. Granted another chance, the prosecutor said what the judge witnessed in the hearing, especially from Mr. Woodruff, was the continuing victimization of Officer Baker and the Jacobs family. (RT 28:5841.) The judge said Mr. Woodruff's words would speak for themselves. (*Ibid.*)

The judge called a recess. "I will take into account the comments I have heard this morning, as well [as] the written brief, which I will order filed." (RT 28:5842.) After the recess, the judge denied the automatic motion. (RT 28:5850.)

Discussion

Penal Code section 190.4, subsection (e), provides for an automatic motion to modify a jury's death verdict, without further fact-finding. "In ruling on the motion, the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267 [120 Cal.Rptr.2d 432, 47 P.3d 225].)

This Court has said a trial court has a "duty to consider *only* those materials that had been presented to the jury in ruling on the section 190.4(e) motion." (*People v. Ray* (1996) 13 Cal.4th 313, 361 [52 Cal.Rptr.2d 296, 914 P.2d 846](emphasis added).) A trial court's ruling on a modification motion is proper if it is "based *solely* on the evidence presented at trial." (*People v. Smith* (2003) 30 Cal.4th 581, 640 [134 Cal.Rptr.2d 1, 68 P.3d 302](emphasis added).)

The United States Supreme Court has said a trial judge in a death-penalty case cannot engage in additional fact-finding after the jury reaches its penalty verdict. The "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it ... [did not encompass] the factfinding necessary to put [a defendant] to death." (*Ring v. Arizona* (2002) 536 U.S. 584, 609 [122 S.Ct. 2428, 153 L.Ed.2d 556].)

Mr. Woodruff's right to trial was diminished by the sentence modification hearing and the judge's premature review of the probation report, neither of which met the requirement of heightened reliability of a penalty determination in a death-penalty case. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

At Mr. Woodruff's trial, the trial judge's decision to deny the automatic motion to modify the penalty verdict was not based on "*only* those materials that had been presented to the jury" or "*solely* on the evidence presented at trial," as this Court requires. The trial judge explicitly said in open court that he would "take into account the comments I have heard this morning" at the modification hearing in reaching his decision to modify the jury's death-penalty verdict. (RT 28:5842.)

The comments the judge took into account, which were made in court more than two months after the jury had been excused, were highly emotional and inflammatory, unsworn and not subject to cross-examination. Four of the five who spoke in favor of the death penalty were close relatives of the victim, the other the wife of the surviving police officer in the shooting incident. Two of the witnesses who gave unsworn comments on the automatic motion – the victim's father, Charles D. Jacobs Jr., and sister, Tara Schofield – did not testify in front of the jury at all.

Officer Baker added to the prejudicial atmosphere, shouting at Mr. Woodruff, "You were a coward on January 13th." (RT 28:5836.) The

judge was clearly influenced by the inflammatory atmosphere, telling Officer Baker in response to Baker's outburst, "I know how you feel." (*Ibid.*)

By allowing the unsworn testimony, which the jury did not hear and the defense could not confront, the trial judge violated Mr. Woodruff's rights to a fair trial, to confront witnesses against him, to heightened reliability in a death-penalty case, and to due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 17, 24 and 29 of the California Constitution.

b. Probation report

Facts

Immediately after rejecting the automatic motion, Judge Thierbach proceeded to sentencing. The judge said he had read and considered the probation report of Probation Officer Lorena Gonzalez. (RT 28:5850; CT 19:5511-5522.) The probation officer had cautioned that the summary of facts of the case in her probation report was taken largely from a Riverside police report "and may not accurately reflect the evidence and testimony presented at trial." (CT 19:5513.) Nonetheless, she offered her opinion to the trial judge that "the punishment in this matter, as fixed by the jury and prescribed by law, appears appropriate." (CT 19:5521.)

Discussion

This Court has repeatedly held that "in ruling upon an automatic motion for modification of the penalty, the trial court may consider only the evidence before the jury, and that therefore it is error to consider the probation report, a matter not before the jury." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1381, quoting *People v. Crittenden* (1993) 9 Cal.4th 83, 151 [36 Cal.Rptr.2d 474; 885 P.2d 887].)

Furthermore, basing a sentencing decision on factors in the probation report that were not considered by the jury violates the jury-trial guarantee of the Sixth Amendment to the United States Constitution. (*Cunningham v. California* (2007) 549 U.S. 270, 274-275 [127 S.Ct. 856]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona*, *supra*, 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621].)

In *Crittenden*, "there was no recess between the proceedings at which the trial court considered the motion to modify and the proceedings at which it imposed sentence." Consequently, it appeared to this Court "that at the time it reviewed and ruled upon the application for modification of the penalty the court already had read and considered the probation report." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 151.) The same sequence of events occurred at Mr. Woodruff's trial. (RT 28:5850.)

In *Crittenden*, this Court found a lack of prejudice, concluding that the trial court, in ruling on the motion to modify the death verdict, "made its determination in reliance upon the evidence submitted at trial." (*Id.*, at p. 152.) However, in *People v. Lewis*, *supra*, 50 Cal.3d 262, this Court said the case had to be remanded for reconsideration of the automatic motion because "the probation report contained prejudicial information about defendant's juvenile record and prior involvement in [an adult felony] – information that would not otherwise have been known." (*Lewis*, *supra*, 50 Cal.3d at p. 287.)

Mr. Woodruff's probation report included juvenile adjudications for robbery, battery and assault with a deadly weapon, as well as four adult misdemeanor convictions, none of which had been introduced at trial, and which bolstered the trial judge's expressed view regarding the motion for modification of the jury's verdict that Mr. Woodruff was "nothing more than a street thug who will resort to violence in an effort to get what he wants." (CT 19:5515; RT 28:5848.) Additionally, the probation officer commented on a post-trial interview with Mr. Woodruff, in which he "expressed remorse only for himself – for having been deprived of his own life and children. ... The defendant's actions are indicative of a callousness and complete disregard for human life; he lay in wait, and then fired shots at the officers, who were unaware of the impending attack." (CT 19:5520-5521.)

The information in the probation report about Mr. Woodruff's juvenile record (CT 19:5515), the characterizations of Mr. Woodruff throughout the report, and the report's conclusion that the jury's death verdict "appears appropriate" (CT 19:5521) were all highly prejudicial to Mr. Woodruff.

The judge's error in reading and considering the probation report before considering the automatic motion to modify the jury's verdict violated Mr. Woodruff's rights to a fair trial, to heightened reliability in sentencing in a death-penalty case, to a sentence limited to factors considered by a jury, and to due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, sections 7, 15, 16, 17, 24 and 29 of the California Constitution.

On this claim, Mr. Woodruff's case should be remanded to the trial court for reconsideration of the automatic motion to reduce the jury's verdict.

E. Structural

CLAIM E: Trial record was falsified in multiple places, casting doubt on veracity of entire record.

The reporter's transcript of Mr. Woodruff's trial was falsified in multiple places, creating the illusion of a complete transcript when in reality it was repeatedly a "cut and paste" of what had been reported earlier.

The falsification of the trial transcript made a reliable appellate process impossible. Consequently, it violated Mr. Woodruff's state and federal constitutional rights to a fair trial, to the heightened reliability required in death-penalty proceedings, to equal protection of the laws, and to due process of law.

Facts

In at least 11 places in the reporter's transcript of Mr. Woodruff's trial, what appears to be happening at trial is a copy of what had been reported in an earlier section of transcript. In the sections of trial transcript covering the trial court's instructions to potential jurors, the court reporter copied the transcript from the first panel of jurors to appear on March 18, 2002, and pasted that verbatim account for subsequent jurors appearing later that day and the next. When jury selection resumed on November 7, 2002, so did the court reporter's "cut and paste" practice, thus misrepresenting what actually happened in jury selection.

The trial transcript indicates that the portion of the trial judge's colloquy to the first panel on March 18, 2002, which was reported first at RT 1:143, line 10, through RT 1:144, line 13, was repeated verbatim to the second, third, fourth and fifth panels. (RT 1:200, line 10-1:201, line 13; RT 1:249, line 8-1:250, line 11; RT 1:297, line 12-1:298, line 15; RT 1:345, line 19-1:346, line 22.) The telling excerpt is a repetition of an error, when the trial judge misspoke, using "personally" when the intended word was "reasonably":

> Further, that in the commission of that offense, the defendant knew or personally – excuse me, knew or reasonably should have known that the victim was a peace officer engaged in the performance of his duties.

(RT 1:144, lines 4-7 (Emphasis added).) The transcript purports that this Court made precisely the same misstatement underlined above – "knew or personally – excuse me, knew or reasonably" – again to the second, third, fourth and fifth panels. (RT 1:201, lines 4-7; RT 1:250, lines 2-5; RT 1:298, lines 6-9; RT 1:346, lines 13-16.)

Another portion of the colloquy that first appears in the transcript of the first panel on March 18, 2002 (RT 1:192, line 19, through RT 1:196, line 12), allegedly was repeated verbatim, including errors, to the second, third and fourth panels, on March 18, 2002, and to the fifth panel, on March

19, 2002.[31] None of the errors in this section are as glaring as the previous example. A reference to "murders" at RT 1:193, line 8[32], should be "murderers"; a reference to "probability of parole" at RT 1:193, lines 14-15[33], should be "possibility of parole"; and a reference to the "jury find" at RT 1:195, line 10[34], should be "jury finds". Collectively, however, they demonstrate a pattern of error not likely to occur in five consecutive colloquies by random chance.

However, the "cut and paste" manipulation of the trial transcript did not end on March 19, 2002. When the second attempt to time-qualify jurors began on November 7, 2002, the trial judge was quoted as telling the first panel of prospective jurors:

> In Count II, the Grand Jury alleges that – I'm sorry. Before we get to Count II, the Grand Jury further charges that in the commission of the offense set forth in Count I, the defendant murdered Charles Douglas Jacobs for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect an escape from lawful custody within the meaning of Penal Code Section 190.2 Subdivision (a) Subsection (5).

(RT 2:627, line 24-2:628, line 3 (Emphasis added).) The same "I'm sorry" interruption underlined above was allegedly made again in an identical

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[31] See RT 1:241, line 25-1:245, line 18; RT 1:288, line 20-1:292, line 13; RT 1:336, line 18-1:340, line 11; RT 1:370, line 4-1:373, line 25.
[32] Error also found at RT 1:242, line 14; RT 1:289, line 9; RT 1:337, line 7; RT 1:370, line 21.
[33] Error also found at RT 1:242, lines 20-21; RT 1:289, lines 15-16; RT 1:337, lines 13-14; RT 1:370, lines 27-28.
[34] Error also found at RT 1:244, line 16; RT 1:291, line 11; RT 1:339, line 9; RT 1:372, line 23.

colloquy to the third panel (RT 2:715, lines 2-9) and fourth panel (RT 2:760, lines 2-9) the same day.

Lest all of these examples be attributed to coincidence, consider a paragraph the trial judge allegedly read to the fourth and final panel on the afternoon of November 7, 2002:

> Now, I'm going to read to you a brief statement to give you kind of an idea of what you can expect if you are in fact ultimately chosen as a juror in this case. You are the first of potentially five panels of jurors this size who will be in this courtroom throughout the day. And those of you who survive this process that you go through this morning will be asked to fill out a detailed questionnaire concerning your views, particularly on the issue of capital punishment.

(RT 2:761, lines 13-21 (Emphasis added).) That paragraph is identical to one that appears in the transcript as having been said earlier to the first panel of the day, which actually was in the morning. (See RT 2:629, lines 7-15.)

Appellate counsel challenged the veracity of the reporter's transcript in a motion for new trial, filed in the trial court on November 21, 2008, in conjunction with an alternative motion to correct, augment and settle the record. In a hearing on appellant's motion, respondent's counsel disclosed that the court reporter at trial "is married to an assistant district attorney ... within our office." (SRT 5-6, March 12, 2009.) The trial judge responded with mock surprise: "She is, really? I performed the ceremony. I know." (SRT 6, March 12, 2009.)

At the March 2009 hearing, the trial judge acknowledged, "[T]here are undoubtedly examples of cut-and-paste and so on" in the trial transcript. Nonetheless, the trial judge concluded, "[T]here is no showing of deliberate falsification of anything in any of the transcripts," and denied the motion for new trial. (SRT 14, March 12, 2009.)

At a subsequent hearing to certify the record on appeal, the trial judge said he would "reiterate or reaffirm that earlier ruling and deny a motion for reconsideration" concerning the motion for new trial based on the falsified trial transcript, thus preserving the issue for appeal. (SRT 2-3, January 8, 2010.)

Discussion

Although fabrication of the record is frequently alleged by pro per appellants and habeas petitioners (see, e.g., *People v. Chessman* (1959) 52 Cal.2d 467, 475-476 [341 P.2d 679]; *Stinchcomb v. People* (1951) 102 Cal.App.2d 857, 858 [228 P.2d 588]), appellate counsel has found no published case in which an appellate court reversed a conviction for a fabricated trial transcript. This could be because falsification of the record is so uncommon, and the resulting denial of due process so egregious, that such cases as occur are handled by trial courts with per se reversal and never reach the appellate courts.

The closest case that has been found is *State v. Sanders* (N.C. 1984) 321 S.E.2d 836, in which the North Carolina Supreme Court reversed the

conviction and sentence in a death-penalty case after concluding that the trial transcript was inaccurate and that no adequate transcript could be formulated. That court concluded, in light of "the gravity of the offenses for which defendant was tried and the penalty of death which was imposed," to exercise its authority to vacate the judgment and order a new trial. (*State v. Sanders*, at p. 837.)

Under the Eighth and Fourteenth Amendments to the United States Constitution and California case law, a criminal defendant is entitled to an appellate record that is adequate to permit meaningful review. (*People v. Young* (2005) 34 Cal.4th 1149, 1170 [24 Cal.Rptr.3d 112, 105 P.3d 487], citing *People v. Alvarez* (1996) 14 Cal.4th 155 [58 Cal.Rptr.2d 385, 926 P.2d 365], *People v. Howard* (1992) 1 Cal.4th 1132 [5 Cal.Rptr.2d 268, 824 P.2d 1315]; see also *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Chessman v. Teets* (1957) 354 U.S. 156, 164-165 [77 S.Ct. 1127].) "Under the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review. [Citations omitted.] Under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed." (*Howard*, at p. 1166.)

The United States Supreme Court has emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. (*Parker v. Dugger* (1991)

498 U.S. 308, 321 [111 S.Ct. 731]; *Gregg v. Georgia*, *supra*, 428 U.S. at pp. 204-206; *Proffitt v. Florida* (1976) 428 U.S. 242, 253 [96 S.Ct. 2960]; *Jurek v. Texas* (1976) 428 U.S. 262, 276 [96 S.Ct. 2950].)

Under California Penal Code section 190.9, subsection (a), paragraph (1), "The court reporter shall prepare and certify a daily transcript of all proceedings." When, as here, there is a failure to perform that duty to transcribe all proceedings and instead the transcription from one proceeding is copied and misrepresented to be the transcription of later proceedings, appellate counsel and the courts can have no confidence in anything in the trial record.

California statutory law anticipates death, disability or negligence in the court reporting process, not dishonesty. The statute deals only with situations in which the court reporter's notes may be unavailable because they were lost or inadvertently destroyed. (Pen. Code § 1181(9).)

This Court has noted that even the loss or destruction of a court reporter's notes is uncommon:

> As such it randomly burdens isolated appellants, denying them adequate appellate review. It does not advance the cause of justice to require these appellants to proceed with such a handicap. It is far better that a defendant be retried than that the state should permit itself to be subject to the criticism that it has denied an appellant a fair and adequate record on appeal. The burden of requiring a new hearing is small indeed compared to the importance of ensuring that justice is done on an adequate record on appeal.

(*In re Steven B.* (1979) 25 Cal.3d 1, 9 [157 Cal.Rptr. 510, 598 P.2d 480].)

The critical importance of an accurate trial transcript in the appellate process has long been recognized. "Frequently, issues simply cannot even be seen – let alone assessed – without reading an accurate transcript. ... Moreover, the actual record (if appellate counsel could have it to inspect) might disclose issues substantial enough to constitute probable or possible 'plain error,' even though trial counsel was not aware of their existence." (*Hardy v. United States* (1964) 375 U.S. 277, 280, fn. 3 [84 S.Ct. 424] (quoting Boskey, *The Right to Counsel in Appellate Proceedings* (1961) 45 Minn. L. Rev. 783, 792-793).)

The duties of appellate counsel include preparing "a legal brief containing citations to the [appellate record] and appropriate authority, and setting forth all arguable issues." (*People v. Barton* (1978) 21 Cal.3d 513, 519 [146 Cal.Rptr. 727, 579 P.2d 1043].) "[I]f counsel has a duty to cite to the appellate record in support of his contentions, then counsel has a duty to insure that there is an adequate record before the appellate court from which those contentions may be resolved on their merits." (*Id.*, at pp. 519-520.) Counsel is supposed to ensure the existence of an accurate record by requesting augmentation or correction of the appellate record "or by other appropriate means." (*Id.*, at p. 520; see also rule 8.346 of California Rules of Court.)

The defendant bears the burden of demonstrating that the record is inadequate to permit meaningful appellate review. (*People v. Samayoa* (1997) 15 Cal.4th 795, 820 [64 Cal.Rptr.2d 400, 938 P.2d 2].) The appellate record is inadequate "only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." (*People v. Alvarez, supra,* 14 Cal.4th at p. 196, fn. 8.)

If the record can be reconstructed with other methods, the defendant must employ such methods to obtain appellate review. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 66 [14 Cal.Rptr.2d 133, 841 P.2d 118].) However, if the record cannot be corrected, the trial court and the reviewing court have the power "to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding." (Pen. Code § 1181(9).) That statute refers to the "loss or destruction" of reporter's notes.

In *People v. Woodruff*, the falsification of the trial record is tantamount to the destruction of the trial record, because any possibility of reconstructing an accurate record has been forever lost by the destruction of the trial record's integrity.

Courts have vacated or reversed judgments only where the fault could be ascribed to governmental authorities or employees, not to the defendant. (*People v. Valdez* (1982) 137 Cal.App.3d 21, 25 [187 Cal.Rptr. 65].) "The defects in the record must be of a prejudicial character, not

merely inconsequential inaccuracies or omissions. [Citations omitted.] Each case must stand on its own merits, and the outcome will depend upon the circumstances of the particular case." (*People v. Moore* (1988) 201 Cal.App.3d 51, 56 [248 Cal.Rptr. 31].)

As a condemned prisoner, Mr. Woodruff has a due process right to such a complete record on appeal as will assure him meaningful and effective appellate review. (*People v. Alvarez, supra*, 14 Cal.4th at p. 196, fn. 8; *People v. Howard, supra*, 1 Cal.4th at p. 1166.) This right is codified in Penal Code section 190.7, and also appears in rule 8.619 of the California Rules of Court. Appellate counsel has a duty to request correction, augmentation and settlement of the record where necessary to ensure the existence of an adequate record. (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 187 [115 Cal.Rptr.2d 674, 38 P.3d 512]; *People v. Barton, supra*, 21 Cal.3d at pp. 519-520.)

The prejudice to Mr. Woodruff from the falsification of the trial transcript comes from the realization that the entire trial record is untrustworthy. In an appellate process that depends on the precise wording of the trial record, no one can rely on anything in the record when it is clear that portions of the record are not the accurate accounts of the proceedings they purport to be. In a death-penalty case such as this that requires a record of heightened reliability, a tainted transcript will not suffice. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)

The trial court in Mr. Woodruff's case instructed the jury with CALJIC 2.21.2 at both the guilt and penalty phases. (CT 18:5271; CT 19:5447.) That instruction says a witness, "who is willfully false in one material part of his or her testimony, is to be distrusted in others." (CALJIC 2.21.2.) The principle underlying that instruction applies not only to witnesses but to court reporters as well. If the trial transcript was falsified and made to appear to be something it was not on at least eleven occasions in separate days and separate months, then nothing in the trial transcript can be trusted.

More than 50 years ago, the United States Supreme Court held that "California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand." (*Chessman v. Teets*, *supra*, 354 U.S. at p. 164.)

California courts have also long recognized that when the trial transcript is not complete, "at the heart of the problem we consider is the failure of an official of the court, the court reporter, to fully discharge his duties mandated by law. It makes no difference why the court reporter did not report, the fact is that the [defendant] has been deprived of a portion of the record because of the court reporter's omission." (*In re Andrew M.* (1977) 74 Cal.App.3d 295, 299 [141 Cal.Rptr. 350].)

Mr. Woodruff "was deprived of the right to an effective presentation of his appeal due entirely to a failure on the part of an official of the trial

court to comply with the law." (*People v. Serrato* (1965) 238 Cal.App.2d 112, 119 [47 Cal.Rptr. 543].) It would violate Mr. Woodruff's fundamental rights under the United States and California constitutions "to hold that an effective possibility of appealing the convictions was properly taken away by the omission of a court official to perform the duties prescribed by our system of justice." (*Ibid.*)

Because the trial record in this case is tainted by apparent dishonesty in its preparation, the heightened reliability required in death-penalty determinations cannot be obtained. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Under the circumstances of this case, the requirement that appellate counsel rely on the unreliable trial record violates Mr. Woodruff's rights to a fair trial, to the heightened reliability required in death-penalty proceedings, to equal protection of the laws, and to due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 17, 24 and 29 of the California Constitution.

Consequently, Mr. Woodruff's convictions and sentences should be overturned and a new trial should be ordered.

F. Constitutional

CLAIM F1: California's death-penalty statutes, as interpreted by this Court and applied at Mr. Woodruff's trial, violate United States Constitution.

Introduction

Many features of California's capital sentencing scheme, alone or in combination, violate the United States Constitution. These features, as applied in Mr. Woodruff's trial, deprived him of his federal constitutional rights when multiple errors by the trial judge, prosecutor and defense counsel resulted in the misapplication of the death penalty to a mentally disabled defendant.

As the United States Supreme Court has stated, "The constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6 [126 S.Ct. 2516]; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871].)

Viewed as a whole, California's capital sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a reliable basis for selecting the relatively few offenders subjected to capital punishment.

Judicial interpretations have placed the entire burden of narrowing the class of murderers most deserving of death on Penal Code section

190.2, the "special circumstances" section of the statutes – but that section, as applied, allows for the arbitrary and capricious imposition of death.

Further, California death-penalty laws provide no safeguards to enhance the reliability of the trial's penalty-phase outcome. Instead, jurors who are not instructed on any burden of proof, and who may not agree with each other, find individual factual prerequisites for the imposition of the death penalty. Paradoxically, the concept that "death is different" (*Ford v. Wainwright* (1986) 477 U.S. 399, 411 [106 S.Ct. 2595], citing *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305) has come to mean in California that procedural protections taken for granted in trials for lesser offenses are suspended when the question is foundational to the imposition of death. As a result, Mr. Woodruff became one of the random few from among the thousands of defendants convicted of murder in California to be chosen for the ultimate sanction.

a. Penal Code section 190.2 is impermissibly broad

A state's death penalty is cruel and unusual unless it provides "a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023 [254 Cal.Rptr. 586, 766 P.2d 1], quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726] (conc. opn. of White, J.).)

States are required to narrow the class of murderers eligible for the death penalty by rational and objective criteria. According to this Court, narrowing is accomplished in California by the "special circumstances" set out in Penal Code section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 457, 465, 467 [24 Cal.Rptr.2d 808, 862 P.2d 808].)

However, California's 1978 death-penalty law, passed by the voters as Proposition 7, came into being not to narrow those eligible for the death penalty but to make *all* murderers eligible. (See California Voters Pamphlet, General Election, November 7, 1978, p. 34, "Argument in Favor of Proposition 7.")

In 2001, at the time of the offenses charged against Mr. Woodruff, Penal Code section 190.2 contained 33 special circumstances[35] purporting to narrow the category of first-degree murders to those most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the Proposition 7 drafters' declared intent.

Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass

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[35]This figure does not include the "heinous, atrocious, or cruel" special circumstance (Penal Code section 190.2(a)(14)) declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797 [183 Cal.Rptr. 800, 647 P.2d 76].

virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515 [117 Cal.Rptr.2d 45, 40 P.3d 754]; also see Claim B9, *supra*, challenging the sufficiency of the evidence of lying in wait in Mr. Woodruff's case.)

The United States Supreme Court has made clear that the narrowing function is to be accomplished by the legislature. However, in defiance of numerous court rulings, the drafters of Proposition 7 threw down a challenge by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death-penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty against Mr. Woodruff in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

b. Penal Code section 190.3 as applied allows arbitrary and capricious imposition of death

Penal Code section 190.3, factor (a), which allows the trier of fact to consider "the circumstances of the crime" in aggravation, has been applied in such a manner that almost all features of every murder have been characterized by prosecutors as "aggravating" within the statute's meaning. As a result, Penal Code section 190.3(a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 78 [246 Cal.Rptr. 209, 753 P.2d 1]; see also CALJIC 8.88.)

Nonetheless, in Mr. Woodruff's trial, the prosecutor improperly argued that the circumstances of the crime were enough by themselves to warrant the jurors' votes for the death penalty, without considering any penalty-phase evidence. (See Claim D1, *supra.*)

The purpose of Penal Code section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [108 S.Ct. 1853] (discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759].)

Certainly that was the argument of the prosecutor at the outset of Mr. Woodruff's penalty phase, when he said jurors would soon know, "if you don't already," that death was the appropriate penalty. (RT 26:5378.)

Viewing section 190.3 in context of how it is actually used, it is apparent that every fact that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, as in Mr. Woodruff's trial, in violation of the United States Constitution.

c. California's death-penalty statutes contain no safeguards to avoid arbitrary and capricious sentencing; statutes deprive defendants of right to jury determination of each factual prerequisite to sentence of death

California's death-penalty statutes contain none of the safeguards common to other states' death-penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. Juries do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that aggravating circumstances outweigh mitigating circumstances, or that death is the appropriate penalty.

In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all.

i. Death verdict for Mr. Woodruff was not premised on findings beyond a reasonable doubt by unanimous jury that one or more aggravating factors existed and outweighed mitigating factors.

The jurors at Mr. Woodruff's trial were told it was not necessary that they agree on the presence of any particular aggravating factor. However, they were not told they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether to impose a death sentence. (RT 27:5704-5705.)

The trial court's instructions were consistent with this Court's previous interpretations of California's death-penalty statutes. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [69 Cal.Rptr.2d 784, 947 P.2d 1321], this Court said "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors, or that death is the appropriate sentence."

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh

any and all mitigating factors.[36] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 192 [121 Cal.Rptr.2d 106, 47 P.3d 988]), which was read to the jury at Mr. Woodruff's trial (RT 27:5772), "an aggravating factor is *any fact,* condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88 [2000 Revision] CT 19:5456; RT 27:5772; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the jury must find the presence of one or more aggravating factors. And before the decision to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[37]

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[36] This Court has acknowledged that fact-finding is part of a capital penalty jury's responsibility, even if not the greatest part; the capital penalty jury's "role is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant." (*People v. Brown* (1988) 46 Cal.3d 432, 448 [250 Cal.Rptr. 604, 758 P.2d 1135].)

[37] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1277 [232 Cal.Rptr. 849,

This Court's pronouncement in *Fairbank* has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466; *Ring v. Arizona*, *supra*, 536 U.S. 584; *Blakely v. Washington*, *supra*, 542 U.S. 296; *United States v. Booker*, *supra*, 543 U.S. 220; and *Cunningham v. California*, *supra*, 549 U.S. 270.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death-penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593.) *Any* factual finding increasing the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found. The Sixth and Fourteenth Amendments require that such a factual finding be found by a jury beyond a reasonable doubt.

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729 P.2d 115]; *People v. Brown* (1985) 40 Cal.3d 512, 541 [230 Cal.Rptr. 834, 726 P.2d 516].)

The governing rule since *Apprendi* is that other than a prior conviction[38], *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra*, 542 U.S. at p. 304 [italics in original].)

This Court has sought repeatedly to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to ... impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41 [45 Cal.Rptr.3d 407, 137 P.3d 229]; *People v. Dickey* (2005) 35 Cal.4th 884, 930-931 [28 Cal.Rptr.3d 647, 111 P.3d 921]; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

In *Cunningham v. California,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out

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[38] Mr. Woodruff had no prior felony convictions. The jurors were instructed to consider unproven allegations of aggravating circumstances involving express or implied use of force or violence or threat of force or violence: 1) assault; 2) battery, and battery against former cohabitant; 3) aggravated battery causing serious injury, and robbery; 4) carrying a concealed firearm; 5) murder and attempted murder. (RT 27:5704.) Item 5 referred to the instant offenses.

by the legislature. (*Cunningham v. California, supra*, 549 U.S. at p. 274.) In so doing, the high court explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (549 U.S. at p. 282.)

In the wake of *Cunningham*, it is clear that in determining whether *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether there is a requirement that any factual findings be made before a death penalty can be imposed.

A California conviction of first-degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 604.) Penal Code section 190, subd. (a) provides that the punishment for first-degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 [2000 Revision] CT 19:5456; RT 27:5772.) "If a State makes an increase in a

defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at p. 602.)

The issue of the Sixth Amendment's applicability hinges on whether the sentencer must make additional findings during the penalty phase before determining whether the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned.

In Mr. Woodruff's trial, all of the facts the judge considered before determining the death penalty should have been considered by the jury first and found to be true beyond a reasonable doubt. However, the trial judge relied on numerous facts not found by the jury to be true beyond a reasonable doubt, including aggravating and mitigating factors in the penalty phase, as well as the unsworn testimony of seven witnesses at the automatic hearing for reduction of sentence and the hearsay evidence in the probation report. (See Claim D3, *supra*.)

Consequently, Mr. Woodruff's death sentence violated his rights to a jury trial and due process of law under the Sixth and Fourteenth Amendments to the United States Constitution.

ii. California law fails to require jury to base death sentence on written findings regarding aggravating factors.

The failure of California's death-penalty statutes to require written findings by the jury regarding aggravating factors deprived Mr. Woodruff of his federal constitutional rights to meaningful appellate review and due process of law. (*California v. Brown* (1987) 479 U.S. 538, 543 [107 S.Ct. 837]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.)

Because California juries have total discretion on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings if it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (*Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.Ct. 745].)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death-penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859 [9 Cal.Rptr.2d 24, 831 P.2d 249]; *People v. Rogers* (2006) 39 Cal.4th 826, 893 [48 Cal.Rptr.3d 1, 141 P.3d 135].)

However, in other contexts, such findings have been considered by this Court to be an element of due process so fundamental that written findings are even required at parole suitability hearings. (*In re Sturm* (1974) 11 Cal.3d 258, 270 [113 Cal.Rptr. 361, 521 P.2d 97].) "It is unlikely that

an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, at p. 269.) The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code § 1170, subd. (c).) Under the federal Constitution, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680].)

Because providing more protection to a non-capital defendant than to a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 [108 S.Ct. 1860].) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can and should be articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment.

There are no other procedural protections in California's death-penalty system that would compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. California's failure to require written findings thus violates Mr. Woodruff's rights to trial by jury, heightened reliability in death-penalty sentencing, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

iii. Alleged criminal activity could not serve as factor in aggravation unless found to be true beyond a reasonable doubt by unanimous jury.

The jury's use of unadjudicated criminal activity as aggravating factors under Penal Code section 190.3, factor (b), violated Mr. Woodruff's rights to a jury trial, heightened reliability in death sentencing, and due process of law.

At the penalty phase of Mr. Woodruff's trial, the prosecution presented evidence regarding unadjudicated criminal activity allegedly involving appellant, including an alleged battery in Riverside, California, in September 1988 (RT 26:5423-5437); an incident in Riverside, California,

in May 1989 in which one man was killed and another man was wounded in an exchange of gunfire (RT 26:5438-5458, 5466-5489, 5501-5523; RT 27:5564-5569); an alleged assault in Rubidoux, California, in December 1993 (RT 26:5379-5409); an alleged threat in Rubidoux, California, in February 1999 (RT 26:5409-5423); and an alleged assault in Pomona, California, in December 1999 (RT 26:5523-5534; RT 27:5556-5563, 5569-5581). (RT 27:5704; CT 6:1569-1570.)

At closing argument, the prosecutor told the jurors they "are not required to make any findings of any of those crimes. ... [Y]ou as jurors individually now, not as a group, are free to decide whether you believe the defendant did those things beyond a reasonable doubt. And if you do, then you get to use it as you want to." (RT 27:5723.) The prosecutor went on to say the alleged prior acts "present a picture" of Mr. Woodruff as "a man who carries a gun, and has on other occasions. He's a man who will beat up somebody ... kick him, break his wrist. He's a man that will push girlfriends when he's angry. He's a man who, when he's around violence, joins in it and shoots. ... Steve Woodruff gets angry. And when he gets angry, he hurts. And he ... has hurt people whenever he needs to. He is not a peaceful family man." (RT 27:5732-5733.)

Since 2000, the U.S. Supreme Court's decisions in *Apprendi*, *Ring*, *Blakely*, *Booker* and *Cunningham* have confirmed that under the jury trial guarantee of the Sixth Amendment, the heightened reliability requirement

of the Eighth Amendment and the due process clause of the Fourteenth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity.

Even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. The jury in the penalty phase of Mr. Woodruff's trial was not instructed on the need for such a unanimous finding; nor is such an instruction required under California's sentencing scheme. (See RT 27:5704-5705, 5723.)

Consequently, Mr. Woodruff's death sentence violated his rights to a jury trial, heightened reliability of death sentencing, and due process of law under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

iv. Judge's failure to instruct jury that statutory mitigating factors were relevant solely as potential mitigation precluded fair, reliable and evenhanded administration of death penalty.

Each of the factors under Penal Code section 190.3 introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – was relevant solely in mitigation in the penalty phase of Mr. Woodruff's trial. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1034; *People v. Davenport* (1985) 41 Cal.3d 247, 289-290 [221 Cal.Rptr. 794, 710 P.2d 861].)

However, the jury was free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of nonexistent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733].)

Further, the jury was free to aggravate a sentence based upon an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness

or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing in favor of a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. [Citations omitted.] Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors."

(*People v. Morrison* (2004) 34 Cal.4th 698, 730 [101 P.3d 568], quoting *People v. Arias*, *supra*, 13 Cal.4th at p. 188.)

However, this assertion is demonstrably false. Within the *Morrison* case itself lies evidence to the contrary. The trial judge mistakenly believed that Penal Code section 190.3 factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 34 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944-945 [21 Cal.Rptr.2d 705, 855

P.2d 1277]; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424 [63 Cal.Rptr.2d 1, 935 P.2d 708].)

The very real possibility that the jury in the penalty phase of Mr. Woodruff's trial aggravated his sentence based upon nonstatutory aggravation deprived Mr. Woodruff of an important state-law-generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775 [215 Cal.Rptr. 1, 700 P.2d 782]) – and thereby violated Mr. Woodruff's Fourteenth Amendment right to due process of law. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343 [100 S.Ct. 2227].)

The likelihood that the jury in Mr. Woodruff's case would have been misled about the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument, such as his erroneous assertion that the "aggravating circumstances in this case for you to look at are the crime itself, the intented [*sic*] victimization over and over and over again of the family and everybody involved." (RT 27:5732.)

It is thus likely that the jury aggravated Mr. Woodruff's sentence upon the basis of what were, as a matter of state law, nonexistent factors and did so believing that the trial court had identified them as potential aggravating factors supporting a sentence of death. This violated not only

state law, but the Eighth Amendment, for it made it likely that the jury treated Mr. Woodruff "as more deserving of the death penalty than he might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235 [112 S.Ct. 1130].)

Consequently, Mr. Woodruff's sentence violated his rights to a fair trial, heightened reliability in death sentencing, and due process of law under the Sixth, Eighth and Fourteenth Amendments.

d. California's use of death penalty as regular punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments.

The United States is among a small number of nations that regularly use the death penalty as a form of punishment. Indeed, as of December 31, 2010, the only other major countries that had *not* abolished the death penalty in law or fact were in Asia and Africa. (Amnesty International, *Death Sentences and Executions, 2010* [Annex I: Reported Death Sentences and Executions in 2010] (March 2011).)[39]

Although the United States is not bound by the laws of any other sovereignty in its administration of its criminal justice system, it has relied

[39] The only countries with more reported executions than the 46 in the United States in 2010 were China, Iran, North Korea and Yemen. Other countries with reported executions in 2010 were Saudi Arabia, Libya, Syria, Bangladesh, Somalia, Sudan, Palestinian Authority, Egypt, Equatorial Guinea, Taiwan, Belarus, Japan, Iraq, Malaysia, Bahrain, Botswana, Singapore and Vietnam. (A link to the full report may be found at http://amnesty.org/en/library/info/ACT50/001/2011/en.)

from its beginning on the customs and practices of other parts of the world to inform its understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] (dis. opn. of Field, J.); see also *Hilton v. Guyot* (1895) 159 U.S. 113, 227 [16 S.Ct. 139]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing Brief for European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, even if capital punishment is not contrary to international norms of human decency as an extraordinary punishment for extraordinary crimes, its use as a *regular punishment* for substantial numbers of crimes is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in the United States to lag so far behind. (See

Atkins v. Virginia, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as a regular punishment, capital punishment is unconstitutional in the United States because international law is a part of U.S. law. (*Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Thus, the overly broad death-penalty scheme in California and the use of the death penalty as a regular punishment violate the Eighth and Fourteenth Amendments to the United States Constitution and international law. Mr. Woodruff's death sentence should be set aside.

CLAIM F2: Cumulative effect of errors pretrial and at guilt, retardation and penalty phases requires reversal of Mr. Woodruff's convictions and death sentence.

This opening brief has identified numerous errors that occurred before Mr. Woodruff's trial and during the guilt, retardation and penalty phases. These errors – considered individually and collectively – deprived Mr. Woodruff of a fair trial, the right to confront the evidence against him, a fair and impartial jury, effective assistance of counsel, fair and reliable guilt and penalty determinations, and due process of law.

The United States Supreme Court "has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [93 S.Ct. 1038].) "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." (*Id.*, citing *Chambers*, at p. 290, fn. 3.)

This Court has held that a "series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill*, *supra*, 17 Cal.4th at p. 844.) Such errors can create "a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*Id.*, at p. 847.) In such cases, "'a

balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381, quoting *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

Each error identified in this brief, by itself, is sufficiently prejudicial to warrant reversal of Mr. Woodruff's convictions, retardation-phase determination, and/or death sentence. Even if that were not the case, however, reversal of Mr. Woodruff's convictions and death sentence would be required because of the substantial prejudice flowing from the cumulative impact of the errors, which violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, sections 7, 15, 16, 17, 24 and 29 of the California Constitution.

VII. CONCLUSION

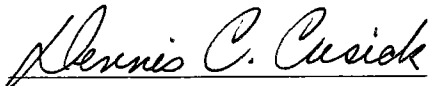
For all of the reasons stated above in claim categories A through F, appellant Steve Woodruff, by and through counsel, respectfully requests that this Court reverse his convictions on all counts, the trial court's findings of special circumstances and the finding that he is not mentally retarded, and all sentences, including the sentence of death.

At all phases of the trial proceedings, Mr. Woodruff was denied his rights to a fair trial, assistance of counsel, heightened reliability of guilt and penalty determinations, due process of law and equal protection of the laws under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections 7, 15, 16, 17, 24 and 29 of the California Constitution.

This case should be remanded to the trial court for a new trial with competent counsel and an unbiased judge and jury.

August 29, 2011

Respectfully submitted,



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Attorney for Appellant

VIII. CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief in *People v. Woodruff*, S115378, is printed on recycled paper using 13-point Times New Roman type. It is 58,649 words in length.

August 29, 2011

Respectfully submitted,

DENNIS C. CUSICK
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IX. CERTIFICATE OF SERVICE

I, the undersigned, hereby declare:

I am over the age of eighteen years and am not a party to the within-entitled action. On August 29, 2011, I served the attached Appellant's Opening Brief in the case of Steve Woodruff, appellant, by placing copies of the brief in postage-paid envelopes addressed to the persons listed below and by depositing those envelopes in the United States mail.

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

Executed this 29 day of August, 2011, at Martinez, California.

Donald F. Knuth