THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>MICHAEL LEON BELL,<br><br>Defendant and Bell. | No. S080056<br><br>Stanislaus Co.<br>No. 133269 |



# APPELLANT'S OPENING BRIEF

## VOLUME I of II

## APPEAL FROM A JUDGMENT OF DEATH
## FROM THE SUPERIOR COURT OF STANISLAUS COUNTY
## THE HONORABLE DAVID G. VANDER WALL, JUDGE PRESIDING

Melissa Hill
State Bar No. 71218
PO Box 2758
Corrales, NM 87048
Phone: (505) 898-2977
Email: mhcorrals@me.com

Attorney for Appellant
Michael Leon Bell

THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA, | ) | |
| | ) | No. S080056 |
| Plaintiff and Respondent, | ) | |
| | ) | Stanislaus Co. |
| vs. | ) | No. 133269 |
| | ) | |
| MICHAEL LEON BELL, | ) | |
| | ) | |
| Defendant and Bell. | ) | |
| | ) | |
| | ) | |

# APPELLANT'S OPENING BRIEF

## VOLUME I of II

## APPEAL FROM A JUDGMENT OF DEATH
## FROM THE SUPERIOR COURT OF STANISLAUS COUNTY
## THE HONORABLE DAVID G. VANDER WALL, JUDGE PRESIDING

Melissa Hill
State Bar No. 71218
PO Box 2758
Corrales, NM 87048
Phone: (505) 898-2977
Email: mhcorrals@me.com

Attorney for Appellant
Michael Leon Bell

# TOPICAL INDEX

TOPICAL INDEX

STATEMENT OF FACTS – Continued

TOPICAL INDEX

TOPICAL INDEX

ARGUMENT – Continued

TOPICAL INDEX

ARGUMENTS – Continued

TOPICAL INDEX

ARGUMENTS – Continued

TOPICAL INDEX

ARGUMENTS – Continued

TOPICAL INDEX

ARGUMENTS -- Continued

TOPICAL INDEX

TOPICAL INDEX

ARGUMENTS – Continued

TOPICAL INDEX

ARGUMENTS – Continued

TOPICAL INDEX

ARGUMENTS – Continued

TOPICAL INDEX

ARGUMENTS – Continued

ARGUMENTS – Continued

TABLE OF AUTHORITES CITED

CASES

ARGUMENTS – Continued

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

ARGUMENTS – Continued

TABLE OF AUTHORITES CITED

CASES

ARGUMENTS – Continued

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

CASES

TABLE OF AUTHORITES CITED

CASES

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

CASES

TABLE OF AUTHORITES CITED

CASES

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

CASES

TABLE OF AUTHORITES CITED

STATUTES

## STATUTES

## STATUTES

## RULES



## CONSTITUTIONS



## JURY INSTRUCTIONS

## JURY INSTRUCTIONS



## LAW REVIEWS

TABLE OF AUTHORITES CITED

LAW REVIEWS



PERFORMANCE GUIDELINES

TABLE OF AUTHORITES CITED

PERFORMANCE GUIDELINES



LEGAL TREATISES



MISCELLANEOUS AUTHORITIES

TABLE OF AUTHORITES CITED

MISCELLANEOUS AUTHORITIES

THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| **PEOPLE OF THE STATE OF CALIFORNIA,** | ) | |
| | ) | **No. S080056** |
| **Plaintiff and Respondent,** | ) | |
| | ) | **Stanislaus Co.** |
| **vs.** | ) | **No. 133269** |
| | ) | |
| **MICHAEL LEON BELL,** | ) | |
| | ) | |
| **Defendant and Bell.** | ) | |
| | ) | |
| | ) | |

## APPELLANT'S OPENING BRIEF

## STATEMENT OF APPEALABILITY

This is an automatic appeal from a death judgment, taken pursuant to section 1239.[1]

## STATEMENT OF THE CASE

By felony complaint filed on May 5, 1997, appellant, Michael Bell [hereafter Bell], was charged in Count 1 with the January 20, 1997, murder of Simon Francis. (§ 187.) The complaint alleged as special circumstances that the murder of Francis was committed while Bell was engaged in the commission of the crimes of burglary and robbery within the meaning of section 190.2(a), subdivision (a), sections (17)(a) and (17(b). Bell was additionally charged in Counts 2, 3, and 4, respectively, with the robbery of Francis (§ 211), assault with a firearm upon Daniel Perry (§ 245, subd. (a)(2)), and unlawful possession of a firearm by an ex-felon (§ 12021).

As enhancements in Counts 1, 2, and 3, it was further alleged that Bell personally used a firearm to commit the charged murder, robbery and

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

felonious assault. (§12022.5.) Pursuant to section 667, subdivision (d), it was alleged that on April 23, 1996, Bell was previously convicted of a serious felony, to wit, robbery (§ 211) within the meaning of section 1192.7, subdivision (c). (I Clerk's Transcript [hereafter CT] 57-59.)

Co-defendant, Roseada Travis [hereafter, Travis], was jointly charged in the same complaint with murder without special circumstances, and robbery. (I CT 57-59.)

Bell and Travis were arraigned and pled not guilty to all charges and enhancements. (I CT 1; I Reporter's Transcript [hereafter RT] 2-8.) Following a preliminary examination separately held in Bell's case on January 28, 1998,[2] Bell was held to answer on all charges and enhancements. (I CT 60; I RT 63-187.)

An information was filed charging Bell with the same charges and enhancements, except that in Count III, in lieu of the felonious assault count, Bell was charged with maliciously discharging a firearm at a motor vehicle (§ 246) with an enhancement for the personal use of a firearm (§ 12022.5). (I CT 189-193.) At his arraignment on February 2, 1998, Bell pled not guilty to all charges and enhancements. (I CT 195; II RT 1-5.)

Bell filed a motion to recuse the Office of the Stanislaus County District Attorney, or in the alternative, to preclude testimony by a witness, to wit, Taureen "Tory" T. [hereafter, Tory], a juvenile co-defendant in the case. (II CT 461-495.) Following an evidentiary hearing of the motion on October 16, 1998, the motion to recuse the Stanislaus County District Attorney or to prevent Tory from testifying was denied. (II RT 34-63.)

The guilt phase trial commenced on March 8, 1999, with jury selection, and concluded with jury verdicts finding Bell guilty of all charges

---

[2] Travis was held to answer for murder and robbery following a separate preliminary hearing held on March 18, 1998. (I CT 210-296.) She died before her trial.

and enhancements, including true findings of the robbery and burglary special circumstance allegations. (III CT 845-882; IX RT 1758; IV CT 997-1000; XV RT 2668-2672.)

The penalty phase trial commenced on April 6, 1999. (XIV RT 2749; IV CT 1013-1014.) On April 19, 1999, the jury reached a verdict sentencing Bell to death. (V CT 1231; XIX RT 3837-3838.)

On June 18, 1999, after hearing evidence and arguments of the parties, the trial court denied Bell's motion to reduce the death judgment to a sentence of life without parole. (V CT 1256-1262; XIX RT 3878-3881.) Thereafter, Bell was sentenced as follows:

For Count I, Bell was sentenced to death. (V CT 1289-1291; XIX RT 3891.) For Count I, the trial court also imposed a 10-year sentence for the personal use of a firearm. (XIX RT 1391; V CT 1290.)

For the remaining counts, Bell received a total additional consecutive sentence of 15 years and 4 months, calculated as follows:

For Count II, the crime of robbery, Bell was sentenced to two years in prison, plus 40 months for the personal use of a firearm, but the sentence was stayed pursuant to section 654. (XIX RT 3895-3896; V CT 1290.)

For Count III, the crime of shooting at an occupied vehicle, Bell was sentenced to 14 years in prison (double the base term sentence of 7 years pursuant to section 667, subdivision (d)). (XIX RT 3894; V CT 1290.)

For Count IV, the charge of ex-felon in possession of a firearm, Bell was sentenced to 16 months (one-third the middle term sentence doubled pursuant to section 667, subdivision (d)). (XIX RT 3895-3896; V CT 1290.)

## STATEMENT OF FACTS

### Guilt Phase Evidence

### The Robbery and Murder

On January 20, 1997, Daniel Perry was driving a delivery truck for Lucky Stores. While driving eastbound past the Quik Stop Market on West Monte Vista in Turlock, he noticed someone tall running out of the store in the direction of West Monte Vista, wearing a dark mid-length field jacket with a pointed hood. (IX RT 1858-1860, 1871-1872.) As Perry approached, he heard several shots. Perry thought he was being shot at so he kept driving; he passed a dark mid-1970's model sedan parked in the dirt with its lights out. (IX RT 1864-1865.) The doors to the vehicle were closed and Perry could not see anyone in the car. (IX RT 1870.) As Perry passed the car, the headlights came on, the engine started and the car departed. (IX RT 1866.)

Perry immediately went into the market and called the police. (IX RT 1867.) He led Turlock police officer Craig Guinasso back to the Quik Stop Market to show him the location where the shots were fired. (IX RT 1868.) Guinasso observed bullet damage in Perry's truck, and found a bullet on the paved driveway just north of the Quik Stop Market. (IX RT 1843-1845.)

On January 20, 1997, at approximately 4 a.m., Safeway truck driver Richard Faughn stopped at the Quik Stop Market before heading to work. (X RT 1916-1917.) Faughn heard a high-pitched tone when he entered the store. As Faughn put several items on the counter for purchase, he noticed that the cash register drawer was open with no money in it, and the clerk was lying behind the counter with an apparent bullet hole in his jacket and bloodstain on his shirt. (X RT 1918-1920.) A tray of money lay partially on the clerk's leg and money was scattered on the floor. (X RT 1922.) Faughn

called in his observations to a 911 operator and stayed by the phone until the police arrived. (X RT 1920.)

Turlock police officers Lee Medlin, James Silveira, and Scott King were dispatched to the Quik Stop Market, and contacted Faughn, who directed their attention to the clerk who was lying on the floor behind the counter. (IX RT 1792-1798, 1823-1824, 1833.) The officers cleared the store and checked the robbery victim, Simon Francis [hereafter, Francis], an Assyrian male approximately 25 to 35 years old, for signs of life. There were none. (IX RT 1800-1806, 1824.) Paramedics arrived and took life-saving measures, to no avail. (IX RT 1816-1820.)

Francis was transported to the Emanuel Medical Center and pronounced dead at 4:51 a.m. (IX RT 1826.) According to a forensic pathologist who reviewed photographs and reports of the autopsy performed on the victim by another pathologist, Francis died from a lethal gunshot wound to the upper back that punctured the left lung and damaged the heart, causing massive internal bleeding. (XI RT 2172-2176-2177.) Francis suffered a second wound to the lower back caused by a bullet that entered the abdominal cavity, passed through the small bowel and mesentery fatty tissue, then lodged behind the transverse colon. The bullet was recovered and taken into evidence. (XI RT 2176.)

A piece of lead that looked like a bullet was found underneath Francis when he was moved. (IX RT 1820, 1825-1826.) The item was taken into evidence but no other shell casings or bullets from an automatic or semiautomatic weapon were found. (IX RT 1812, 1825-1826.) Revolvers do not automatically eject casings. (IX RT 1812.)

A cash register drawer was open and empty. There was a cash drawer on the floor with a few scattered coins. (IX RT 1814-1815.) A subsequent audit by the Quik Stop Market's owner found $261 missing. (IX RT 1894.)

Officer King interviewed Faughn, and spoke with the truck driver, Daniel Perry, who had reported shots being fired. King examined Perry's truck for damage and observed a dent under the passenger door. (IX RT 1834-1835, 1837, 1867-1869.) Police observed tire tracks just south of the roadway in a dirt area between the road and a power pole. (IX RT 1836, 1846-1847, X RT 1960-1962.) There was a possible shoe print in the area where Perry said he saw a person running from the vicinity of the Quik Stop store, which appeared to have been made after early morning rain that stopped at about 3:15 a.m. (IX RT 1838-1840, 1848, X RT 1951, 1961-1962.)

**The Quik Stop Market Surveillance Videotapes**

At the time of the robbery, the Quik Stop Market was equipped with a video surveillance system. The system had three simultaneously recording video cameras, one zooming toward the door, one facing the cash register, and a third facing the front door. The tapes were changed daily. (IX RT 1874-1884.)

The store's security system also included a panic button, a two-way radio, and a microphone near the cash register. (IX RT 1882-1884.) A safe in the store was on a 15 to 20 minute time-delay and required a key. Francis could not have opened the safe. (IX RT 1885-1886.)

During the early morning hours of January 20, 1997, Detective Lance Olson and Officer Medlin viewed the videotape captured by the Quik Stop's security cameras with the store's owner, Mr. Benjamin, and were able to observe what had occurred. (IX RT 1885, X RT 1951-1952.)

The videotape was taken into evidence, and subjected to video enhancement by Richard Whipple at the Lawrence Livermore National Laboratories Forensic Science Center. (X RT 1924-1947, 1952.) At the request of Turlock police detective Lance Olson, Whipple also captured and printed still images from selected frames of the videotape, which he

enlarged and enhanced to improve brightness, contrast and color. (X RT 1929-1946.) Among the captured still images were included pictures of the perpetrator's body, face and mask, a gloved hand holding a stainless or satin finish revolver, and one of the perpetrator's shoes. (X RT 1932-1944, 1952-1953.) Police could not determine from the photograph the caliber of the gun. (X RT 1952.)

Francis was known to be six feet tall and, in pictures, the robbery suspect towered over Francis and the store's cigarette rack, which caused Olson to conclude the perpetrator was 6'3" to 6'5" tall. (X RT 2026.)

The store videotape of the robbery was played for the jury several times, from the perspective of each of the three surveillance cameras. (IX RT 1886-1897.)

**Bell's Extrajudicial Statements**

Detective Olson arranged a meeting with Bell in Modesto on February 6, 1997. Bell told Olson that he had spent the entire weekend with Travis, her son Tory, and a friend of Tory's, Robert Dircks [hereafter, Dircks]. Bell said he was sick and had not left Travis' apartment the entire weekend. (X RT 1968-1972, 1978.) Bell's mother lived not far from Travis, on Cromwell Road. (X RT 1977-1979.)

**Other Evidence Connecting Bell To the Robbery**

At the time of the robbery, Travis drove a 1988 blue Chevy Beretta, California license number 3NXS359. (X RT 1971.) Travis was arrested and her car was impounded and searched.[3] Tire impressions from all four of

[3] Travis' home was searched, but police found nothing of value. (X RT 2021.) Officers also searched the home of Bell's mother and seized several pairs of men's tennis shoes, which were placed in evidence. Detective Olson did a visual inspection of the shoes and a photograph of the single footprint seen east of the Quik Stop, but they did not appear to be a match. (X RT 2000.) Further comparisons were not pursued by the Department of Justice because, subsequently, Tory admitted his role in the robbery and

Travis' mismatched tires were sent to the Department of Justice Crime Laboratory for comparison with photographs of the tire prints found near the Quik Stop Market on January 20, 1997. (X RT 1979-1984.) The comparisons were inconclusive, but Travis' car was not ruled out. (XI RT 2141-2154.)

Following her arrest, Travis led the police to a field west of the intersection Crowell West Zeering Road, in the neighborhood where Bell's mother and Travis both lived. In the field, officers recovered an operable, four-inch satin .357 Smith & Wesson revolver buried inside a green cloth gun case with several rounds of Federal 38 Specials Plus hollow point bullets. (X RT 1988-1991, 1999.)

The revolver recovered from the field, and bullets recovered at the crime scene and during the victim's autopsy, were sent to the Department of Justice for examination and testing by criminalist Sarah Yoshida. (X RT 1994, 1999.) In testing, the revolver functioned normally. (XI RT 2163.) People's Exhibit 15, the bullet recovered from Francis' abdominal cavity at his autopsy, shared rifling characteristics with the bullets test-fired from the revolver recovered in the field, and could possibly have been fired from the Smith & Wesson revolver. (XI RT 2162-2166.)

Exhibit 7, the bullet found in the middle of the street where shots were fired at Mr. Perry's truck (IX RT 1851-1853), was in such a damaged condition that it's rifling characteristics could not be fully determined. (XI RT 2166-2167.) Yoshida could not say with certainty that either of the bullets came from the gun she test-fired. (XI RT 2211.)

Based on gunshot residue [GSR] testing of Francis's sweater (People's Exhibit 9) and the revolver, Yoshida opined that the gun was

---

informed police that Bell was wearing Fila brand shoes on the night of the robbery that he burned them within a week of the robbery. (X RT 2006-2010, 2023-2024.)

fired from a distance of one to two feet from the sweater. (XI RT 2167-2170.)

**Testimony of Codefendant Tory**

Tory was sixteen years of age at the time of trial; he was born on May 23, 1982. Tory pled guilty to accessory after the fact to murder and received a sentence of credit for time served in exchange for promising to testify truthfully in Bell's case. (X RT 2034.)

In early, 1997, Tory was living with his mother (Travis) and Bell in an apartment at 950 West Zeering Road in Turlock. (X RT 2028-2031.) Bell had a gun, which Bell told Tory he had purchased in Los Angeles. The gun was a .357 revolver that used .38 Special bullets. Bell talked about using the gun to commit a robbery. (X RT 2035-2037.)

On January 20, 1997, Tory walked into Travis' bedroom and discovered Bell and Travis preparing to commit a robbery. (X RT 2038.) Bell and Travis had been drinking Courvoisier and Old English that day. Travis had also been using drugs. Bell had consumed a whole bottle of brandy. Bell and Travis were staggering drunk, and Bell had slurred speech. (X RT 2063-2066.)

That day, Tory had been drinking alcohol and smoking marijuana with his friend Robert Dircks, with whom he sold "crank" at school. (X RT 2061-2065, 2069.) Bell, Travis, and Tory were "pretty well out of it." (X RT 2066, 2069.)

Bell and Travis cleaned Bell's gun with alcohol to remove any fingerprints. (X RT 2038.) They covered Bell's shoes with black electrical tape to mask their visibility. (X RT 2039, 2049.) There was a red ski mask in the bedroom that Travis had altered around the eye area, and chrome .38 Special bullets with blue plastic hollow points. (X RT 2039-2042.)

Tory wanted to go with Bell and Travis; Bell persuaded Travis, who was against it, to allow Tory to come with them. All three wore black. Bell

wore a black jacket that belonged to Tory's friend, Nathan Neal. (X RT 2041-2042.)

Tory waited outside, and signaled Bell and Travis by ringing the doorbell three times when it was safe to come outside and get in Travis' Chevrolet Beretta. Travis drove and Tory sat in the front passenger seat; Bell rode in the back seat and gave Travis instructions on where to drive. (X RT 2042-2045.)

Travis and Tory scouted the inside of several markets as possible robbery locations before Bell decided on the Quik Stop Market in Turlock, because of the lack of cars in the parking lot and little apparent traffic. (X RT 2044-2048.) Before entering the store, Bell asked Tory whether he should kill the clerk or not. Tory responded no.

Travis dropped Bell off at the side of the store, and drove her car behind the store to wait. As Bell came running from the store, Tory saw a big truck approaching. Bell shot in the direction of the truck twice. After Bell got back inside Travis' car, he explained that he had fired at the trucker to make him leave because he did not want any witnesses. (X RT 2048-2059.) Bell also admitted to Tory that he had struggled with the store clerk and shot him. (X RT 2059.)

After driving around for an hour, the three companions returned to Travis' apartment. They cleaned the gun and the bullets. At Bell's direction, Tory took Bell's shoes to an area near the apartment and burned them, using lighter fluid. (X RT 2052-2053, 2061.) Travis and Tory, accompanied by Nathan Neal, buried the gun, gun case, and ammunition in a nearby field. (X RT 2054-2056.) Bell returned to Neal the black jacket he had worn during the robbery. (RT 2055.)

The next morning, Tory saw Bell counting money. Tory found another $15 in his mother's car, which he kept. (X RT 2056.)

Tory was in juvenile hall from May 2, 1997 to January 22, 1999, on this murder charge. He was released in January of 1998 after signing a plea agreement that avoided a murder charge. Tory was housed in juvenile hall with Kenneth Alsip. He did not recall telling Alsip that he had lied about Bell's involvement and that Bell was not even in the car that night. (X RT 2067.) Bell, Travis and Tory were in the car that night. Travis was not dating anyone else at the time. (X RT 2066-2068, 2074.)

**Other Evidence**

It was stipulated that Travis died of natural causes on December 27, 1998. (XII RT 2253, 2266.)

***Testimony of Robert Dircks***

At the end of 1996, sixteen-year-old Robert Dircks was a neighbor and a friend of Tory. Travis was like a second mother to Dircks, who was present at Travis' apartment on Sunday, January 20, 1997, when Bell and Travis spoke about committing "jacking." That day, Bell had a gun in his possession that fired .38 and .357 bullets, and was wearing Nathan Neal's jacket. (XI RT 2108-2110, 2112.) At some point, Bell, Travis and Tory left together in Travis' Chevrolet Beretta. (XI RT 2110-2115.)[4] The next day, Tory told Dircks about committing the robbery. (XI RT 2110-2111.)

***Testimony of Daniel Herrera, Nathan Neal and Felix Foster***

In January of 1997, after the Quik Stop robbery, Bell gave Herrera a gun and some bullets in a green zip case. (XI RT 2118-2119, 2121.)[5]

---

[4] Dircks inconsistently told Detective Olson that he left the apartment before the others left to do the robbery. He was scared and did not want to get in trouble. (XI RT 2117.)

[5] In December of 1998, Daniel Herrera told the district attorney's investigator, George Piro, that he could not remember who gave him the gun. This was true at the time because he was using marijuana and coming off LSD. (XI RT 2121-2122.)

Herrera gave the gun and case to Felix Foster and Nathan Neal. (XI RT 2120-2121.)

Neal owned a black jacket with a hood, which he loaned to Bell at the end of 1996. (XI RT 2220-2221.) Neal later sold the jacket because he did not want to own it if it was used by Bell in the robbery of the Quick Stop Market. (XI RT 2222.) Tory had told Neal that Bell and he were involved. (XI RT 2225.) Nathan had also seen television coverage of the robbery, including pictures of someone wearing a jacket that appeared to be his. (XI RT 2225-2226.) At some point, Neal got his jacket back and turned it over to the Turlock Police Department. (XI RT 2218-2222.)

At Bell's request, Neal went with Felix Foster to get Bell's gun, a revolver in a green zip case, back from Daniel Herrera. Neal and Foster gave the gun to Travis, who cleaned it. Afterward, Neal helped Tory bury the gun in a field. (X RT 2081-2086, XI RT 2118-2120, 2222-2224.)

Nathan Neal testified under a grant of immunity from prosecution. (XI RT 2119.) Before he received immunity, Neal denied having knowledge about Bell's gun. (XI RT 2227-2228.)

A few weeks prior to the robbery, Bell told Neal he had made a trip to Los Angeles. (XI RT 2224.)

***Testimony of Phillip Campbell and Nick Feder***

Phillip Campbell, who lives in Los Angeles, purchased two handguns from his brother-in-law, Charles Nagy, in September or October of 1995. Both were .357 Smith & Wesson revolvers bearing serial numbers AVZ3852 and AVZ4073. (XI RT 2136-2138.) Campbell sold the gun with the serial number AV3852 to Nick Feder in December of 1995. (XI RT 2128, 2130, 2138-2140.) Feder owned the gun for four or five months, then

sold it to Debra Ochoa, who wanted a gun for protection. She paid him $350. (XI RT 2127-2132.)[6]

***Admission to Nick Lauderbaugh***

Nick Lauderbaugh heard about the robbery of the Quik Stop Market in January of 1997. Subsequently, Lauderbaugh had a conversation about the robbery with Bell in which the latter told Lauderbaugh that "he was pulled over the counter and he laid down on his stomach. And then three shots were fired." (XI RT 2236.)

**The Defense**

Kenneth Alsip was in prison for a felony conviction at the time of Bell's trial. Alsip had previously spent several weeks housed with Tory in jail. At some point, Tory bragged to Alsip about the Quik Stop shooting and said, "I did commit that murder, and the person that I'm going to let fall for me did not commit it." (XII RT 2275, 2278.)

On a tip from Bell, private defense investigator, Joe Maxwell, and defense counsel, Kent Faulkner, visited Alsip in September and December of 1998, while Alsip was incarcerated at Salinas Valley State Prison. (XII RT 2275-2276, 2286, 2297.) Alsip told Maxwell about Tory's statement but was reluctant to talk for fear of being labeled a snitch. (XII RT 2276.) After Alsip was released on parole, he contacted Maxwell. Maxwell helped Alsip find a place to live and helped him with grocery money up to about $160. (XII RT 2276-2277, 2287-2288.)

Alsip was convicted of felony auto theft and second-degree murder on November 3, 1997. He was found incompetent to stand trial on

---

[6] Ochoa testified briefly, that she had known Bell for 14 years. Outside the presence of the jury, at an Evidence Code section 402 hearing, she invoked the Fifth Amendment privilege when asked if she had given Bell the handgun. (XI RT 2178-2183.) A request for defense witness immunity was denied and a motion to strike the testimony of Nick Feder and Phillip Campbell was denied. (XI RT 2183-2184.)

December 31, 1998, and sent to a mental hospital for treatment. He was found competent to stand trial and convicted of possession of a deadly or dangerous weapon in jail on May 12, 1998. (XII RT 2281-2282.)

Brandon Thornsberry, a convicted felon, knows Tory. He was in a cell with Tory in Juvenile Hall at some point prior to Bell's trial. At that time, Tory indicated that he, his mother and his mother's boyfriend were in the car together the night of the robbery. Tory said that his mother's boyfriend, the man who did the shooting, was a black guy from Las Vegas, not Bell. Thornsberry came forward as a witness when he read in the newspaper that they were prosecuting Bell for murder. (XII RT 2453-2456, 2461.) Thornsberry sent a "kite" or message to Bell's defense counsel, whose name he obtained from the newspaper. (XII RT 2458-2460.)

Detective Lance Olson saw the crime scene video at about 4:45 or 5:00 a.m. of the morning of the robbery. He put out a "be on the lookout" bulletin with a description of the robber. The perpetrator was described as 6'2" with a slender build and long gait. (XII RT 2394-2400.)

Olson was also in charge of putting out a wanted poster. Police used the picture that the Modesto Bee had published in the newspaper, taken from the videotape. The wanted poster said that the robbery suspect was 5'8" tall with a thin build. (XII RT 2402-2404.) Bell is 6'5" and weighs approximately 250 pounds. (XII RT 2405-2406.) Olson prepared a warrant for Bell's arrest that described him as 6'5" and 260 pounds. (XII RT 2406.)[7]

---

[7] Olson was cross-examined about his failure to follow up on testing of several items evidence, including two pairs of Fila tennis shoes, sizes 12 and 13, respectively, seized during the search of Bell's mother's apartment, and a bloodstain recovered from a door frame. These items were sent to the Department of Justice, but not processed. (XII RT 2407-2414, 2437-2441.)

### Rebuttal

On March 21, 1997, Tory was cited for possession of marijuana on school grounds. At that time, Tory was about 5'10" and weighed 135 pounds. (XII RT 2463.)

Travis's ex-husband from Las Vegas passed away on March 26, 1996, prior to the Quik Stop Market robbery. (XII RT 1465.)

Gary Wolford had a conversation with Bell sometime after the Quik Stop robbery. (XII RT 2467.) Bell told Wolford he wanted to get in touch with "Willie" or "Clint." (XII RT 2467.) Bell said he was worried "about Tory talking." (XII RT 2468.) Bell further brought up the subject of Travis's ex-husband and said, "That's the one that did it." (XII RT 2469.)

Regina Faye Alsip, the mother of Kenneth Alsip, testified that her son "had been known to lie," and most of her family members would probably think he was not truthful. (XII RT 2472-2477.)

### Bell's Prior Convictions

For purposes of the charge of unlawful possession of a firearm by an ex-felon (§ 12021), Bell admitted prior felony convictions on April 23, 1996, for robbery and felon in possession of a firearm, for purposes of count IV, the charge of felon in possession of a firearm. (XII RT 2501-2502.)

## Penalty Phase Evidence

### The Prosecution's Evidence In Aggravation

#### *Testimony of Francis's Family Members*

Several relatives of Francis, including his father, a sister, and the cousin of Francis' bereaved wife, testified for the prosecution regarding their suffering consequent to Francis' death. (XIV RT 2756-2763.)

### *The Videotape of the Victim's Wedding*

The jury was shown a four-minute videotape of portions of the wedding of Simon and Esther Francis. (XIV RT 2765.)

### *Prior Bad Acts Evidence*

#### *Sexual Battery of Leatha O'Halloran*

Leatha O'Halloran has three children by Bell, ages seven, eight and nine. (XIV RT 2765, 2769.) In May of 1991, Halloran lived at 433 South 7th Street with Bell. On May 19, 1991, Bell, who was fairly intoxicated and angry about something, grabbed O'Halloran, dragged her into the bedroom and threw her on a bed. He removed some of her clothing without her consent, and attempted to have sex with her. (XIV RT 2766-2767, 2767-2768.) O'Halloran ran next door to the neighbors to summon help. (XIV RT 2768.) She suffered a swollen lip from wrestling with Bell.

O'Halloran was 19 years of age, and three months pregnant with her youngest child, Stephanie Bell, when the assault occurred. At the time, however, she did not know she was pregnant. (XIV RT 2767-2769.) This incident caused the end of her relationship with Bell. (XIV RT 2769.)

Bell pled guilty to section 243.4, subdivision (a), felony sexual battery, as a result of the incident involving O'Halloran. (V CT 1322-1324.)

#### *Robbery Of Larry Wooldridge*

Larry Wooldridge has known Bell since they were both children. (XIV RT 2784, 2788.) On March 14, 1996, Wooldridge made a report to the Turlock Police Department about an assault upon him by Bell. (XIV RT 2784.)

Wooldridge went to the home of a friend, Danielle. Bell, who was Wooldridge's friend, and Michael Hill were there. Wooldridge gave Bell some money and asked him to get him some marijuana. Bell, Hill and Danielle left and came back five minutes later, and accused Wooldridge of being a "cop." (XIV RT 2785, 2787-2788.) They pulled Wooldridge

outside. (XIV RT 2785-2786.) Bell and Hill pulled machetes out and started swinging them like they were going to chop Wooldridge in half. Bell and Hill struck Wooldridge and kicked him in the face. Bell demanded that Wooldridge give him all of his money. (XIV RT 2786.) Wooldridge gave him the little money he had left on his person, $25. (XIV RT 2786, 2792.)

Wooldridge received a cut on his knee from being pushed down. He required surgery on his knee because it became infected. (XIV RT 2787.)

At the time of Bell's trial, Wooldridge was in a drug diversion program due to his felony conviction of possession of methamphetamine. (XIV RT 2790-2791.) Wooldridge's memory of what happened in March of 1996 was not very good. He suffered from epilepsy, which causes memory lapses. (XIV RT 1791.)

Bell suffered a conviction of robbery as a result of the incident involving Wooldridge. (XIII RT 2729-2731; V CT 1336.)

*High Speed Chase, And Evading And Resisting Arrest*

On February 27, 1997, during the early morning hours, Turlock Police Officer Robert Lugo was on patrol in a marked police car when he noticed a blue Oldsmobile, traveling in a 45 mile per hour zone at approximately 90 miles per hour. (XIV RT 2795-2799, 2802, 2811.) Lugo made a U-turn and followed the car, which slowed to approximately 55 miles per hour. The car turned northbound on Johnson Road, failing to stop for a four-way stop sign. (XIV RT 2799-2800.) After rounding a corner, the driver turned off the headlights and accelerated to a high rate of speed. (XIV RT 2800.) Lugo assumed the driver was attempting to elude him and activated his emergency lights and siren and initiated pursuit. (XIV RT 2800.)

The speeding vehicle turned westbound on Marshall Street and Lugo lost sight of it momentarily after it rounded the corner. Lugo followed and

found the car stopped on the north side of the road along the curb. (XIV RT 2801-2802.) The vehicle appeared to be unoccupied. Lugo alit from his patrol car to summon a backup unit, and to see if he could determine the direction of travel that the driver might have fled. (XIV RT 2802.)

A resident came out to his front yard and Lugo asked if he had seen anyone jump or run from the parked vehicle; he had not. (XIV RT 2802.) At that moment, the Oldsmobile's engine started and the driver sat up in the seat and drove off westbound. (XIV RT 2802.) Lugo initiated pursuit again, with his lights and sirens activated. (XIV RT 2803.)

During the chase that ensued, the driver drove at high speed on narrow roads in residential neighborhoods, failed to stop for several stop signs, ran a red light, and several times crossed over and drove on the wrong side of the road. At one point, the driver threw a bottle from the driver's side window (XIV RT 2803-2309.)

Eventually, the vehicle turned into a road, which was barricaded due to construction. (XIV RT 2809-2810.) The car stopped, and officers initiated a stop with weapons drawn. (XIV RT 2810.) The driver, Bell, did not immediately comply with an order to step out of the vehicle; rather, he remained seated in the car for a minute hitting the steering wheel and windshield with his hands. (XIV RT 2811-2812.) Eventually, Bell got out of his car, knelt, and assumed a position for handcuffing. But Bell began to resist the officer who was trying to handcuff him, by pulling away and swinging his body. It took three officers to put Bell in a prone position, handcuff him and place him in leg irons. (XIV RT 2813-2814.) When Officer Lugo stopped to search Bell prior to placing him in the patrol vehicle, Bell began banging his head on the trunk of Lugo's car. (XIV RT 2814.)

Bell smelled strongly of an alcoholic beverage. (XIV RT 2814-2815.) A broken bottle of malt liquor was recovered from the area where

Lugo saw a bottle thrown from the car. (XIV RT 2815.) Bell's blood alcohol level was tested and registered .10 and .11 percent, respectively. (XIV 2815-2818.)

*Shank Possession In Jail*

On September 15, 1998, Deputy Timothy Kirk he was working at the jail in Modesto. (XIV RT 2821-2822.) During a routine search of inmates, including Bell, Kirk found a shank, a hand made stabbing instrument, hidden under the insole of one of Bell's shoes. (XIV RT 2822-2825.) Kirk found a small piece of mirror glass wrapped in masking tape hidden in the other shoe. (XIV RT 2824.)

*Assault of Patrick Carver*

The jury heard three accounts of an incident in September 5, 1993, which involved a violent assault on Patrick Carver by Bell and several others.

According to the People's penalty phase witness, Lawrence Smith, on September 5, 1993, the alleged victim in the incident, Patrick Carver, was staying with his girlfriend at the Turlock home of Smith's friend, Joseph Black. (XV RT 2967-2970.) Smith received information from Carver's girlfriend that Carver was a child molester, and shared this information with Bell. (XV RT 29692970.)

When Carver showed up at Black's house, Smith and Bell, whom Smith knew as Mike Brown, confronted Carver with the intention of beating him up. (XV RT 2970-2971; XVII RT 3417-3418.) First, Bell directed Black to put on a Dr. Dre "gangsta rap" tape. (XV RT 2971.) Bell said to Black, "You know how I get when I hear my Dre." (XV RT 2972.)

Next, appellant forced Carver to relinquish a fixed-blade 12-inch knife, which was hanging from Carver's hip in a sheath. (XV RT 2972-2873, 2985.) Bell carried Carver into the back yard, slammed him into the framing of a house under construction, and jabbed Carver in the forehead

20-30 times with Carver's knife. (XV RT 2974-2975.) Bell held the knife against Carver's throat, then dropped Carver to the ground and jumped on him with both feet, coming down on his rib cage. (XV RT 2975, 3006.)

Bell offered Carver a drink of water, which Carver accepted. (XV RT 2975.) Bell turned on a garden hose and started to let Carver drink; then he shoved the hose into his mouth causing Carver to choke, shake and kick. (XV RT 2976.) Smith, who was carrying a .45 caliber pistol, pointed the gun towards Bell and told him it was "enough." (XV RT 2977, 2988.) Bell pulled the garden hose out of Carver's mouth and lifted Carver up over his head, walked across the back yard, and threw him over the fence into the street. (XV RT 2977.)

Bell demanded money from Carver, and told Carver he wanted him to sign over title to his car. (XV RT 2978.) Carver had no money, so Bell ordered everyone into Smith's car, and drove to a pay phone so Carver could use the phone to call his family and ask for money. (XV RT 2978-2879.) While Carver was using the phone, the police arrived, and Bell fled. (XV RT 2981-2982.)

The credibility of Smith's account was thoroughly impeached. At the time of this incident, Smith was regularly using methamphetamine. (XV RT 2983.) Additionally. Smith was impeached with the inconsistent accounts of the assault on Carver that he had previously given to the police. (XVII RT 3405-3406, 3423.)

After the Carver incident, in 1995, Smith was convicted of child cruelty as the result of the brutal beating of his girlfriend's three-year-old child. (XV RT 2983-3012.) The child suffered a fractured skull, ruptures to the liver and spleen and an injury to the pancreas. (XVII RT 3413.) He would have died within hours if he had not gotten surgery. (XVII RT 3413.) Smith was questioned in detail about the child abuse incident and minimized his involvement. (XVII RT 3407-3426.) Afterward, the defense

called Raymond Gauthier, the police investigator in the child abuse case, as a witness. Gauthier described in detail the visible injuries inflicted upon the child by Smith, including a chipped tooth, contusions to the head, extremely swollen testicles, and bruising, and evidence that Smith and his girlfriend, not others, were responsible for inflicting the beating. (XVII RT 3487-3493.)

While in prison at Folsom, Smith "walked with" a gang called the White Pride. (XV RT 2997.) Smith admitted it had been his practice to pick fights, and beat people he identified as homosexual. (XV RT 2993-2994.)

The defense called Joseph Black as a defense penalty witness to the Carver incident. (XVI RT 3370-3371.) According to Black, Bell's dispute with Carver stemmed from money that Carver allegedly owed to someone named Carla Wallace for rent. (XVI RT 3375,3384.) Bell did not use a knife during the fight, and he did not jump up and down on Carver. (XVI RT 3373, 3375, 3383.) Black did not see Bell stick a garden hose into Carver's throat, nor did he see him pick Carver up and throw him over a fence. (XVI RT 3373.) Bell knocked Carver down twice and kicked him once. (XVI RT 3385-3386.) Afterward, because there was no telephone in Black's house, they all got in the car and drove to an apartment complex with a pay phone outside so Carver could call his aunt or mother and have rent money sent. (XVI RT 3386-3387, 3393.)

In rebuttal, the People called Carver as a witness. His account of the incident varied in several respects from the testimony of both Smith and Black. According to Carver, the motive for the beating was Carver's failure to pay rent to Chris and Carla Wallace. (XVIII RT 3576-3578, 3582-3584.) On the day in question, Wallace came over to the Black residence to confront Carver, accompanied by friends, including Lawrence Smith and a man named Mike Brown [identified during Black's testimony, but not

Carver's testimony as Bell]. (XVIII RT 3582; XVI RT 3389.) A brief fracas ensued. (XVIII RT 3583-3585.)

In court, Carver did not recognize Bell, and testified that the defendant in court was not the Mike Brown who had beaten him up. (XVIII RT 3556, 3607.)

Carver then left with Black's brother, Stephen, to go to a pay phone to call his aunt for help. (XVIII 3588.) Before he could use the phone, Brown, Black, Smith and Carla's brother, Art, pulled up in a car. (XVIII RT 3588.) Carver was forced into the car, struggling, and taken back to the Blacks' house. (XVIII RT 3588-3589.)

At Black's house, Brown dragged Carver out of his car and threw him to the ground. (XVIII RT 3584, 3589.) Someone held Carver up while Brown and others kicked him in the face. (XVIII RT 3585-3586.) Carver kept getting knocked out. (XVIII 3586.)

Eventually, Brown picked up Carver and threw him over the fence. (XVIII RT 3586.) Bell dragged Carver to a chair and tied him to it. (XVIII RT 3587-3590.) Brown and Black continued to hit and kick him. (XVIII RT 3589-3590.) Bell jumped on Carver like he was a trampoline, and kicked Carver, causing the chair to fall over. (XVIII RT 3591-3595.) Brown turned the hose on full blast and shoved the nozzle in Carver's mouth. (XVIII RT 3592.) Carver passed out. (XVIII RT 3592-3593.) When he awoke, the others were standing around laughing. (XVIII RT 3595.)

Carver owned a fixed blade knife that was always kept in his car. (XVIII RT 3593.) Brown held the knife across Carver's throat, put the blade in his mouth and tapped him on the head with the tip, not causing any physical injury. (XVIII RT 3594.) Bell took Carver's knife, his leather jacket and his car keys. (XVIII RT 3597.) Carver never got his knife, jacket or car back. (XVIII RT 3602.)

Carver's assailants kept asking him how he was going to come up with the money he owed. (XVIII RT 3596.) Carver said he would call his aunt from a pay phone to get the money. (XVIII RT 3596.) Either Smith or Brown drove him to the pay phone at the apartment complex where Carver was staying. (XVIII RT 3596, 3598.) Carver called his aunt and told her a man had a gun to his head and would kill him if he did not come up with $20,000. (XVIII RT 3599.) Brown pretended he had a gun secreted in the sleeve of Carver's jacket. (XVIII RT 3599.) Carver's intent was to get his aunt to call the police, not to wire money. (XVIII RT 3600.) After Carver hung up, police vehicles arrived from every direction, and Brown fled. (XVIII RT 3600.)

Police searched and handcuffed the remaining people at the scene, then transported Carver to the hospital emergency room for treatment of swelling, bruises and scratches. (XVIII RT 3601-3602.)

Carver was impeached with felony convictions in the State of Utah, including theft, forgery, fraud, robbery and burglary. (XVIII RT 3604.)[8]

---

[8] Testimony about the Carver incident spawned several motions for mistrial by the defense based on the prosecutor's alleged failure to disclose favorable evidence. The first motion was brought after Smith's testimony, upon allegations that prosecutors intentionally called Smith, not Carver as a witness, knowing that Carver's account of the incident was at variance with Smith's account, and more favorable. (See, XVI RT 3245-3249.) Defense counsel also argued that he should have been furnished the police reports concerning Smith's child abuse conviction. (XVI RT 3247-3248.) The court found no misconduct by the prosecutors, denied the motion for mistrial, and denied a motion to strike Smith's testimony. (XVI RT 3255-3287.) Defense counsel brought another motion for mistrial after Black testified for the defense, then Carver testified in rebuttal. (XVIII RT 3756.) The gist of the defense motion was that the prosecutors had intentionally withheld the fact that Carver could not identify Bell as the Mike Brown who beat him up. (XVIII RT 3756-3770.) The prosecutor pointed out that at Smith and Wallace had both identified Bell as Carver's assailant in a photo lineup conducted shortly after the incident. The court denied the motion for

*Gary Wolford Incident*

On February 12, 1996, Gary Lyn Wolford was living in a converted garage in the city of Turlock, which he rented from Moe Drinnon. On that date, Drinnon called Wolford on the phone and asked him to come inside his house. (XV RT 3029.) There, Wolford was confronted by Bell and Drinnon, who demanded that Wolford bring a woman named Renee over because she had given Drinnon some bad "crank." (XV RT 3029-3030.) Renee was Wolford's friend, and she had introduced her to Drinnon. (XV RT 3033.)

Bell and Drinnon were using "crank" and insisted that Wolford to "do a line" because of concern that Wolford was a "snitch and a rat." (XV RT 3030.)[9] Wolford complied, and Bell demanded that Wolford pay him $100. (XV RT 3030-3031, 3034.) Wolford tried to leave, but Bell and Drinnon refused to let him go for three or four hours. (XV RT 3031-3032.) Several times, Bell grabbed Wolford's head and banged it against the wall, and shoved him to the ground. (XV RT 3031.) Eventually, Wolford was permitted to leave, but Bell warned that Wolford must return the next day with a $100 or else he was going to hurt him. (XV RT 3032.)

Wolford contacted the Turlock Police Department advised them of what had occurred. (XV RT 3032.)

At the time of trial, Wolford was on parole. (XV RT 3037.)

*Prior Conviction Of Possession Of A Firearm By A Felon*

Bell suffered a prior conviction of possession of a firearm by a felon in violation of section 12021, subdivision (a), an offense committed on September 7, 1995. (IX RT 1773; V CT 1326-1330.)

---

mistrial, finding no doubt that Bell was involved in the incident rather than someone named Michael Brown. (XVIII RT 3769-3774.)

[9] Wolford admitted he was a "snitch" for Deputy Sheriff Ottoboni, and worked on 20 to 30 cases. (XV RT 3036.)

## The Defense Case

### *Testimony of The Defense Prison Expert*

James Park, whose expertise was unchallenged by the prosecution, testified as an expert on classification of prisoners and prison security. Park described the methods employed in California prisons to classify prisoners for purposes of determining the appropriate level of custody and security. (XIV RT 2836-2837.)

According to Park, prisoners who receive longer sentences, including those sentenced to life without the possibility of parole, are automatically sent to a Level IV maximum security prison. (XIV 2837.)

Park identified a photograph as the interior of a cell of the type found at New Folsom, High Desert, Tehachapi and Pelican Bay prisons, the prisons where people are sent who are serving life without the possibility of parole. (XIV RT 2838, 2844.) Such rooms have a door controlled by an armed officer in a guard post and a window five inches wide, which satisfies a court requirement that prisoners get fresh air and natural light. (XIV RT 2838-2839.) No prisoner has ever escaped through one of these five-inch wide slits. (XIV RT 2839.) The rooms have a combination toilet and sink, made out of stainless steel, and anchored in concrete. (XIV RT 2839.) Each room is furnished with two bunk beds, also anchored in concrete. Prisoners are double-celled. The beds have no springs because springs might be used as weapons. (XIV RT 2839.)

Officers observe the tiers of cells from a guard station, through impact resistant windows. The prisoners' cells have steel doors with windows that the officers can see inside. There are also separate shower cells on the tier. (XIV RT 2840.) Correctional officers control the individual steel doors of inmates' cells and the shower cells through an electronic console panel in an impregnable station. (XIV RT 2840.) The officers who walk the floor of the prison do not carry guns. However,

correctional officers in the station are armed with guns and they have a line of sight to anywhere the prisoners go when they are outside of their cells, including the exercise yard and the dining hall area. (XIV RT 2840-2842.)

Around the outside of the prison are two 12-foot fences with razor ribbon wire. In the center is a 13-foot electric fence with 4500 volts. (XIV RT 2842.)

When a prisoner gets in trouble, he may be placed in a 23-hour per day lockup where he only gets out for one hour a day, or at most three hours every two days, to a small exercise yard. (XIV RT 2843.) Prisoners who are not in 23-hour lockup have access to shops and factories where inmates may work, take daily showers, or watch television, and recreational areas where inmates can socialize with other inmates outside of their cells. (XIV RT 2847-2850.)

It is possible, though unusual, for a prisoner sentenced to life without the possibility of parole to be placed in a Level III housing situation. (XIV RT 2845.) However, this would require an enthusiastic recommendation by prison staff and director's review board approval. Normally, this would not be considered for at least 10 to 12 years after imprisonment. (XIV RT 2857.) Level II housing has the same perimeter security as Level IV housing. (XIV RT 2857.)

***Defense Mitigation Evidence***

*Testimony of Bell's Family Members*

Bertha Bell-Udeze is Bell's mother. (XV RT 3043-3044.) Bell-Udeze is a receptionist for an alcohol and drug treatment center. (XV RT 3044.) She has two other children, Niekesha, age 19 and Scheron, age 20. At the time of trial, Niekesha was attending Michigan State University. (XV RT 3068.) Scheron was attending college in Merced. (XV RT 3068.) Neither of Bell's siblings suffered from behavioral problems. (XV RT 3069.)

Bell-Udeze was unmarried and only 16 years of age when Bell was born. At the time, she lived with her mother in Rockford, Illinois. Bell's father was several years older than Bell-Udeze and attended the same high school. (XV RT 3045-3946.) Bell-Udeze was unhappy about the pregnancy because she wanted to go to college. (XV RT 3046.)

Bell was born prematurely after six and a half months of pregnancy. (XV RT 3046.) Bell-Udeze went into labor a few days after slipping and falling into a ditch during her summer job. (XV RT 3048.) Bell only weighed three pounds and four ounces at birth. (XV RT 3047.) He had to remain in the hospital in an incubator for eight weeks. (XV RT 3047.) For eight weeks, Bell-Udeze was unable to put her hands into the incubator and touch Bell or hold him in her arms. (XV 3047-3048.)

After Bell came home, Bell-Udeze's mother took care of Bell while Bell-Udeze finished high school. (XV RT 3048.) Bell was a sickly baby, and in and out of the hospital until he was about two years old. Bell could not keep food in his stomach and suffered from diarrhea. He suffered from jaundice and had to have blood transfusions. (XV RT 3049.)

At age 18, Bell-Udeze married Bell's father when Bell was about two years old. (XV RT 3049.) In 1972, the family moved to Blytheville, Arkansas because Bell's father was in the Air Force. (XV RT 3050.) They stayed in Blytheville for two years before Bell's father was transferred, first to Guam, and then to Portugal. (XV RT 3050-3051.) Bell-Udeze moved back home to Rockford, Illinois while her husband was in the Air Force in Guam. (XV RT 3051.) Eventually, Bell-Udeze and Bell rejoined Bell's father, Michael, in Portugal. (XV RT 3051-3052.)

In Portugal, Bell's mother and father had marital problems. Michael, Sr. stayed out until all hours of the night. Bell's father was impatient, and treated Bell as though he could never do anything right. (XV RT 3052-3053.)

As a child, Bell exhibited behavioral problems. He could not sit still. He was always hyperactive. A doctor in Portugal prescribed Ritalin for Bell when he was four years old. (XV RT 3053.) Bell-Udeze did not like Bell's reaction to the medication so she stopped administering the drugs after several days. The drugs made Bell withdrawn and inactive. (XV RT 3053-3054.)

Bell-Udeze was lonely and depressed during the time the family lived in Portugal. (XV RT 3055.)

From Portugal, the family moved to Las Vegas, Nevada, to Nellis Air Force Base. (XV RT 3055.) At this point, Bell was six years old and continued to have behavioral problems related to hyperactivity. He was frustrated and agitated, played too roughly, could not sit still, and was constantly disruptive in class. (XV RT 3055-3056.) Bell's younger brother, Scheron, was born while the family was living in Las Vegas. (XV RT 3058.)

Bell-Udeze separated from Bell's father and moved to California, first to Atwater, then to Winton, and later to Merced. (XV RT 3057.) In Merced, Bell's sister, Niekesha, was born. (XV RT 3058.)

Bell was referred to a counselor at the County Mental Health Department in Merced due to school problems. (XV RT 3060.) Bell only saw a counselor a few times before the family moved to Turlock. (XV RT 3060.) Bell-Udeze moved to Turlock in August of 1985, when Bell was about 15 years old, because Bell had gotten in trouble several times in Merced for shoplifting. Additionally, Bell's mother wanted to continue her schooling. (XV RT 3060-3061.)

In Turlock, Bell's family attended church every Sunday. (XV RT 3061.) Bell's mother held several jobs, and attended classes at Stanislaus State University. (XV RT 3062.) In 1985, she married Al Udeze. (XV RT

3063.) Bell resented having his mother's new husband in the home. (XV RT 3063-3064.) Bell's real father seldom visited. (XV RT 3064.)

In school, Bell was placed in special education reading and math. He had difficulty understanding the rules and was easily frustrated. (XV RT 3066.)

On one occasion, when he was about 16 years old, Bell took his mother's car and hit someone. He came home drunk and threw up everywhere. Udeze-Bell was upset with him so Bell decided to move in with his girlfriend, Leatha O'Halloran, who subsequently got pregnant. (XV RT 3066-3067.)

Bell-Udeze loves Bell and is overwhelmed by the possibility that he could receive the death penalty for the murder of the robbery victim. (XV RT 3070.)

Scheron Bell was twenty years old at the time of trial and a student at Merced Junior College. (XVI RT 3208-3209.) Scheron described his childhood activities and academic and athletic accomplishments while growing up. (XVI RT 3211-3212.) Scheron testified that he loved his brother very much. (XVI RT 3213.)

Leatha O'Halloran met Bell when she was fifteen and Bell was sixteen years old. They became boyfriend and girlfriend. O'Halloran became pregnant and had Bell's first child, Vanessa, when O'Halloran was seventeen. (XVI RT 3215.) Vanessa, age nine, is a happy child and does well in school. (XVI RT 3216.) Bell's second child with O'Halloran, Marcus, age eight, is happy, but has problems with hyperactivity. (XVI RT 3217.) Bell has a third child with O'Halloran, Stephanie, who is seven. (XVI RT 3218.)

The incident described by O'Halloran during her testimony on behalf of the prosecution occurred while Bell was intoxicated. Normally he

does not behave that way. (XIV RT 3218.) Bell was angry and jealous because O'Halloran had told him to leave. (XVI RT 3219.)

Bell's children have been told that Bell is "out of town." (XVI RT 3219.) The children will be devastated if Bell is executed. (XVI RT 3219-3220.)

*Testimony of Clinical Neuropsychologist Nell Riley*

Nell Riley, whose qualifications as an expert clinical neuropsychologist went unchallenged by the prosecution, testified as an expert for the defense. (XVI RT 3129.)

Riley conducted tests on Bell to identify possible problems in his neuropsychological and cognitive functioning. (XVI RT 3138.) Riley also reviewed Bell's birth records, school records, a chronology of life events prepared by the defense investigator, educational records of Bell's parents, and interviews with a number of people who had known Bell in early childhood. (XVI RT 3139.)

Riley administered a battery of standard tests widely used in the practice of clinical neuropsychology. (XVI RT 3138-3140.) She administered the Wechsler Adult Intelligence Scale, a standard IQ test. (XVI RT 3140-3141.) Bell's IQ tested at 77, in the lowest sixth percentile. (XVI RT 3141.) Bell is not mentally retarded, but his intellectual ability is subnormal. (XVI RT 3141.) Bell has severe dyslexia, very poor reading skills, severe attention deficit disorder (XIV RT 3170-3171), and a group of other problems generally referred to as impairments in executive function. (XVI RT 3144.) An impairment in executive functions means a person has impaired ability control emotions and behavior, and to perform multiple tasks at once. (XVI RT 3144-3145.) Over the years since age fourteen, Bell's readings skills consistently tested between third grade and fifth grade level. (XVI RT 3158.)

According to Air Force records, when Bell was four, an Air Force pediatrician evaluated Bell because of his mother's complaints that he was extremely impulsive, hyperactive and hard to control. (XVI RT 3145.) Bell was diagnosed with hyperkinetic syndrome of childhood, a predecessor diagnosis for what is now called ADHD, and prescribed Ritalin. (XVI RT 3145.) Bell's mother administered the Ritalin briefly, but did not like its affect and took him off the medication. (XVI RT 3146.)

At age nine, Bell was put in psychological counseling because he was disruptive in the classroom and could not get along with his peers. (XVI RT 3160.)

Riley tested Bell's "working memory," the ability to hold information in one's mind for a few seconds. Bell did very poorly on these tests, a characteristic often observed in ADHD. (XVI RT 3160-3161.) Bell processes information at a very slow rate. (XVI RT 3161.)

Bell was tested to determine his frontal lobe functioning. He had problems with cognitive flexibility. (XVI RT 3162.) In problem solving tests, he would do something that was not working and could not let go and move on to another way of doing things. (XVI RT 3163.) Such deficits are consistent with severe attention deficit disorder. (XVI RT 3163.)

Riley did testing on Bell to detect malingering. Bell's pattern of performance was consistent with genuine cooperation and doing his best. (XVI RT 3143-3144.)

The cause of Bell's mental defects cannot be ascertained with certainty. Bell was extremely premature, with a birth weight less than 1,500 grams, which put him at high risk to suffer the types of developmental disabilities observed in Bell by Dr. Riley. (XVI RT 3146.) Bell was kept in the hospital for six or eight weeks in an incubator, and fed with a gastric tube. He could not suck or swallow in a normal manner. (XVI RT 3147.) Such premature babies are at risk for many neurobiological problems. They

tend to be developmentally slow, are likely to have difficulties acquiring language, and are more vulnerable to attention deficit and hyperactivity disorders than the general population. (XVI RT 3148.)

Low birth weight babies tend to have more trouble regulating behavior, adapting to change, and getting along with peers, and they have more academic problems. (XVI RT 3150.) Male babies who are premature tend to have more problems than girls who are premature. (XVI RT 3149.)

At the time Bell was born, low birth weight babies were typically separated from their mothers and kept in "isolettes" with little human contact. (XVI RT 3150.) Today, "isolettes" are equipped so that mothers and nurses can reach through with gloves and pick up, hold and stroke the baby. When premature babies get touch stimulation, they gain weight faster and are released from the hospital sooner. Their mental development is more normal. (XVI RT 3151.)

Babies who are deprived of normal contact with the mother often develop bonding deficits. They have trouble being attached to others or become overly attached. (XVI RT 3157.)

Low birth weight babies suffer high levels of stress due to exposure to hospital environments that include bright lights, noise, and irritating tubes in throats and noses. This causes the creation of cortisols, stress hormones that are damaging to the nervous system and interfere with normal development. (XVI RT 3152.) Low birth weight babies under intensive hospital care are stressed, and may develop high blood pressure. When the premature baby's blood pressure increases, tiny vessels may break, causing hemorrhages or micro-strokes. This causes impairment in brain development. (XVI RT 3153, 3158.)

Bell was a very sickly baby. At eight months he had to be taken back to the hospital. He was diagnosed with profound anemia and congestive heart failure and hospitalized for 11 days. (XVI RT 3164-3165.) This

occurred while Bell's brain was still developing, and could have contributed to his sub-optimal development. (XVI RT 3165.)

Attention deficit disorders during the first five to seven years of life can have profound impacts on the rest of a person's life. (XVI RT 3165.) Such persons are often profoundly developmentally, educationally, occupationally and economically impaired for the rest of their lives. (XVI RT 3166-3167.) People who are diagnosed with ADHD are more likely to drop out of school, to get involved in substance abuse, and to be involved in the criminal justice system. (XVI RT 3178.) Studies demonstrate that people who are incarcerated have higher rates of attention deficit disorder than the general population. (XVI RT 3177.)

Riley was in the hallway of the courthouse when a commotion occurred involving sheriff's deputies and Bell after Bell's mother, while leaving the stand, wailed, "Oh, my baby," and cried loudly. (XVI RT 3168-3169.) Bell acted out in an uncontrollable physical way at the worst possible time: when jurors were deciding whether or not to give him the death penalty. (XVI RT 3169.) This behavior is consistent with the kinds of deficits he has; he has difficulty acting in his own self-interest and in controlling himself. (XVI RT 3169.)

*Testimony of Defense Psychologist Gretchen White*

Dr. Gretchen White, a psychologist, testified on Bell's behalf as an expert without objection by the prosecution. (XVI RT 3297-3299.) Dr. White was asked to evaluate the factors that shaped Bell's development from the point of view of a psychologist. (XVI RT 3300.) Dr. White reviewed various records, and interviews with family members and constructed a psychosocial history or psychological biography. (XVI RT 3301.) Dr. White also reviewed the records in Bell's criminal case. (XVI RT 3301.) Dr. White personally interviewed Bell and some of his family members, including his sister, brother, aunt, ex-wife, and mother. (XVI RT

3302.) She read reports of interviews with other relatives, including Bell's grandmother, paternal aunts, and an uncle. (XVI RT 3302-3303.)

Dr. White found that at every developmental level, from birth through infancy, early childhood, school-age years, pre-adolescent and adolescent years, Bell experienced a variety of risk factors that affected his adjustment. (XVI RT 3304.) Risk factors are cumulative and multiplicative; this means that as one begins to accumulate risk factors, they do not just add up, they multiply. (XVI RT 3304.) In Bell's case, the failures at each developmental stage led to ongoing deficits that interfered with Bell's ability to master the developmental level. (XVI RT 3304.)

Dr. White also considered protective factors in Bell's case. Protective factors include things like an even temperament, not having siblings born too close in time, or not having a family history of criminality or substance abuse. (XVI RT 3306-3307.)

In Bell's case, the risk factors included: prematurity and low birth weight; the exceptionally young age of his mother; his tendency to be sick for the first two years of his life; his hyperactivity; absence of the father for the first two years; and isolation of the mother and marital strife during early childhood. (XVI RT 3308.) Research shows that infants weighing less than 1,500 grams tend to be prone to negative temperament characteristics, attention deficit disorder and lower levels of social competence than full term infants or infants with higher birth weights. (XVI RT 3309.) Hyperactivity has several significant consequences. Hyperactivity adversely affects parental bonding. It brings parents into conflict with other parents and caretakers at school. (XVI RT 3315-3316.) Parents may develop uneven attachments, where they withdraw from the child and feel guilty and then react and overcompensate. (XVI RT 3316.) Hyperactive children have difficulty pursuing long-term goals because they cannot master tasks that require repeated learning. (XVI RT 3316.) They may be intolerant of

stress and overreact to disproportionately small events. (XVI RT 3316-3317.)

In infancy, Bell's risk factors included that his mother was only 16 years old when she gave birth. (XVI RT 3318.) The relationship between Bell's mother and father was marked with conflict. (XVI RT 3318.) Bell's mother and father did not marry until Bell was two years old. (XV RT 3319.) In addition, Bell was in an incubator for a period and Bell's mother was not allowed to touch him during that time. (XVI RT 3318.)

When Bell was three, additional risk factors included that Bell's family moved abroad, causing Bell's mother to feel isolated. Marital problems ensued. (XVI RT 3319.)

During his school-age period, risk factors included learning disabilities; low intelligence; the birth of two siblings a year apart; surgery on his genitals; the divorce of his parents; and his father leaving. (XVI RT 3308, 3320.) Bell's intelligence was well below normal. He was learning disabled. Bell was placed in intellectually handicapped classes in elementary school, and continued to be in learning disabled or special education classes through the 10th grade. (XVI RT 3320.)

Bell's sister was born when Bell was eight years old and a brother was born only a year later. (XVI RT 3321.) At age nine, Bell had to undergo surgery on his genitals, first to correct an undescended testicle, and again to repair a botched circumcision. (XVI RT 3321.) Bell never looked normal even after the second surgery. (XVI RT 3321-3322.) Bell used to tell people he had been injured in a motorcycle accident to explain the deformity. (XVI RT 3322.) This same year, Bell's parents separated. (XVI RT 3322.) At age nine, Bell was referred to counseling for temper outbursts and day dreaming, and diagnosed as having hyperkinetic reaction of childhood, another way of saying attention deficit disorder. (XVI RT 3323.)

Bell underwent individual and group therapy. The counselor described Bell's father as hostile and defensive, and ultimately, the father refused to continue therapy. Counselors felt that a lot of Bell's behavior was related to the lack of attention he received from his father. (XVI RT 3323.)

When Bell was about twelve or thirteen years old, his father left Merced permanently, and Bell did not know where he was until investigators for this case located him. He was incarcerated in Oklahoma for a series of bank robberies. (XVI RT 3324.) Bell felt particularly rejected by the loss of his father. (XVI RT 3324.)

People with hyperactivity disorders have a much more difficult time adjusting to changes in family than other children. (XVI RT 3324.) The most commonly reported problem in such boys adjusting to divorce is aggressive noncompliance acting out behaviors, disruptions in relationships with peers, and problems with academic achievement and school adjustment. (XVI RT 3325.)

During Bell's adolescence, cumulating risk factors included the remarriage of Bell's mother to a stepfather, and his transfer to another high school in the tenth grade. (XVI RT 3308.) Bell's mother married Al Udeze, a Nigerian working toward a chiropractic degree in Los Angeles. Udeze was a very authoritarian, rigid individual, intolerant of childishness. (XVI RT 3326.) During the summers, Udeze took the younger children to the library with him, and made them spend most of the day writing reports from the encyclopedia, and memorizing places on a map. (XVI RT 3326.) Bell had much conflict with Udeze; he felt Udeze had taken his place as the oldest male figure in the house. (XVI RT 3326.)

The family moved to Turlock when Bell was in tenth grade. He was placed in special education classes, which he felt made him look retarded. (XIV RT 3327.) For someone with Bell's deficits, the change was more

difficult to cope with than it would have been for someone without his problems. (XVI RT 3327.) The accumulation of risk factors led to a lifestyle that was more and more risky. (XVI RT 3328.)

**Rebuttal Evidence**

***Bell's Actions During Trial***

*The Incident In The Courtroom*

Sheriff's deputies, Beverly Bentley and Jim Ridenour, were on duty in the courtroom on April 8th, 1999, when Bell's mother testified. (XVII RT 3450-3469.) Ridenour was standing near the jury deliberation room between two courtrooms. (XVII RT 3470.) Bentley was standing at the rear of the courtroom as Bell's mother's testimony was concluding. (XVII RT 3451.)

Bell's mother was weeping when she walked to the back of the courtroom. (XVII RT 3452, 3470.) Bell became upset and began pounding on the table with his fists. (XVII RT 3452, 3470.) Bentley thought Bell was going to tip the table over. Deputies Schmidt, Harper and Pettit jumped on Bell, and Bentley tried to help keep him down. (XVII RT 3453, 3470.) Bell kept struggling. (XVII RT 3455.) Bentley was struck by something and fell into the audience section of the courtroom. (XVII RT 3455-3456.) Bentley returned to help hold Bell down, but backed away because Deputy Ridenour had begun striking Bell with an asp, a metal baton used as a striking instrument. (XVII RT 3458, 3471-3472.)

Bell stood and started moving towards the aisle. (XVII RT 3460-3461.) Bentley tried to grab Bell's head and push him back but could not get a grip. Bell put Bentley in a headlock and his hands became tangled in Bentley's microphone cord as she was trying to call for more deputies. (XVII RT 3461-3463, 3472.) Finally, deputies succeeded in getting Bell in leg irons and handcuffs. (XVII RT 3464-3465, 3473.)

Bentley sustained injuries including a sore head, from having her hair pulled, a sore jaw, and a sore ear. (XVII RT 3466.) Ridenour was kicked in the shin, causing a minor scrape and redness. (XVII RT 3474.)

*The Incident on April 12, 1999*

Candy Cook is a custodian deputy at the Stanislaus County Men's Jail. (XVII RT 3497.) She was working the previous night (April 12, 1999) at about 10:15 p.m. (XVII RT 3497.) As she walked toward the tier, where Bell is housed, she and her partner, Deputy Rieff, heard the sound of metal hitting the floor. (XVII RT 3498-3500.) Deputy Ray Framstad was dispatched to the tier to investigate. He handcuffed Bell and his roommate, and informed them he needed to conduct a search of their cell. (XVII RT 3503-3504.) Before Framstad could pull them out of the cell, Bell reached under his mattress and pulled out a shank and handed it to the deputy. (XVII RT 3404.)

# ARGUMENTS

## ARGUMENT SECTION 1

## INTERRELATED ARGUMENTS REGARDING THE IMPARTIALITY OF, AND SELECTION OF THE JURY THAT DECIDED GUILT AND PENALTY.

### INTRODUCTION

As will be demonstrated below, the entire jury selection process was constitutionally infirm. During the death qualification process, the trial court systematically refused to grant defense "for cause" challenges in the face of very strong evidence of pro-death penalty bias, or bias stemming from panelists' prior relationships with witnesses in the case. The trial court intentionally impeded defense counsel's ability to conduct meaningful questioning to detect bias by threatening to punish defense counsel with the termination of sequestered *voir dire* if counsel insisted on asking leading questions based on panelists' pro-death penalty answers in questionnaires to explore the strength of panelists' pro-death penalty views.

When prospective jurors admitted very strong biases in favor of the death penalty, the court consistently intervened in defense counsel's questioning, and employed strong admonishments regarding the state of the law, and rote, leading death-qualification questions calling for "yes" or "no" answers – questions clearly designed to induce prospective jurors to repudiate their pro-death penalty positions. Additionally, the trial judge failed to discharge his duty to weigh in good faith the credibility of strongly pro-death penalty panelists when such panelists responded affirmatively that they could set aside their personal beliefs and follow the law and the court's instructions. Rather, the trial court pre-judged that any panelist would be deemed qualified to serve on Bell's jury who gave the "correct" answers to the court's questions, giving lip service to the willingness to set aside personal beliefs and follow the instructions and the law.

## FACTS RELATING TO ARGUMENTS IN SECTION I

### Defense "For Cause" Challenges Denied

***The Examination Of Prospective Juror Armendariz:***

During the third day of jury selection, the parties and the court commenced individual questioning of potential jurors who had survived hardship *voir dire* and filled out lengthy juror questionnaires. Before questioning began, defense counsel, Kent Faulkner, requested some latitude in questioning prospective jurors whose answers to death qualification questions were either inconsistent or ambiguous. (IV RT 565.)

> I have noticed, I'm sure Ms. Fladager has as well, their answers are all over the board. There are a lot of ambiguities regarding death, contradictory answers. They need to be followed up on so we can get an idea where these people are and whether they have the ability to consider mitigation.

(IV RT 565.) The trial court responded that he would give counsel "a little bit of latitude" but would not "spend all day on each juror." (IV RT 565.)

Questioning began with prospective juror Armendariz. (IV RT 577.) In the written juror questionnaire, Mr. Armendariz had expressed strong support for the death penalty and opined that "[i]f you do the crime you pay for the crime," "[if] you take a life in the commission of a crime, you should give your life," and "[i]f you take a life for your own personal gain, then you should be willing to give your life." (VIII JQ 2306-2307, 2309.)[10] Prospective juror Armendariz also answered "yes" to a question asking if anyone who attempts to commit a serious crime and kills someone should get the death penalty, and "yes" to the statement "[a] person's background does not matter when deciding whether or not he or she should be sentenced to death for murder...." (VIII JQ 2309.) This panelist also felt that "anyone who has been in the prison in the past and kills someone

[10] JQ refers to the Clerk's Transcripts on appeal containing jury questionnaires.

should get the death penalty" (VIII JQ 2310), and that the costs of keeping someone in jail for life would be a factor he would consider. (VIII JQ 2308.)

After questioning on other several other subjects covered by the questionnaire (see, VIII JQ 2293-2331), the Court asked a series of rote, leading questions of Mr. Armendariz.

> Q. Okay. You said you strongly support the death penalty; is that correct?
> A. Yes, sir.
> Q. If you're actually picked as a juror in the case, will you listen to the evidence with an open mind and judge the case based on the evidence that you hear during the course of trial?
> A. Yes, sir.
> Q. Do you have any moral, ethical or religious feelings that would prevent you from fairly weighing the evidence in determining the penalty of life without the possibility of parole or death?
> A. No, sir.
> Q. Do you have any conscientious objection to the death penalty that would cause you not to vote for murder as charged in Count I, special circumstance regardless of the evidence in order to avoid trial on the death penalty?
> A. No, sir.
> Q. On the other hand, do you have any personal feelings that would require you to vote for the charge of murder and special circumstance regardless of the evidence, so that the defendant would in all cases be required to face the death penalty?
> A. No, sir.
> Q. If the jury found the defendant guilty of the murder charge, that's Count I, okay, and the special circumstance to be true, and then you heard all the evidence in mitigation, and all the evidence in aggravation, would you automatically vote for the death penalty regardless of the evidence?
> A. No, sir.
> Q. And would you vote for -- automatically vote for life without the possibility of parole regardless of the evidence?
> A. No, sir.
> Q. Okay. So you'll wait, keep an open mind and hear all the evidence in the case?

A. Yes.
Q. Do you think you'll be able to follow the Court's instructions and your oath as a trial juror in this case?
A. Yes.
Q. Could you vote for the death penalty if the aggravating factors outweigh the mitigating factors?
A. I believe I would.
Q. Could you vote against the death penalty if the aggravating factors do not outweigh the mitigating factors?
A. Yes.

(IV RT 581-582.)

The prosecutor asked one question; then defense counsel began questioning.

Counsel noted that in question 52 of the questionnaire, the juror had stated that, "if you do the crime, you pay for the crime." (IV RT 583; VIII JQ 2306.) Mr. Faulkner asked, "Now, does that mean that in your opinion is the only way to pay for a murder, with your life?" (VI RT 583.) The juror responded: "That is my opinion." (VI RT 584.) Under further questioning, Armendariz stated that there was no question in his mind that, if a person takes a life, the person's life should be taken, and that the cost of keeping someone in prison would definitely have an influence on his decision. (IV RT 583-585; VIII JQ 2307.)

The judge then took over questioning of Mr. Armendariz from defense counsel.

Q. You said here in response to their questions about an eye for an eye and if you do the crime you pay for the crime, but in responding to my questions, you have indicated that will [sic] keep an open mind and you listen to the factors on both sides and that you'll wait and hear the evidence before you make up your mind.
A. Yes, sir.
Q. So when you said that the man commits murder, he should be put to death, you understand that not all murder cases the Defendant automatically gets the death penalty?
A. Yes, I do.

Q. And in this particular case it's up to you folks to decide whether he should get the death penalty or not. But you have to hear all the evidence before you make up your mind.
A. Yes, sir.
Q. Are you willing to do that in this case?
A. Yes, sir, I am.
Q. So despite what your feelings are in the questionnaire here, in talking to us today, now that you have heard the Court's instructions on this, you could set aside your personal feelings and apply the law that I give to you in this case?
A. Yes, sir.

(VI. RT 585-586.)

Mr. Faulkner again took a turn at questioning Armendariz. The panelist reaffirmed his opinion that, without question, anyone who plans and commits a murder should get the death penalty. Armendariz also opined that the burden of proof was on the defendant to prove why he should not be sentenced to death. (IV RT 586-587; VIII JQ 2309.)

The Court then asked Mr. Armendariz whether he understood that the burden of proof was on the prosecution, not the defense, and whether he would follow the court's instructions on that point. The panelist answered, "Yes, sir." (IV RT 587.)

Defense counsel asked a question about conversations the panelist might have had with an uncle who worked for the Department of Corrections, then inquired:

Q. Okay. So as I understand it, then, the opinions you have, you've had for a long time; is that right?
A. Yes, sir.
Q. They're strong opinions?
A. I believe so.
Q. And they're not subject to change; is that right?
A. Not in this type of case, I don't think so.
Q. Not in a death penalty case?
A. No, sir.

(IV RT 587-588.)

Defense counsel moved to excuse Mr. Armendariz for cause. The Court disagreed that the panelist was disqualified, and threatened counsel to end sequestered *voir dire* if counsel continued "putting words in [the prospective juror's] mouth." (4 RT 588.)

The court questioned Mr. Armendariz again, calling upon him to confirm that he would be able to follow the court's instructions, and would have no problem voting for the death penalty. (IV RT 589.) When the court asked Mr. Armendariz if he could vote *against* the death penalty if aggravating factors did not outweigh the mitigating factors, the prospective juror equivocated, responding, "Possibly, yes." (XV RT 590.) The court admonished the panelist he would have to set aside his own personal feelings about this subject and apply the law based on the law of the State of California. Asked if he could do this, Mr. Armendariz responded, "Yes, sir." (IV RT 590.)

The trial court denied Bell's challenge for cause. Defense counsel asked if he could make another comment. The court said no. (IV RT 590.) The court offered defense counsel an opportunity to question Armendariz, but *not* about the death penalty. Defense counsel declined to ask any more questions. (IV RT 590.) Counsel peremptorily excused this panelist. (VIII RT 1714.)

***The Examination Of Prospective Juror Diep:***

In his juror questionnaire, prospective juror Diep expressed "support" for the death penalty, indicating, "one who deserves it should get it." (IX JQ 2423.) He agreed with the adage, "[a]n eye for an eye." (IX JQ 2424.) Diep also agreed that anyone who "plans and commits a murder should get the death penalty," explaining, "[i]f you have a mind to kill then you deserve to die." (IX JQ 2426.) Diep agreed that anyone who attempts to commit a serious crime and kills someone should get the death penalty. He agreed that a person's background does not matter when deciding

whether the person should live or die. (IX RT 2426.) He further agreed that anyone who has been in prison in the past and kills someone should get the death penalty. (IX JQ 2427.) Diep also indicated that costs of keeping someone in jail for life would be a consideration for him. (IX JQ 2425.)

Under questioning by defense counsel, Diep gave the following responses.

> Q. Mr. Diep, when you answered the question, "Briefly describe your opinions about the death penalty," you said, "One who deserves it should get it." Do you recall making that answer?
> A. Yes.
> Q. And my question to you, sir, how do you determine who deserves it in your own mind?
> A. Well, if they're proven guilty, then they deserve it.
> Q. So are you telling us that someone who is convicted of murder should automatically be given the death penalty?
> A. I think so. In my opinion.
> Q. And this is something that you thought about for a while or is this something you just thought about today?
> A. I mean, I think about it all the time.
> Q. You think about the death penalty all the time?
> A. Not all the time, but you know, when someone says something like that and that's what I think.
> Q. Okay. So you feel that if you were on a jury that convicted someone of murder, first degree murder, with a special circumstance of robbery, and you came to decide the penalty, that you would automatically vote for the death penalty; is that right?
> A. Well, if – if he intentionally kill somebody [sic], you know, then I think they should die.

(IV RT 666-667.)

The trial court then examined Mr. Diep.

> Q. The law requires that you weigh certain what we call aggravating factors and mitigating factors with regard to the Defendant. You understand that? I tried to explain that to you earlier. Once you find the Defendant guilty of first degree murder, you go to the second phase of the trial. And both sides are going to present evidence in that second phase on

certain aspects of the defendant's life and the victim and all those things. And then you're going to have to determine aggravating, mitigating factors. If the law requires that the – if the aggravating factors don't outweigh the mitigating factors, you can't impose -- I mean, you can't impose the death penalty. You understand that?
A. (The juror nodded.)
Q. Are you going to follow the law in the case?
A. Yes.
Q. Okay.

(IV RT 667.)

Defense counsel examined Mr. Diep further.

Q. Could you tell me what the judge just explained to you about –
THE COURT: That's an improper question.
MR. FAULKNER: I want to know if he understands it's –
THE COURT: That's an improper question.
Q. Do you understand what the judge told you about mitigation and aggravation?
A. Yes, I do.
Q. You indicated that your feeling about the death penalty is that someone who's convicted of first degree murder, if it's proven that they did it, they should get the death penalty; is that right?
A. That's the way I think.
Q. Okay. And do you think that belief is going to get in the way of your sitting as a juror and making a life or death decision?
A. I don't think so.
Q. You don't think so. Why not?
A. Because I have an open mind.
Q. You have an open mind?
A. Yeah, I listen to everything.
Q. Okay. If you got to the point where we had to make a decision about penalty, and it was – strike that. If we get to the point where you have to make a decision about penalty, what facts would you want to know about Mr. Bell, who is the Defendant here, before you made up your mind as to what would be the appropriate penalty.
A. I guess if there was a lot of proof, you know.
Q. A lot of proof.

A. That he really did it and meant to do it, then –
Q. Let's assume that you – there is no question in your mind, he did it, he meant to do it, it was an outrageous crime, all those things are proved to you. Now would you automatically vote for the death penalty?
A. I don't know if I would.
THE COURT: He's already been asked and answered that.
MR. FAULKNER: And he said yes.
THE COURT: No, he said he would keep an open mind. You keep reanswering [sic] the question over again. Miss Fladager, you might want to object it's been asked and answered once in a while.
MR. FAULKNER: Just one more question.
Q. Do you understand that in making a decision on a death penalty whether to give life without the possibility or death, that you have to consider the background of the Defendant?
A. I don't think it really matters, the background or not.
Q. Okay. Is that something that you could consider?
A. Yeah.
Q. But it doesn't matter to you?
A. Not really.

(IV RT 668-669.) At this point, defense counsel argued that Mr. Diep was substantially impaired in that he would not be willing to consider mitigation. (IV RT 670.)

The court resumed examination of the prospective juror.

Q. Now, Mr. Diep, you understand that in the penalty phase of the trial, if you do get to that phase, that's one of the things we really haven't explained to you, that's one of the things that you do have to take into consideration, the defendant's background.
A. Yeah, you told me earlier.
Q. In aggravation, I mean, it – the People may present certain things with regard to the Defendant and the Defendant's attorney may. And they'll present things with regard to the victim in the case as well. Okay.
A. (The juror nodded.)
Q. Okay. Do you have any moral, ethical, or religious feelings that would prevent you from fairly weighing the evidence in the case and determine [sic] the penalty of life without the possibility of parole or death?

A. No.
Q. Do you have any conscientious objection to the death penalty that would cause you not to vote for murder as charged in this case and the special circumstance regardless of the evidence in order to avoid a trial on the death penalty?
A. I don't think so.
Q. Do you understand that? In other words, you don't oppose the death penalty such that you would just not vote for murder just because you didn't want to go to the second phase of the trial?
A. I wouldn't do that.
Q. On the other hand, do you have any personal feelings that would require you to vote that the Defendant is guilty of murder charge [sic] and a special circumstance regardless of the evidence so that the Defendant would in all cases be required to face the death penalty?
A. No.
Q. Okay. Assume, that you found the Defendant guilty of murder in the first degree, okay, and you found a special circumstance to be true. And so you had to go to the second phase of the trial, the penalty phase, okay. You heard all the evidence in aggravation and mitigation. Would you automatically vote for the death penalty regardless of the evidence?
A. I don't think so.
Q. Okay. You would wait and hear the evidence; is that right?
A. Yeah.
Q. You would base your decision on the evidence?
A. (The juror nodded.)
Q. Okay. Would you automatically vote for life without the possibility of parole regardless of the evidence?
A. Can you repeat?
Q. Would you automatically vote for life without the possibility of parole regardless of the evidence?
A. No.
Q. Okay. So you said no as to both those. In other words, will you keep an open mind and listen to all the evidence before you make up your mind?
A. Yeah.
Q. And will you be able to follow the Court's instructions and your oath as a trial juror in this case?
A. Yes.

Q. Could you vote for the death penalty if the aggravating factors outweigh the mitigating factors?
A. I don't know.
Q. Well, you just said you supported the death penalty. Let me read the question to you again. I think what you're now saying is you won't know until you hear the evidence in the case, right?
A. Yeah.
Q. Could you vote for the death penalty if the aggravating factors outweigh the mitigating factors.
A. Yeah, I think so.
Q. And could you vote against the death penalty if the aggravating factors do not outweigh the mitigating factors?
A. Yeah.
Q. And could you set aside your own personal feelings and apply the law in this case?
A. Yes.

(IV RT 670-673.)

The court asked counsel if he wanted to challenge the panelist for cause; counsel responded that he already had. (IV RT 673.) The court denied the challenge for cause. (IV RT 673.)

The prosecutor admitted she had some concern about the inconsistencies in some of the Mr. Diep's answers. (IV RT 673.) The trial court responded: "That's the way it's always going to be with these people. You keep asking – the last person to talk to him thinks they're going to convince him some way. That's why I'm going last because most of them will keep an open mind." (IV RT 674.)

Then the court then threatened,

> You know, if we're going to keep going this way I will bring in all 15, we'll just do all of them here. Because, you know, you just – that's the way it is in every case. I mean, if I ask the questions and they answer them appropriately, I will keep them qualified as a juror. You can always exercise your peremptories.
>
> But everybody's answers in their questionnaire are a little bit inconsistent. They answer yes they're in favor of the

> death penalty, but then they answer 53 that they would be able to listen to the Court's questions and judge the case fairly.
>
> If they're going to take a side one way or the other, you're going to have some inconsistencies. But once they hear the questions that the Court is supposed to ask them without putting things in their mind in the form of questions that counsel is trying to ask, then they answer them.
>
> And it's clear to me they're not – they're going to keep an open mind on the subject. I can't disqualify them as jurors in this case. That's what the law says.

(IV RT 674.)

Mr. Faulkner mentioned that both he and the district attorney had expressed some concerns about whether Mr. Diep understood the Court due to language problems. (IV RT 674-675.) Ms. Fladager, the district attorney, remarked that it "would have been nice maybe to have [Diep] explain something rather than having him say yes or no." (IV RT 765.) Defense counsel explained that this is why he had asked "the question," apparently referring to the open-ended question about Diep's understanding of the process, that the court had earlier adjudged "improper" and disallowed. (IV RT 668, 675.) Then the court chastised the district attorney:

> ...You need to take a stronger position as a district attorney in this case. These aren't just open-ended questions that we're going to sit here for three weeks talking to jurors about.

(IV RT 675.) To this, the district attorney responded, "All right." (IV RT 675.)

Defense counsel objected to the "court's application of the [*Witt*] standard and the Court's rehabilitation of jurors." (IV RT 675.) The Court again responded with a threat to curtail sequestered *voir dire*.

> That's fine. The next panel we will bring out and do just like we did in Brian Johnsen: all at the same time.

(IV RT 675.) Mr. Faulkner pointed out that "the same problem is going to exist whether you do them in a group or individually." (IV RT 675.) The court responded: "That's fine. We'll just do them as a group." (IV RT 675.) Defense counsel complained that he felt like he was "being punished for trying to defend my client." (IV RT 675.) The court responded that counsel was "taking too long with each juror" and that it was "going to take us forever to pick a jury in this case." (IV RT 675-676.)

The court declared he had no obligation to "do this modified Hovey"[11] if he did not want to. (IV RT 676.) The court warned again that he could "bring the whole panel in here." (IV RT 676.) The court further accused Mr. Faulkner of not wanting "any juror that suggests they favor the death penalty" and of using two assistants who were helping with jury selection to "put in their mind that just because they're in favor of the death penalty they can't be fair and impartial in this case." (IV RT 676-677.)

Mr. Faulkner argued that they were getting answers from prospective jurors indicating impairment under the standard articulated in *People v. Samoyoa* (1997) 15 Cal.4th 785; he opined that the court – whom counsel called "important and powerful" in jurors' minds – was getting prospective jurors to say something other than what they really believed. (IV RT 677.) The court, in turn, accused defense counsel of "sitting there putting the idea in their [jurors'] mind that because they believe in the death penalty there is no way they're going to change their mind or listen to it with an open mind." (IV RT 677.) The court reiterated that he could not

---

[11] The trial court was referring to *Hovey v. Superior Court* (1980) 28 Cal.3d 1. In *Hovey*, many years ago this Court established a supervisory rule requiring sequestered *voir dire* in capital cases. The rule was abrogated by amendments to Code of Civil Procedure section 223 enacted by initiative measure. (Prop. 115, approved by voters, Primary Elec. (June 5, 1990); *People v. Stitely* (2005) 35 Cal.4th 514, 537, fn. 11.) Thus, in 1999, sequestered *voir dire* was no longer required.

"exclude people that may not believe in the death penalty or believe in the death penalty *as long as they answer these questions that I've given them appropriately*." (IV RT 678; emphasis added.)

The Court overruled counsel's objection, explaining:

> You can note your objection, if you want, for the record. That's fine. ... – there's no use sitting here arguing as to each one. You ask your questions and I'll go through mine. Every time I ask a question, I'm not going to say follow-up. Because then, you know, you confuse them. I'm not going to permit that.

(IV RT 678.)

The defense used a peremptory challenge to excuse Mr. Diep. (VIII RT 1717.)

***The Examination Of Alternate Juror #3:***

In his questionnaire, Alternate Juror #3 indicated he "strongly supported" the death penalty. (XVII JQ 5151.) He agreed with the adage, "An eye for an eye," and interpreted this to mean, "the crime committed should carry equal punishment." (XVII JQ 5151-5152.) He further indicated that the "same penalty should apply to the murderer as to the victim." (XVII JQ 5154.) He indicated that it was "true" that "[a]nyone who plans and commits a murder should get the death penalty," and true that "[a] person's background does not matter" when selecting death; "the punishment should fit the crime." (XVII JQ 5154.) Alternate Juror #3 also voiced the opinion that "it would be cost effective to impose the death penalty." (XVII JQ 5153.)

After a few initial questions about Alternate Juror #3's questionnaire responses, the court turned questioning over to the prosecution. Among the questions asked and answers given were the following:

> Q. Now, if the judge were to tell you that the cost of incarceration is something which you should not consider in

making that decision, could you put that out of your mind and follow the judge's instruction?
A. Probably not because our prisons are basically filled with people that are in for life, going through that. And I don't know if I could basically just disregard the fact of that, you know, the cost effectiveness of it.
Q. Okay. And you spoke a little bit about, in making the decision, that you didn't think a person's background is important. [¶] The judge has talked about if we ever got – if we got to any type of penalty phase, that you would hear evidence in aggravation, meaning, say, bad things, and evidence in mitigation, which would be good things, and you would be instructed that you would really need to weigh those two things. [¶] Would you be able to do that?
A. I am not sure if I understand what those things have to do with the background, in other words, things that don't really have to do with the case or –

(IV RT 601-602.)

At this point, the court interrupted and explained that the defendant's background was only relevant to the second, penalty phase of the trial. (IV RT 602.) The court inquired of the alternate juror whether he would be willing to consider the defendant's background at the penalty trial; Alternate Juror #3 responded, "Okay. Sure." (IV RT 602.) The court advised the panelist that the "cost factor" was not a relevant consideration, and asked for an assurance that he would follow the court's instruction on that. Alternate Juror #3 responded, "Sure. I am willing to – yeah, I can follow the instructions, so yeah." (IV RT 603.)

Then examination by defense counsel began. Alternate Juror #3 reaffirmed his belief that the "punishment needs to fit the crime..." (IV RT 604.) He opined that there would be less "first degree murder in the course of a murder" if the punishment were more often death. (IV RT 604.) He admitted that, in weighing life without the possibility of parole and death, he would "consider the death penalty greater than life without possibility"

and would favor death. (IV RT 604.) He indicated he believed "strongly" in the death penalty for someone who murdered someone. (IV RT 604.)

Next counsel inquired about Alternate Juror #3's views about a defendant's background.

> Q. But you would be willing to consider, for instance, things about the defendant and maybe what kind of background he had as a child. [¶] Would you consider those to be appropriate considerations for making your decision?
> A. I am not sure that I am necessarily in the agreement that upbringing determines the response of the crime committed. You know what I mean? Because we all make our own choices. [¶] I don't necessarily believe that just because a person was brought up one way, one another; one is prone to a life of crime and one is not.
> THE COURT: But you are willing to listen to the evidence on the subject.
> [A]. Sure. I will listen to it.
> MR. FAULKNER: Well, sir, I am sure you are willing to listen to it. I appreciate that. [¶] But as a practical matter, it's your opinion that you don't consider it to be viable evidence, that you don't agree with it; is that right?
> A. I honestly don't agree with it in the sense of that. Because... I know various people that are raised up one way, went one way with their life; other ones raised another way, went another way in their life. [¶] I think ultimately the decisions we make carry our own – we have our own responsibility to lead the best life that we know and to pursue the best life that we can.
> Q. Would it be fair to say that evidence about the defendant's background, let's say, psychological makeup or psychological test results, his childhood, would be received – would not be received by you with an open mind?
> A. Kind of a hard question to answer. [¶] I would – yeah, I would have to listen to – you know, and hear the testimony, you know, like a doctor or something like that, according to the psychological background. Then I could consider that information as well, yeah.
> THE COURT: I mean, when you take an oath as a juror, you have to agree to hear the case with an open mind despite your own personal feelings. Once you are picked as a juror, you have to agree to hear both sides of the case.

[A]. Right.
THE COURT: Once you hear all the evidence, it's up to you what you feel you decide about the evidence, but you have to be open to hearing both sides of the case. [¶] Are you willing to do that?
[A]. I can be open as far as hearing both sides. But the conviction on my belief is that it doesn't – background doesn't necessarily determine how your life is going to come out as an adult.
MR. FAULKNER: Do you think that somebody's background should be considered when making a decision – assuming you have already reached the point where he has been convicted of murder and special circumstance, do you think a person's background should be considered as an important fact in making your decision as to penalty?
A. I think that, again, goes along with what the judge said earlier about listening to the case and determining what factors are to the background to make that kind of decision.
Q. Do you think you could do that?
A. Yeah. I could probably do that, yeah.
Q. Well, you're going to be asked to do that. You're going to be instructed to do that by the judge.
A. Right.
Q. And, you know, can you be fair to both sides? Can you be fair to the defendant and consider the evidence that is going to be put on if we get that far? Will you listen to it with an open mind and make your decision in your heart? [¶] Could you tell us from your heart that you can do that?

(IV RT 603-607.)

After receiving assurances from Alternate Juror #3 that he could "listen to what the testimony is and then make a decision from the testimony," defense counsel turned to the subjects of costs and deterrence.

Q. ...[¶] Getting back to the cost of life without possibility you indicated in your questionnaire and in response to Ms. Fladager's question that you would take then – you would take the cost into consideration in deciding which penalty to apply. [¶] Do you feel strongly that way? Do you still feel that way?
A. Yeah, actually I do. I believe that we would have – I think that we would really have less crime if we just instilled the

penalty, you know. Life without possibility means that life still goes on when a life is now taken.
Q. Which you think is wrong?
A. Yes, I do.
Q. I assume, sir, that you would be – it would be unlikely for you to be able to vote for a penalty that you felt was wrong in view of your beliefs; is that right?
A. Yes, I do.
Q. I assume, sir, that you would be – it would be unlikely for you to be able to vote for a penalty that you felt was wrong in view of your beliefs; is that right?
A. Yeah, I think so.

(IV RT 607-608.)

The court followed up with another series of leading questions. Alternate Juror #3 gave assurances that he would not vote "not guilty" to avoid a penalty trial, would not vote "guilty" so the defendant would have to face the death penalty, would base his decision "on the evidence," would not "automatically" vote for the death penalty regardless of the evidence, would not automatically vote for life without parole regardless of the evidence, would follow the court's instructions, and would listen with an open mind. (IV RT 609-610.) The court also admonished Alternate Juror #3 that he was going to have to set his personal considerations about the cost effectiveness of life without parole aside, and inquired could he do that. (IV RT 610.) The juror responded, "yes." (IV RT 610.)

Then the court inquired:

Q. And particularly on the issue of the death penalty, once you hear all the evidence, you can make up your mind, but it has to be based on the evidence in this trial, not on your personal feelings before you get there.
A. Right.
Q. Are you able to do that?
A. Yes, I can do that.
Q. And you could vote for the death penalty if the aggravating factors outweigh the mitigating factors.
A. Yes.

Q. Could you vote against the death penalty if the aggravating factors do not outweigh the mitigating factors?
A. Yeah. I could vote against it in accordance to the factors, yeah.
Q. Okay. You would have to do that. [¶] You're going to have to weigh – if you are on the jury, that would be up to you as a juror to weigh the factors. And if the factors in aggravation don't outweigh the mitigating factors, you couldn't find the defendant to have the death penalty. [¶] Do you understand that?
A. Right.
Q. Are you able to do that in this case?
A. Uh-huh (yes). Yeah, I can do that.
Q. Could you set aside any personal feeling you might have and apply the law?
A. Yeah.

(IV RT 610-611.)

At this point, the court declared his belief in the panelist's statement "when he says he can follow these instructions." (IV RT 611.) But defense counsel asked for a chance to ask a few more questions.

BY MR. FAULKNER: ...[¶] Do you think that your views, the views that you carry in here, would impair your ability to be – to consider both life and death equally, they would impair your ability somewhat?
A. It's kind of tough to answer. Again, it would – kind of goes along with the testimony and the circumstances and so forth. It's hard to just sit in the chair right now and say yeah, I could, one or the other equally, in view of how I feel right now. But I am still open to listening to the testimony and so forth and the information being brought forward.
Q. I assume, sir, that you have very strong feelings about the death penalty and life imprisonment; is that right?
A. Yes.
Q. And my question is, would those feelings impair your ability to make a decision at the end of this trial?
A. No. I believe I have made it clear to the judge that I could listen to it with an open mind, and my personal feelings would not necessarily sway me one way or the other. [¶] But if you ask me right now, then I would go with – I am – I feel

more strongly about the death penalty than life without possibility of parole."

(IV RT 612-613.)

Defense counsel thereupon moved to excuse Alternate Juror #3 for cause. The Court declared that he believed the panelist would follow the court's instructions and that he was not substantially impaired. (IV RT 613.) The for-cause challenge was denied. The panelist was later sworn as an alternate juror because defense counsel had already exhausted the single peremptory challenge allocated for each of four alternate jurors. (VIII RT 1724-1726.)

***The Examination Of Prospective Juror Appiano:***

In his juror questionnaire, prospective juror Appiano expressed strong support for the death penalty, explaining, "I believe that if a person kills someone and he or she is proved to have killed someone they should also have their life taken, because an [innocent] person had their life taken." (X JQ 2929.) Appiano agreed with the adage "[a]n eye for an eye," which to him meant that if "someone takes a life they should lose theirs." (XJQ 2930.) Prospective juror Appiano agreed that "[a]nyone who plans and commits a murder should get the death penalty" because "they planned on taking a life." (X JQ 2932.) He also agreed that anyone who "attempts to commit a serious crime and kills someone should get the death penalty," and that a person's background "does not matter when deciding whether or not he or she should be sentenced to death for a murder." (X JQ 2932.) Last but not least, Appiano felt that "[a]nyone who has been in prison in the past and kills someone should get the death penalty," and that there would be fewer killings in society if more people got the death penalty. (X JQ 2933.) The job of prosecutor was a "job [Appiano] could do." The job of an attorney who defends people was a job Appiano "couldn't do." (X JQ 2942.)

Under questioning by Mr. Faulkner, Appiano confirmed that he believed in the "death penalty" and guessed that "paying for a lot of people in prison that is costing taxpayers a lot of money." (V RT 899.) He said he would "do the best of my ability" to set his personal beliefs aside. (V RT 899.) Asked how he felt about the penalty of life without the possibility of parole for first degree murder in the course of a robbery, prospective juror Appiano said he could not "see" it, did not understand it, and did not feel that he could apply it. (V RT 901.)

The court resumed questioning of Mr. Appiano.

> Q. I mean, when you say you don't think you could apply life without the possibility of parole, that's just what we have been talking about this whole time, and you indicated that you could consider it and you would wait and hear all the circumstances of the case before you made up your mind.
> A. Yes.
> Q. Would you do that?
> A. Yes.
> Q. So Mr. Faulkner just asked you, you said you didn't think you could – if you had a first degree murder conviction with a special circumstance, you said you didn't think you could give them life without the possibility of parole, whereas, before you said –
> A. Yeah, you are right.
> Q. – you would wait and hear all the circumstances first. Because remember what I told you, you don't just put someone to death because they committed first degree murder?
> A. I am sorry, Your Honor.
> Q. You would have to look at all those circumstances of the mitigating factors and aggravating factors?
> A. Sorry.
> Q. Would you be willing to do that?
> A. Sorry. Yeah. My mind is a little bit boggled right now.

(V RT 902.)

Defense counsel then resumed his questioning. He advised the panelist that there was no right or wrong answer for questions. He asked

Mr. Appiano whether, in a situation where there is a cold-blooded shooting with a gun in the course of a robbery, the panelist could ever vote for life in prison. Appiano responded, "I guess I could, yeah." (V RT 903.)

Mr. Faulkner argued based on the panelist's demeanor that Appiano was "struggling," but that in his "heart of hearts," he would not be able to impose life without the possibility of parole. (V RT 903-904.)

The court questioned Mr. Appiano further. Appiano gave assurances that he had no moral, ethical or religious feelings that would prevent him from considering life without parole or death, that he would not vote "not guilty" to murder to avoid a trial for the death penalty, that he would not vote guilty on the murder charge and special circumstance just so the defendant would have to face the death penalty, that he would listen to all of the aggravating and mitigating evidence at a penalty phase trial, and that he would consider the defendant's background factors in determining penalty. (V RT 904-905.) Appiano gave "no" answers when asked if he would automatically vote for the death penalty, or conversely, automatically vote for life, regardless of the evidence. (V RT 906.) He answered "yes," he could follow the court's instructions and his oath as a juror, and "right," when asked if he could set aside his personal feelings and judge the case fairly and impartially. (V RT 906-908.) Asked if he could vote against the death penalty if the aggravating factors did not outweigh the mitigating factors, he said "yes." (V RT 908.)

Counsel's motion to challenge Mr. Appiano for cause was denied. (V RT 908.) When this panelist was called to serve as an alternate juror, defense counsel used his only remaining peremptory challenge to excuse him. (VIII 1724-1725.)

***Examination of Prospective Juror Galvez:***

In the juror questionnaire, Mr. Galvez described his opinion about the death penalty this way:

> Eye for an eye, they say, isn't a deterrant [sic], but at least it would be one less maggot on this beautifull [sic] planet.

(XI JQ 3202.)

Galvez expressed "support" for the death penalty, and agreed with the adage "[a]n eye for an eye," which to him meant "the punishment should fit the crime." (XI JQ 3203.) This panelist personally believed that "[a]nyone who plans and commits a murder should get the death penalty." (XI JQ 3205.) He explained: "You have decided to commit the ultimate crime, thus you should be prepared to receive the ultimate penalty, your life." (XI JQ 3205.) Galvez also agreed that "[a]nyone who attempts to commit a serious crime and kills someone should get the death penalty." He explained: "Many criminals attempt & successfully commit serious crimes without killing anybody, but if they do, they should be toast." (XI JQ 3205.) Mr. Galvez opined that a person's background "doesn't matter" when deciding whether or not to impose death. (XI JQ 3205.) He felt that "[a]nyone who has been in prison in the past and kills someone should get the death penalty." (XI JQ 3206.) Last but not least, Mr. Galvez opined, "Death Row is a joke, too many appeals. I say convict, give them 1 appeal, throw the switch." (XI JQ 3206.)

The court did initial questioning of Mr. Galvez, and explained to him the two parts of a death penalty trial. (VI RT 1042-10444.) The court reminded Galvez of his statement, "[t]he death penalty is a joke," and asked if he would be willing to listen to the evidence before making up his mind. The panelist responded affirmatively. (VI RT 1044.) Not surprisingly, the prosecutor asked Galvez only one question, whether there was anything else he had not mentioned that might affect his decision-making. (VI RT 105.) Then defense counsel undertook examination of this prospective juror.

Counsel explored with Galvez what he meant when he said that implementation of the death penalty would mean "one less maggot on this beautiful planet." The panelist explained that he had "always had some strong feelings about it" and felt that "the death penalty should be used a little but more – should be enforced a little bit more aggressively." (VI RT 1047.) By maggot, Galvez said he meant "one less person that commits a terrible, heinous crime." (VI RT 1047.) Counsel probed Mr. Galvez's views further.

> Q. Okay. Well, assuming that you convicted someone of a cold-blooded senseless first degree murder in the course of a robbery, no self-defense involved thinking like that, would you vote for the death penalty?
> A. Yes, I would.
> Q. No question about it?
> A. Well, based on evidence, I would have to look at all the angles.
> Q. Based on what evidence?
> A. On whatever is presented before me.
> Q. Well, okay. What would influence you as to not vote for the death penalty?
> A. Lack of evidence.
> Q. Of the crime?
> A. Correct.
> Q. In other words, if somebody – if you were convinced beyond a reasonable doubt that someone committed a cold-blooded senseless first degree murder in the course of a robbery, then you would vote for the death penalty; is that right?
> A. Yeah, I think I would. But I would go to the second phase like the judge was explaining. There are mitigating circumstances that you need to weigh and so forth. I guess we would have to base our decision based on those rules.
> THE COURT: So despite your personal feelings would you be willing to listen to that other evidence?
> [A]. Yes, I would. I would keep an open mind about it.
> BY MR. FAULKNER: What do you consider mitigating circumstances?
> A. I don't know.
> Q. You don't know?

A. I would have to see what is thrown at me.
Q. Would you consider things about Mr. Bell's background, for instance, neurological impairments or psychological problems to be legitimate mitigating evidence?
A. Possibly. I would have to weigh that. I would have to consider it.
Q. Now, according to – going back to that consideration, would you expect Mr. Bell or the defense to prove to you that he doesn't deserve to die?
A. Yes.
Q. There is no question in your mind that he would have to do that in order for you to safe his life?
A. Correct.

(VI RT 1048-1049.)

The court interrupted counsel before he could state his next question and resumed questioning Mr. Galvez. The court admonished Galvez that it was the People's burden to prove guilt beyond a reasonable doubt at the guilt phase, and at the penalty phase, "the Defendant doesn't have to prove anything at that point in time." The panelist nodded his understanding. (VI RT 1049-1050.) Defense counsel then continued questioning. Mr. Faulkner again asked if the juror would "expect Mr. Bell or me or both of us to prove to you that he deserves to live." Galvez responded, "yes." (XI RT 1050.) Questioning continued as follows.

Q. So you wouldn't expect Mr. Bell to give you any evidence to prove that he does deserve to live?
A. Well, I'm sure you would do that.
Q. Well, I'm asking what you would require, sir, not what I would do.
A. I would want the People to prove that he deserves it.
THE COURT: Would you follow whatever the law requires?
[A]. Yes, I would.

In subsequent questioning by Mr. Faulkner, prospective juror Galvez confirmed his belief that a person who committed a serious crime that resulted in the death of another "'should be toast.'" (VI RT 1051-1053.)

Mr. Galvez elaborated: "There's been situations where people go to convenience store and they commit robbery, and for no apparent reason, the night clerk will be shot. Or whatever, killed. I don't view that as being a very – there's no reason for that." (VI RT 1053.) Galvez likewise reaffirmed his belief that people subject to the death penalty should be executed much sooner than they are. (VI RT 1053.) When pressed, however, Galvez insisted that he would not "automatically" impose the death penalty in such circumstances; "I would have to keep an open mind and go based on the rules of the Court." (VI RT 1052.) He insisted he "could" vote for something other than the death penalty. (VI RT 1054.)

After this, the court went through its customary litany of questions about the death penalty. Mr. Galvez denied having moral, ethical or religious feelings that would prevent him for voting for life or death, denied he would vote "not guilty" of murder regardless of the evidence to avoid trial on the death penalty, denied he would find a defendant guilty of murder with special circumstances in order to force him to face the death penalty, denied that he would automatically vote for or against the death penalty regardless of the evidence, and claimed he would be able to follow the court's instructions and his oath as a juror. (VI RT 1055-1056.) Galvez also asserted he could vote against the death penalty if the aggravating factors did not outweigh mitigating factors. (VI RT 1056.) He stumbled and said "no," then "yes," when asked if he could set aside his personal feelings and reach a just verdict in the case. (VI RT 105.)

Based in part on the panelist's use of such terms as "maggot" and "toast," defense counsel moved to challenge Mr. Galvez for cause. The court denied the motion. (VI RT 1057.)

***Examination Of Prospective Juror King:***

In his questionnaire, prospective juror King expressed "concern about his ability, to serve fairly as a juror" in Bell's case. He cited his belief

in the death penalty and three friends on the police force as the reason. (V JQ 1250.) He opined that, "a person who commits cold bloody murder should be put to death, especially when they kill two, three or more persons." (V JQ 1254.) Prospective juror King indicated that the "costs of keeping someone in jail for life" would be a consideration for him because it was a "waste of money." (V JQ 1256.) King personally believed that "[a]nyone who plans and commits a murder should get the death penalty." He explained that "[i]t's not only right, but it's the only way one can atone for his sins." He opined, "[a]nyone who has been in prison in the past and kills someone should get the death penalty" "after a fair trial and all evidence has been submitted." (V JQ 1258.) He agreed that there would be fewer killings in society if the death penalty were more frequently used. (V JQ 1258.)

The court conducted initial questioning of prospective juror King. King denied that his friends on the Modesto and Waterford police forces would make him incapable of judging witnesses equally. (VI RT 1204-1205.) The court explained to King the two phases of a death penalty trial and both the court and defense counsel asked questions and obtained assurances that the panelist would set aside any personal feelings he had about the death penalty and decide the case based on the evidence. (VI RT 1206-1213.)

On the seventh day of jury selection, defense counsel notified the court that prospective juror King's wife, who receives dialysis treatments, had been receiving care from the murder victim's wife at the dialysis unit. (VIII RT 1507.) Counsel expressed concern that, as a juror, King would view Francis's wife as someone who was caregiver for his dying wife. (VIII RT 1507.) The district attorney indicated that the victim's widow, Ms. Francis, had only "actually hooked [King's wife] up to the equipment once

or twice" and did not really know her. (VIII RT 1509.) No decision about prospective juror King was made at that time.

Several days later, defense counsel re-raised the problem of prospective juror King's wife. The court individually examined King. King confirmed that the victim's widow, Esther Francis, worked at the dialysis treatment center where King's wife received treatment. (VIII RT 1701.) King did not know Esther Francis personally, and he was not certain if his wife knew her or not. (VIII RT 1701.) Mr. King gave the deputy district attorney, Ms. Fladager, his assurance that he would not talk to his wife about what happened in the case. (VIII RT 1702.)

Defense counsel then questioned Mr. King. King indicated that his wife of 23 years was seriously ill, but her life was being prolonged by dialysis. If it were not for the dialysis treatments, Mrs. King would be dead. (VIII RT 1702-1704.)

Mr. Faulkner argued that King should be excused for cause because Mrs. King was receiving dialysis every other day, and Francis's widow had treated her on at least two occasions. According to Esther Francis, everyone in the dialysis unit was aware of the murder and Bell's trial and talked about it a lot. (VIII RT 1704.) Counsel pointed out that Francis's wife would be asked about her employment when she testified; the contents of her testimony would appeal to the sympathies of Mr. King, who would looking at the witness as the caregiver of his dying wife. (VIII RT 1705.)

The court responded in relevant part:

> You're overdramatizing it, Mr. Faulkner. The dialysis treatment, you go up there and get your treatment. If she were giving her mouth to mouth resuscitation or something like that, but we're not dealing with that. Mrs. Francis is a technician, I'm sure, at the dialysis center. So if we were talking with Mrs. King, well, that's a different circumstance. But this is Mr. King who said he could be fair and impartial.

(VIII RT 1707.)

Defense counsel protested that King's service as a juror would amount to a violation of Bell's federal and state rights to a fair and impartial jury, to due process, and a reliable penalty determination under the 5th, 6th, 8th and 14th Amendments to the federal constitution and article I of the California Constitution.[12] (VIII RT 1709.)

Ms. Fladager then clarified for the record that Mrs. Francis had brought the problem to the district attorney's attention when, while watching jury selection, she realized that Mr. King's wife might be a patient. Francis's wife was concerned that this might have an impact. (VIII RT 1709.) The court denied counsel's challenge for cause, finding that prospective juror King was not substantially impaired. (VIII RT 1709.) Later, defense counsel peremptorily excused Mr. King. (VIII RT 1716.)

---

[12] Mr. Faulkner's recitation of constitutional rights violated was on recommendation by his appellate counsel, who was apparently sitting in on *voir dire*. Mr. Faulkner remarked that he should always be putting this litany on state and federal constitutional violations on the record. The court averred that it would suffice if counsel just made his constitutional objections at the beginning of the case and then they would apply to all changes for cause. (VIII RT 1709.) Counsel mentioned that he had "a brief on that." The court offered that counsel could submit the brief and that would "take care of the problem." (VIII RT 1709.) Defense counsel filed his brief the same day. (III CT 858-859.) The brief, entitled "MOTION THAT DEFENSE COUNSEL'S OBJECTIONS INCLUDE BOTH CALIFORNIA AND FEDERAL CONSTITUTIONAL ARGUMENTS," is not limited to objections during jury *voir dire*. The motion requests that "all of defense counsel's objections at trial be deemed objections under the Constitutions of both the State of California and the United States." (III CT 858.) The motion recites that it applies to "objections to the admissibility of evidence, jury selection procedures, conduct of the trial, conduct of the parties or the Court, juror conduct, jury instructions, or other matters not currently foreseeable." (III CT 858.)

***Examination Of Prospective Juror Ranes:***

Prospective juror Ranes was sister-in-law to a detective in the Turlock Police Department listed as a *witness* in Bell's case. (XII JQ 36023615.) A teacher by profession, Ranes recognized another person on the witness list, Turlock officer Joe Esquivel, as the father of one of her students. (XII JQ 3615.)

In the questionnaire, this panelist indicated her strong support for the death penalty. She stated, "I believe that if an individual willingly takes the life of another individual, he or she has forfeited his/her right to live. If a person is found guilty of a heinous crime, beyond a reasonable doubt, and the penalty is death then I support it." (XVV JQ 3591.) In deciding whether to impose life or death, Ms. Ranes indicated that cost of keeping someone in jail for life would be a consideration. "I realize there is an overcrowding problem in our institutions and more + more+ more taxpayer's $ is required in keeping criminals locked up." (XII JQ 3593.) Ranes held in high regard attorneys who prosecute people accused of crimes. She had mixed views about attorneys who defend people accused of crimes. While Ms. Ranes felt that innocent people should "get the best defense possible," she had low regard for "attorneys that try tricks + find loop holes to get their client off, even where there is a lot of evidence that proves the defendant is guilty." (XII RT 3604.) Prospective juror Ranes also expressed the following view of the Fifth Amendment privilege against self-incrimination: "If a person is innocent, I feel that they should tell the jury their story. I can tell a lot about a person when thy talk – innocent or guilty." (XII JQ 3605.)

Initially, the court questioned Ms. Ranes about her relationships with members of the Turlock Police Department, and informed her generally about the two phases of a capital trial. The court exacted commitments from Ranes to not consider the costs of incarceration in weighing the

appropriate penalty, and to treat police officer witnesses equally. (XII RT 1214-1217.)

Defense counsel then questioned Ms. Ranes about her ability to listen to defense counsel "even though [he might] be tricky." (XII RT 1218.) Ranes frankly admitted that she strongly believed it was defense counsel's job to prove that the defendant should not be given the death penalty, although she indicated she would follow the court's instructions to the contrary. (XII RT 1219.)

Counsel then explored the possible effect of Ranes' relationship with a prosecution witness on her ability to vote for life.

> Q. One, do you think that you would have any problem voting against death and then facing David Ranes who is going to be on the stand on behalf of the prosecution here?
> A. Uh-huh (yes).
> Q. They are going to be asking for the death penalty if it gets that far, and you may have to confront David and say, "I didn't do it. I didn't vote the way that your side asked me to vote."
> A. Yeah. I don't know.
> THE COURT: Would you make up your mind, or do you let him make up your mind for you?
> [A]. I wouldn't let him make up my mind.
> THE COURT: So could you deal with it afterwards?
> [A]. Yeah, I think so.
> MR. FAULKNER: So you could do that and look at him -- or go to the next family gathering and say, "this is what I did"?
> A. Yeah, just wouldn't talk about it, say –
> Q. Will you promise me and everyone else, when you're deliberating, if we get that far, that you won't let that factor influence you?
> A. I will try my best to.
> Q. Your going to have to promise the Court.
> THE COURT: You are going to take an oath as juror. You have to agree that won't influence your decision.
> [A]. Yeah.Yeah. If that was the case, yeah.

(VI RT 1221-1222.)

Juror Ranes expressed difficulty with the privilege against self-incrimination. Asked if she could set her feelings aside and follow the court's instructions about the defendant's right not to testify, she responded, "Well, I don't know. I just – I just have – I have a feeling about people, and I would rather hear their side of the story rather than let everybody else do it for them." (VI RT 1223.) She acknowledged that it was her belief that Bell should "say something to [her] as to what happened or why he should be allowed to live." (VI RT 1223.)

The court then intervened and explained the reasons for the privilege. The court admonished Ranes: "So there is a specific instruction which says you can't consider the fact that a defendant doesn't testify as evidence against him. Can't even think about that or even discuss it in the jury room. [¶] So would you be agreeable to follow that instruction?" (VI RT 1224.) The panelist responded, "I would agree to follow it, yeah." (VI RT 1224.) The court inquired further: "Set aside your own personal feelings, right? Prospective juror Ranes replied, "I would have to." (VI RT 1224.)

Ms. Ranes was then asked whether the cumulative effect of having a brother-in-law testify and the fact that she expected the defendant to testify might cause her to be "more biased in the case" or could she "separate those things?" (VI RT 1224-1225.) To this question, the panelist responded, "I think I could." (VI RT 1225.) She responded, affirmatively when the court asked her to promise she could judge the case fairly and impartially. (VI RT 1225-1226.)

After this, the court went through the usually litany of death qualification questions, which asked for "yes," and "no" answers. (VI RT 1226-1227.) Ranes responded affirmatively that she would follow the court's instructions, obey the oath of a juror, set aside her personal feelings, and reach a fair and just verdict in the case. She further stated, "Un-huh

(yes)," when asked if she could vote against the death penalty if the aggravating factors did not outweigh the mitigating factors. (VI RT 1227.)

At the conclusion of questioning, defense counsel challenged Ms. Ranes for cause. He argued, *inter alia*, that the panelist's brother-in-law was going to be part of the prosecution team and that she had frankly admitted this would bother her. He further asserted this panelist was substantially impaired by virtue of the cumulative effect of her relationship with a prosecution witness and her negative views about the Fifth Amendment. (VI RT 1228.) The court denied the challenge for cause. (VI RT 1228-1230.)

***Examination Of Prospective Juror Ewing:***

Prospective juror Ewing was formerly a prison guard while an M.P. [military police] for the Marine Corp in Vietnam. (XIV JQ 4043; VII RT 1425.) On occasion, American military personnel who were prisoners in the brig attacked him. (VII RT 1426.)

In the juror questionnaire, Mr. Ewing indicated strong support for the death penalty. (XIV JQ 4098.) He believed in the adage "[a]n eye for an eye," which he equated with "justice." (XIV JQ 4099.) Ewing indicated that, before making a decision about penalty, he wanted to nothing about the defendant "but guilt or innocence." (XIV JQ 4100.) Mr. Ewing agreed that [a]nyone who plans and commits a murder should get the death penalty," explaining that "premeditation is the key." (XIV JQ 4101.) He indicated that "probably" "[a]nyone who attempts to commit a serious crime and kills someone should get the death penalty." It was also Ewing's opinion that a person's background "does not matter when deciding whether or not he or she should be sentenced to death for a murder...." (XIV JQ 4101.) Guilt or innocence was the only factor of importance to Ewing. (XIV JQ 4102.)

Prospective juror Ewing also expressed negative views in his questionnaire about psychologists, psychiatrists and other mental health professionals who testify in court. Ewing opined, "they can mislead, for the right price." (XIV JQ 4118.)

The court conducted initial questioning of prospective juror Ewing. The court explained the two phases of a capital trial, and received assurances from the panelist that he would be able to keep an open mind. (VII RT 1427.) The district attorney asked only one question regarding whether the 1975 murder of the panelist's aunt would affect him at the trial. (VII RT 1428.) In follow-up questioning by the court, Ewing assured the court that the aunt's murder, committed during a burglary, by an African-American man, would not affect him. (VII RT 1428-1429.)

Under questioning by defense counsel, Ewing opined that the punishment received by the murderer of his aunt "didn't fit the crime." VII RT 1430.) The man was sentenced to prison and did not serve the entire sentence; in Ewing's opinion, he should have received the death penalty because a life was taken. (VII RT 1430.) The following questions by Mr. Faulkner and answers followed.

> Q. Is it your feeling that any time a life is taken in a first degree murder and burglary that there should be capital punishment?
> A. Unless it's accidental.
> Q. Unless it's accidental. [¶] Do you feel very strongly about that?
> A. Yes, sir.
> Q. Is that your absolute position?
> A. (Affirmative nod.)
> Q. I couldn't change –
> A. Unless there is extreme mitigating factors, mitigating circumstances, but I would have to hear those.
> Q. In other words, it would be up to the defendant to prove to you that he didn't deserve to die based on those facts?
> A. (Affirmative nod.) Yes.

(VII RT 1431.)

The court then explained to prospective juror Ewing that it was the People's burden in the second phase of the trial to prove that the sentence should be death. (VII RT 1431-1432.) The court admonished Ewing that he would "have to listen to the evidence and make a reasonable decision based on the aggravating and mitigating circumstances rather than just the fact the defendant committed a first degree murder. (VII RT 1432.) Mr. Ewing responded, "I could do that. I guess I would have a predisposition on that." (VII RT 1432.) Despite his predisposition, Ewing agreed that he could set aside his personal feelings and make a decision based on the evidence. (VII RT 1432-1433.)

Under examination by defense counsel, Mr. Ewing stated that his aunt's murder by an African-American man would not impair his ability to be fair in a case with an African-American defendant. He said it was a "possibility" he could consider somebody's childhood in deciding penalty, and he "could consider" someone's neurological impairment. (VII RT 1433-1434.) Mr. Ewing denied he had any problems with African-Americans, although African-American soldiers were usually the ones who attacked him while he was an M.P. (VII RT 1435.)

Counsel probed further Mr. Ewing's views about the death penalty.

> Q. In question 63-A, the question was, "Anybody who plans and commits a murder should get the death penalty." And you said, "Premeditation is the key, yes." [¶] Is that the way you feel?
> A. That seems to be what is – the dominant thinking anyway, that seems to be the key in cases that I have heard, that premeditation seems to make it the most heinous of murders as opposed to the other gradations of life-taking like manslaughter and accidental homicide, so on.
> Q. Sir, the question is your opinion, not what the general opinion is. [¶] Is your opinion that anyone who premeditates a murder and commits it should get the death penalty?
> A. Yes, sir.

Q. Without a doubt.
A. Well there is always doubt. That's my predisposition. I can't --
....
THE COURT: Before coming in here, that's your feeling.
A. That's my feeling.
Q. But knowing what the law is –
A. I can put that aside.
Q. — you have to set aside and you have to judge the case based on –
A. Based on what I hear.

(VII RT 1435-1436.)

Defense counsel resumed questioning Mr. Ewing.

[Q]. If you were in Mr. Bell's situation as a defendant in the case in which we just talked about and you were an African-American, would you want twelve people with your frame of mind sitting as a juror, sir?
A. Probably not.
Q. Sir, I respect your honesty.
A. (Affirmative nod.)
Q. Tell me why.
A. Well, the questions on the questionnaire that I filled out, I would think would not make me a likely juror from your standpoint and about the military experience and so on.
Q. Do you think you would be biased and prejudiced?
A. Military police, things like that would probably make me a more likely candidate from the prosecutor's side.
Q. So you think you would be predisposed to the prosecution; is that right?
A. I would say there is a strong possibility if I were in your chair.
Q. Okay.
A. Or in his chair.
Q. Well, sir, you know, it's – again, I appreciate your candor and your honesty. And there are no right answers, but this is something that you have to search in your heart.
A. Uh-huh (yes).
Q. And it's your testimony that you don't feel that – because of your military background and other factors in your past, that you would be predisposed to the prosecution; is that right?

A. I can keep an open mind.
Q. Well, you told me that you don't think that you would want yourself as a juror if you were in Mr. Bell's shoes; is that right?
A. That is correct.

(VII RT 1437-1438.)

Thereafter, defense counsel moved to challenge Mr. Ewing for pro-death penalty and racial bias, and predisposition to fine Bell guilty because of his history with the military. (VII RT 1440, 1442.) The court thereupon questioned the panelist again. The court asked a series of death qualification, eliciting the appropriate yes or no responses. Ewing answered, "yes," that he could set aside his predisposition toward death. (VII RT 1440.) He denied that he would automatically vote for the death penalty regardless of the evidence. (VII RT 1440.) He asserted that he could vote for life imprisonment without parole if the aggravating factors did not outweigh mitigating factors. (VII RT 1441.) He agreed with the court that "[R]ace isn't relevant in this case." (VII RT 1441.) The court denied the challenge for cause. (VII RT 1442.)

## I

## THE TRIAL COURT VIOLATED BELL'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO TRIAL BY AN IMPARTIAL TRIBUNAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THEIR CALIFORNIA COUNTERPARTS, BY APPLYING AN INCORRECT STANDARD TO FIND STRONGLY PRO-DEATH PENALTY PANELISTS SUBSTANTIALLY UNIMPAIRED PURSUANT TO *WAINWRIGHT V. WITT* (1985) 469 U.S. 412 [83 L.ED.2D 841, 105 S.CT 844] BASED SOLELY ON JURORS' "APPROPRIATE" ANSWERS TO THE JUDGE'S LEADING QUESTIONS THAT THE COURT DEEMED AUTOMATICALLY QUALIFYING ACCORDING TO *WITT*, AND BY EMPLOYING THREATS TO CHILL DEFENSE COUNSEL'S ABILITY TO MEANINGFULLY SCREEN PROSPECTIVE JURORS FOR ACTUAL OR IMPLIED BIAS.

### A. Bell's Right To An Unbiased Jury At A Capital Trial Is Guaranteed by The Sixth, Eighth and Fourteenth Amendments To The United States Constitution And California's Parallel Constitutional Provisions.

This Court has "long recognized that '[t]he right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.'" (*People v. Earp* (1999) 20 Cal.4th 826, 852; citation omitted.) When a state provides for capital sentencing by a jury, "'the due process clause of the Fourteenth Amendment of the federal Constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial.'" (*People v. Earp, supra*, at p. 852; quoting *People v. Williams* (1997) 16 Cal.4th 635, 666; see also *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [119 L.Ed.2d 492, 112 S.Ct. 2222].) California's Constitution provides coequal guarantees. (*People v. Earp, supra*, at p. 853; *People v. Williams, supra*, at p. 666.)

As the United States Supreme Court explained in *Morgan v. Illinois, supra,* 504 U.S. at pp. 726-727 [internal citation omitted]:

> "…. In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver, 333 U.S. 257, 92 L. Ed. 682, 68 S.Ct. 499* [(1948)]; *Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S.Ct. 437* [(1927)]. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S.Ct. 623* [(1955)]. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624* [(1960)]. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies."

When the government seeks to exact upon a defendant the ultimate penalty, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." (*Mattox v. United States* (1892) 146 U.S. 140, 159 [13 S.Ct. 50; 36 L. Ed. 917].) One of the central purposes of *voir dire* is to effectuate the right to an impartial tribunal by "exposing possible biases, both known and unknown, on the part of potential jurors." (*McDonough Power Equipment, Inc., v. Greenwood* (1984) 464 U.S. 458, 554 [104 S.Ct. 845; 78 L.Ed.2d 663].) The risks inherent in denying adequate *voir dire* are "most grave when the issue is of life or death." (*Aldridge v. United States* (1931) 283 U.S. 308, 314 [51 S.Ct. 470; 75 L. Ed. 1054]; *California v. Ramos* (1983) 463 U.S. 992, 998-999 [103 S.Ct. 3446; 77 L.Ed.2d 1171] [death is different].) Especially in a death penalty case, the Eighth Amendment demands that the state assure *reliability* in the process by which a person's life is taken. (*Gregg. v. Georgia* (1976) 428 U.S. 153, 196-203 [96 S.Ct. 2909; 49 L.Ed.2d 859] (Opn. of Justices Stewart, Powell & Stevens).)

**B. In Assessing The Qualifications Of Prospective Jurors, The Trial Court Had A Duty To Zealously Protect Bell's Right To An Unbiased Jury, And Make A Good Faith Assessment, Based On Answers To Oral And Written Questions And Demeanor Evidence, Whether Pro-Prosecution Panelists Were Substantially Impaired From Performing The Duties of A Juror In An Unbiased Manner.**

The proper standard for determining when a prospective juror may be excluded from a capital trial because of a bias for or against the death penalty "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 105 S.Ct. 844] (quoting *Adams v. Texas* (1980) 448 U.S. 38, 45 [65 L.Ed.2d 581, 100 S.Ct. 2521]; *People v. Ashmus* (1991) 54 Cal.3d 932, 962; *People v. Ghent* (1987) 43 Cal.3d 739, 767-768.) In fact, this standard applies not only to challenges for cause based on bias for or against capital punishment; essentially the same standard applies in any situation where a party is seeking to disqualify a biased juror from a capital case. (*Wainwright v. Witt, supra*, at p. 423-424.)

"'[The] trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor....In exercising discretion, the trial court must be zealous to protect the rights of an accused.'" (*Wainwright v. Witt, supra*, at pp. 429-430, quoting *Dennis v. United States* (1950) 339 U.S. 162, 168 [94 L.Ed.2d 734, 70 S.Ct. 519]).)

> "... [D]oubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid."

(*United States v. Nelson* (2nd Cir. 2001) 277 F.3d 164, 202, quoting *Bailey v. Bd. of Commissioners* (11th Cir. 1992) 956 F.2d 1112, 1127, and *United*

*States v. Nell* (5th Cir. 1976) 526 F.2d 1223, 1230.) "[T]he goal of *voir dire* is not to 'salvage' problematic jurors, but rather to find 12 fair-minded jurors who will impartially evaluate the case." (*People v. Hoyos* (2007) 41 Cal.4th 872, 908.)

### C. The Trial Court Repeatedly And Deliberately Misapplied The *Witt* Standard In Determining Whether Challenged Jurors Were Biased; The Court Pre-Judged That Any Juror Giving "Yes" Or "No" Responses To Rote, Leading *Witt* Questions Could Not Be Disqualified, And Ruled Accordingly.

As a general matter, "judges are presumed to know the law and to apply it in making their decisions." (*Walton v. Arizona* (1990) 497 U.S. 639, 653 [111 L.Ed.2d 511, 110 S.Ct. 3047], overruled on other grounds in *Ring v. Arizona* (2002) 536 U.S. 584 [54 L.Ed.2d 717, 98 S.Ct. 824].) In instances in which the record does not indicate what standard the judge applied, the judge will be presumed to have applied the correct legal standard. (*Wainwright v. Witt, supra*, 469 U.S. at p. 431.) Here, however, the presumption of correctness should not be applied. The record unmistakably shows that the trial judge, highly motivated to expedite jury selection, did not engage in a *bona fide* weighing of demeanor evidence and responses to questions in order to determine the credibility and impartiality of the jurors challenged for cause by the defense. (See, *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [68 L.Ed.2d 22, 101 S.Ct. 1629].) Rather, the court determined panelists' qualifications to serve in a capital case based solely on the panelists' willingness to give lip service to neutrality, by providing "appropriate" responses to the court's leading questions.

Generally, the trial court followed a similar, goal-oriented pattern of questioning whenever a prospective juror expressed a strong predisposition

to impose the death penalty during questioning by defense counsel. The court would often interrupt counsels' questioning to admonish the panelist that his or her answer was incorrect, and to educate the panelist regarding what his or her response had to be to serve on the jury. Then the court would follow up by asking one or more leading *Witt*-type questions – questions that called for "yes" or "no" answers repudiating strong opinions previously voiced, and/or demonstrating the panelist's commitment to listening to the evidence and following the instructions and the law. So long as the panelist gave what the court considered "appropriate" responses to death qualification questions, he or she would be retained as a possible juror regardless of the vehemence of the bias exhibited in answers to defense counsel's questions and questions posed in the jury questionnaire.

For example, during defense counsel's questioning of Mr. Armendariz, the panelist reaffirmed that there was no doubt in his mind that someone who takes a life should give his or her life. The panelist also confirmed that he would consider the costs of life imprisonment, but possibly not the defendant's background, in determining the appropriate penalty. (IV RT 584-585.) The court interrupted counsel's questioning to educate the panelist about what the correct answer should have been, and afterward, extracted a promise from him that he would set aside his personal feelings and apply the law. (IV RT 586.)

When counsel resumed questioning of Armendariz, the panelist opined that it was the burden of the defendant or his counsel to convince him that he should not sentence the defendant to death. (IV RT 586.) Immediately, the court interrupted questioning to admonish the panelist that the burden of proof was on the prosecutor, and demanded, "So you'll follow the Court's instructions on that?" Armendariz replied, "Yes, sir." But a prospective juror's affirmative response that he can follow instructions and the law are not necessarily inconsistent with other

responses to specific death penalty questions. (*People v. Thompson* (2010) 49 Cal.4th 79, 102-103 [panelists were properly disqualified for anti-death penalty bias despite responding "yes," to this question: "'If the Judge gives you an instruction on the law that you feel is different from a belief or opinion you have, will you be able to follow and apply that instruction?'"].) A panelist's "assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inferences from his other statements that in fact he would be substantially impaired...." (*Uttecht v. Brown* (2007) 551 U.S. 1, 18 [167 L.Ed.2d 1014, 127 S.Ct. 2218].)

Under questioning by Mr. Faulkner, Armendariz acknowledged that his "strong opinions" in favor of the death penalty were "not subject to change" – "[n]ot in this type of case...." Counsel reasonably challenged the juror for cause. (IV RT 588.) Instead of excusing this obviously biased panelist, the court accused defense counsel of "putting words in [the juror's] mouth, and threatened that if counsel "kept doing that," the court would bring all the prospective jurors out and question them all at one time. (IV RT 588.)

After threatening counsel to switch to a death-qualification procedure that would have worked to his client's serious disadvantage (*Hovey v. Superior Court, supra,* 28 Cal.3d at pp. 79-80), the trial court then asked Armendariz a series of leading questions, the accusatory tone of which clearly would have conveyed to the panelist the judge's belief that the panelist had betrayed his earlier promises to follow the court's instructions and obey the law. (IV RT 589.) The court first demanded assurances from Armendariz that he would follow the court's instructions and his oath as a juror. The court began, "... you already told me that if you -- you'll be able to follow the Court's instructions, right?" ... "And your oath as a juror in this case?" To both of these questions, Armendariz

answered "yes." (IV RT 589.) (See, *People v. Thompson, supra,* at pp. 102-103.) Armendariz, confirmed, not surprisingly, that he would have no problem voting for the death penalty. (IV RT 589.) Then the court asked for assurances that "if in the penalty phase the aggravating factors don't outweigh the mitigating factors, you could vote against the death penalty, right?" Armendariz's response was equivocal: "Possibly, yes." (IV RT 590.) Then the judge, wearing black robes, in an obvious position of power and authority, admonished Armendariz that if he sat on the case, he was going to "have to set aside [his] own personal feelings about this subject and judge the case and apply the law based on what the law is in the State of California." The Court forcefully inquired: "Are you willing to do that in this case? Armendariz, obviously succumbing to the court's authority, responded, "Yes, sir." (IV RT 590.) After the panelist had left the courtroom, the court accused Mr. Faulkner of using a "skillfully crafted question to get a juror dismissed" rather than to "get to the truth of the matter." (IV RT 592.)

The court's pattern of handling of any prospective juror who expressed a bias continued throughout *voir dire*. For example, Alternate Juror #3 voiced a strong belief in the death penalty for anyone who planned and committed a murder; felt that the defendant's background was irrelevant to the choice of punishment, and was not at all certain he could disregard the cost of life imprisonment in making the life or death decision. (XVII JQ 5151-5154; IV RT 601-602.)

The court interrupted the juror while he was responding to one of the prosecutor's questions – about the panelist's unwillingness to consider the defendant's background – to admonish Alternate Juror #3 that, if there was a second, penalty phase of the trial "the defendant's background does become relevant." (IV RT 602.) The judge directed that the juror "would have to consider" the defendant's background, then asked, "So you would

be willing to do that, right?" (IV RT 602.) To this, the panelist responded. "Okay, sure." (IV RT 602.) The court also took the opportunity to admonish Alternate Juror #3 that the costs of incarceration was "not a relevant consideration and you can't consider that," to which the alternate juror replied, "okay." (IV RT 603.) Finally, the court asked the alternate juror if he would be "willing to follow my instructions?" The juror responded in relevant part, "Sure...."

During subsequent questioning by defense counsel, Alternate Juror #3 asserted that he would consider life imprisonment but admitted he favored the death penalty over life without parole: "But, overall, I would consider the death penalty greater than life without possibility." (IV RT 604.) The alternate strongly agreed when defense counsel asked if someone who murders someone should be put to death, but *disagreed* when defense counsel suggested that the defendant's background would be an appropriate consideration in deciding penalty. (IV RT 605.) At this point the trial judge interrupted counsel's questioning and pressed Alternate Juror #3: "But you are willing to listen to the evidence on the subject?" The Alternate responded, "Sure. I will listen to it." (IV RT 605.)

But a panelist's agreement to "listen" to mitigating background evidence is not the same thing as an agreement to give it any weight. The panelist's subsequent responses confirm that, though he was willing to "listen," he would not give Bell's background or childhood circumstances any weight.

In response to further questioning by Mr. Faulkner, Alternate Juror #3 again reiterated his disagreement with the notion that a defendant's responsibility for criminal acts had anything to do with his or her childhood or upbringing. (IV RT 605.) Asked if he could consider evidence of the defendant's background and psychological makeup with an open mind, Alternate Juror #3 honestly responded that he was *not certain*: "Kind of a

hard question to answer." (IV RT 606.)

Consistent with the court's pattern of rehabilitating panelists anytime an admission of bias was forthcoming, the court then interrupted defense counsel's questioning to tell Alternate Juror #3 he would "have to be open to hearing both sides of the case." (IV RT 606.) When the court asked Alternate Juror #3 if he would be "willing to do that," the Alternate equivocated. He responded that he would be "open as far as hearing both sides," but reiterated his conviction that the defendant's background did not determine how the defendant's "life is going to come out as an adult." (IV RT 606.) Alternate Juror #3 stated he could "probably" listen to background information, and could "listen to what the testimony and then make a decision from there." (IV RT 607.)

> "[A] juror who 'could probably be fair and impartial'" should not be considered impartial, because '"probably' is not good enough."

(*United States v. Nelson, supra*, at p. 202, quoting *United States v. Sithithongtham* (8th Cir. 1999) 192 F.3d 1119, 1121; accord *People v. Boyette* (2002) 29 Cal.4th 381, 418.)

On the subject of costs of life imprisonment, Alternate Juror #3 acknowledged in response to defense counsel's questioning his strong belief that costs of life imprisonment should be a factor in the sentencing decision, that "we would really have less crime if we just instilled the [death] penalty," and that it was "wrong" for someone who has taken a life to be allowed to live. (IV RT 607-608.)

The trial court, consistent with its pattern, then asked a series of leading death qualification questions calling for "yes" or "no" responses. Individual questions by the court asking whether the panelist could or could not do something – such as listen to the evidence, or disregard personal feelings – were first preceded by strong admonitions telling this panelist

exactly what he "had to" do. Alternate Juror #3 readily obliged the court by giving the answers obviously sought. (IV RT 608-611.) Having elicited the desired responses, the trial court announced that he believed Alternate Juror #3 "when he says he can follow these instructions." (IV RT 611.)

Defense counsel was allowed a chance to follow up. (IV RT 612.) The alternate again admitted uncertainty about whether he would be impaired by his views, and reiterated that he felt more strongly for the death penalty than life without parole. (IV RT 612-613.) But the challenge for cause was denied.

It became increasingly apparent, during the questioning of subsequent prospective jurors that the court intended to excuse a prospective juror for cause, *regardless* of he strength of any expressed bias, only in instances where the prospective juror could not be induced to say "yes," when asked if he or she would keep an open mind, consider the evidence before deciding penalty, and obey the court's instructions. Prospective juror Diep, for example, repeatedly confirmed under questioning by defense counsel his belief that, once someone is proven guilty of murder, the person *automatically* deserves to die. (IV RT 667.) The court immediately interrupted counsel's questioning to briefly lecture Diep on the necessity of weighing aggravating and mitigating factors as a prerequisite to determining penalty. Then the court demanded, "Are you going to follow the law in the case?" Diep answered "yes." (IV RT 667.)

Under further questioning by defense counsel, Diep adhered to the view, expressed in his questionnaire, that the background of the defendant really did not matter. (XV RT 668-669.) But when the judge took over questioning, by using the same pattern of first telling the panelist what he "had to" do, or consider, to be qualified as a juror, he was able to induce Diep to give qualifying affirmative responses, "yes," "no," or in some instances "yeah," or "I think so," to leading questions asking if Diep would

keep an open mind, listen to all the evidence, and follow the court's instructions. When the prosecutor, too, expressed reservations about Diep, the court chastised her for not taking a "stronger position" in support of panelist's qualifications to serve. (IV RT 675.)

At this point, defense counsel pointed out, accurately, that the judge was using his position of authority to compel prospective jurors to recant statements admitting what they really believed. (IV RT 675-677.) The trial court's response was to accuse counsel of improper questioning and threaten him for the second time with the termination of sequestered *voir dire*. (IV RT 675-677.)

The judge even explained his "appropriate answer" approach to screening for bias.

> [W]hen you get through with your questioning, if I go through the questions they say they can keep an open mind, won't automatically vote one way or the other, they're going to be qualified as jurors in the case. [¶] You know, if you want to disqualify them later, that's fine. But, you know, I can't exclude people that may not believe in the death penalty or believe in the death penalty as long as they answer these questions that I've given them appropriately. [¶] Now, the person that was from the Department of Corrections, obviously she had to go. But as to the others, once they get through those questions of mine, if they answer in a certain fashion, then they're going to stay as qualified jurors. [¶] You can note your objection, if you want, for the record. That's fine... there's no use sitting here arguing as to each one. You ask your questions and I'll go through mine. Every time I ask a question, I'm not going to say follow up. Because then, you know, you'll confuse them. I'm not going to permit that.

(IV RT 678.) A judge is supposed to consider the entirety of a prospective juror's examination in deciding whether a *Witt* excusal is justified – not just "the prospective juror's later voir dire answers" that favor retention. (*People v. Tate* (2010) 49 Cal.4th 635, 674.)

It is abundantly clear that, throughout *voir dire*, the trial court was

*not* evaluating the demeanor of each prospective juror and his or her responses to oral questions, and weighing whether the juror's views about capital punishment would "substantially impair" the performance of the duties of a juror. (*Rosales-Lopez, supra,* at p. 188; *Witt, supra*, at p. 424.) Rather, the court was applying its own kind of litmus test, somewhat more akin to the reverse of the "unmistakably clear" standard articulated in *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21 [20 L.Ed.2d 776, 88 S.Ct. 1770], repudiated and clarified by the United States Supreme Court in *Witt.*[13] So long as a prospective juror, in later *voir dire*, could be induced to give "appropriate" "yes" or "no" answers to the court's series of leading death-qualification questions, and would commit to not *automatically* imposing the death penalty, he or she would be deemed immunized against a challenge for cause no matter how strong the prejudice expressed under questioning by defense counsel.

The questioning of prospective juror Appiano is yet another example of the trial court's consistent application of an "appropriate answer" test to the disqualification of prospective jurors. Under questioning by defense counsel, this strongly pro-death penalty panelist (X JQ 2929-2933, 2942) expressed concerns about the costs of life imprisonment (V RT 899) and

---

[13] The Supreme Court in *Witherspoon* articulated the unmistakably clear standard as follows: "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 523.)

opined that he could *not* impose the sentence of life without the possibility of parole for a first degree murder committed in the course of a robbery. (V RT 899-901.)

The trial court interrupted counsel's questioning to rebuke Mr. Appiano, and remind him that he had previously "indicated he could consider" life without parole and "would wait and hear all the circumstances of the case" before making up [his] mind." (V RT 902.) Mr. Appiano replied, "Yeah, you are right." (V RT 902.) The court admonished the panelist he "would have to" consider mitigating and aggravating factors before deciding penalty, then asked, "Would you be willing to do that?" Appiano responded, "Yeah...." He gave a slightly more equivocal response when defense counsel asked if he really could "ever" impose a life sentence for a cold-blooded shooting in the course of a robbery: "I guess I could, yeah." (V RT 902.)

After defense counsel made an argument in favor of excusing Mr. Appiano for cause, the court resumed questioning. First, the court not so subtly implied that defense counsel was guilty of confusing the juror: "I know sometimes hearing questions from lawyers and things, you can get confused about certain things." (V RT 904.) The court then went through its typical litany. First, the court strongly admonished the panelist of what he "had to" do according to the law, and then followed up each admonition by asking if the panelist would obey the court's instructions on the particular point. The court succeeded in eliciting "appropriate" qualifying answers from Mr. Appiano. (V RT 904-908.) Without giving counsel another opportunity to examine the panelist, the court announced, "I choose to believe that Mr. Appiano...is credible," thereby denying the defense's for-cause challenge. (V RT 904-908.)

The examination of prospective juror Galvez followed a similar pattern, despite the fact that this panelist's responses written questions

voiced the following inflammatory pro-death opinions: "eye for an eye...isn't a deterrent, but at least it would be one less maggot on this beautiful planet"; anyone who commits a serious crime and kills someone should be "toast"; death row is "a joke"; that a person's background "doesn't matter"; that there are "too many appeals"; and that after one appeal, he would "throw the switch." (XI JQ 3202, 3205, 3206.) In Galvez's case, the judge questioned the panelist first, preemptively. The judge reminded Galvez of his questionnaire responses, but, before asking any questions, carefully admonished Galvez what he was going to "have to" do or "have to" consider, according to the law. Through typically leading questions, the judge then succeeded securing promises from Galvez to consider the defendant's background at the penalty phase, to "listen to all the evidence," and to base his decision on the evidence and the rules of court. (VI RT 1043-1044.)

Not surprisingly, upon later questioning, this panelist readily admitted to defense counsel that, barring a lack of evidence proving the crime, he would probably vote for the death penalty if he convicted someone of first degree murder in the course of a robbery without self-defense. (VI RT 1047-1048.) He qualified his response by saying, "like the judge was explaining," that the jury "would have to base our decision based on those rules." (VI RT 1048.) Galvez also admitted there was "no question in [his] mind" that the defense would have to prove that Bell did not deserve to die in order for him to vote for a life sentence. (VI RT 1049.)

At this point the court interrupted defense counsel mid-question. Counsel asked if he could finish his question and the court said, "no." (VI RT 1049.) The court then admonished Galvez that it was "up to the People to prove what the penalty should be in the case." (VI RT 1050.) Defense counsel followed up: "So you wouldn't expect Mr. Bell to give you any evidence to prove that he does deserve to live?" (VI RT 1050-1051.)

Galvez avoided the question, responding, "Well, I'm sure you would do that." (VI RT 1051.) When counsel forced the issue, the panelist said he would "want the People to prove he deserves it." (VI RT 1051.)

Galvez repeatedly reaffirmed his belief that a person who commits a murder during a serious crime "should be toast." (VI RT 1052, 1053.) Galvez even cited as an example of an unnecessary killing, one for which there could be no excuse, *the killing of a clerk during a convenience store robbery*. (VI RT 1053.) Galvez reaffirmed his view that death row was a "joke" and that there were too many appeals. (VI RT 1053.) When pressed to admit he would automatically give the death penalty for such a murder, he parroted the court: "I would have to keep an open mind and go based on the rules of the Court." (VI RT 1053.) Galvez insisted that he "could" impose the death penalty for a cold-blooded senseless murder during the robbery of a convenience store. (VI RT 1054.) The court, of course, denied the defense for-cause challenge to Mr. Galvez. (VI RT 1057-1058.) Consistent with the court's findings throughout *voir dire*, the panelist's later answers to the court's aggressive questioning trumped vehemently pro-death penalty views voiced earlier.

The same pattern of judicial questioning occurred during the *voir dire* of Mr. Ewing, another panelist who, in writing, had expressed very vehement support for the death penalty for any person found guilty of a premeditated murder. (XIV JQ 4098-4102.) Ewing had also revealed his belief that mental health professionals who testify in court would be willing to mislead "for the right price." (XIV JQ 4118.)

As occurred in other cases in which jurors exhibited strong predilections to impose death, the court questioned Ewing first. The court reminded Ewing he had promised to listen with an open mind, and admonished him not to decide the case without first hearing the evidence and keeping an open mind. (VII RT 1426-1427.) The prosecutor asked only

one question, whether the fact that Mr. Ewing's aunt had been murdered by an African-American man would affect him in Bell's case, an inquiry answered by Ewing negatively. (VI RT 1428.)

During defense counsel's *voir dire*, Ewing admitted that in the case of his aunt's murderer, the "punishment didn't fit the crime," and should have been capital punishment. (VII RT 1430.) Mr. Ewing strongly opined that any time a life is taken the punishment should be death unless the killing was accidental. (VII RT 1430.) He indicated that this was an "absolute" position that could not change unless the defendant proved that he deserved to live because of "extreme mitigating factors." (VII RT 1431.)

At this point, the court interrupted counsel's questioning to admonish the panelist that it was "not the prosecution's burden," and that the defendant did not have to prove anything. (VII RT 1431.) The judge pointed out to Mr. Ewing that the panelist's statement to defense counsel, that the death penalty would be warranted if the defendant was found guilty of first degree murder in this case, was inconsistent with his earlier promise not to "automatically" impose the death penalty without listening to the evidence. (VII RT 1432.) He acknowledged again that he had a predisposition to impose the death penalty. The court admonished the panelist that he "had to" set aside his personal feelings, then asked if he could do so. Naturally, having been cued by the court to give the appropriate response, the juror gave the court the asked-for answer. (VII RT 1042-1043.)

More questioning followed, during which Mr. Ewing admitted he was "extremely," then "moderately" predisposed to impose the death penalty. (VII RT 1434-1435.) He further acknowledged that, if he were in Bell's shoes, he would not want twelve people with his frame of mind sitting on the jury. (VII RT 1437-1438.)

The court, consistent with its pattern, questioned Mr. Ewing last,

posing the usually litany of leading death-qualification questions, and receiving the sought-after "appropriate" answers. (VII RT 1439-1441.) Defense counsel's for-cause challenge was, of course, denied. (VII RT 1442.)

The court's application of an "appropriate answer" test was not limited to assessing the biases of panelists toward capital punishment. For example, prospective juror Ranes not only was a strong supporter of capital punishment who held negative views about the Fifth Amendment privilege against self-incrimination and "tricky" defense attorneys (see XII JQ 3591-3604); additionally, she was the sister-in-law of Turlock police officer, David Ranes, who was listed as a witness in Bell's case! She also knew another police officer witness. (XII JQ 3602, 3615.)

The court went through its usual initial questioning, admonishing Ms. Ranes what she "had to" do to if picked as a juror – such as making her decisions based on aggravating and mitigating factors, disregarding costs, and viewing the testimony of police officers "objectively" -- then obtained assurances from the panelist that she could do so. (VI RT 1214-1217.)

When subsequently questioned by defense counsel, Ms. Ranes frankly admitted she would have "problems voting against death" and then facing her brother-in-law, David Ranes, although she said she would "try [her] best" not to let it influence her. (VI RT 1221-1222.) She expressed uncertainty regarding her ability to set aside her feelings about the Fifth Amendment, expressing a preference to hear what the defendant had to say. (VI RT 1223.)

At this point, the court interrupted counsel to admonish Ms. Ranes that she "would have to set aside" her own personal feelings and follow the law. (VI RT 1224.) The court further explained that, as a juror, Ranes could not "even think about" or "discuss" the defendant's failure to testify in the jury room. The court asked if she could set aside her personal feelings and

Ms. Ranes answered, "I would have to," (not "I can"). (VI RT 1224.) A prospective juror's statement that he or she "would have to" follow the court's instructions does not indicate the panelist believes he or she is actually capable of doing so. (*People v. Tate, supra,* 49 Cal.4th at p. 675.)

Ms. Ranes was asked if she could be fair and impartial considering her relationship to Officer Ranes and her views about the self-incrimination privilege. (VI RT 1224-1225.) She twice responded, "I think I could," and answered lukewarmly, "yeah," or by nodding her head when the court asked her to promise she would be fair. (VI RT 1225-1226.) Despite this panelist's tepid assurance of impartiality, the court went through its usual leading death qualification questions. Ms. Ranes gave the "appropriate" responses, indicating "no," she would not automatically impose either death or life without parole. She generally nodded or replied "uh-huh," or "yes," when asked if she could set aside her personal beliefs and be fair, and impose life imprisonment if the aggravating factors outweighed mitigating factors. (VI RT 1225-1227.)

Manifestly, the trial court's overriding goal in selecting a jury was to expedite the jury selection process by salvaging any candidate for the jury whose pro-death penalty bias made them "problematic." (See *People v. Hoyos, supra,* 41 Cal.4th at p. 908.) The trial court's on-the-record statements reveal the court's predetermination to adjudge a panelist qualified to serve – regardless of the strength of the individual's pro-death penalty bias – so long as the panelist offered even the most tepid verbal assurance in response to the court's accusatory leading questioning that he or she could "keep an open mind," and would not "automatically vote one way or the other" before hearing the evidence. (IV RT 678.) As the United States Supreme Court once stated in *Wainwright v. Witt, supra,*

> ...determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the matter of a catechism.

(*Id.* at p. 424.) But reducing death qualification to the matter of a catechism is exactly what the trial court did.

In pre-judging the qualifications of prospective jurors, court placed heavy reliance on jurors' affirmative responses to question number 57 of the written juror questionnaire: "Could you set aside any such training and decide this case according to the law as stated to you by the Court?" (IV RT 678.) But, as trial counsel aptly pointed out, that question does not embody the *Witt* standard. (IV RT 678.) Furthermore, this particular question referred panelist's ability to set aside "*religious* or *moral* training on the death penalty," not pro-death penalty beliefs having no foundation in religious or moral training. (See e.g., *People v. Thompson, supra,* 49 Cal.4th at p. 103.)

Contrary to the requirements of *Witt*, the trial court abdicated its "'serious duty to determine the question of actual bias,'" (*Wainwright v. Witt, supra*, at pp. 429-430; internal citation omitted), and resolved all doubts about the existence of actual bias in favor of permitting pro-death penalty jurors to serve. (*United States v. Nelson, supra,* 277 F.3d at p. 202.) In essence, unless it was "unmistakably clear" that the prospective juror would vote for death for intentional murder regardless of the presence of mitigating circumstances – the standard long ago repudiated by the United States Supreme Court in *Witt* – the court found the juror qualified to serve.

### D. A Judge's Determination That A Juror Is Qualified Is Normally Entitled To Deferential Review, But Not If The Trial Court Applies The Incorrect Legal Standard.

Assessing the qualifications of jurors challenged for cause is generally a matter falling within the broad discretion of the trial court. It is the trial court's duty to weigh the jurors' responses and to decide whether or not to remove the juror for cause. When a challenged juror has given ambiguous, equivocal, or conflicting responses, the trial court's assessment of the juror's state of mind is usually binding, and on appeal, the trial court's judgment will be upheld if supported by substantial evidence. (*People v. Thomas* (2011) 51 Cal.4th 449, 462; *People v. Boyette*, supra, 29 Cal.4th at p. 416.)

A trial judge does not receive the benefit of deferential review, however, if there exist reasons to avoid the usual presumption of correctness. (*Wainwright v. Witt, supra*, 469 U.S. at p. 431.) A trial court's decision to grant or deny a for-cause challenge will *not* be affirmed, for example, if the court's finding on the bias issue is not fairly supported by the entirety of the juror's responses and the record as a whole. (*Wainwright v. Witt, supra*, at p. 431; *People v. Ashmus, supra*, 54 Cal.3d at p. 962.) A deferential standard of review likewise does not apply when a court uses the wrong legal standard to assess whether or not a juror is biased. (See, *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1197; *Bell v. Ricketts* (10th Cir. 1985) 779 F.2d 578, 581; *People v. Stewart* (2004) 33 Cal.4th 425, 451; *People v. Avila* (2006) 38 Cal.4th 491, 529.) This Court has also recognized that deferential review is inappropriate when a trial judge's ruling on a for-cause challenge is a product of apparent ulterior motives in the case. (See, *People v. Moon* (2005) 37 Cal.4th 1, 14-15, explaining the holding in *Gray v. Mississippi* (1987) 481 U.S. 648 [95 L.Ed.2d 622, 107 S.Ct. 2045].) Further, *dicta* in *Ross v. Oklahoma* (1989) 487 U.S. 81, 91, fn. 5 [101

L.Ed.2d 80, 108 S.Ct. 2273], suggests that deference is not accorded when the trial court "repeatedly and deliberately misapplied the law," thereby forcing a defendant to use peremptory challenges to excuse biased jurors.

The record bespeaks a strong motive on the part of the court to expedite the process of jury *voir dire*, by death-qualifying as many jurors as possible as rapidly as possible regardless of panelists' strong expressions of pro-death penalty bias. (See *People v. Moon, supra,* at pp. 14-15.) The trial judge did not apply the correct "substantial impairment" standard in assessing the qualifications of Bell's jurors. Rather, the court used the equivalent of the "unmistakably clear" standard repudiated by *Witt*. The trial court's determination that the above-referenced panelists suffered no substantial impairment within the meaning of *Wainwright v. Witt, supra,* 469 U.S. at p. 424 and *Adams v. Texas, supra,* 448 U.S. at p. 45, is, accordingly, owed no deference by this reviewing court.

### E. The Court's Denial Of Defense Challenges To Seven Panelists For Pro-Death Penalty Bias Are Clearly Erroneous And Not Supported By Substantial Evidence.

Bell adopts and incorporates by reference the facts and arguments previously set forth in the Introduction to Argument Section 1, and Argument I, C, *ante*.

Like the juror challenged in *People v. Boyette, supra,* 29 Cal.4th at pp. 413-419, prospective jurors Armendariz, Diep, Appiano, Galvez, Ewing, and Ranes, and Alternate Juror #3, each expressed very strong biases favoring capital punishment over life without parole for intentional murder. Despite the fact that panelists gave lip service to neutrality, the trial court erred in denying challenges for cause against each of these panelists.

Prospective juror Armendariz, for example, stated that he had "no doubt" in his mind that someone who takes a life should give a life. (IV RT

584.) He further acknowledged that his "strong opinions" in favor of the death penalty were "not subject to change" – "[n]ot in this type of case...." (IV RT 588.) Only after the judge berated Armendariz for admitting bias, and repeatedly admonished him that he would "have to" set aside his personal beliefs and follow the court's instructions did this panelist respond that, "possibly, yes," he could consider the death penalty. (IV RT 589-590.)

Alternate Juror #3, who voiced a strong belief in the death penalty for anyone who planned and committed a murder, felt that a defendant's background was irrelevant to the choice of punishment, and was not at all certain he could disregard the cost of life imprisonment in making the life or death decision. (XVII JQ 5151-5154; IV RT 601-602.) During questioning by defense counsel, Alternate Juror #3 repeatedly and frankly admitted that he would favor the death penalty over the penalty of life without parole. (IV RT 604, 612-613.) The alternate felt that it was "wrong" for someone who has taken a life to be allowed to live. (IV RT 607-608.) Alternate Juror #3 found it "tough to answer" whether his ability to consider life imprisonment and death equally would be impaired. (IV RT 612-613.)

Prospective juror Diep wrote, "[i]f you have a mind to kill then you deserve to die." (IX JQ 2426.) During *voir dire*, Mr. Diep repeatedly confirmed under questioning by defense counsel his belief that, once someone is proven guilty of intentional murder, the person *automatically* deserves to die, regardless of mitigating background evidence. (IV RT 666-669.) It took protracted questioning by the court, peppered with admonitions regarding what the law required, to get Diep to give eliciting monosyllabic commitments base his decision on the evidence and to follow the court's instructions and the oath of a juror. (IV RT 670-673.)

During oral *voir dire*, prospective juror Appiano opined that it was costing the public a lot of money to keep people in prison. (V RT 899.)

Asked if he could ever impose life without the possibility of parole for a first degree murder in the course of a robbery, Mr. Appiano frankly responded that he could not "see" it, did not understand it, and did not feel that he could apply it. (V RT 901.) Appiano gave technically qualifying answers to death-qualification questions only after being rebuked and thoroughly educated about the correct answers by the court. (V RT 899-908.)

Prospective juror Galvez's written responses to the questionnaire voiced the following inflammatory pro-death opinions: "eye for an eye...isn't a deterrent, but at least it would be one less maggot on this beautiful planet": anyone who commits a serious crime and kills someone should be "toast"; death row is "a joke"; that a person's background "doesn't matter"; that there are "too many appeals"; and that after one appeal, he would "throw the switch." (XI JQ 3202, 3205, 3206.) Mr. Galvez readily re-affirmed these opinions during oral *voir dire*. (VI RT 1047-1048, 1052-1053.) Galvez even cited as an example of an unnecessary killing, one for which there could be no excuse, the killing of a clerk during a convenience store robbery. (VI RT 1053.) When pressed to admit he would automatically give the death penalty for such a murder, he parroted the court: "I would *have to* keep an open mind and go based on the rules of the Court." (VI RT 1053-1054; emphasis added.) But, as this Court acknowledge in *People v. Tate, supra* 49 Cal.4th at p. 674, when a prospective juror states that he or she would "have to" follow the court's instructions, it is not tantamount to saying the juror could actually do so.

A vehement supporter of the death penalty over life without parole for all but an accidental killing (VII RT 1430, 1432), prospective juror Ewing indicated that this was an "absolute" position that could not change unless the defendant proved that he deserved to live because of "extreme mitigating factors." (VII RT 1431.) This panelist also felt that mental health

professionals who testify in court would be willing to mislead "for the right price." (XIV JQ 4118.) A number of mental health experts testified for the defense in Bell's case. Ewing acknowledged that, if he were in Bell's shoes, he would not want twelve people with his frame of mind sitting on the jury because there was a "strong possibility" he would be predisposed to the prosecution. (VII RT 1437-1438.)

In her questionnaire, prospective juror Ranes strongly supported the death penalty and additionally voiced negative attitudes about the Fifth Amendment privilege against self-incrimination and "tricky" defense attorneys. (XII JQ 3591-3604.) More importantly, Ranes also revealed that she was the sister-in-law of Turlock police officer, David Ranes, who was listed as a witness in Bell's case. She also knew another police officer witness. (XII JQ 3602, 3615.)

Ms. Ranes frankly admitted she would have "problems voting against death" and then facing her brother-in-law, David Ranes, although she said she would "try [her] best" not to let it influence her. (VI RT 1221-1222.) She expressed uncertainty regarding her ability to set aside her feelings about the Fifth Amendment, expressing a preference to hear what the defendant had to say. (VI RT 1223.) When the court asked if she could set aside her personal feelings about these matters, Ms. Ranes noncommittally answered, "I would have to." (VI RT 1224.) As Bell has previously pointed out, this panelist's acknowledgement of the obligation to set aside her personal feelings falls short a commitment to do so. (*People v. Tate, supra.*)

Ms. Ranes' extremely close familial relationship with a possible police officer witness in the case – her husband's brother -- was precisely the type of relationship to "some aspect of the litigation ...that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." (*United States v. Gonzalez* (9th Cir. 2000) 214

F.3d 1109, 1112.) Yet the court denied defense counsel's for-cause challenge, noting that the panelist had answered, "she *thought* she could be fair and impartial ... even if her brother-in-law testifies." (VI RT 1229; emphasis added; see *United States v. Sithithongtham, supra,* 192 F.3d at pp. 1121-1124 ["A juror who 'would probably give [law enforcement officers] the benefit of the doubt' is not what we would consider impartial."].)

The goal of *voir dire* in a death penalty case is not supposed to be to "salvage" obviously biased jurors, but rather to find fair-minded jurors who will impartially evaluate the guilt and penalty phases of the defendant's case. (*People v. Hoyos, supra,* 41 Cal.4th at p. 908.) But in this case, it clearly appears that the trial court's overriding goal was to expedite *voir dire* rather than to take the time necessary to find genuinely unbiased jurors. The trial court berated panelists who dared give "inappropriate" responses to death qualification questions, lectured panelists about what the law required and what the panelist would "have to" do to serve as a juror, and asked sometimes accusatory and almost always leading questioning designed to elicit "yes" or "no" answers giving disingenuous lip service to neutrality. The trial court disregarded the overwhelming weight of evidence that these seven panelists were substantially impaired from considering a life sentence, instead accepting at face value these prospective jurors' tepid "yes" and "no" answers that favored retention.

Substantial evidence is lacking to support the court's findings that each of these panelists was satisfactorily life-qualified. The pro-death penalty biases of these prospective jurors were unmistakably clear. The panelists' tepid assurances that they could, or could possibly, or would "have to" consider imposing life imprisonment, listen to the evidence and follow the law do not overcome the overwhelming inference from panelists' other written and verbal statements that in fact they would be substantially impaired. (*Uttecht v. Brown, supra,* 551 U.S. at p. 18.) The

trial court erred by disingenuously resolving doubts about panelists' disqualifying biases in favor of permitting all to serve. (*United States v. Nelson, supra*, 277 F.3d at p. 202.)

### F. The Trial Court Erred And Abused Its Discretion By Denying Bell's For Cause Challenge Of Prospective Juror King.

In prospective juror King's questionnaire, he evinced a strong pro-death penalty, and pro-law enforcement bias. (V JQ 1250, 1256, 1258.) During death qualification *voir dire*, however, King gave assurances that he would weigh the testimony of police officers equally with other witnesses, set aside any personal feelings he had about the death penalty and decide the case on the evidence. (VI RT 1204-1213.) Defense counsel did not move to excuse Mr. King at this point.

Later in jury selection, it was revealed that the murder victim's widow, Esther Francis, worked at the dialysis center where prospective juror King's wife received treatment. Mrs. King was seriously ill, and needed dialysis to survive. (VIII RT 1701-1704.) Esther Francis had treated Mrs. King on at least two occasions and was scheduled to be a witness at Bell's trial. (VIII RT 1704-1705.) The court refused to excuse Mr. King for cause, and belittled counsel's concern that the Mrs. Francis' testimony would appeal to the sympathies of Mr. King, who would view her as the caregiver of his dying wife. (VIII RT 1707-1708.)

The denial of Bell's for-cause challenge was error. When the government seeks to exact upon a defendant the ultimate penalty, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." (*Mattox v. United States, supra*, 146 U.S. at p.149.) The young newly wed wife whose husband Bell allegedly killed had actually furnished life-saving care to prospective juror

King's wife. Mrs. Francis had recognized prospective juror King as the husband of her patient. (VIII RT 1704-1709.) The potential for substantial emotional involvement, adversely affecting impartiality, is evident when a juror must decide the guilt and penalty of a person accused of killing the husband of someone who is a caregiver for his own wife. (*United States v. Allsup* (9th Cir. 1977) 566 Fed.2d 68, 71-72 [potential for substantial emotional involvement, adversely impacting impartiality, is evident when prospective jurors work for a bank that has allegedly been robbed by the defendant].) It was an abuse of discretion for the trial court to deny defense counsel's challenge for cause against prospective juror King.

### G. The Trial Court Improperly And Repeatedly Threatened To Penalize Bell's Counsel With Cessation Of Hovey Voir Dire As Punishment For Voicing Objections, Thereby Unconstitutionally Chilling The Ability of Bell's Counsel To Conduct Voir Dire To Elicit Possible Sources Of Implied And Actual Bias.

On the third day of jury selection, March 11, 1999, upon denying defense counsel's challenge for cause to prospective juror Armendariz, trial counsel asked to put something on the record. (IV RT 591.) The trial court indicated he would allow Mr. Faulkner to speak, but warned him that the court would cease conducting individual death qualification of panelists if counsel was "going to do that on every ... potential juror." (IV RT 591.)

The termination of sequestered *voir dire* would have had extremely negative consequences for Bell. Exposure to the death-qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death, more likely to assume the law disapproves of people who oppose the death penalty, more likely to assume the judge, prosecutor and defense attorney all believe the defendant is guilty and will be sentenced to die, and more likely to believe the defendant deserves the

death penalty. (John H. Blume, et al, *Probing "Life Qualification" Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209, 1232, n. 258 (2001); *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Edition, February 2003) [hereafter, 2003 ABA Guidelines]; Guideline 10.10.2; *Voir Dire* and Jury Selection; Commentary, p. 102, n. 260; see also, Samuel L. Gross, *ABA's Proposed Moratorium: Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Prob. 125, 147 (Fall, 1998).) The degree of prejudicial alteration of jurors' attitudes resulting from the death qualification is increased when questioning of venire persons is conducted in a group. (*Hovey v. Superior Court, supra,* 28 Cal.3d at pp. 79-80.) This Court long ago recognized that the

> most practical and effective procedure available to minimize the untoward effects of death-qualification is individualized sequestered *voir dire*. Because jurors would then witness only a single death-qualifying *voir dire* – their own – each individual juror would be exposed to considerably less discussion and questioning about various aspects of the penalty phase before hearing evidence of guilt.

(*Ibid.*)

Our adversary system of criminal justice "is premised on the notion that an advocate may zealously protect his or her client's interests." (Cf. *Franklin Mint Co. v. Manatt, Phelps & Phillips* (2010) 184 Cal.App.4th 313, 356.)

> "One of the most serious threats to zealous advocacy is the imposition of sanctions against lawyers who file pleadings or make arguments that are deemed to be 'frivolous.'"

(*Ibid.*, quoting Freedman & Smith, *Understanding Lawyer's Ethics* (2d ed. 2002) § 4.07, p. 93.) An attorney fearful of retaliation is more likely to temper the zealousness of his or her advocacy. The creativity of lawyers

"who operate on the leading edge of legal development" is thereby chilled. (*Ibid.*)

> Even 'settled' legal questions must be open to challenge at some point, or else the law would stultify.

(*Ibid.*)

For these reasons, courts in the civil context have disfavored causes of action for the tort of malicious prosecution. (*Franklin Mint Co. v. Manatt, Phelps & Phillips, supra,* 184 Cal.App.4th at p. 356.) Similarly, when reviewing claims of ineffective assistance of counsel in criminal cases, courts have accorded great deference to the tactical decisions of trial counsel in part to *avoid* chilling vigorous advocacy. (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) In both the civil and criminal context, it is well recognized that "the limits of the power to punish [a lawyer] for contempt are the least possible power adequate to the end proposed." (*Harris v. United States* (1965) 382 U.S. 162 [15 L.Ed.2d 240, 86 S.Ct. 352].)

> "Unless a lawyer's conduct manifestly transgresses that which is permissible it may not be the subject of charges of contempt. Any other rule would have a chilling effect on the constitutional right to effective representation and advocacy. In any case of doubt the doubt should be resolved in the client's favor so that there will be adequate breathing room for courageous, vigorous, zealous advocacy."

(*In the Matter of Judith L. Gorfkle* (D.C. App. 1982) 444 A.2d 934, 941; internal citation omitted.)

Appellate courts must ensure that attorneys are given great latitude in the area of vigorous advocacy; only by resolving doubts in favor of advocacy can "an independent and unintimidated bar…be maintained." (*In the Matter of David Dellinger* (7th Cir. 1972) 461 F.2d 389, 398.) In *Cooper v. Superior Court* (1961) 55 Cal.2d 291, 278, in which a defense attorney in

a death penalty case was adjudged guilty of contempt, this Court accepted the argument that,

> the power to silence an attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy has been afforded.

Nowhere is the need *not* to chill zealous advocacy more critical than in a death penalty case, in which the client's *life* is at stake. "The selection of jurors is a critical area of a jury trial, especially in a capital case." (*Harris v. Blodgett* (W.D. Wa. 1994) 853 Fed. Supp. 1239, 1265.) The state has an obligation to assure reliability in the process by which a person's life is taken. (*Gregg v. Georgia, supra,* 428 U.S. 153, at pp. 196-206.) The risk in denying adequate *voir dire* is "most grave when the issue is of life or death." (*Aldridge v. United States, supra,* 283 U.S. at p. 314.) Moreover, "[t]he conventional wisdom is that most trials are won or lost in jury selection." (John H. Blume, et al., *supra,* 29 Hofstra L. Rev. at p.1209, 1209 & n. 1.)

The American Bar Association [ABA] Standards for Criminal Justice therefore provide:

> Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

(*ABA Standards for Criminal Justice: Prosecution Function and Defense Function,* Standard 4-1.2(c).) The *2003 ABA Guidelines* demand that defense counsel,

> ... conduct a *voir dire* that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, whether because they will automatically vote for death in certain circumstances or because they are unwilling to consider mitigating evidence. Counsel should also develop a

> strategy for rehabilitating those prospective jurors who have indicated opposition to the death penalty.

(*Keith v. Mitchell* (6th Cir. 2006) 455 F.3d 662, 688; quoting *2003 ABA Guideline* 10.10.2, Commentary, p. 102; see also, *Cox v. McNeil* (11th Cir. 1998) 638 F.3d 1356.) Although the most recent ABA death penalty guidelines were compiled in 2003, several years after the trial in this case, the guidelines essentially codify professional norms for capital cases that have existed since the 1980's. (*Hamblin v. Mitchell* (6th Cir. 2003) 354 F.3d 482, 486-487; Eric M. Freedman, *Introduction to 'The Guiding Hand of Counsel': ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31(4) Hofstra L. Rev. 903, 903 (2003).)

In this case, when counsel sought to meet stringent professional norms by conducting questioning broad enough to expose prospective jurors with disqualifying biases, he was *threatened* by the trial judge with cessation of sequestered *voir dire* – a method of jury selection designed to reduce the quantum of prejudice inherent in exposure of jurors to the death qualification process. (See, Blume, et al, *supra*, at p. 1232; see also James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2097 & n. 164 (2000).) Moreover, the court's intention to *punish* Bell for counsel's vigorous advocacy is unmistakably clear. The court obviously knew that cessation of sequestered death qualification would risk making the jury more death prone. (Blume, et al, *supra*; Liebman, *supra*.)

Because of the court's threat, counsel was left with no option but to self-limit his questioning so as to avoid the likelihood that the court would carry out its threat, and that panelists, upon hearing repeated discussion of the death penalty during *voir dire*, would become substantially more likely to sentence Bell to die. Unlike the situation where a trial court merely limits questioning on subjects that might be helpful for screening out biased jurors

(cf. *Mu'min v. Virginia* (1991) 500 U.S. 415, 425-426 [114 L.Ed.2d 493, 111 S.Ct. 1899]), the court's threats rendered the trial fundamentally unfair.

Significantly reduced zeal in the later questioning of prospective jurors by trial counsel is evident in defense counsel's questioning of the *actual* jurors in this case. There is evidence in the record that counsel "'pulled his punches,'" i.e., failed to represent Bell as vigorously as he might have had it not been for the court's repeated threats to cease *Hovey voir dire*. (*People v. Easley* (1988) 46 Cal.3d 712, 725; *People v. Roldan* (2005) 35 Cal.4th 646, 674.)

"[E]ither party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721.) In fact, it is error for a trial court to prohibit a defense attorney from inquiring during *voir dire* whether prospective jurors would automatically vote for the death penalty based on evidence that the defendant has committed a prior similar crime. (*Ibid.*) In this case, counsel *on several occasions* after being threatened refrained from asking questions of actual jurors whose questionnaires suggested the possibility that Bell's prior robbery conviction, or at least his service of a prior prison sentence, would cause them to vote for the death penalty regardless of mitigating circumstances. (See, XII RT 2501-2502.)

For example, Juror no. 1,[14] who expressed support for the death, identified a defendant's "prior convictions" as something she would want to know about before making a penalty decision. (XVI JQ 4646.) Yet defense

[14] Juror no. 1 was questioned on Friday, March 12, 1999.

never inquired of juror no. 1 whether Bell's history prior crimes would cause this juror to impose a sentence of death. (V RT 1019.)

Juror no. 3[15] expressed support for the death and opined that, if the defendant were found guilty of murder with special circumstances, the punishment must equally fit the crime. (XVI JQ 4722-4723.) This juror also felt that anyone who plans and commits a murder, or anyone who attempts to commit a serious crime and kills someone, should get the death penalty. (XVI JQ 4725.) Like juror no. 1, juror no. 3 opined that anyone who has been in prison before and kills someone should get the death penalty. (XVI JQ 4726.) Mr. Faulkner asked this juror only two questions regarding whether he could listen to the evidence and "keep an open mind." (VII RT 1403-1404.) Not a single question was asked about this juror's possible predisposition to vote for death given Bell's service of a prior prison term.

Juror no. 8 left blank a question asking whether anyone who has been in prison in the past and kills someone should get the death penalty. (XVII JQ 4921.) Counsel failed to even touch upon the juror's failure to answer the prison question, or to determine if the juror's views about someone who had previously been in prison and killed someone were a potential source for pro-death penalty bias. (VIII RT 1522-1523.)

ABA Guidelines declare that counsel should employ a case-specific *voir dire* strategy that chooses a jury most favorable to the theories of mitigation that will be presented. (*2003 ABA Guidelines, supra,* Guideline 10.10.2, Commentary, p. 101.) Counsel's strategy included presentation of mitigating evidence of Bell's social history, including lifelong indications of mental and educational deficits. In several instances, actual jurors opined that the defendant's background would be irrelevant to their penalty

[15] Juror no. 3 was questioned on Tuesday, March 16, 1999.

decision. Yet counsel did not vigorously pursue *voir dire* on Bell's background as a mitigating factor.

Juror no. 2[16] stated in his questionnaire, "that is the way I feel to the tee," in response to the statement: "a person's background does not matter when deciding whether or not he or she should be sentenced to death for murder – the punishment should fit the crime." (XVI JQ 4686.) Defense counsel asked this juror only one question, having nothing to do with the juror's possible unwillingness to give any weight to Bell's mitigating background information. (VII RT 1449.)

Juror no. 8,[17] a death penalty supporter, agreed that anyone who plans and commits the death penalty should get the death penalty. (XVII JQ 4920.) Like juror no. 2, he opined that a person's background "should not matter" in the selection of the death penalty. (XVII JQ 4920.) Defense elicited a commitment from juror no. 8 to listen to "what...the prosecution thought the penalty should be" and "what...[the defense thought]...the penalty should be, and not automatically vote for the death penalty. (VIII RT 1522.) Counsel did not, however, ask whether juror no. 8 could set aside his personal views about the irrelevancy of Bell's background to the penalty determination. A commitment to "listen" to evidence or to refrain from automatically imposing the death penalty is not the same as a commitment to give weight to mitigating social history. (*People v. Tate, supra*, 49 Cal.4th at p. 675.

Jurors' attitudes toward the Fifth Amendment privilege against self-incrimination should have been of concern to defense counsel since there was a palpable risk that some jurors might not be able to disregard Bell's failure to testify at either the guilt or penalty phases of the trial. It is beyond dispute that jurors' attitudes towards a defendant's failure to testify are a

---

[16] Juror no. 2 was questioned on Tuesday, March 16, 1999.
[17] Juror no. 8 was questioned on Wednesday, March 17, 1999.

legitimate area for *voir dire* in a capital case. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 991 [counsel permitted to question jurors' attitudes toward the privilege against self-incrimination].) In this case, the questionnaire included a question asking whether prospective jurors could "put aside" any feelings that the defendant should testify. Juror no. 1 answered this question with a question mark. (XVI JQ 4658.) Counsel should have been interested in knowing why Juror no. 1 left this important question blank, and whether she could set aside her feelings, if any, about Bell's exercise of Fifth Amendment privilege. Yet defense counsel failed to inquire. (V RT 1019.)

Applying a different standard to evaluate the credibility of police officer witnesses is contrary to the court's instructions and violative of a juror's oath of impartiality. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.) Juror no. 9[18] admitted in his questionnaire that he would find more credible witnesses who were peace officers because "this is their work," despite an admonishment in the questionnaire that this was contrary to what the law required. (XVII JQ 4976.) Although it was a certainty that numerous law enforcement officers would be testifying at Bell's trial, defense counsel made no effort to probe the Juror no. 9's pro-law enforcement bias. (VIII RT 1624.)

Accordingly, this Court does not have to look far to find evidence that the trial court's threatening conduct eventually wore counsel down and caused him to " 'pull his punches,'" i.e., to desist from representing represent Bell as vigorously as he might have during death qualification *voir dire*. (*People v. Easley, supra,* 46 Cal.3d at p. 725; see also, *People v. Roldan, supra,* 35 Cal.4th at p. 674.)

---

[18] Juror no. 9 was questioned on Wednesday, March 17, 1999.

### H. The Guilt And Penalty Judgments Should Be Reversed Notwithstanding Trial Counsel's Failure To Utilize All Of Bell's Peremptory Challenges, And The Fact That None Of The Panelists Who Were Challenged For Cause Sat On Bell's Jury.

In Bell's case, none of the panelists for whom challenges for cause were erroneously denied ended up sitting on Bell's jury. One became an alternate juror. Most were excused by the defense using peremptory challenges. Several were simply not called to the jury box. (VIII RT 1714, 1716, 1717, 1718, 1724-1726.) Defense counsel accepted the jury after using only 14 of his peremptory challenges. (VII RT 1720.) Ordinarily, issues concerning a court's denial of defense challenges for cause must be preserved on appeal by taking three steps: (1) by exercising peremptory challenges to remove the prospective jurors in question; (2) by exhausting all peremptory challenges allotted by statute and holding none in reserve and (3) by expressing to the trial court dissatisfaction with the jury as presently constituted. (*People v. Mills* (2010) 48 Cal.4th 158, 186-187.) An exception exists, however. "In addition, the issue may be deemed preserved for appellate review if an adequate justification for the failure to satisfy these rules is provided." (*Id.* at p. 186.)

In Bell's case, adequate justification exists to address the issue on the merits and to reverse the judgment, despite trial counsel's ostensible failure to satisfy the above-referenced rules. Here, the entire jury selection process was rendered fundamentally unfair and constitutionally unreliable by the court's misapplication of the *Witt* standard, and the use of threats against trial counsel to curtail *voir dire*.

Structural error occurs in very limited circumstances, when the likelihood that a verdict is unreliable and the consequences of error so

unquantifiable that reviewing courts will forego individual inquiry into prejudice and simply presume that prejudice has occurred. In such circumstances, a presumption of prejudice applies as a prophylactic measure because application of a *Strickland*[19] standard of prejudice is inadequate to assure vindication of the Sixth Amendment right to counsel. (*Mickens v. Taylor* (2002) 535 U.S. 162, 176 [152 L.Ed.2d 291, 122 S.Ct. 1237]; *People v. Rundle* (2008) 43 Cal.4th 76, 173.)

The trial court's use of an "appropriate response" test to supplant genuine assessments of jurors' attitudes toward capital punishment, paired with the court's threatening conduct during jury *voir dire* should be treated as reversible error *per se*. As appellant has previously pointed out, counsel actually failed to represent Bell as vigorously during *voir dire* as he would have had it not been for the judge's repeated threats to stop sequestering jurors for the purpose of death qualification. (See, Argument I, G, *ante*.) In many instances involving panelists who became sworn jurors, counsel failed to pursue appropriate questioning where actual jurors' questionnaires contained answers suggesting possible sources of pro-prosecution bias. The trial court's conduct of jury selection completely undermined the right to effective counsel during jury selection, the ultimate fairness of the trial, and the reliability of both the guilt and penalty phase judgments. (U.S. Const., Amendments VI, VIII, & XIV; see also *Gregg v. Georgia, supra*, 428 U.S. 153, 196-206; *Mattox v. United States, supra* 146 U.S. at p. 149; *Aldridge v. United States, supra*, 283 U.S. at p. 314.)

The denial of an impartial tribunal is considered structural error, requiring automatic reversal of the entire judgment. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 294 [113 L.Ed.2d 302, 111 S.Ct. 1246]; opinion of White, J., dissenting in part and concurring in part].) So is the denial of the

---

[19] *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674, 104 S.Ct. 2052] [hereafter, *Strickland*].)

right to counsel of choice, even when a competent attorney represents a defendant. (See, *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 [165 L.Ed.2d 409, 126 S.Ct. 2557].) In both instances, the harm is not quantifiable. The error here should be deemed structural, too. The adverse consequences to Bell of his trial counsel's tempered zeal in selecting an impartial jury are just as unquantifiable as are the adverse consequences to a defendant who is erroneously denied his right to choose retained counsel, or denied the right to an impartial judge or jury.

### I. The Trial Court Arbitrarily Violated Bell's Right To The Use Of Peremptory Challenges, Resulting In The Denial Of A State-Created Procedural Protection In Violation Of Federal Due Process.

In *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227], the United States Supreme Court made it clear that, when a state has provided for the imposition of criminal punishment subject to certain procedural protections, it is not correct to say that the denial of those protections "is merely a matter of state procedural law." A liberty interest protected by the federal Due Process Clause may result from a state's failure to abide by procedural rules created under state law. (*Hicks, supra*; *Marsh v. County of San Diego* (9th Cir. 2012) 680 F.3d 1148, 1157; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

In this case, the trial court effectively eviscerated Bell's state-created right to a full complement of peremptory challenges, provided to vindicate the right to a jury free of biased jurors. (Cf. *People v. Webster* (1991) 54 Cal.3d 411, 439.) The court's arbitrary denial of this right, which resulted from the deliberate misapplication of the *Witt* standard, resulted in a violation of the Due Process Clause of the Fourteenth Amendment. (*Hicks*

*v. Oklahoma, supra,* 447 U.S. at p. 346; *Carter v. State* (Miss. 2001) 799 So.2d 40, 47.)

## II

## BELL WAS DENIED DUE PROCESS, A FAIR TRIAL, EQUAL PROTECTION AND A RELIABLE DETERMINATION OF PENALTY BY THE TRIAL COURT'S UNREASONABLE REFUSAL TO ALLOW SECTION 987.9 FUNDS TO BE SPENT ON AN INVESTIGATOR WHO WAS ALSO A JURY SELECTION CONSULTANT, RATHER THAN ON AN INVESTIGATOR WITHOUT ANY JURY SELECTION EXPERTISE OR A SECOND ATTORNEY.

### A. The Facts:

On May 8, 1998, defense counsel filed a confidential declaration and request pursuant to section 987.9 seeking $5,510 in funding to hire New Mexico jury consultant, Eda` Gordon to assist with jury selection. (I § 987.9 Reporter's Transcript [hereafter 987.9 RT] 119-124.) The declaration asserted in relevant part that the

> State in this case has a significant advantage over the defendant with respect to resources and manpower available to it at its discretion. The District Attorney's office has access to all criminal history information concerning prospective jurors, has access to other sources of information unavailable to the accused, has the ability and funds to deploy more manpower in investigation and preparation than the accused, and the absolute discretion to have any expert it wishes, in addition to those automatically available to it, without any court supervision over selection and payment whatsoever.

(I 987.9 RT 120.) A copy of Ms. Gordon's Curriculum Vitae was attached as an exhibit to the motion. (I 987.9 RT 122-123.) Counsel declared that the services of a jury consultant were necessary in order to effectively represent Bell at a death penalty trial. (I 987.9 RT 119.) The request for funding was summarily denied without a hearing. The order recited that defense counsel was "quite competent to select his own jury, especially in this day and age of voir dire being conducted judicially." (I 987.9 RT 124.)

On May 18, 1998, counsel filed a supplemental declaration in support of petitioner's request for funding for a jury consultant. The declaration set forth counsel's expectation that counsel for the parties would be involved in sequestered *voir dire*, that lengthy juror questionnaires would be filled out by panelists, and evaluated and graded by trial counsel prior to *voir dire*. (Application for Augmentation on Appeal, filed September 27, 2012, Appendix [hereafter 9/27/12 Aug. Appendix].) Counsel further declared that, assuming the court conducted *voir dire*, the need for a jury consultant would be even greater because of the increased speed of the jury selection process and the smaller amount of information elicited upon which to base a decision. Counsel averred, *inter alia*, that the use of a jury consultant would save the county money inasmuch as he was being paid $100 per hour, while the jury consultant would be charging for her time at $60 per hour. (9/27/12 Aug. Appendix.)

Counsel's declaration asserted that denial of a jury consultant would deny Bell due process, a fair trial before an impartial jury, and the effective assistance of counsel. (9/27/12 Aug. Appendix.) Counsel further asserted that denial of a jury consultant would deny Bell equal protection of the laws because four similarly situated capital defendants had received funding for a jury consultant, three of which received sentences of life without the possibility of parole. (9/27/12 Aug. Appendix.) Counsel declared that in three Stanislaus County cases, *People v. Brooks* (Case No. 235572), *People v. Hoskins* (Case No. 250173) and *People v. Stephens* (Case No. 259693), funding for a jury consultant had been approved, and in all three cases the defendants had received a sentence of life without the possibility of parole. (9/27/12 Aug. Appendix.) In a fourth case, *People v. Moore* (Case No. 30966), a defendant represented by the Public Defender had used Eda Gordon as a jury consultant and received a verdict of life without parole. (9/27/12 Aug. Appendix.)

An *ex parte* hearing was held on counsel's request for a jury consultant on May 27, 1998, outside Bell's presence. (I 987.9 141-142.) At the hearing, deputy public defender Greg Spiering was called as a witness to testify about his successful use of Eda Gordon as a jury expert in the capital case of Rhett Lamar Moore, in which Gordon helped him secure a sentence of life without parole. (I 987.9 RT 144-157.)

In support of the motion, defense counsel also submitted a Declaration signed by attorney Robert Wildman, stating that he had represented defendants in the *Brooks*, *Hoskins*, and *Stephens* cases, in which he requested and received funding for a jury consultant pursuant to section 987.9. (I 987.9 RT 157.)

The court took the matter under submission, but denied the request for funding for a jury consultant in a lengthy minute order. (I 987.9 RT 138.) The court found that there was "nothing so unusual or complex" about Bell's case that it would require the expertise of a jury consultant over and above the expertise of counsel, who had "considerable experience in trying capital cases...." (I 987.9 RT 138.) The court expressed doubt that the use of a jury consultant would save money because counsel would have to spend time consulting with the expert in the preparation of, and review of, the questionnaires. (I 987.9 RT 138.) The court further found that the District Attorney had "no advantage over Defense Counsel" in information it had about prospective jurors. (I 987.9 RT 138.)

Regarding the four murder cases tried in Stanislaus County using jury consultants, the court referred to the "many, many murder cases" tried without a jury consultant, and ruled that it did not violate Bell's constitutional rights that he had been denied funding for a particular expert that another defendant had been granted. (I 987.9 RT 139.)

On June 5, 1998, Bell's counsel filed a Request For New Hearing on Defendant's Application for Funding for a Jury Consultant. (Augmentation

to Sealed Record dated April 27, 2011.) The ground for the motion was that Bell was not personally present and had not waived his presence at the prior hearing, as required by section 977, subdivision (b)(1). (*Ibid.*)

Another *ex parte* hearing on Bell's request for funding for a jury consultant was held on July 23, 1998, before a different judge, this time in Bell's presence. (Augmentation to Sealed Record dated April 27, 2011; Sealed Transcript of July 23, 1998 hearing [hereafter, 7/23/98 SRT].) The court could not find a copy of the May 18, 1998, Supplemental Declaration in the court's files, but a copy without a file-stamp was furnished to the court for purposes of the hearing. (7/23/98 SRT 2-5.)

At the hearing, public defender Gregory Spiering testified again regarding his use of Eda Gordon as a jury consultant in the case of Rhett Lamar Moore, which had been tried several months earlier. (7/23/98 SRT 8.) Moore was a young African-American man charged with murder during a convenience store robbery. The victim was a young Assyrian man, and the crime was captured on videotape. (7/23/98 SRT 18.) The jury returned a guilty verdict and found special circumstance allegations true. (7/23/98 SRT 9.) Mitigating evidence included evidence of the defendant's limited cognitive functioning, mental problems, and difficult family history. The jury returned a verdict of life without parole. (7/23/98 SRT 9.)

Eda Gordon consulted with Spiering about the contents of the jury questionnaire. (7/23/98 SRT 9.) She advised him about the types of jurors who would be desirable on the jury. Gordon analyzed juror hardship questionnaires to determine whether they met requirements to be relieved from sitting on the case. She also analyzed 150 38-page juror questionnaires, rated each jurors' responses, including attitudes toward the death penalty, and reduced their material responses to a 2-page summary. (7/23/98 SRT 10.) Gordon further helped Spiering decide what questions to ask since limited questioning by counsel was to be permitted. (7/23/98 SRT

10.) During trial, Gordon sat at counsel table, which allowed Spiering to focus on questioning, while Gordon observed the demeanor of jurors as they responded. She also helped counsel articulate bases for legal challenges to jurors, preserve issues for appeal, and present motions during the course of jury selection. (7/23/98 SRT 11.)

In Spiering's opinion based on post-trial interviews of jurors, Gordon did an excellent job. (7/23/98 SRT 15.) Additionally, using a jury consultant allowed Spiering to spend less of his time on jury selection-related tasks and more time preparing for trial. (7/23/98 SRT 16-17.)

The court questioned the relevance of his assertion that Gordon had been effective at screening for jurors who would be open to considering certain types of evidence in the case. (7/23/98 SRT 12.) The court also inquired whether the district attorney was going to have a consultant at counsel table, to which defense counsel responded, "I have no idea." (7/23/98 SRT 13, 27.) Counsel noted that in the Moore case, the district attorney had the assistance of a detective and his investigator during the entire jury selection. (7/23/98 SRT 14-15, 24.)

Bell's counsel expressed certainty that there would be a penalty phase, and argued that Bell's case was different from other capital cases he had tried due to the significant amount of mental health evidence that would be presented at the penalty phase. (7/23/98 SRT 19.) He also talked about the difficulty of addressing attitudes formed by jurors in response to advertising and media, and suggested that there was extreme sensitivity in the community to violence that needed to be addressed in jury selection. (7/23/98 SRT 19-21.)

The court questioned Ms. Gordon's qualifications to act as a jury consultant, noting the lack of any psychological training, or anything he could see in her background, other than experience consulting, establishing a level of expertise that would make her more qualified than counsel or an

investigator. (7/23/98 SRT 22.) Counsel argued that there was not an investigator in the county qualified to evaluate jurors. He also indicated that, despite his confidence in Gordon's skills, he would be "more than willing" to hire a California jury consultant if the court had reservations about Ms. Gordon. (7/23/98 SRT 24.)

Counsel informed the court that he and the district attorney, Ms. Fladager, had agreed on using a 38-page questionnaire in Bell's case. (7/23/98 SRT 27.) Counsel assumed that someone from the district attorney's office would assist the trial deputy by analyzing the questionnaires. (7/23/98 SCT 27.)

The motion for appointment of a jury expert was denied in a page-long minute order, which provided in relevant part:

> The Defendant has not demonstrated that denial of his motion will deny Defendant's constitutional right to effective assistance of counsel because:
>
> 1. No evidence is offered the District Attorney has or is going to retain a "jury expert."
> 2. No satisfactory connection is shown between the jury consultant's claim of expertise and the objective of acquiring a fair and impartial jury, or between her claim of expertise and the verdicts in trials, which she has participated. The jury expert sought is, in fact, a private investigator.
> 3. The evidence is insufficient to conclude the peculiar facts of Defendant Bell's case are such that he will not receive a fair trial unless and/or that the District Attorney will acquire a favorable jury, as opposed to a fair jury, unless the jury expert is retained.
>
> The defendant has demonstrated that his counsel will need private investigator assistance in study and review of the jury questionnaires. (No doubt, the District Attorney also will require such investigator assistance.) This assistance should be predicated on a study and review of 75 questionnaires for 75 "hardship qualified" jurors. Also some allowance for review of the questionnaires on jurors who claim hardship should be included.

> The PC 987.9 application is DENIED, without prejudice to reapply as set forth above, in the event none of the prior applications for private investigator services have included this subject matter.

(II 987.9 RT 202.)

On or about July 31, 1998, defense counsel filed a declaration and request for $4,500 in funding to pay *private investigator* Eda Gordon the sum of $50 per hour to assist counsel with evaluating juror questionnaires. (II 987.9 RT 215-217.) The court granted counsel's request for $2,750.00 in funding, payable at $50 per hour, but specified that the sum was "authorized to be paid for services rendered by one of he previously authorized private investigators, Joe Maxwell or Richard Wood." (II 987.9 RT 218.)

On August 24, 1998, defense counsel filed another declaration and request for funding for an investigator to assist with jury selection. Counsel alleged that he had discussed the matter with investigators Joe Maxwell and Richard Wood. Both investigators had indicated they were not qualified to assist counsel with jury selection in a capital jury trial.[20] Counsel indicated he had met with Dr. Karen Fleming, Ph.D., a trial consultant from Oakland, California with experience selecting jurors in capital cases. He requested $7,000 in funding to hire Dr. Fleming to assist counsel during jury selection. Dr. Fleming's experience included consulting with the defense in more than 20 capital cases, and assisting the prosecution in jury selection in the Timothy McVeigh trial. (II 987.9 RT 219-220, 225.)

---

[20] The confidential section 987.9 transcripts include a declaration signed by Joe Maxwell as Exhibit A to one of counsel's funding requests. The declaration was executed on August 14, 1998, and averred that Maxwell lacked the qualifications to assist with the selection of the jury, and presumably was filed with the court prior to its ruling on September 1, 1998. (II 987.9 RT 224.)

Counsel asserted that he did not have the qualifications and experience necessary to pick jurors who would understand and accept the issues necessary to give Bell's case in mitigation adequate consideration. He further alleged that denial of a jury consultant would deny Bell the effective assistance of counsel and a fair trial. (II 987.9 RT 220.)

On August 28, 1998, defense counsel filed a supplemental declaration in support of his request for a jury consultant, accompanied by a detailed itemized Proposal for Jury Consultation Services by the National Jury Project at a total projected cost of $7,500, plus expenses. (II 987.9 RT 228-238.)

On September 1, 1998, the court denied the request for funding for Dr. Fleming in a minute order, referring back to the minute order of August 12, 1998, ordering $2,750 in funding to pay either Joe Maxwell or Richard Wood to assist with jury selection, and excluding payment for meals, lodging or transportation. (987.9 RT 222-223.)

In late October of 1998, defense counsel filed a declaration seeking an increase in funding for investigative assistance during jury selection, to $4,625, billable at $50 per hour. (II 987.9 RT 255-256.) Counsel also alleged that neither Joe Maxwell nor Richard Wood were willing to assist with jury selection. He requested modification of the previous order to allow for the hiring of an investigator other than Maxwell or Wood to review jury questionnaires and confer with defense counsel. The Court signed the order allowing counsel to hire a "person" to perform investigative services, but refused to increase the sum approved for investigative services. (II 987.9 RT 258.)

On December 8, 1998, defense counsel filed another declaration, requesting reconsideration of the prior request for funding to hire Dr. Karen Fleming as a jury consultant. Counsel alleged that absence of a jury consultant would deny Bell due process and a "level playing field."

Counsel also requested an immediate *in camera* hearing. (II 987.9 RT 2260-262; see also II RT 87.)

An *in camera* hearing on counsel's request for a jury consultant was held on December 29, 1998. (12/29/98 Sealed Reporter's Transcript of § 987.9 hearing [SRT] 92-119.) At the hearing, deputy district attorney Birgit Fladager testified that a second prosecutor, Douglas Raynaud, had been assigned to jointly try Bell's case. (12/29/98 RT 94-95.) Fladager anticipated having Raynaud assist her at all stages of the trial, including jury selection. According to Fladager, if there were insufficient time for both lawyers to analyze all questionnaires, the two deputies would divide the juror questionnaires between them to rank the panelists' desirability from the prosecutions' standpoint. Additionally, one district attorney would conduct *Hovey* questioning while the other watched jurors and made notes on how jurors' demeanors while answering questions. (12/29/98 SRT 97.)

Following the testimony of Ms. Fladager, defense counsel described his anticipated mitigation case in some detail, explaining the importance of having a jury receptive to considering such evidence. (12/29/98 SRT 98-99.) Counsel reiterated that he lacked the expertise to select jurors receptive to this type of mitigation evidence. He further explained that the process of selecting a capital jury required two sets of eyes. Counsel asserted he would be deluged with information from questionnaires and trying to watch the prospective jurors and make eye contact. Counsel argued that he could not competently read all of the questionnaires and evaluate all the jurors alone. (12/29/98 SRT 101-102.) Counsel pointed out that the cost of a jury consultant would be less than the cost of paying a second attorney to sit in the courtroom for the entire trial. (12/29/98 SRT 102.)

The court denied the request for a jury consultant, stating that nothing presented at the hearing had convinced him that Bell would be disadvantaged by *not* having a jury selection expert present, since there was

no proven relationship between the use of a jury expert and the outcome of a capital trial. (12/29/98 SRT 107-108.)

Counsel informed the court that the two investigators he had been authorized to hire had refused to help with *voir dire*, stating that they were incompetent to do the job. Counsel admitted he had not searched for another investigator, but knew of none with the expertise he desired. (12/29/98 SRT 112-114.) The court accused counsel of trying to circumvent the court's denial of the motion to hire the New Mexico jury consultant, Eda Gordon, and denied the motion for any additional investigative funding. (12/29/98 SRT 116-117; II 987.9 295.)

Subsequently, counsel filed a declaration and request for funding to hire Karen Kelly, an attorney, as *Keenan* counsel. The court awarded $6,750, payable at the rate of $75 per hour for the services of Ms. Kelly "as needed during jury selection . . . to assist in selecting jury." (II 987.9 296-300.)

### B. Bell, An Indigent Defendant In A Capital Prosecution, Was Entitled To The Tools Of An Adequate Defense, A Right Guaranteed By The Due Process And Equal Protection Clauses Of The Fourteenth Amendment.

Although *Ake v. Oklahoma* (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087] [hereafter, *Ake*] is most often cited for the proposition that an indigent defendant must be given access to "the raw material integral to the building of an effective defense," this important principle actually had its origins many years earlier in judicial decisions construing the Equal Protection and Due Process Clauses of the federal constitution, and laws implementing those protections.

The constitutional guarantee of counsel in a capital case was first established by the Supreme Court in 1932, in *Powell v. Alabama* (1932) 287 U.S. 45 [77 L. Ed 158, 53 S.Ct. 55]. The *Powell* decision was rooted in

the Sixth Amendment right to counsel, and the Due Process Clause of the Fourteenth Amendment. (*Id.*, at pp. 71-72.)

Soon thereafter, in *Griffin v. Illinois* (1956) 351 U.S. 12 [100 L. Ed. 891, 76 S.Ct. 585], the United States high court attacked the problem of "[p]roviding equal justice for poor and rich, weak and powerful alike..." (*id.*, at p. 16) in the context of an Illinois law that required indigent defendants in noncapital cases to pay for a stenographic record of the trial as a prerequisite to a complete appeal. The Illinois law provided a free transcript to indigent defendants to the limited extent necessary to obtain review of constitutional questions, but not of other alleged trial errors, such as the admissibility and sufficiency of evidence. (*Id.*, at p. 15.) The Supreme Court held that, inasmuch as appellate review was an "integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant" (*id.*, at p. 18), it violated the Due Process and Equal Protection Clauses to deny "the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." (*Ibid*)

Not long after the decision in *Gideon v. Wainwright* (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792] guaranteed the right to counsel in a *state* criminal proceeding, Congress passed the 1963 Criminal Justice Act [CJA].[21] The purpose of the CJA was to furnish counsel for defendants

---

[21] California codified the constitutional guarantee of counsel decades earlier, in 1872. (Deering's California Codes Annotated, §§ 686 [the right "to appear and defend in person with counsel"] 858 [duty of magistrate to advise defendants of the "right to the aid of counsel in every stage of the proceedings"]; 859 [duty of magistrate to advise a defendant of "the right to have the assistance of counsel" and to assign counsel if the defendant is unable to employ counsel]; 987 [prescribing procedures to apply for court-compensated counsel].) Section 987.2, which provided a system for compensation of court-appointed counsel, was first enacted in 1941. (Deering's California Codes Annotated, § 987.2; added Stats. 1941, ch.

"financially unable to obtain adequate representation." (18 U.S.C. § 3006A(a); *Self v. United States* (6th Cir. 1978) 574 F.2d 363, 366.) The goals of the CJA were "stated repeatedly and in no uncertain terms" in congressional hearings and reports, i.e., "to diminish the role poverty plays in securing to a criminal defendant a fair trial, an experienced lawyer, a trained investigator or a technical expert." (John F. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents* (1982) 51 U. Cin. L. Rev. 574, 600.)

On March 8, 1963, President John F. Kennedy wrote a letter to the Speaker of the House of Representatives, recommending "prompt and favorable action by Congress" on the proposed Criminal Justice Act. (*Self v. United States, supra*, at p. 366.) President Kennedy aptly wrote in relevant part:

> "In the typical criminal case the resources of the government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow."

(*Ibid.*)

More than 20 years later, the United States Supreme Court, in *Ake v. Oklahoma, supra*, 470 U.S. 68, held that it violated the Fourteenth Amendment's due process guarantee of fundamental fairness for Oklahoma to refuse to provide expert psychiatric assistance to a defendant who had

---

451, § 1 as Pen. Code, § 987a.) Section 987.9, the statute providing funding for investigators and experts for indigent defendants in capital cases, was added in 1977. (Deering's California Codes Annotated, § 987.9; added by Stats. 1977, ch. 1048, § 1, effective September 24, 1977.)

raised an insanity defense to a capital murder charge. Justice Marshall, writing for the majority, applied the three-factor test of *Mathews v. Eldridge* (1976) 424 U.S. 319 [47 L.Ed.2d 18, 96 S.Ct. 893], to determine whether the denial of a psychiatric expert had denied Mr. Ake the "'basic tools of an adequate defense....'" (*Ake, supra*, at p. 77, quoting *Britt v. North Carolina* (1971) 404 U.S. 226, 227 [30 L.Ed.2d 400, 92 S.Ct. 431].) Applying the *Mathews* test, the Court considered: (1) "the private interest that will be affected by the action of the State;" (2) "the governmental interest that will be affected if the safeguard is to be provided;" and (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." (*Ake v. Oklahoma, supra*, at p. 77.)

The Supreme Court described the "private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk" as "uniquely compelling." (*Ake, supra*, at p. 78.) Mr. Ake, like Bell, was subject to the death penalty.

The Supreme Court was not persuaded by the state's argument that providing Mr. Ake with psychiatric assistance "would result in a staggering burden to the State." (*Id.*, at p. 78.) The Court noted that many states, as well as the federal government, made psychiatric assistance available to indigent defendants, without finding the financial burden prohibitive. (*Ibid.*) Moreover, the Court found it "difficult to identify any interest of the States," other than economy, that weighed against recognition of a right to psychiatric assistance. (*Ake, supra*, at p. 79.) The Court noted that the State's interest in prevailing at trial was "necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." (Ibid.)

> ...[U]nlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.

(*Ake v. Oklahoma, supra*, 470 U.S. at p. 79.) The Court found the State's interest in denying Mr. Ake the assistance of a psychiatrist to be insubstantial. (*Ibid.*)

Last, the Court considered the probable value of psychiatric assistance, compared with the risk of error in the proceeding if such assistance was not offered. (*Ake, supra*, at p. 79.) Justice Marshall observed that more than 40 states, and the federal government had determined, either through legislation or judicial decision, that indigent defendants were entitled, under certain circumstances, to the assistance of a psychiatrist's expertise. (*Id.*, at pp. 79-80.) These statutes and judicial decisions reflected the reality that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of the psychiatrist may well be crucial to the defendant's ability to marshal his defense." (*Ake, supra*, at p. 80.)

The Court rejected the notion that psychiatric assistance was less necessary to the defense merely because psychiatry was not an "exact science." (*Id.*, at p. 81.)

> Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to attach to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and "a virtual necessity if an insanity plea is to have any chance of success." [Footnote omitted.] By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then

> laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so. In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of evolving practice.

(*Ake v. Oklahoma, supra*, 470 U.S. at pp. 81-82.) The Court concluded that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, the risk of an inaccurate resolution of the defendant's sanity was "extremely high." (*Ake, supra*, at p. 82.)

### C. State And Federal Courts Have Unreasonably Refrained From Recognizing A Constitutional Right To The Assistance Of A Jury Selection Expert Or Consultant.

#### 1. California:

In *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, in the context of a noncapital case, this Court affirmed the decision of a trial court to award funding for a jury selection expert pursuant to Evidence Code sections 730 and 731, and sections 987.6 and 987.8. The request was based on trial counsel's confidential showing that there were factors in the case necessitating special attention to jury selection. (*Id.*, at p. 321.) This Court held that the trial court was well within its discretion to order funding for the jury selection expert. (*Ibid.*)

When confronted with defense challenges to the denial of funds for a jury selection expert, however, this Court has consistently found neither statutory nor constitutional error. In *People v. Box* (2000) 23 Cal.4th 1153, for example, a panel of trial judges charged with the duty to review expert

funding requests, took the position that "'lawyers are trained as well as anyone else to select juries....'" (*Id.*, at p. 1183.) In *Box*, the trial court denied the funding request, opining that the defendant's lawyers were "adept and skilled" at jury selection. (*Id.*, at p. 1184.) The lawyers' argument, that they lacked experience selecting a jury in the post-Proposition 115 era,[22] or in a case involving a child's murder, was rejected. (*Ibid.*)

In *People v. Mattson* (1990) 50 Cal.3d 826, the defendant asserted the need for a jury selection expert in capital case involving a sexual assault based on counsel's lack of experience in selecting juries under the death qualification process established by *Hovey v. Superior Court, supra,* 28 Cal.3d 1.[23] This Court found that the denial of funds was not an abuse of discretion. (*Id.*, at p. 848.)

**2. Federal Courts**:

In *Caldwell v. Mississippi* (1985) 472 U.S. 320 [86 L.Ed.2d 23, 105 S.Ct. 2633], the defendant requested the appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, all of which requests were denied. (*Id.*, at p. 323, fn. 1.) The Mississippi Supreme Court

---

[22] Before the passage of Proposition 115 in the June 5, 1990, Primary Election, the permissible scope of *voir dire* included examination directed towards the exercise of peremptory challenges. Proposition 115 changed the scope of legitimate inquiry on *voir dire* by requiring that the examination of prospective jurors be conducted only in aid of the exercise of challenges for cause. (*People v. Mendoza* (2000) 24 Cal.4th 130, 168, fn. 5.)

[23] In *Hovey v. Superior Court, supra*, 28 Cal.3d 1, this Court decided that in capital prosecutions the death-qualification portion of each prospective juror's *voir dire* should be sequestered, meaning that it should be conducted out of the presence of other prospective jurors. This Court did not hold that sequestered *voir dire* was constitutionally required; instead, the Court mandated this practice as a rule of procedure. Proposition 15 abrogated *Hovey voir dire*. (*People v. Burney* (2009) 47 Cal.4th 203, 240.

affirmed the denials because the defendant had offered "little more than undeveloped assertions that the requested assistance would be beneficial." (*Ibid.*) The United States Supreme Court found no deprivation of due process in the state court's decision, but explicitly refrained from deciding "as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought." (*Ibid.*) The high court's decision clearly implies that a defendant might be entitled upon a more sufficient showing to the assistance of other types of experts – not just mental health experts when the defendant's mental state is at issue – as a matter of federal constitutional law.

In *Moore v. Johnson* (5th Cir. 2000) 225 F.3d 495, the Court of Appeals for the Fifth Circuit held that a Texas defendant's "purported right to a jury-selection expert wither[ed] before the language of *Ake*." (*Id.*, at p. 503.) The Court declared, "jury selection [was] not a mysterious process to be undertaken by those learned in the law only with the assistance of outside professionals." (*Ibid.*) The Court further opined:

> All competent lawyers are endowed with the "raw materials" required to pick a jury fairly disposed toward doing substantive justice. While the wealthiest defendants might elect to spend their defense funds on jury consultants, indigent defendants are not privileged to force the state to expend its funds on this exercise in bolstering an attorney's fundamental skills. Meanwhile, of course, a defendant does not lack "an adequate opportunity to present [his] claims fairly" because he has been denied a jury consultant. Communicating with the jury is a quintessential responsibility of counsel.

(*Moore v. Johnson, supra*, at p. 503.) Other federal courts have tended to follow suit. (See, e.g., *United States v. Mikos* (7th Cir. 2007) 539 F.3d 706, 712; *Jackson v. Anderson* (N.D. E.D. Ohio ) 141 F.Supp.2d 811, 853-854; *United States v. Rivera* (E.D. Virginia 2003) 292 F.Supp.2d 823, 825; *Sutton v Warden* (E.D. Tennessee 2010) 683 F.Supp.2d 640, 700-701.)

**D. Bell Made An Adequate Showing To Establish That A Jury Consultant, Or Alternatively, An Investigator With Expertise In Jury Selection, Was Integral To The Building Of An Effective Defense; Hence, The Denial Of An Investigator-Expert Violated The Sixth Amendment Right To Counsel, The Due Process And Equal Protection Clauses, And *Ake v. Oklahoma*.**

**1. Bell's Private Interest Affected By Denial Of The Assistance Of A Jury Selection Expert:**

Bell was on trial for an interracial murder of a young Assyrian newlywed man. Because evidence at the guilt phase was to include the testimony of an accomplice identifying Bell as the perpetrator of the crime, as well as a videotape of the robbery-murder, defense counsel reasonably anticipated that a penalty phase trial *would be required*, at which the effect of Bell's lifelong mental deficits on his moral culpability, and possible racial bias, would certainly be issues. It cannot be gainsaid that Bell was on trial for his life, and his lawyer knew it. Bell's interest in life was compelling. (*Ake, supra*, 470 U.S. at p. 78.)

**2. The State's Interests:**

Neither the trial court nor the District Attorney of Stanislaus County had any substantial interest in denying Bell's lawyer the assistance of an experienced jury selection expert. The District Attorney's arguable interest in prevailing at trial was "necessarily tempered by its interest in the fair and accurate adjudication" of Bell's case. (*Ake v. Oklahoma, supra*, 470 U.S. at p. 79.) There is no reason to think the District Attorney would have objected to the use of a jury consultant by the defense. Such experts had obviously been used by the defense in numerous other Stanislaus County cases, which did not result in death verdicts. (I 987.9 RT 141-157.)

It is difficult to identify any State interest other than, arguably, economy, weighing *against* paying for jury selection assistance in Bell's case. (*Ibid.*) But the *economies* of paying for a jury selection expert obviously had nothing to do with the trial court's decision to deny counsel the assistance of a jury consultant. In fact, the economies of the situation favored allowing counsel to hire someone with jury selection expertise rather than a second lawyer.

Frugality was manifestly not the court's motive. Counsel initially asked for a total of $5,510, to be paid to Eda Gordon at a rate of $60 per hour. (I 987.9 RT 119-124.) The trial court denied counsel's request without prejudice to apply for funding for an *investigator* to help with jury selection tasks. (II 987.9 RT 202.) Counsel then asked to hire Ms. Gordon as an *investigator* for $50 per hour. Instead of ordering funding to pay Ms. Gordon, a *licensed investigator* experienced in jury selection in capital cases, the court granted $2,750.00 in funds, payable at $50 per hour, however specified that the sum was only authorized to be paid for services rendered by one of the previously authorized private investigators, Joe Maxwell or Richard Wood, *neither of whom was qualified to aid in jury selection.* (II 987.9 RT 218, 224.) The denial was completely irrational.

At some point, the court gave counsel permission to hire any investigator (except Ms. Gordon) at a rate of $50 per hour, provided none of the funds would be used for meals, lodging or transportation. (12/29/98 SRT 113-114, II 987.9 RT 222-223.) In the end, however, the trial court authorized funding in excess of the $5,510 initially requested to pay Ms. Gordon -- $6,750 – to pay for second counsel in *lieu of a jury selection expert* at a rate of $75 per hour. (II 987.9 RT 296-300.)

Respondent may argue that the trial court was well within its discretion to consider the professional credentials of Ms. Gordon in ruling on counsel's request for funds to hire her. But counsel expressed a

willingness to use one of several in-state jury consultants with qualifications of the type the court had found lacking in Ms. Gordon. This did not change the court's mind. So, plainly, Ms. Gordon's qualifications were not the reason why Bell was denied the services of any jury selection expert.

Respondent may argue that the cost of an in-state jury consultant was prohibitive, and the court was well within its discretion to save the State the expense. It would have cost somewhat more to hire either of the two in-state jury consultants than to retain Ms. Gordon, who was from New Mexico. (7/23/98 SRT 22-24; II 987.9 RT 219-220, 225, 228-238.) Nevertheless, money does not appear to have been the Court's ultimate concern; the amount authorized to pay second counsel – who had no special qualifications to pick a jury – was only a few dollars less than the sum that would have been required to hire Dr. Karen Fleming, who was eminently qualified to advise counsel during selection of a capital jury. (II 987.9 RT 219-220, 225.)

Accordingly, the record as a whole suggests that the court's refusal to fund either a jury consultant – or even an investigator with experience in capital jury selection – was not economic at all. Rather, it appears the judge was personally antagonistic toward the use of jury experts because their use had resulted in verdicts of life without parole in so many capital cases. Accordingly, the judge was willing to frame funding orders in a manner insuring that, no matter how much or how little money funding was provided, funds could not be spent on a person claiming any expertise in jury selection. For all intents and purposes, the trial court did not consider the merits of counsel's request for investigative assistance, but rather denied the motion in furtherance of a policy – against jury selection assistance – which would seemingly have precluded funding for Ms. Gordon in all death penalty cases. (See, *Johnny S. v. Superior Court* (1979) 90 Cal.App.3d 826,

828.) The trial court's denial of funding for Ms. Gordon was irrational and constituted an abuse of discretion.

### 3. The Probable Value Of A Jury Consultant And The Risk Of Error In The Proceeding Without Such Assistance:

Under the third prong of *Ake*, a court must consider probable value of assistance requested by counsel, compared with the risk of error in the proceeding if such assistance is denied. (*Ake, supra*, at p. 79.) The judge who denied Bell the assistance of a jury consultant made no secret of his skepticism that a jury selection expert would have any discernable effect on the fairness of the jury to be selected. (II 987.9 RT 202.)

Bell was tried in 1999. The use of jury selection experts in the most serious criminal cases was already a well-established practice before Bell's trial. (See, *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 428; *Corenevsky v. Superior Court, supra*, 36 Cal.3d at p. 321; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1081; *People v. Whitt* (1990) 51 Cal.3d 620, 658; I 987.9 RT 144-157; see also, *Goins v. Angelone* (E.D. Va. 1999) 52 F. Supp.2d 638, 658; *United States v. McDade* (E.D. Penn. 1996) 929 F. Supp. 815, 819; *Brandborg v. Lucas* (E.D. Tex. 1995) 891 F. Supp. 352, 360; *United States v. Pasciuti* (N.H. 1992) 803 F. Supp. 499, 551; David Robinson, Jr., *Perspective: The Shift of the Balance of Advantage in Criminal Litigation: The Case of Mr. Simpson*, 30 Akron L. Rev. 1, 13 (Fall 1996).) It cannot be disputed that the Public Defender of Stanislaus County had the authority in its capital cases to hire a jury consultant, and then apply for reimbursement from the state for the costs. (67 Ops. Cal. Atty. Gen. 310 (1984); § 987.9; Gov. Code, § 15201; 2 Cal. Code Regs. §§§ 1025.1, 1025.2, 1025.3.) Bell's court-appointed counsel was authorized to request

funding for an expert, but had to do so in a confidential application to a judge. (§ 987.9.)

At the time of Bell's trial, the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases explicitly provided that counsel should consider requesting resources to pay for "jury selection assistance." (1989 *ABA Guidelines for the Appt. and Performance of Counsel in Death Penalty Cases*, Guideline 11.5.1.) In the 2003 Revised ABA Guidelines, the rationale underlying the need for expert jury selection assistance was explained in greater detail:

> Jury selection is important and complex in any criminal case. [Footnote omitted.] In capital cases, it is all the more critical. Counsel should devote substantial time to determining the makeup of the venire, preparing a case-specific set of *voir dire* questions, planning a strategy for *voir dire*, and choosing a jury most favorable to the theories of mitigation that will be presented. Given the intricacy of the process, counsel should consider obtaining the assistance of an expert jury consultant. [Footnote omitted].

(*2003 ABA Guidelines, supra,* Guideline 10.10.2, Commentary, p. 101.) The use of jury consultants is recommended in capital cases because of the difficulty of uncovering jurors during *voir dire* "who will automatically impose the death penalty following a conviction or finding of the circumstances which make the defendant eligible for the death penalty," or "who are unable to consider particular mitigating circumstances." (*2003 ABA Guidelines*, Guideline 10.10.2, History of the Guidelines, p. 100.)

At the time of Bell's trial, the *National Legal Aid & Defender Association Performance Guidelines for Criminal Defense Representation* [hereafter, NLADA Guidelines], Guideline 7.2(a)(7) (1995 ed.) also recommended that death penalty defense attorneys "consider whether to seek expert assistance in the jury selection process." The United States Supreme Court has long referred to both the ABA and NLADA Guidelines

when determining whether a defense attorney's conduct of a case has fallen below professional norms. (*Padilla v. Kentucky* (2010) 130 S.Ct. 1473, 1482 [176 L.Ed.2d 284]; *Rompilla v. Beard* (2005) 545 U.S. 374, 387 [162 L.Ed.2d 360, 125 S.Ct. 2456]; *Strickland v. Washington, supra,* 466 U.S. at pp. 688-689; see also, *Smith v. Mahoney* (9th Cir. 2010) 611 F. 3d 978, 988.)

In *Ake, supra*, the Supreme Court, ruling on the probable value of defense psychiatric assistance, considered the fact that numerous state and federal jurisdictions had recognized the reality that in some instances "the assistance of the psychiatrist may well be crucial to the defendant's ability to marshal his defense." (*Ake, supra*, at p. 80.) Numerous jurisdictions have likewise recognized the reality that jury selection in death penalty cases is increasingly complex, and a defendant on trial for his life may not be able to select a jury capable of giving any weight to certain types of mitigating factors unless counsel has help from someone with jury selection expertise.

Under modern death penalty jurisprudence, professional caliber assistance with jury selection has truly become a "basic tool" (*Britt v. North Carolina, supra,* 404 U.S. at p. 227) of an adequate defense. Since the death penalty was reinstated in California, in 1977, in the jury has played a pivotal role as the fact-finder and decision-maker in capital cases. (§§ 190.2, 190.3.) In the wake of the United States Supreme Court's decision in *Ring v. Arizona, supra*, 536 U.S. 584, the role of the jury to determine life or death is more than pivotal. The Sixth Amendment now prohibits a judge, sitting without a jury, from finding facts – other than the fact of a past conviction – necessary to impose a death judgment. (*Ring, supra*, at p. 597-608.) A jury must find all facts upon which a death judgment is based.

The qualifications for sitting on a capital jury have been especially rigorous for more than four decades. In *Witherspoon v. Illinois, supra,* 391 U.S. at p. 523, the United States Supreme Court held that a sentence of

death could not be carried out if the jury that imposed or recommended it was chosen by excluding individuals for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. Seventeen years later, *Wainwright v. Witt, supra,* 469 U.S. 412, clarified that 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.'" (*Id.*, at p. 424, quoting *Adams v. Texas, supra,* 448 U.S. 38, 45.)

Shortly thereafter, in *Morgan v. Illinois, supra,* 504 U.S. at pp. 729-730, the United States Supreme Court held that part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. The Court recognized that, without an adequate *voir dire* "'the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" (*Ibid.*, quoting *Rosales-Lopez v. United States, supra,* 451 U.S. at p. 188 (plurality opinion).)

The decisions in *Witherspoon*, *Witt* and *Morgan* dramatically increased the both the level of expertise and quantum of work required for an attorney to identify unqualified jurors in a capital case. In this case, a 39-page juror questionnaire was filled out potential jurors. In total, there were more than 5,000 pages of questionnaires filled out by panelists. Questionnaires had to be read, line-by-line, and analyzed, so that counsel could effectively screen for jurors whose attitudes toward the nature and circumstances of the crime, capital punishment, Bell's race, or various mitigating and aggravating features of Bell's crimes or life history, might be disqualifying.

"The conventional wisdom is that most trials are won or lost in jury selection." (See, John H. Blume, et al., *supra*, 29 Hofstra L. Rev. at p. 1209, fn. 1; see also, Steven C. Serio, *Comment: A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 Am. U. L. Rev. 1143, 1147, fn. 22 (June 2004).) Nowhere is selection of qualified jurors more likely pre-determinative of outcome than in a capital case, where empirical evidence suggests that selection of the death penalty is too often preordained as soon as jurors find the defendant guilty of some form of capital murder.

The Capital Jury Project [hereafter "CJP"] was created in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation. Beginning in 1991, the CJP researched the decision-making of actual capital jurors in death penalty states, including California. Having discovered through research that many jurors decide to impose death prematurely, CJP researchers decided to investigate whether jury selection procedures, even when conducted pursuant to the *Witt* or *Morgan* standards, failed to identify jurors for whom death is the only appropriate penalty for the cases on which they served. What the CJP found was that many jurors who had been screened as capital jurors under *Witt-Morgan* standards, and who sat on actual capital cases, approached the trial believing the death penalty was the only appropriate penalty for many kinds of murder.

> Over half of the jurors indicated that death was the only punishment they considered acceptable for murder committed by someone previously convicted of murder (71.6%); a planned or premeditated murder (57.1%); or a murder in which more than one victim was killed (53.7%). Close to half could accept only death as punishment for the killing of a police officer or prison guard (48.9%), or a murder committed by a drug dealer (46.2%). A quarter of the jurors thought only death was acceptable as punishment for a killing during another crime (24.2%), i.e., a "felony murder." Nearly three

> out of ten jurors (29.1%) saw death as the only acceptable punishment for all of these crimes.

(William J. Bowers and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. Law Bull. 51 (2003), p. 62.)

The complexities involved in jury selection do not end with counsel's need to identify and excuse jurors disqualified from serving by reason of their views favoring capital punishment. Consequent to the Supreme Court's decisions in *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712], and *Georgia v. McCollum* (1992) 505 U.S. 42 [120 L.Ed.2d 33, 112 S.Ct. 2348], an attorney must also maintain constant awareness of the race, gender and ethnicity of all panelists excused through the use of peremptory challenges, and be cognizant of disparate questioning practices used by opposing counsel, in order to assess whether prosecuting attorneys are exercising challenges in a discriminatory manner. The right to root out discrimination in jury selection, while important, places additional burdens on defense counsel to research, observe and record what goes on in the courtroom. (Priya Nath, *Note, Miller-El v. Cockrell*, 15 Cap. Def. J. 407, 417 (2003).)[24]

In this case, the trial court refused to allow the appointment of Ms. Gordon because of the lack of empirical proof of a relationship between Gordon's "claim of expertise and the objective of acquiring a fair and impartial jury, or between her claim of expertise and the verdicts in trials in which she has participated." (II 987.9 RT 202.) Later, the court refused to allow the use of *any* jury expert because the court remained unpersuaded

---

[24] The article discusses the Supreme Court's decision in *Miller-El v. Cockrell* (2003) 537 U.S. 322 [154 L.Ed.2d 931, 123 S.Ct. 1029], which expanded and elaborated upon the sources of evidence upon which an attorney can rely in the course of trial to prove discrimination in violation of *Batson*.

that there was a relationship between the use of a jury expert and the outcome of a capital trial. (12/29/98 SRT 107-108.)

Jury selection is no more an "exact science" than is psychiatry, of course. But, in *Ake v. Oklahoma*, the fact that psychiatry was not an "exact science," i.e., that there might be differences of opinion in the psychiatric profession regarding the definition of mental illness, or the appropriate diagnosis, cure or treatment of a defendant, was *rejected* as a basis to deny the defendant psychiatric assistance. (470 U.S. at p. 81.) The standard articulated in *Ake v. Oklahoma, supra*, 470 U.S. at p. 83, is whether the issue upon which the expert's assistance is sought will be a "significant factor" at trial. If so, it is error to deny the defendant the services of the expert if denial might increase the risk of an inaccurate resolution of the issues in controversy. (*Id.*, at p. 82.)

Bell's mental deficits were undisputedly a "significant factor" in the defense against the death penalty. Neuropsychologist Nell Riley testified at length about Bell's mental deficits. (XVI RT 3124-3207.) Gretchen White, a psychologist, also testified regarding mitigating aspects of Bell's social and mental health history. (XVI RT 3296-3368.)

In Bell's case, psychological experts were provided at state expense. The problem was that defense counsel believed that he was insufficiently experienced, and thus unqualified without expert assistance, to screen for jurors who might have disqualifying biases given the salient features of Bell's case. A jury expert could have helped counsel to identify and excuse jurors – like those jurors in the CJP study who were seated on capital juries despite *Witt-Morgan* screening – who would be predisposed to choose death based solely on a conviction of robbery-murder, and/or incapable or unwilling to consider and give mitigating weight to the testimony of Dr. Riley and Dr. White. The "risk of an inaccurate resolution" (*Ake*, at p. 82) of a capital case is just as acute when jurors are incapable of *weighing*

mitigating mental health evidence, as it is when the defendant is denied the assistance of a psychiatric or psychological expert to assist with the evaluation, preparation and presentation of such evidence at trial.

When a trial attorney believes he is deficient in the highly sophisticated skills necessary to select a life-qualified jury in a given type of case, it should not be for the court to second-guess whether the attorney in fact has such skills. A jury expert may bring to the table extensive prior jury selection experience or superior knowledge of social science and psychology that a defendant's trial lawyer lacks. (See, Steven C. Serio, *supra*, 53 Am. U. L. Rev. at p. 1150-1151.) As the Court of Appeal once noted, the practice of law has become highly specialized: therefore, we would no longer "appoint a tax lawyer to represent an indigent defendant in a rape case." (*Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 545.)

Jury selection in death penalty cases has also become highly specialized. It can no longer be assumed that all criminal defense attorneys – or even all attorneys with capital trial experience – have the skills necessary to competently screen for jurors unqualified to sit in a particular type of death penalty case. Accordingly, when jury selection expertise is made available to defense counsel in a death penalty case, "the potential accuracy of the jury's determination is ... dramatically enhanced" (*Ake*, at p. 83) because the odds are improved that unqualified jurors will not end up on the jury.

Most federal courts faced with the decision whether or not to award funding for experts give great weight to the judgment of the defense attorney that a particular expert is needed. If the attorney makes a timely and reasonable request for expert funding in circumstances in which he or she would engage such services for a client having independent financial means to pay for them, funding is granted. (*United States v. Bass* (9th Cir. 1973) 477 F.2d 723, 725; *United States v. Cooper* (2nd Cir. 1980) 626 F.2d

254, 259; *United States v. Patterson* (5th Cir. 1984) 724 F.2d 1128, 1131; *United States v. Theriault* (5th Cir. 1971) 440 F.2d 713, 716-717; *United States v. Jonas* (7th Cir. 1976) 540 F.2d 566, 569, fn. 3; *Brinkley v. United States* (8th Cir. 1974) 498 F.2d 505, 509-510.) So, too, should California courts give great weight to the good faith assertion by counsel that expert assistance is crucial to the effective presentation of the defense.

Counsel's request for a jury consultant was timely; it was made well before trial. The request for funding was also reasonable. The use of jury consultants in capital cases was a well-established professional norm at the time of Bell's trial. The Stanislaus County Public Defender was free to hire such experts for their capital clients, at state expense, without seeking permission from the court. There is no question that Mr. Faulkner, who was court-appointed but not a public defender employee, would have employed a jury consultant had he been a public defender, or had Bell had the independent means to pay for such services.

Defense counsel's requests for funding, either for an investigator with jury selection expertise or a jury consultant, were supported by a detailed showing of need. Counsel asserted that, despite prior capital trial experience, he lacked the qualifications necessary to effectively select a jury in a case involving a black defendant and Assyrian victim, where the crime was captured on videotape, and the mental impairments of the client would be a significant issue at the penalty phase of the trial. Counsel demonstrated with great specificity, in part through the testimony of public defender Spiering, exactly how the consultant/investigator's skills would be employed. The accuracy of Spiering's claim that use of a jury consultant was instrumental in obtaining a life verdict in a nearly identical type of case – an interracial robbery-murder by a black, mentally impaired client, that was caught on videotape – was not contradicted. Furthermore, it is a fact, as

counsel claimed, that the assistance of a jury selection expert would have been less costly than was the assistance of a second attorney.

Under *Ake*, a trial court is not free to reject a defendant's request for funding for psychiatric expert *merely because his counsel cannot show with any statistical certainty a relationship between the use of an expert psychiatric witness and the probable outcome of a capital trial.* Nor should a court be allowed to deny a death eligible defendant needed assistance with jury selection merely because his or her counsel cannot prove that the use of a jury consultant will change the ultimate outcome of the defendant's case.

The record demonstrates that the probable value of a jury consultant far outweighed any interest the state had in interfering with counsel's good faith determination that the expertise of a jury consultant was "crucial to the defendant's ability to marshal his defense." (*Ake, supra*, at p. 80.) Under the circumstances, it was arbitrary and capricious, and a denial of due process deny Bell's request for funding to hire Ms. Gordon, a licensed investigator with capital jury selection experience, or one of the in-state consultants for whom funding was alternatively requested. (*Ake v. Oklahoma, supra*, 470 U.S. at pp. 81-87.) Additionally, because the denial of funding for a jury expert impinged upon the effectiveness of Bell's counsel, Bell's Sixth Amendment right to counsel was also impinged.

### E. Denial Of Funding For A Jury Selection Expert Denied Bell Equal Protection.

"Both equal protection and due process emphasize the central aim of entire judicial system – all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" (*Griffin v. Illinois, supra*, 351 U.S. at p. 17; internal citation omitted.) "In criminal trials a State can no more discriminate on

account of poverty than on account of religion, race, or color." (*Ibid.*) In *Griffin v. Illinois*, the Supreme Court held that the states are not required by the Constitution to provide appellate courts or a right to appellate review; however, when a state does grant such a right, it cannot do so in a way that discriminates against some convicted defendants on account of their poverty. (*Id.*, at p. 18.)

California guarantees the right to effective counsel and also the right to reasonably necessary ancillary defense services for indigent defendants at state expense. (*Corenevsky v. Superior Court, supra*, 36 Cal.3d 307, 319-320; see also, *People v. Blair* (2005) 36 Cal.4th 686, 729-734.) As previously explained in argument D, 3, above, courts have interpreted section 987.9 as authorizing state expenditures for jury consultants when an indigent defendant is charged with a capital crime. (*Corenevsky, supra.*)

The use of jury selection experts in the most serious criminal cases was a well-established practice at the time of Bell's trial. The use of such experts was strongly recommended in capital case performance guidelines published by the American Bar Association and National Legal Aid & Defender Association. (1989 *ABA Guidelines for the Appt. and Performance of Counsel in Death Penalty Cases*, Guideline 11.5.1; *National Legal Aid & Defender Association Performance Guidelines for Criminal Defense Representation*, Guideline 7.2(a)(7) (1995 ed.).)

Counsel knew Bell's mental deficits were to be a "significant factor" in the defense against the death penalty. He believed in good faith that he needed not only mental health experts, but also someone with jury selection expertise to help select jurors capable of understanding and fairly considering the testimony of psychological experts.

Bell was a part of the class of defendants in which the prosecution was seeking to impose death, not just life without parole. Bell was indigent, and the Stanislaus County Public Defender was initially appointed to

represent him; that office withdrew because of a conflict of interest. (I RT 6, 15, 21-22, 36-38, 45.) Kent Faulkner was appointed to replace the public defender from a panel of private attorneys, but attorney's fees and ancillary defense services were still paid by the state. Had Mr. Faulkner been a public defender, he would have had the authority to hire a jury consultant without the court's consent, and his office could have applied for reimbursement from the state. (67 Ops. Cal. Atty. Gen. 310, *supra*; § 987.9; Gov. Code, § 15201; 2 CCR 1025.1, 1025.2, 1025.3.)

One prerequisite to a meritorious equal protection claim is a showing that individuals are similarly situated with respect to the legitimate purposes of the law. (*People v. Barrett* (2012) 54 Cal.4th 1081, 1107.) For all intents and purposes, Bell was similarly situated with other indigent and non-indigent capital defendants with respect to the purposes underlying the provision of ancillary defense funding. The purpose underlying such laws is to "diminish the role poverty plays in securing to a criminal defendant a fair trial, an experienced lawyer, a trained investigator or a technical expert." (John F. Decker, *supra,* 51 U. Cin. L. Rev. at p. 600; cf. *People v. Faxel* (1979) 91 Cal.App.3d 327, 331 [assuming indigent defendants must be placed on "a general level of equality with non-indigent defendants"]; *Green v. State* (Fla. 1993) 620 So.2d 188 [defendant represented by court-appointed counsel was similarly situated to other defendants represented by the Public Defender of the Tenth Judicial Circuit for purposes of funding for counsel to file a petition for a writ of certiorari]; *State v. Brown* (2006) 139 N.M. 466, 474 [indigent defendant represented by *pro bono* private counsel is similarly situated with defendants represented by Public Defender Department for purposes of expert funding]; see also, Aimee Kumer, Comment and Note: *Reconsidering Ake v. Oklahoma: What Ancillary Defense Services Must States Provide to Indigent Defendants*

*Represented By Private Or Pro Bono Counsel?*18 Temp. Pol. & Civ. Rts. L. Rev. 783 (Spring 2009).)

California traditionally applies two different standards to evaluate equal protection claims. The first standard applies to review economic or social welfare legislation in which there is discriminatory treatment of similarly situated classes of people or individuals. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 832.) This standard clothes legislation resulting in unequal treatment with a presumption of constitutionality, and requires only that the distinctions drawn bear a rational relationship to a conceivable state purpose. (*Ibid.*; see also *Harris v. McRae* (1980) 448 U.S. 297 [65 L.Ed.2d 784, 100 S.Ct. 2671] [addressing an equal protection challenge to the Hyde Amendment, which provides for the subsidy of medical expenses of women who carry their pregnancies to term, but not women who undergo abortions].)

The second equal protection standard applies when unequal treatment involves a "suspect classification," or touches upon "fundamental interests." (*In re Marriage Cases, supra*, at p. 832.) Under this standard, the court applies strict scrutiny. The State bears the burden of establishing that it has a compelling interest which justifies disparate treatment, *and* that the disparate treatment is necessary to further the compelling governmental interest. (*Ibid.*)

Although financial need alone does not identify a "suspect class" for purposes of equal protection analysis (*Harris v. McRae, supra*, 448 U.S. at p. 323), here, Bell's "interest in the accuracy of a criminal proceeding that places [his] life . . . at risk is almost uniquely compelling." (*Ake v. Oklahoma, supra*, 479 U.S. at p. 78.) Additionally, the indigent defense funding scheme impinges upon Bell's right to effective counsel, guaranteed by the Sixth Amendment, and the Fourteenth Amendment's due process guarantees. (*Ake, supra*, at p. 76; *People v. Blair, supra*, 36 Cal.4th at p.

732.) Accordingly, the disparate treatment of Bell – both the denial of a jury consultant and the court's interference with counsel's discretion to use available public funds to hire an *investigator* with jury expertise – impinge on fundamental interests, and should be subjected to strict scrutiny.

The state cannot establish a compelling interest justifying the disparate treatment of defendants represented by court-appointed private counsel and those represented by the Public Defender. A deputy public defender would have been able to use an in-house investigator, or hire investigator, and his office would have been reimbursed "at a rate not to exceed the prevailing rate paid investigators performing similar services in capital cases," providing the investigator was not the attorney of record in the case, and the work performed did not require legal research or legal representation. (67 Ops. Cal. Atty. Gen., *supra*, at p. 311; 2 CCR § 1025.2.) A deputy public defender could likewise have retained an expert to assist in jury selection – as did Mr. Spiering in the Moore case – and his office would have been reimbursed by the state for the expenses incurred by the county. The Stanislaus County Public Defender's right to reimbursement from the state would have been governed by "such factors as prevailing rates for similar services, customary fees normally approved by the court for similar services, or such other criteria or standard of comparison as may be reasonable for this particular expense." (2 CCR §1025.3.)

No compelling reason exists to deny court-appointed counsel similar leeway to hire experts that he or she deems reasonably necessary for a proper defense. Equal protection demands that a request for funding be granted when a court-appointed attorney makes a reasonable request for services of a type that would ordinarily be available to the clients of the public defender – or privately retained counsel – in a capital case, and the sums requested to pay for such services do not exceed the prevailing rates or customary fees paid for such services.

Even if, however, this Court were to apply the "rational relationship" test, the disparate treatment of Bell, merely because his lawyer was court-appointed, does not bear a rational relationship to any conceivable state purpose. The state's interest, if any, aside from assuring that Bell's poverty did not contribute to depriving him of a fair trial and effective counsel, was predominantly economic. In this case, the denial of funding is particularly arbitrary and does not appear to have been economically motivated. The trial court not only denied Bell the services of a jury consultant; additionally, the court made it clear *investigative* funding that *was* awarded could *not* be spent on counsel's preferred investigator, Eda Gordon, even though she was a licensed investigator as well as a jury consultant. Furthermore, the court eventually awarded more funding than counsel requested be spent for jury selection assistance to hire second counsel *in lieu of someone with jury expertise*.

For the foregoing reasons, Bell respectfully submits that the denial of funding for a jury consultant denied him equal protection.

**F. The Error Was Prejudicial.**

This Court has previously held that a jury selection expert is not reasonably necessary for preparation or presentation of the defense. (*People v. Box, supra,* 23 Cal.4th at p. 1184; *People v. Mattson, supra,* 50 Cal.3d 826.) For reasons stated above, prior decisions of the Court should be reexamined. Whether a jury selection expert is reasonably necessary for preparation or presentation of the defense should depend, not on black letter law, but on defense counsel's showing of need in an individual case – i.e., whether, given the unique facts of the case and the strategy and experience of trial counsel, the use of a jury consultant could be a "significant factor" (*Ake, supra,* at p. 83) in assuring the defendant is judged by jurors "qualified" to serve in a capital case, as that concept has been defined in

*Wainwright v. Witt, supra,* 469 U.S. 412, *Morgan v. Illinois, supra*, 504 U.S. 719.

In this case, defense counsel made a strong showing of case-specific need for assistance with jury selection. His request was reasonable and supported by both ABA and NLADA capital case guidelines. Had the Stanislaus County Public Defender not declared a conflict in Bell's case, it is almost certain that Bell, like Mr. Moore, would enjoyed the benefits of Ms. Gordon's services as a jury consultant. Under the circumstances, it was an abuse of discretion for the court to arbitrarily prevent counsel from using available section 987.9 funds for an investigator with jury selection expertise, effectively forcing him to expend the same resources on second counsel. (See, *Doe v. Superior Court, supra*, 39 Cal.App.4th at p. 545-547.) The trial court's ruling violated the Sixth Amendment right to counsel, as well as the Due Process and Equal Protection Clauses. As in *Ake v. Oklahoma, supra*, 470 U.S., at p. 87, the judgment should be reversed.

Furthermore, as appellant has previously pointed out, *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346, holds that a liberty interest protected by the federal Due Process Clause will result when a state arbitrarily fails to abide by its own laws. Under California law, a defendant in a capital case is guaranteed ancillary services necessary to the preparation of a defense, including expert assistance. (*Harris v. Vasquez* (9th Cir. 1990) 949 F.2d 1497, 1522; *Corenevsky v. Superior Court, supra*, 36 Cal.3d at p. 319.) It violated Bell's liberty interest guaranteed by the federal Due Process Clause for the trial court to arbitrarily deny him funds for an investigator with the particular qualifications necessary to assist with jury selection. (Cf. *Harris v. Vasquez, supra*, at pp. 1522-1523 [*Hicks* claim denied because, although section 987.9 provides the right to ancillary expert psychiatric assistance, it does not provide for judicial review of the competency of the psychiatrist or the validity of the expert's confidential report.].)

Moreover, it bears repeating that, when the government seeks to exact upon a defendant the ultimate penalty, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." (*Mattox v. United States, supra,* 146 U.S. at p. 159.) One central purpose of *voir dire* is ensuring an impartial tribunal by "exposing possible biases, both known and unknown, on the part of potential jurors." (*McDonough Power Equipment, Inc., v. Greenwood, supra,* 464 U.S. at p. 554.) The risks inherent in denying adequate *voir dire* are "most grave when the issue is of life or death" (*Aldridge v. United States, supra,* 283 U.S. at p. 314; *California v. Ramos, supra,* 463 U.S. at pp. 998-999.) Especially in a death penalty case, the Eighth Amendment demands *reliability* in the process by which a person's life is taken. (*Gregg v. Georgia, supra,* 428 U.S. at pp. 196-203.) Accordingly, the denial of assistance in jury selection compromised the reliability of the process by which Bell was convicted and sentenced to die, which violated the Eighth Amendment. The judgment should be reversed.

## ARGUMENT SECTION 2

## INTERRELATED ARGUMENTS STEMMING FROM THE TRIAL COURT'S DENIAL OF BELL'S MOTION FOR DISCOVERY OF TORY'S STATEMENTS MADE TO DEPUTY DISTRICT ATTORNEY CASSIDY WHILE CASSIDY WAS TRAVIS' DEFENSE ATTORNEY, AND MOTION TO RECUSE THE STANISLAUS COUNTY DISTRICT ATTORNEY'S OFFICE OR, ALTERNATIVELY, PRECLUDE TORY FROM TESTIFYING AGAINST BELL AT HIS TRIAL.

### INTRODUCTION

Sometime after the robbery-murder but prior to January 20, 1998, the law firm of Perry & Wildman was appointed to represent Bell's juvenile co-defendant, Tory T. Alan Cassidy, an employee at the firm, was assigned responsibility for Tory's defense. (II CT 461-462, 488; II RT 37.) On January 20, 1998, a written agreement with the Stanislaus County District Attorney was memorialized; the agreement provided that, in exchange for testimony against Bell, Tory would receive a reduction in charges from murder to accessory after the fact (§ 32). The agreement specified that Tory would be placed on probation and receive credit for time served. (II CT 462, 485-487; II RT 45, 47.)

On January 21, 1998, Cassidy was present and represented Tory when he testified against Bell at the preliminary hearing. (II CT 489.) Unbeknownst to Bell, Cassidy had accepted employment with the Stanislaus County District Attorney's Office in November or December of 1997. (II CT 478, 491-492, 47.) Cassidy continued representing Tory until he began working for the Stanislaus County District Attorney on February 2, 1998. (I CT 104; II CT 462, 491.) The firm of Perry & Wildman continued to represent Tory after Cassidy started his job as a district attorney. (II RT 37.) The client files remained with the firm. (II RT 37-37.)

During his representation of Tory, Cassidy met and conferred with Tory on more than twenty occasions to discuss his client's and Bell's involvement in the death of Mr. Francis. (II CT 463, 489, 494.) Cassidy facilitated an agreement between the prosecution and Tory after he had accepted employment as a deputy district attorney. (II CT 478.)

Members of Bell's defense team interviewed Cassidy on July 16, 1998. During the interview, Cassidy refused to reveal the contents of any of his conversations with Tory, invoking the attorney-client privilege. (II CT 494; II RT 41.)

On August 6, 1998, Bell filed a motion seeking disclosure of information related by Tory to Cassidy, recusal of the Stanislaus County District Attorney, or alternatively, an order precluding Tory from testifying against Bell. (II CT 464-484.)

An evidentiary hearing was held on Bell's motions on October 16, 1998. (2 RT 33, et seq.) At the hearing, Bruce Perry of the law firm of Perry & Wildman testified. (II RT 36, et seq.) Perry, invoking the attorney-client privilege on Tory's behalf, refused to disclose any of the contents of Tory's file to Bell's counsel. (II RT 38.)

Testifying at the evidentiary hearing, Cassidy asserted that for those criminal cases that were pending when he was working for Mr. Perry, he refrained from taking any part in discussions about the cases at the Stanislaus County District Attorney's office. Cassidy further testified that he had no supervisorial powers in the district attorney's office, and that he had no communication with anyone in the district attorney's office regarding Bell's case other than to arrange for his own appearance in court. (II RT 42-43.)

The trial court denied the motion to recuse the Stanislaus County District Attorney, impliedly sustained the invocation of attorney-client privilege as to Tory's statements to Cassidy during the course of Cassidy's

representation, and refused to preclude Tory from testifying as a witness against Bell. (II RT 62.)

## III

## BELL'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION AND COMPULSORY PROCESS WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF BELL'S MOTION FOR DISCOVERY OF TORY'S STATEMENTS TO DEFENSE COUNSEL AT A TIME WHEN COUNSEL WAS IN THE PROCESS OF APPLYING FOR, OR HAD ALREADY ACCEPTED A JOB IN THE OFFICE OF THE STANISLAUS COUNTY DISTRICT ATTORNEY, AND WAS AT THE SAME TIME NEGOTIATING A PLEA BARGAIN WITH THE DISTRICT ATTORNEY NOTWITHSTANDING THAT THE STATEMENTS WERE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE.

### A. Bell's Confrontation, Compulsory Process And Due Process Rights Were Violated By The Denial Of Discovery As To All Of Tory's Statements To His Former Attorney.

In *Davis v. Alaska* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347] (*Davis*), the United States Supreme Court declared:

> *The Sixth Amendment to the Constitution* guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas, 380 U.S. 400 (1965).*

(*Davis* at p. 315; internal citation omitted.)

In *Davis*, the United States Supreme Court explained the role cross-examination and impeachment in securing the constitutional right of confrontation:

> Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." (*Douglas v. Alabama, 380 U.S. 415, 418 (1965)*.... The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining

> immediate answers." 5 J. Wigmore, Evidence, § 1395, p. 123 (3d ed. 1940). (Emphasis in original.)
>
> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.... A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues and personalities in the case at hand. The partiality of the witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3 A.J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Green v. McElroy, 360 U.S. 496 (1959).*

(*Davis v. Alaska, supra,* 415 U.S. at pp. 315-317; accord: *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137.)

In *Davis v. Alaska, supra*, the issue was whether the Confrontation Clause was violated by prohibiting cross-examination directed at eliciting possible bias derived from a juvenile witness' probationary status, when such impeachment would conflict with the State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. (*Id.* at p. 309.) Prohibiting the defense from making inquiry into the juvenile's probationary status was found to violate the Sixth Amendment.

The high court held:

> [D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Appellant was thus denied the right of effective cross-examination which "'would be

> constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' [Citation omitted.]"

(*Davis* at p. 318.)

In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 [94 L.Ed.2d 40, 107 S.Ct. 989] (hereafter, *Ritchie*), the United States Supreme Court revisited the Confrontation Clause as well as the Compulsory Process Clause in a case in which the defendant was denied pretrial discovery of information which had potential use for impeachment purposes. The defendant in *Ritchie* was charged with sexual offenses victimizing his minor daughter. During pretrial discovery, the defense served the Pennsylvania's Children and Youth Services [hereafter "CYS"], the investigating agency, with a subpoena seeking access to records concerning his daughter. CYS failed to honor the subpoena and the trial judge refused to order CYS to disclose its files. (*Id.* at pp. 42-45.)

On appeal, the defendant argued that he could not effectively cross-examine his daughter without the CYS material, in violation of the Confrontation and Compulsory Process Clauses of the federal constitution.

The United States Supreme Court declined to reach a decision, which would have the effect of "transform[ing] the Confrontation Clause into a constitutionally compelled rule of discovery." (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. at p. 52.) The Court stated, in relevant part:

> We simply hold that with respect to this issue, the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial.

(*Id.* at p. 53, fn. 9.)

Respecting the defendant's claim that his compulsory process rights had been violated, the Court responded:

> This Court has never squarely held that the Compulsory Process Clause guarantees the right to discovery the identity of witnesses, or to require the government to produce exculpatory evidence.... Instead, the Court traditionally has evaluated claims such as those raised by *Ritchie* under the broader protections of the *Due Process Clause of the Fourteenth Amendment*.... Because the applicability of the *Sixth Amendment* to this type of case is unsettled, and because our *Fourteenth Amendment* precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the *Fourteenth Amendment*. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.

(*Pennsylvania v. Ritchie, supra*, 480 U.S. at p. 56.) The Supreme Court agreed that Ritchie was entitled "to know whether the CYS file contains information that may have changed the outcome of the trial had it been disclosed." (*Id.* at p. 61.)

At least one Justice, in a concurring opinion, disagreed with the plurality's narrow reading of the Confrontation Clause in the *Ritchie* case.

> Although [Justice Blackmun] believes that "there are cases, perhaps most of them, where simple questioning of a witness will satisfy the purposes of cross- examination,"...he also believes that there are cases in which a state rule that precludes a defendant from access to information before trial may hinder that defendant's opportunity for effective cross-examination at trial, and thus that such a rule equally may violate the Confrontation Clause.

(*Kentucky v. Stincer* (1987) 482 U.S. 730, 738, fn. 9 [96 L.Ed.2d 631, 107 S.Ct. 2658], referring to Justice Blackmun's concurring opinion in *Ritchie*.)

Furthermore, the plurality decision in *Pennsylvania v. Ritchie* marked a departure from earlier cases of the Supreme Court, which

suggested that any state action that denies effective cross-examination also violates the Confrontation Clause. In *Delaware v. Van Arsdall* (1986) 475 U.S. 673 [89 L.Ed.2d 674, 106 S.Ct. 1431], for example, counsel was improperly restricted from cross-examining a prosecution witness regarding criminal charges pending against him when he agreed to testify against the defendant. The Supreme Court held:

> By cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.

(*Id.* at p. 679.)

The Supreme Court explained:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

(*Delaware v. Van Arsdall, supra,* at p. 680, quoting *Davis v. Alaska, supra,* 415 U.S. at p. 318.) The matter was remanded to the Delaware Supreme Court with directions to determine whether, under *Chapman* harmless error analysis, the error was harmless beyond a reasonable doubt. (*Id.* at p. 684; see, *Chapman v. California* (1967) 368 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].)

Other cases make it clear that the Confrontation Clause is violated if the defense is not "'given a full and fair opportunity to probe and expose [forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.'" (*United States v. Owens* (1988) 484 U.S. 554,

558 [98 L.Ed.2d 951, 108 S.Ct. 838]; citation omitted; accord: *Maryland v. Craig* (1990) 497 U.S. 836, 847 [111 L.Ed.2d 666, 110 S.Ct. 3157].)

United States Supreme Court cases since *Ritchie* have implied, without expressly holding, that a defendant's right to compulsory process may be violated by denial of discovery, which interferes with effective cross-examination. In *Taylor v. Illinois* (1988) 484 U.S. 400 [98 L.Ed.2d 798, 108 S.Ct. 646], the Court, quoting *United States v. Nixon* (1974) 418 U.S. 683, 709 [41 L.Ed.2d 1039, 94 S.Ct. 3090], states:

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of justice would be defeated if judgments were to be found on partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed by the prosecution or by the defense."

(*Taylor v. Illinois, supra*, at p. 409.)

The Supreme Court in *Taylor v. Illinois*, also states:

> The defendant's right to compulsory process is itself designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were found to be found on a partial or speculative presentation of the facts."

(*Id.* at p. 411; quoting *United States v. Nixon, supra*, 418 U.S. at p. 709.)

This Court has implicitly assumed that a defendant's confrontation and compulsory process rights might in some cases be violated by the denial of discovery. In *Alvarado v. Superior Court, supra,* 23 Cal.4th 1121, this Court examined the Confrontation Clause in analyzing the validity of an order, entered prior to a criminal trial, authorizing the prosecutor to refuse to disclose to the defendants and their counsel the identities of

crucial prosecution witnesses, on the ground that disclosure would pose a significant danger to the witnesses' safety. This Court found the withholding of identifying witness information to be constitutionally impermissible:

> In short, although the People correctly assert that the confrontation clause does not establish an absolute rule that a witness's true identity always must be disclosed, in every case in which the testimony of a witness has been found crucial to the prosecution's case the courts have determined that it is improper at trial to withhold information (for example, the name or address of the witness) essential to the defendant's ability to conduct an effective cross-examination.

(*Alvarado v. Superior Court, supra,* 23 Cal.4th at p. 1146.)

Here, it is undisputed that a chief prosecution witness – an admitted aider and abettor – had numerous discussions with Mr. Cassidy regarding his own involvement in the alleged capital murder, as well as regarding what Bell purportedly did. The discussions with Cassidy also encompassed the possible terms of an extremely favorable plea bargain, which guaranteed Tory *probation* in exchange for testimony against Bell at his preliminary examination and trial. The discussions occurred during a period when Cassidy was applying for, being interviewed for, and awaiting the start of a job as a prosecutor in the office whose job it was to prosecute both Tory's and Bell's cases. Both Tory and Mr. Cassidy had much to gain from the negotiation of a plea bargain guaranteeing that Tory would testify against Bell. Yet this situation went undisclosed to the defense while it was occurring. Bell submits that the blanket denial of discovery of Tory's statements violated both the Confrontation and Compulsory Process Clauses of the federal constitution.

**B. Where, As Here, The Defense Attorney Had Accepted Employment As A Prosecutor When Plea Bargaining Discussions Were Occurring, The Trial Court Should Have Held An In Camera Hearing To Determine Whether The Privilege Applied To All Communications With Mr. Cassidy Regarding Plea Bargaining Or To Weigh The Confidentiality Interests of Tory and Deputy District Attorney/Former Defense Counsel Cassidy Against Bell's Constitutional Rights To A Fair Trial And To Confront And Cross-Examine The Witnesses Against Him.**

In *Swidler & Berlin v. United States* (1998) 524 U.S. 399 [141 L.Ed.2d 379, 118 S.Ct. 2081 [*Swidler*], the United States Supreme Court was called upon to address whether a lawyer's notes of an interview of a client shortly before his death were protected by attorney-client privilege. (*Swidler* at p. 401.) The dispute over the discovery of attorney notes arose out of an investigation by the United States Government's Office of Independent Counsel into whether various individuals had made false statements, obstructed justice, or committed other crimes during an investigation of the 1993 dismissal of employees from the White House Travel Office. The Independent Counsel argued that the attorney-client privilege should not prevent disclosure of confidential communications of a client who had died where the information was relevant to a criminal proceeding. (*Swidler* at p. 402.)

The United States Supreme Court reversed the Court of Appeals for the District of Columbia Circuit, which had held that the attorney-client privilege should not automatically apply after the death of the client where communications are sought for use in a criminal investigation, but rather, should be subject to a balancing test. (*Swidler* at pp. 402-403.) The high court ruled that the attorney-client privilege survived the client's death, and found no case authority for the proposition that the attorney-client privilege would apply differently in criminal than in civil cases. (*Swidler* at pp. 408-

409.) The Supreme Court expressly declined to address whether "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege." (*Swidler* at p. 409, fn. 3.)

To date, the nation's highest court has yet to directly confront a conflict between the state-law attorney-client privilege and a criminal defendant's constitutional rights under the Confrontation and Due Process Clauses. (*Murdoch v. Castro* (9th Cir. 2010) 609 F.3d 983, 993.) The dissenting opinion of Justice Sandra Day O'Connor in *Swidler*, with whom Justices Scalia and Thomas joined, dissenting, did, however, confront a related issue head-on. (*Swidler & Berlin v. United States, supra*, 524 U.S. at pp. 411-416.) Justice O'Connor's words furnish persuasive reasons to hold that exceptional circumstances implicating a defendant's constitutional rights may warrant breaching the attorney-client privilege.

Justice O'Connor disagreed with the *Swidler* majority, opining that "a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality." (*Swidler* at p. 411.) In reaching this opinion, Justice O'Connor observed:

> The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. [Citation omitted.] The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence. A privilege should operate, however, only where "necessary to achieve its purpose," [citation omitted], and an invocation of the attorney-client privilege should not go unexamined "when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise," [citation omitted].

(*Swidler* at p. 412.)

Justice O'Connor noted, accurately, that even the Office of Independent Counsel conceded, "an exception may be appropriate where the constitutional rights of a criminal defendant are at state...." (*Swidler* at p. 413.) The dissenting opinion further observed:

> A number of exceptions to the privilege already qualify its protections, and an attorney "who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit."

(*Swidler*, at p. 414.) Justice O'Connor concludes:

> Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication....

(*Swidler* at p. 416.)

Although Justice O'Connor was focused on the need for an exception to the rule that attorney-client privilege survives the death of the client, her logic applies with equal force where, as here, an admittedly culpable codefendant testifies against a defendant in a death penalty case in exchange for extremely lenient treatment in his or her own case. In this narrow circumstance, the potential harm of denying a death-eligible defendant critical impeachment evidence that is unavailable by any other means should outweigh any potential disincentive to the testifying codefendant to forthright communication with his or her lawyer. Once a bargain has been struck, and it is clear the codefendant will testify in exchange for lenity as the result of promises conveyed by the defendant's lawyer, the capital defendant's right to access information bearing on the credibility and motives of the testifying codefendant should trump the witness' right to invoke absolutely the attorney-client privilege.

The purpose of the attorney-client privilege, to encourage full and frank communication between attorneys and clients is important. However, as the United States Supreme Court explained in different context in which the attorney-client privilege was at issue, the remote possibility that attorney-client communications may eventually have to be divulged will not create a "discernible chill" on attorney-client communications. (*Mohawk Industries, Inc. v. Carpenter* (2009) 558 U.S. 100 [130 S.Ct. 599, 607, 175 L.Ed.2d 458] [*Mohawk*].) "[C]lients and counsel must [already] account for the possibility that they will later be required by law to disclose their communications for a variety of reasons...." (130 S.Ct. at p. 607; see also *People v. Gray* (2011) 194 Cal.App.4th 1133, 1139-1145.) Moreover, "protective orders are available to limit the spillover effects of disclosing sensitive information." (130 S.Ct. at p. 608.)

In *Swidler*, Justice O'Connor felt that the lower court should have been granted an opportunity to re-examine the attorney-client privileged material *in camera* to "balance these competing considerations and decide whether the privilege should be trumped in the particular circumstances of this case." (*Id.* at p. 416.) Appellant respectfully requests that this Court adopt the narrow exception to the attorney-client privilege, the need for which is implied by the dissenting opinion in the *Swidler* case; to wit, where exoneration of a potentially innocent criminal defendant is at stake, the attorney-client privilege should give way to the defendant's need for potentially exonerating or impeaching evidence.

Bell further requests that this Court fashion the same remedy in this case that was suggested by dissenting justices in *Swidler*: to remand the matter for an *in camera* review of Tory' confidential conversations with counsel to determine whether Bell was denied critical impeachment evidence stemming from what was said by the parties during plea bargaining discussions.

Bell is aware that this Court has rejected similar, if not identical, arguments brought by other defendants. In *People v. Littlefield* (1982) 136 Cal.App.3d 477 [*Littlefield*], for example, a prosecution witness who had negotiated a plea bargain respecting the same murders allegedly committed by the defendant was ordered by the trial court to testify on cross-examination as to the content of confidential conversations between him and his public defender. The Court of Appeal granted a petition for writ of mandate or prohibition, prohibiting any examination of the witness or the public defender as to communications between them. The appellate court ruled that the defendant was not entitled to invade the attorney-client privilege only to bolster his attack on the witness' credibility. (*Id.* at pp. 482-483.) The court further rejected the argument that a waiver of the attorney-client privileged occurred because the witness had testified to facts that might have been discussed in confidential conversations with his attorney. (*Id.* at p. 483-484.)

The *Littlefield* case was discussed and cited with approval by this Court in *People v. Johnson* (1989) 47 Cal.3d 1194, 1228 [*Johnson*]. In *Johnson*, the defendant similarly argued that he was denied due process by the trial court's rulings that the attorney-client privilege precluded most of his questions to a witness who had negotiated a plea bargain in exchange for his testimony against the defendant. The defendant's theory was that the public defender representing the witness (Kenneth Bianchi) had disclosed facts about the alleged murders, enabling the witness to fabricate testimony. This Court saw no grounds to violate the attorney-client privilege in this situation. (*Id.* at p. 1228.)

In *Johnson*, however, the trial court ruled that a conversation between the witness and his lawyer *at which the prosecutor was present* was not confidential and protected by the attorney-client privilege. The

court allowed questioning about what was said at the meeting with the prosecutor.

Here, the defense attorney was having conversations with a critical witness, an admitted participant in the crime, at a time when he had already accepted employment with the Stanislaus County District Attorney's office. This presents an anomalous situation unlike the facts presented in either *Johnson* or *Littlefield*. The circumstances here raise the specter of an attorney fulfilling two roles simultaneously: that of defense attorney and that of an attorney representing the interests of the District Attorney's office. Depending on what Tory knew of his lawyers' pending employment with the prosecuting attorney's office, the conversation may have been equivalent to a discussing a plea bargain in the presence of someone employed by the district attorney's office. (See, *People v. Johnson, supra*, at p. 1228.) Without an *in camera* review of what communications occurred between Tory and Mr. Cassidy – or at least an *in camera* review of the circumstances surrounding those conversations – it is impossible to know to what extent Mr. Cassidy's role as almost-prosecutor may have played a role in the shaping of Tory's testimony against Bell.

Appellant assumes that respondent will argue that, pursuant to Evidence Code section 915, the trial court has no authority to make an *in camera* review of privileged material to determine whether attorney-client privileged communications between Tory and his former attorney included evidence with which Tory's veracity could have been impeached (see, *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 736). However, Evidence Code section 915

> is based on the notion that when there is a claim of attorney-client privilege…it is neither customary nor necessary to review the contents of the communication in order to determine whether the privilege applies as the court's factual determination does not involve the nature of the

> communication or the effect of disclosure but rather the existence of the relationship at the time the communication was made, the intent of the client and whether the communication emanates from the client.

(*Cornish v. Superior Court* (1989) 209 Cal.App.3d 467, 480.) Courts may hold *in camera* hearings notwithstanding Evidence Code section 915 to review the facts asserted as the bases for the privilege. (*Ibid.*) Litigants may be required to disclose enough information *in camera* to enable the court to determine whether communications are subject to attorney-client privilege, or whether the person invoking privilege is one entitled to assert it. (*Costco Wholesale Corporation v. Superior Court, supra*, at p. 737.) Here, attorney Cassidy's status as an incoming prosecutor in the very office that was prosecuting Bell raises questions regarding whether Tory, when he communicated with his former counsel, even did so with the expectation that the information would be protected by the privilege.

In any event, Evidence Code section 915 is a state evidentiary rule. The United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [90 L.Ed.2d 636, 106 S.Ct. 2142].) The right to present a defense is guaranteed by the Fourteenth Amendment's Due Process Clause (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [35 L.Ed.2d 297, 93 S.Ct. 1038]) as well as the Sixth Amendment's right to compulsory process (*Washington v. Texas* (1967) 388 U.S. 14, 23 [18 L.Ed.2d 1019, 87 S.Ct.1920]). State evidentiary rules are unconstitutional under the Sixth and Fourteenth Amendments if they unreasonably infringe upon the right to present testimony that is critical to the defendant's theory of defense. (*United States v. Loggins* (7th Cir. 2007) 486 Fed.3d 977, 981; *Chambers v. Mississippi, supra*, at pp. 302-303.) Accordingly, apart from Evidence Code section 915's restrictions on disclosure of attorney-client

protected material at an in chambers hearing, in this case, "the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh" Tory's interest in preserving the confidence of plea bargaining discussions with counsel that resulted in a *quid pro quo* for Tory's testimony at trial. (*Swidler & Berlin v. United States, supra*, 524 U.S. at p. 413, dissenting opinion, O'Connor, J.) This Court should remand the matter for an *in camera* hearing at which the trial court would "balance these competing considerations and decide whether the privilege should be trumped in the particular circumstances of this case." (*Swidler* at p. 416.)

## IV

## THE TRIAL COURT ERRONEOUSLY REFUSED TO RECUSE THE DISTRICT ATTORNEY, AND/OR ALTERNATIVELY, TO PRECLUDE TESTIMONY BY TORY, ON THE GROUND THAT DEPUTY DISTRICT ATTORNEY CASSIDY, PRIOR TO JOINING THE DISTRICT ATTORNEY'S OFFICE, WAS THE DEFENSE ATTORNEY FOR TORY AND HELPED NEGOTIATE A PLEA BARGAIN FOR A LENIENT SENTENCE IN EXCHANGE FOR TESTIMONY AGAINST BELL.

### A. Summary And History Of The Rules Governing Vicarious Disqualification.

#### 1. Rules Governing Vicarious Disqualification Of Public And Private Lawyers:

Ethical rules impose upon every attorney two duties respecting the attorney-client relationship: enduring confidentiality of attorney-client communications and undivided loyalty to the client. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [hereafter, *Cobra Solutions*]; Bus. & Prof. Code § 6068, subd. (e); Rules Prof. Conduct, rule 3-310(C) & (E).) An attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation is automatically disqualified from doing so. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284, fn. 3.) Similarly, an attorney may not switch sides during pending litigation, representing one side and then another, as occurred in this case. (*City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23.) This is because the duty to preserve client confidences survives termination of the attorney-client relationship. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* [hereafter *SpeeDee Oil*] (1999) 20 Cal.4th 1135, 1147.)

A client may waive a conflict of interest in writing. (Rules of Prof. Conduct, rule 3-310(E).) But if the conflict is not waived, the courts have

inherent judicial power to disqualify the conflicted attorney, providing there is a "substantial relationship between successive representations." (*Cobra Solutions, supra*, 38 Cal.4th at pp. 846-847.) An attorney is automatically disqualified for conflict of interest if the attorney "had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the representation." (*Id.* at p. 847.) If a direct professional relationship existed, it is presumed, and need not be proven, that the client imparted confidential information to the attorney and the attorney is disqualified. (*Ibid.*)

In California, the ethical rules do not prescribe when an attorney's personal conflict with a client will be imputed to other attorneys in the attorney's private law firm. So-called "vicarious disqualification" rules applicable to private counsel have evolved in decisional law. (*Cobra Solutions, supra,* 38 Cal.4th at p. 847.) In the private civil context, this Court has at stated:

> Where the requisite substantial relationship between the subjects of the prior and current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is presumed and disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm.

(*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 283.)

In the *SpeeDee Oil* case, in which a party unknowingly consulted an attorney who was "of counsel" to the law firm representing the party's adversary in the subject of the consultation, this Court concluded that the conflict of the "of counsel" attorney must be imputed to the adversary's law firm. (20 Cal.4th at p. 1156.) In *SpeeDee Oil*, this Court expressly refrained from considering "whether an attorney can rebut a presumption of shared

confidences to avoid disqualification, by establishing that the firm imposed effective screening procedures." (*Id.* at p. 1151.) At least one Court of Appeal decision has concluded from this particular quote from the *SpeeDee Oil* case that "in the proper situation, ethical screening may be sufficient to rebut the presumption of imputed knowledge" in the private firm setting, particularly when "unnecessary vicarious disqualification of an entire law firm would work a severe hardship on the client deprived of counsel of its choice." (*Kirk v. First American Title Insurance Co.* (2010) 183 Cal.App.4th 776, 802, fn. 21; emphasis added.)

Assuming the Court of Appeal that rendered the *Kirk* decision is correct, vicarious disqualification of a private law firm that hires a conflicted attorney would follow similar, if not identical rules, to the rules applicable when a private lawyer joins a government office with interests adverse to the lawyer's former client in the same or closely related litigation. In that circumstance, this Court appears to condone the use of "ethical screening of that attorney within the government office to protect confidences the attorney obtained from the former attorney in a prior representation." (*City and County of San Francisco v. Cobra Solutions, Inc. supra*, 38 Cal.4th at p. 853.) The reasons cited for allowing the use of "ethical screening" to avoid the conflict include: (1) the potential financial burdens on the public due to the government's need to retain private counsel; (2) the loss in certain types of cases of the specialized expertise of an in-house attorney; and (3) the danger of litigation decisions being driven by financial considerations rather than the public interest. (*Cobra, supra*, at pp. 851-852.)

"Ethical screening" is not considered adequate, however, when private lawyer becomes the *head* of a government law office that has interests adverse to the former client. In that circumstance, disqualification

of the entire office cannot be prevented through the use of ethical screens. (*Id.* at p. 854.)

> Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire and fire is a potent one.

(*Cobra, supra*, at pp. 853-854.)

Regardless of whether vicarious disqualification is absolute or potentially rebuttable in narrow circumstances with the use of ethical shielding, the policy considerations are the same.

> Ultimately, disqualification motions involve a conflict between the clients' rights to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.

(*SpeeDee Oil, supra*, 20 Cal.4th at p. 1145.)

**2. History Of Prosecutorial Disqualification: The *Greer* Case.**

In *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255 [hereafter, *Greer*], this Court's predecessors addressed the propriety of a trial court's disqualification of an entire district attorney's office based on employment in the district attorney's office of a murder victim's mother. The superior court granted a motion to recuse the district attorney, and appointed the Attorney General to assume duties of prosecution under Government Code

sections 12550 and 12553.[25] The People sought a writ of mandate compelling the trial court to permit the district attorney's office to conduct the prosecution against the defendant, despite the fact that the victim's mother, who worked as a discovery clerk in the branch of the district attorney's office that was conducting the prosecution, was scheduled to be a witness for the prosecution.

In *Greer*, this Court addressed whether a court's power to recuse a prosecutor is properly invoked "on the basis of a determination that the district attorney's conflict of interest may bias him against a defendant." (*Greer* at p. 266.) The Court concluded:

> A trial judge may exercise his power to disqualify a district attorney from participating in the prosecution of a criminal charge when the judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office.

(*Greer, supra*, 19 Cal.3d at p. 269.)

In an opinion authored by Justice Mosk, this Court explained at length the rationale underlying its ruling. The Court preliminarily observed that a "fair and impartial trial is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law."

---

[25] Government Code section 12550 provides in relevant part: "The Attorney General…[w]hen he deems it advisable or necessary to do so by the Governor, …shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process." Government Code section 12553 provides in relevant part: "If a district attorney is disqualified to conduct any criminal prosecution within a county, the Attorney General may employ special counsel to conduct the prosecution."

(*Greer, supra*, at p. 266.) The Court further noted that it was "the obligation of the prosecutor ... to respect this mandate." (*Ibid.*) A prosecutor, unlike any other attorney,

> "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he 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."

(*Id.* at p. 266, quoting *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321].) This Court further explained,

> Society also has an interest in both the reality and the appearance of impartiality by its prosecuting officials: "It is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the appearance of impropriety."

(*Id.* at p. 268; internal citation omitted.)

**B. The Enactment Of Section 1424:**

Admittedly, neither the *Greer* rule, nor the ethical standards applicable to private or non-prosecutorial government attorney conflicts were applied in this case. This is because three years after the *Greer* decision, the Legislature enacted section 1424, ostensibly "[r]esponding to an increase in the number of recusals which the Attorney General attributed in part to *Greer's* 'appearance' standard." (*People v. Eubanks* (2006) 39 Cal.4th 47, 59.) Section 1424 imposed both procedural and substantive requirements for a motion to disqualify a city attorney or district attorney from performing an authorized duty. The statute provides in relevant part

that a motion to recuse the district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (§ 1424, subd. (a)(1).) As construed by this Court, two discrete elements must be proven prerequisite to disqualification. First, a "conflict" must exist. For purposes of the statute, a "conflict" "exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." (*People v. Connor* (1983) 34 Cal.3d 141, 148; accord: *People v. Eubanks* (1996) 14 Cal.4th 580, 594.) "Thus, there is no need to determine whether a conflict is 'actual,' or only gives the 'appearance' of conflict." (*People v. Connor, supra.*) The second prerequisite for disqualification is proof that the conflict is "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*Id.* at p. 147; *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.)

Pronouncements of this Court interpreting section 1424 have placed the burden on defendants "of demonstrating a genuine conflict." (*Haraguchi, supra*, at p. 709.) Furthermore, on appeal, a trial court's decision to grant or deny a recusal motion is reviewed for abuse of discretion. (*Haraguchi v. Superior Court, supra*, 43 Cal.4th at pp. 711-712.)

### C. The Trial Court Abused Its Discretion In Denying Bell's Motion To Recuse The Stanislaus County District Attorney From Prosecuting His Case.

The material facts are not really in dispute. Mr. Cassidy filled out an application and was interviewed for the job at the Stanislaus County District Attorney in mid-1997, at a time when he was actively defending Tory in a matter in which Bell, Tory and Tory's mother had been charged. (I RT 2-80; II RT 47; II CT 492.) Negotiations over a bargain for Tory

started sometime prior to Cassidy's application to the District Attorney. (II RT 48.) Although most of the details of the bargain were, according to Cassidy, worked out prior to Cassidy's application for employment, final terms of the bargain were not finalized on paper until January 20, 1998, a month after Cassidy accepted employment with the District Attorney. (II RT 49-52; II CT 491.) Cassidy began work for the District Attorney on February 2, 1998. (II CT 493.)

In an apparent effort to establish an "ethical screen" against disqualification of the entire District Attorney's office (*People v. Gamache* (2010) 48 Cal.4th 347, 365), Alan Cassidy testified that he had not had any contact with the Bell case file since his employment with the district attorney began, and further that, other than for purposes of scheduling his testimony, he had not discussed the case with either of the prosecuting attorneys. (II RT 41-42.) Cassidy also indicated he had no supervisorial powers at the district attorney's office, did not oversee other DA's and was not involved in hiring and firing. (II RT 42-43.) However, Cassidy also admitted that there were no written policies in the District Attorney's office that he was aware of relating to his communication with other deputies about Bell's case. Furthermore, Cassidy's personal office was on the same floor as the office of prosecuting attorney Fladager, 40 to 50 feet away, separated by a "couple of partitions." (II RT 44.)

The evidence fails to establish the existence of an "ethical screen" adequate to ameliorate an actual conflict of interest that resulted from the commencement of contemporaneous negotiations between Alan Cassidy and the head of the District Attorney's over Cassidy's prospective employment as a deputy district attorney and a plea bargain for Cassidy's client. Cassidy's obligation, as Tory's lawyer, was to "'investigate carefully all defenses of fact and of law that may be available....'" [Citation omitted], and to "gather as much information as possible about the case,

including facts concerning the acts charged, possible defenses, and the accused's background and prior record." (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751.)

> A primary source of such information is the accused himself. Often, whether guilty or innocent of the offense charged, the accused knows facts pertinent to his defense which may tend to incriminate or embarrass him.... Thus, if an accused is to derive the full benefits of the right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney.

(*Ibid.*)

Likewise, Cassidy was obliged to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code § 6068, subd. (e).) No matter how potentially damaging Tory's disclosures were to his own case, or to his credibility as a potential witness against Bell, his attorney could *only* be required to reveal confidential information if he deemed it necessary "prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." (*Ibid.*) Yet, unavoidably, Cassidy would have recognized that his prospects for employment, or the terms of his eventual employment, could be improved if he could gain for his prospective employer substantially unimpeachable testimony by the juvenile codefendant against Bell.

In contrast, the ethical duty of the Stanislaus County District Attorney was not to win the case against either Bell or Tory, but to see that justice was done – i.e., "that guilt shall not escape or innocence suffer." (*Berger v. United States, supra*, 295 U.S. at p. 88; see also, *People v. Superior Court (Greer), supra,* at p. 266.) Moreover, the due process clause required the District Attorney to disclose to Bell and his counsel all substantial material evidence known to the prosecution team that was

possibly favorable to the defense, even in the absence of a request. (*People v. Clark* (2011) 52 Cal.4th 856, 981-982; *Kyles v. Whitley* (1995) 514 U.S. 419, 432-441 [131 L. Ed.2d 490, 115 S.Ct. 1555]; *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 11194].) The prosecution's duty to disclose thus extended to disclosing to the defense any information that could be used to impeach Tory's narrative of the events on the night of, and in the wake of, the murder. (*People v. Clark, supra*, at p. 982; *United States v. Bagley* (1985) 473 U.S. 667, 682-682 [87 L.Ed.2d 481, 105 S.Ct. 3375].)

The District Attorney had an overriding ethical duty – owed to Bell as well as members of the public – to act impartially and insure that justice would be done. (*Greer, supra*, 19 Cal.3d at p. 268.) The District Attorney's goal of inducing Mr. Cassidy to abandon private practice – and with it his representation of Tory – and to accept employment in the prosecutor's office had obvious potential to influence the course of the District Attorney's conduct insofar the plea bargaining process and Mr. Cassidy's job prospects were concerned. In this manner, both the Stanislaus County District Attorney and counsel for Tory, upon engaging in contemporaneous negotiations over Cassidy's future employment and Tory's plea bargain during the pendency of Bell's trial proceedings, functioned under conflicting ethical obligations and personal motives.

Assuming section 1424 imposed on Bell the obligation to establish that a conflict of interest existed that made it unlikely Bell would receive a fair trial, he sustained that burden. Section 1424 provides for disqualification whether the conflict is actual or apparent, so long as the conflict is "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*People v. Connor, supra,* 34 Cal.3d at p. 148.) Relevant factors for the court's consideration include not only the circumstances producing the conflict, but

also the size of the prosecuting attorney's office; in a smaller office where prosecutors are in close quarters, it is more likely that prosecuting attorneys will be consciously or unconsciously adversely affected by a colleagues interest in a case to a degree rendering it unlikely the defendant will receive a fair trial. (*Id.* at p. 149.)

In *People v. Connor*, the District Attorney's office was composed of about 25 attorneys. This Court affirmed the trial court's decision to disqualify the entire prosecutor's office where one deputy was an eyewitness to an incident in which the defendant pointed a revolver at deputy sheriffs, and fired a shot, in an effort to escape. Here, the record fails to establish the size of the Stanislaus County District Attorney's office in the years 1997 and 1998. However, Stanislaus County's Adopted Final Budget for Fiscal Year 2011-2012 states that current staffing levels of "33 Deputy District Attorneys is the same level as in 1994." (Adopted Final Budget, Fiscal Year 2011-2012, Stanislaus County, California, p. 92.) Hence, it is apparent that the Stanislaus County District Attorney's Office is relatively small.

Furthermore, the record shows the absence of any real effort to build an "ethical wall" between Cassidy and the District Attorney or individual attorneys prosecuting Bell's case. Typical elements of effective ethical screens generally include: (1) physical, geographic, and departmental separation of attorneys; (2) prohibitions against, and sanctions for, discussing confidential matters; (3) rules and procedures preventing access to confidential information and files; (4) procedures which prevent the disqualified attorney from profiting from the prior representation. (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4$^{th}$ 109, 116, fn. 6.) Here, there were no written policies in the District Attorney's office prohibiting Cassidy from communicating with other deputies about the murder case. Furthermore, Cassidy's personal office was on the same

floor as the office of prosecuting attorney Fladager, 40 to 50 feet away, separated by a "couple of partitions." (II RT 44.) Moreover, it appears that the offices of Cassidy and Fladager were separated by dividers, not doors. Under such circumstances, the risk was high that the all attorneys involved would consciously or unconsciously be adversely affected by their colleagues' interests in the case to a degree rendering it unlikely Bell would receive a fair trial. (*People v. Connor, supra,* 34 Cal.3d at p. 149.)

In *People v. Griffin* (2004) 33 Cal.4th 536, a study in contrasts, this Court affirmed a trial court judgment refusing to disqualify the entire District Attorney's office where an investigator employed the District Attorney was a witness in the defendant's case. The conflict stemmed from the employee's work three years earlier as a private defense investigator for the defendant's brother, who was charged with a murder unrelated to the charges against the defendant. At the time, the investigator had briefly collaborated with an investigator who was representing the defendant. On one occasion, the investigator had attended a team meeting relating to the defendant's case. However, she had never engaged in discussions about defendant's case with any person other than the defendant's attorney or his agents, and to her knowledge, no one in the district attorney's office even knew about her involvement in the cases of the defendant or his brother. (*Id.* at p. 568.) Furthermore, in arguing for recusal, defense counsel for Mr. Griffin conceded that the absence of any "actual conflict." (*Ibid.*) The conflict was even more attenuated in *Griffin*, because the witness-investigator was only a temporary employee of the district attorney's office, and she worked with the civil section of the juvenile division of the office that was situated in a building *miles away* from the building in which the criminal prosecutor's office was located. Here, of course, both Cassidy and the District Attorney would have been engaged for months in contemporaneous discussions over a job for Cassidy and a plea bargain for

Tory, culminating in Cassidy working from an apparently open office setting just yards from the prosecuting attorney in this case.

In *People v. Gamache, supra,* 48 Cal.4th 347, this Court likewise affirmed a trial court's denial of the defendant's motion to recuse the entire district attorney's office where a surviving victim of the crimes had been employed as a typist by that office for ten years. In *Gamache*, the District Attorney's Office was large, with 500 employees and 122 deputy district attorneys, who were divided into three administratively and operationally separate divisions. The district attorney had never had any social contact with the employee, did not know her by name and would not have recognized her if he had run into her on the street. Although the crimes occurred in the region covered by the Desert Division office of the district attorney, where the surviving victim had worked, the case was quickly reassigned to a completely separate division of the prosecutor's office that was 75 miles away. An ethical screen was put into place to make sure that the Desert Division employees played no role in the case, and the attorney actually assigned to prosecute the case had never worked at the Desert Division office and did not know the secretary-witness. (*Id.* at pp. 363-365.)

Here, in contrast, we have a chief public prosecutor and his agents, and a privately employed criminal attorney representing Bell's codefendant, interacting over a sustained period of time to secure a job for the private attorney and a plea bargain for the codefendant he represented. Once Mr. Cassidy left private practice to work for the District Attorney, he would necessarily have had close daily contact with the prosecutors handling Bell's case. A victim's financial assistance to a district attorney's office may produce a disqualifying conflict of interest because a prosecutor "must be free of special interests that might compete with the obligation to seek justice in an impartial manner...." (*People v. Eubanks, supra,* 14 Cal.4th at

p. 588.) By analogy, while the lawyer for an accused codefendant is negotiating to be hired the prosecuting attorney's office at the same time he is negotiating for a plea bargain which would benefit his own client and disadvantage the other codefendants, all parties participating in the negotiations, including the prosecuting attorneys, labor under special interests that compete with the obligation to seek justice for all defendants in an impartial manner. (*Ibid.*)

Furthermore, the disabling conflict did not magically disappear when Tory's attorney began work as a district attorney, ostensibly washing his hands of involvement in his former client's case. In a small public law office, the opportunities for advancement based on the successful prosecution of a defendant in a high publicity death penalty case – reliant in large part on the testimony of a colleague's former client – would have continued to be palpable.[26]

"[N]eutrality is a critical concern in criminal prosecutions because of the important constitutional liberty interests at stake." (*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 54.) In this case, Bell's important constitutional interests in liberty and life were at stake; the death penalty has long been recognized to be profoundly different from all other penalties. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [71 L. Ed 1, 8, 102 S.Ct. 869], cited with approval in *People v. Frank* (1985) 38 Cal.3d 711, 729, fn. 3.) How could Bell or the public ever be certain of the prosecutor's neutrality under the circumstances extant? Both the elected District Attorney and Cassidy, as a new member of the office, would have

---

[26] Notably, Birgit Fladager is now the District Attorney of Stanislaus County rather than a deputy. Alan Cassidy is a Chief Assistant District Attorney and oversees other deputy district attorneys assigned to the Preliminary Hearing Unit, the Special Victims' Unit, Domestic Violence Unit, Major Narcotic Vendor Unit, the Career Criminal Unit and the Vehicle Theft Unit.

been highly motivated to immunize Tory against impeachment that could result from examining any express or implied promises made by Cassidy in pursuit of settlement of Tory's case and a job. Under the circumstances, the trial court abused its discretion by refusing to recuse the entire Stanislaus County District Attorney's office from the prosecution of Bell's case.

### D. Section 1424 Violates Bell's Constitutional Rights To Equal Protection, Due Process And A Reliable Death Penalty Determination To The Extent It Imposes On A Defendant In A Death Penalty Case A More Stringent Burden Of Proof, And Applies A More Favorable Ethical Standard For Disqualification Of Prosecutors Than Other Attorneys.

#### 1. Criminal Defendants Receive Unequal And Disadvantageous Treatment Under Section 1424.

As Bell previously pointed out, section 1424 accords *prosecuting* attorneys' offices special treatment when it comes to the rules governing vicarious disqualification. If Alan Cassidy had joined a private law firm with clients whose interests in substantially the same litigation were adverse to Cassidy's former clients, disqualification of the entire law firm would have been either automatic, or the District Attorney would have been burdened with rebutting the presumption of a disqualifying conflict by proving timely establishment of an effective ethical screen. (*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 283; *Kirk v. First American Title Insurance Company, supra,* 183 Cal.App.4th at pp. 809-816.) Bell would not have been burdened with the need to prove that adverse effects from Cassidy's change of employment were probable.

A different standard would also have applied had Cassidy joined another government law office rather than the District Attorney's office. If Cassidy had obtained confidential information from a party to litigation,

and then joined a government office with adverse interests in the same litigation, the standards for disqualification would have depended upon whether Cassidy was the head of the government office, or just an employee. (*City and County of San Francisco v. Cobra Solutions, Inc., supra,* 38 Cal.4th 839.) If Cassidy were just an employee, as he was in this case, the government office in question would have been permitted to avoid vicarious disqualification of the entire office by setting up an "ethical screen," adequate to protect confidences he may have obtained from the former client in the prior representation. (See *City of Santa Barbara v. Superior Court, supra,* 122 Cal.App.4th 17.) The state would have borne the burden of establishing that staff members working on the prosecution had been effectively screened from contact with the disqualified staff member. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 166, fn. 11.) Bell would have had no burden to prove the conflict was "so grave" as to render it unlikely that he "would receive fair treatment." (*People v. Conner, supra,* 34 Cal.3d at p. 147.)

In short, section 1424 applies much more relaxed ethical standards to apparent conflicts of interest arising in the context of a criminal prosecution. Only in a criminal case must the risk that the defendant will not receive a fair trial "rise to the level of a likelihood of unfairness" before disqualification is allowed. (*Stark v. Superior Court of Sutter County* (2011) 52 Cal.4th 368, 416.) Only in a criminal case is disqualification disallowed even when the prosecutor's continued participation in the prosecution "would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system." (*Ibid.*)

**2. Analysis Of Equal Protection Claims.**

The Equal Protection Clause of the Fourteenth Amendment denies to States "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." (*Eisenstadt v. Baird* (1972) 405 U.S. 438, 447 [31 L.Ed.2d 349, 92 S.Ct. 1029].) In evaluating claims advanced under the Equal Protection Clause, courts will first determine "'what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.'" (*Zablocki v. Redhail* (1978) 434 U.S. 374, 383 [ 54 L.Ed.2d 618, 98 S.Ct. 673]; internal citation omitted.)

> When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

(*Id.* at p. 388; accord: *Fullerton Joint Union High School District v. State Board of Education* (1982) 32 Cal.3d 779, 798.) Under the so-called "strict scrutiny" standard applied to "fundamental interests" cases, "the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*People v. Olivas* (1976) 17 Cal.3d 236, 243; original emphasis.)

There is "an additional dimension to equal protection which requires that statutory classifications be related to *permissible* purposes." (*Parr v. Municipal Court* (1971) 3 Cal.3d 861, 864; original emphasis.) A statute may be violative of equal protection even if the distinctions drawn by the law are necessary to further its purpose, if motives of hostility or antagonism toward a certain group of individuals underlie its enactment, rather than a concern for the public good. (*Ibid.*)

### 3. In This Case, Fundamental Interests Are Encroached By Penal Code Section 1424: Bell's Fundamental Rights To Life, Liberty, A Fundamentally Fair Trial And A Reliable Death Judgment.

In this case, section 1424 significantly interferes with Bell's fundamental interests in life, liberty, and the right to a fair and reliable adjudication of both guilt and punishment phases of a death penalty trial.

> Due process requires that a criminal trial proceed with that fundamental fairness which has been found essential to the concept of justice.

(*People v. Olivas, supra*, 17 Cal.3d at p. 250; see also *Lisenba v. California* (1941) 314 U.S. 219, 236 [86 L. Ed. 166, 62 S.Ct. 280].) The specific guarantees of due process secured by the Fourteenth Amendment "exist largely because of the great concern our system of justice exhibits for procedures which can result in deprivations of personal liberty." (*People v. Olivas, supra*, at p. 249.) "[P]ersonal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 837.)

> A fair and impartial trial is a fundamental aspect of the right to accused persons not to be deprived of liberty without due process of law.

(*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 266.)

Prosecutors play a key role in guaranteeing criminal defendants a fair trial. A prosecutor is not just another advocate; he or she is a public official with the duty to represent the state. The prosecutor's interest in a criminal prosecution "'is not that [the state] shall win a case, but that justice shall be done.'" (*Greer, supra,* at p. 266, quoting *Berger v. United States, supra*, at p. 88.) Because prosecutors enjoy such broad discretion to decide

what crimes are to be charged, how they are to be prosecuted, and even whether a plea bargain will be offered to someone accused of a crime,

> the public...and those [the prosecutor] accuses may justifiably demand that he perform his functions with the highest degree of integrity and impartiality, *and with the appearance thereof.*

(*Greer* at pp. 266-267; emphasis added; accord: *People v. Eubanks, supra*, 14 Cal.4th at p. 589.) For this reason, *until section 1424 was enacted,* trial judges could exercise the power to disqualify a district attorney from participating in a prosecution if the judge determined that the attorney suffered from a conflict of interest "which *might* prejudice him against the accused and thereby affect, or *appear to affect*, his ability to impartially perform the functions of his office." (*Greer* at p. 269; emphasis added.) Section 1424 materially alters a criminal defendant's ability to recuse a prosecutor's office with an apparent conflict of interest by imposing a nearly impossible burden of proving an actual "probability that the defendant will be treated unfairly." (*People v. Gamache, supra*, 48 Cal.4th at p. 363; see e.g., *People v. Vasquez* (2006) 39 Cal.4th 47, 65.)

Furthermore, because this is a death penalty case, more than just Bell's liberty interests in a fair proceeding are at stake. Bell's fundamental right to *life* is impinged upon by section 1424. Death is "profoundly different from all other penalties." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 110.) The Eighth Amendment imposes a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. (*Caldwell v. Mississippi, supra,* 472 U.S. at p. 340.) The taking of a life is irrevocable; accordingly, in capital cases "'the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.'" (*Depew v. Anderson* (6th Cir. 2002) 311 F.3d 742, 751, quoting *Reid v. Covert* (1957) 354 U. S. 1, 45-46

[1 L.Ed.2d 1148, 77 S.Ct. 1222] Frankfurter, J. concurring.)[27] Accordingly, section 1424 also substantially interferes with Bell's fundamental right to heightened reliability in a case in which the ultimate penalty of death is to be exacted.

**4. The State Cannot Sustain The Burden Of Establishing A Compelling Interest Justifying Section 1424, Nor Are The Distinctions Drawn By The Law Necessary To Further The Statute's Purposes.**

In order to determine whether section 1424 violates equal protection, this Court must examine whether the classification scheme – in this case application of different disqualification standards for criminal case litigants versus litigants in other types of cases – rests upon some "ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Eisenstadt v. Baird, supra*, 405 U.S. at p. 447.) This necessarily requires examination of the legislative purpose underlying section 1424.

Section 1424 was the Legislature's repudiation of this Court's decision in *People v. Superior Court (Greer), supra*, 19 Cal.3d 255, which authorized judicial disqualification of prosecuting attorneys based on the

---

[27] Because of the extraordinary nature of death penalty prosecutions, this Court has applied special rules allowing defendants in death penalty cases to challenge the constitutional validity of prior convictions alleged as the basis of a special circumstance allegation, even when the issue has been decided adversely to the defendant in the direct appeal of the prior conviction. (*People v. Horton II* (1995) 11 Cal.4th 1068, 1139.) In respect of the need for heightened reliability, "[t]he Legislature of California has taken extraordinary precaution to safeguard the rights of those upon whom the death penalty is imposed..., by providing automatic appeal...and *enjoining upon this court* an examination of the record and the preparation of a formal opinion and decision from which it should appear that no miscarriage of justice has resulted." (*People v. Stanworth* (1969) 71 Cal.2d 820, 833; internal citations omitted.)

"appearance of impropriety," with the legitimate and important goal of maintaining public confidence in the integrity and impartiality of our system of justice. (*People v. Eubanks, supra*, 14 Cal.4th at pp. 591-592.) The bill adding section 1424 was sought by the Attorney General to alleviate an increase in that office's workload, which the Attorney General attributed to disqualifications based on the "appearance of conflict" test enunciated in *Greer*. (*Id.* at p. 591, fn. 3.) Pursuant to Government Code sections 12550 and 12553, when a district attorney's office is disqualified by a conflict of interest, the office of the Attorney General either takes charge of the prosecution, or hires a special prosecutor to do so.

The Attorney General's wish to shift costs hardly suffices as a "compelling" reason to substantially impair the ability of criminal defendants to disqualify prosecutors with possible conflicts of interest. The funds to prosecute come from the public coffers whether the source of the funding is the budget of the Attorney General or budget of a local prosecutor's office. (*Committee to Defend Reproductive Rights v. Cory* (1981) 29 Cal.3d 252, 278 ["The state's interest in shifting expenditures to the federal fisc, however, can hardly be described as a significant one."].)

Furthermore, in *capital* cases, considerations of judicial economy, strongly weigh in favor of procedures that prevent tainting death judgments with fundamental constitutional flaws. The public and all components of the criminal justice system are "spared the time, expense, and effort of prosecuting a capital case through trial, automatic appeal, and habeas corpus proceedings, only to have the death judgment ultimately set aside," when possible conflicts of interest in the prosecuting attorney's office are detected and averted prior to trial. (See, *People v. Horton II, supra*, 11 Cal.4th at p. 1139.)

Of equal importance, however, the justifications advanced for the enactment of section 1424 do not really have a "fair and substantial relation

to the object of the legislation." (*Eisenstadt, supra*, at p. 447.) By limiting application to criminal prosecutions, the Attorney General and the Legislature have ignored other circumstances in which vicarious or imputed disqualification of the Attorney General's office or other government agencies could occur, and cost the public money. For example, with enumerated exceptions, the office of the California Attorney General must serve as legal counsel to all state agencies, commissioners and officers in all matters in which such agencies, commissioners or officers have an interest or are parties as the result of their official duties. (Gov. Code, § 11042.) A private attorney who represents a party with interests adverse to one of the many agencies of the state could join the office of the Attorney General. In that instance, any conflict of interest on the part of the newly hired attorney would be imputed to the Attorney General's office, unless the conflict could clearly be prevented through the use of an ethical wall. The stringent standards of section 1424 would not apply, as it only imposes additional obstacles to disqualification by a party to litigation when the side-changing attorney is a prosecuting attorney.

All lawyers, private or public, are bound by the same ethical duties to maintain inviolate the confidences of all clients and to avoid representation of conflicting interests. Moreover, there is a compelling *societal* interest in having government agencies unreservedly represent the public's best interest when it is embroiled in litigation. Public perception that a government lawyer may be influenced by his or her previous representation of persons with interests adverse to the public "insidiously undermines public confidence" in Government and its lawyers. (*City and County of San Francisco v. Cobra Solutions, Inc., supra*, 38 Cal.4th at p. 854.) Rules governing vicarious disqualification have evolved in case law to preserve the integrity of the entire system of government, not just prosecuting attorneys.

"The burdens of disqualification are heavy for both private sector and public sector clients." (*Cobra Solutions, supra*, at p. 851.) Even if the burdens of vicarious disqualification are heavier for governmental law offices than for private law firms, they are heavier for *all* governmental law offices not just offices that prosecute crime. When a government law office is disqualified, the government may incur the added cost of retaining private counsel – although not so in *this* state when the Attorney General has no conflict that prevents it from taking over the prosecution from the disqualified District Attorney. (See, Gov. Code § 12550.) There may be other inconveniences as well, such as a possible delay in proceedings to find substitute counsel, or in certain types of prosecutions, the loss of specialized experience held by disqualified government attorneys. (*Cobra Solutions* at p. 851.) But all of these ills apply whenever *any* government law office is disqualified from participating in litigation, not just law offices performing prosecutorial functions. Yet section 1424 selects for disparate treatment only litigants seeking disqualification of a government *prosecuting* attorney, not just any government attorney. Hence, to the extent criminal defendants have been targeted for disadvantageous treatment just to save the Attorney General funds, the statute also fails to pass constitutional muster. (*Parr v. Municipal Court, supra*, 3 Cal.3d at p. 864.)

Many years ago, in *Johnson v. Superior Court* (1958) 50 Cal.2d 693, this Court rejected a similar equal protection challenge to former section 170.6, which authorized litigants in civil actions to peremptorily disqualify one judge per side, but did not accord the same statutory privilege to the parties in criminal cases. (*Id.* at p. 699.) However, the parties challenging the constitutionality of former section 170.6 were plaintiffs in a malpractice action, not criminal defendants. Furthermore, *Johnson* predated contemporary equal protection jurisprudence, in which the nature of the

interests impinged necessarily determines the degree of scrutiny applied to analyze the constitutionality of the discriminatory law. This Court in *Johnson* relied on the rule that a statutory classification will not be overthrown by the courts unless it is "'palpably arbitrary and beyond rational doubt erroneous.'" (*Johnson v. Superior Court*, *supra*, 50 Cal.2d at p. 699; internal citation omitted.) That is not the standard that would be applied were that same type of discriminatory law challenged today. Here, fundamental life and liberty interests are involved; strict scrutiny must be applied according to current equal protection jurisprudence.

On several occasion, this Court has rejected equal protection challenges to statutes that treat criminal cases differently than civil cases. This Court upheld against equal protection challenge former Code of Civil Procedure section 223, which provided for court conducted voir dire in criminal cases, including death penalty cases. (*People v. Ramos* (2004) 34 Cal.4th 494, 511-512.) But in that case, the "rational relationship" test was applied because neither fundamental constitutional interests nor suspect classifications were involved. The right to *voir dire* prospective jurors is not a constitutional right. (*People v. Ramos, supra*, at p. 512.) The peremptory challenge of prospective jurors is a creature of statute, not a constitutional right, so the right to demand information with which to exercise peremptory challenges is *not* regarded as fundamental. (*Ibid.*) This Court concluded that the disparate treatment of jury *voir dire* in criminal cases was rationally related to the objective of correcting abusive jury selection practices in criminal cases i.e., "efforts on the part of counsel for defendants in criminal cases…to disqualify jurors rather than to seek to ascertain their qualifications." (*People v. Boulerice* (1992) 5 Cal.App.4th 463, 479, cited with approval in *People v. Ramos, supra*, 34 Cal.4th at p. 513.)

In contrast to former Code of Civil Procedure section 223, section 1424, in effect, regulates the conduct of *judges* in criminal cases, not the

*defendants*. A defendant can move for recusal of a prosecuting attorney if he or she perceives that a conflict exists; only a judge can exercise discretion to grant such a motion. Even if, prior to the adoption of section 1424, judges were vicariously disqualifying district attorneys' offices with increasing frequency based on this Court's *Greer* standard (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 266-269), this would not amount to an "abuse" of the system by *defendants*. Rather, presumably, a court would only grant a defense motion to recuse a prosecuting attorney's office for the completely lawful, constitutional, and important societal objective of protecting "society's interest in both the reality and appearance of impartiality by its prosecuting officials" and securing for the defendant the right to a fair trial. (*Greer* at p. 266.) There is relatively little room for abuse in such a system.

Accordingly, section 1424 significantly interferes with Bell's fundamental interests in life, liberty and a fair adjudication of his guilt and penalty phases of a capital trial. Yet the distinctions drawn by the law – between prosecutors and other lawyers with apparent or actual conflicts of interest – are not necessary to further its purpose. (*Fullerton Joint Union High School District v. State Board of Education, supra,* 32 Cal.3d at p. 798; *People v. Olivas, supra,* 17 Cal.3d 236; original emphasis.) In fact, the purposes of the law, to save the state money, would be better served by application of the same standard in all cases in which judges are asked to vicariously disqualify an entire public *or* private law firm.

This Court has also tended to reject equal protection challenges to differences in the availability of certain procedural safeguards to noncapital cases, where similar safeguards are denied in capital cases. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 374-375; *People v. Lewis* (2004) 33 Cal.4th 214, 229-231; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288; *People v. Danielson*

(1992) 3 Cal.4th 691, 719-720.) This Court has repeatedly stated that capital and noncapital defendants are not similarly situated because "capital case sentencing involves wholly different considerations than ordinary criminal sentencing...." (*People v. Danielson, supra*; *People v. Smith, supra.*) The same logic cannot be applied when one compares the policies underlying disqualification of various types of attorneys.

A trial court's authority to disqualify any attorney derives from the judiciary's inherent power to control in furtherance of justice the conduct of any officer of the court connected in any way with a proceeding before a court. (*People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc., supra*, 20 Cal.4th at p. 1145; *Kirk v. First American Title Insurance Company, supra*, 183 Cal.App.4th at p. 792.) Disqualification rules seek to strike a balance between a litigant's right to counsel of choice and the need to maintain ethical standards of professional responsibility in legal proceedings. (*SpeeDee Oil Change, supra*, at p. 1145.) Vicarious disqualification rules recognize "the everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information." (*Id.* at pp. 1153-1154.) "The paramount concern [is]...to preserve the public trust in the scrupulous administration of justice and the integrity of the bar." (*Ibid.*) These policy concerns equally permeate criminal and civil cases, as well as al cases in which the government is a party.

When a potentially disqualified lawyer represents the government, additional considerations come into play. "Society also has an interest in the appearance of impartiality by its prosecuting officials." (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 268.) The public must have "'absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly

discharge their responsibilities but also that such officials avoid, as much as possible, the appearance of impropriety.'" (*Ibid.*; internal citation omitted.)

Hence, criminal defendants and other litigants against the Government *are* similarly situated with respect to the purposes underlying disqualification rules. Therefore, this Court's decisions in unrelated contexts, upholding the disparate treatment of criminal versus civil, or capital versus noncapital, litigants, do not lead inexorably to the conclusion that section 1424 does not violate equal protection principles. Bell respectfully submits that the statute does violate equal protection to the extent that it imposes onerous standards for recusal of government attorneys on defendants in *criminal* prosecutions only, absent a compelling state interest for doing so.

**5. Section 1424 Additionally Violates Bell's Right To Due Process, A Fair Trial, And A Reliable Death Judgment, Guaranteed By The Eighth And Fourteenth Amendments And Article I, Sections 7, 15 And 17 of the California Constitution.**

In section D, 3, above, Bell asserts that section 1424 significantly interferes with Bell's fundamental interests in life, liberty, and the right to a fair and reliable adjudication of both guilt and punishment phases of a death penalty trial. In the interests of judicial economy, those arguments are incorporated by reference, but not reiterated in full at this point.

It suffices to say that prosecutors play a key role in guaranteeing criminal defendants a fair trial. (*Greer, supra,* at p. 266.) Prosecutors must perform the functions of the office with the highest degree of integrity and impartiality; moreover, they should avoid any appearance of impartiality. (*Greer* at pp. 266-267; *People v. Eubanks, supra,* 14 Cal.4th at p. 589.) Section 1424 materially alters a criminal defendant's ability to recuse a prosecutor's office with an apparent conflict of interest by imposing a

nearly impossible burden of proving an actual "probability that the defendant will be treated unfairly." (*People v. Gamache, supra*, 48 Cal.4th at p. 363; see e.g., *People v. Vasquez, supra,* 39 Cal.4th at p. 65.) The statute violates the state and federal Due Process Clauses by unreasonably impeding the ability of the courts to insure the integrity and impartiality of our system of justice. (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 268.)

Furthermore, because this is a death penalty case, Bell's fundamental right to *life* is impinged upon by section 1424. The federal Eighth Amendment imposes a heighted need for reliability in the determination that death is the appropriate punishment in a specific case. (*Caldwell v. Mississippi, supra,* 472 U.S. at p.. 340.) The California Constitution, article I, section 17, includes a parallel guarantee. (*In re Alva* (2004) 33 Cal.4th 254, 266.) Applying obstacles to disqualification of a prosecutor with an apparent conflict of interest increases the risk that a death-eligible defendant will not receive a completely fair trial. Application of section 1424 in the capital case setting thus substantially interferes with the fundamental right to heightened reliability in a case in which the ultimate penalty of death is to be exacted; this violates the Eighth Amendment and article I, section 17 of the California Constitution.

## ARGUMENT SECTION 3

## ERRORS IN THE ADMISSION OF EVIDENCE DURING THE GUILT PHASE. [28]

## V

## THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED BELL'S RIGHTS GUARANTEED BY THE STATE AND FEDERAL CONFRONTATION CLAUSE BY ADMITTING THE TESTIMONY OF DETECTIVE OLSON REGARDING THE STATEMENTS OF DECEASED CODEFENDANT ROSEADA TRAVIS.

### A. The Facts.

During the guilt phase, Detective Lance Olson was called as a witness for the defense. (XII RT 2394.) Defense counsel questioned the detective on direct examination about investigative steps leading to his estimation of the height and size of the perpetrator, used on an all points bulletin and wanted poster, advising law enforcement to be on the lookout for a suspect who was six-two, slender build, long legs, with a long gait. (XII RT 2394-2405.) At that time, Bell was six-five and weighed approximately 250 pounds. (XII RT 2405-2406.) Olson was further questioned about lack of any forensic testing by the Department of Justice on two pairs of shoes seized from the home of Bell's mother, and a sample of blood taken from the doorframe of the car used in the robbery. (XII RT 2407-2414.)

Under cross-examination by the district attorney, the following colloquy occurred:

> Q. Was there any reason to believe that there would be blood on that door on the passenger side of the car at some point later on?
> A. No reason to believe.

---

[28] Argument IX addresses an error repeated in both guilt and penalty phases of the trial.

> Q. Did you also receive information from Rosie Travis that things were done to that car subsequent or after the killing?
> A. That's correct.
> Q. Did she tell you that the car was washed?
> A. She said it was washed, yes.
> Q. At a professional car wash?
> A. I don't recall if she said professional. What I recall – at least the portion that I recall is that she went out the next morning and washed down the interior of the car herself. That's what I recall.
> Q. Did she also talk about washing the exterior of the car, if you remember?
> A. I recall something about the exterior, but I don't know if she did it or a professional did it.

(XII RT 2415-2416.)

Later, during a recess, defense counsel objected and moved for mistrial on *Aranda* and *Bruton* grounds to the district attorney's cross-examination, eliciting statements of the deceased codefendant Travis on a material issue. (XII RT 2432-2433.) Counsel stated that he refrained from objecting in front of the jury as a matter of "trial strategy." (XII RT 2432.) The court denied the mistrial because counsel failed to object at the time the testimony was elicited, and further because counsel had "opened the door" by asking questions about the car and blood. (XII RT 2433-2434.) The trial court admonished the district attorney; "maybe you should stay away from any statements made by somebody else that might have been a co-defendant at one time." (XII RT 2435.)

The court further stated, "the time has passed for me to give them any kind of instruction on that, a limiting instruction, unless you want me to do that at the time of instructions to the jury." (XII RT 2435.) The court suggested that defense counsel would not "want to call attention to that," but reiterated that counsel could ask for whatever instructions he wanted. Moments later, the court opined,

> As a matter of fact, I don't think you're entitled to a limiting instruction because there was no objection made at the time and it was made in response to one of the questions that Mr. Faulkner asked that Mr. Raynaud had inquired into this area.

(XII RT 2435-2436.) The district attorney agreed, and indicated that the testimony "wasn't offered for the truth of the matter anyway...." (XII RT 2436.)

The court interrupted:

> That wouldn't matter if the statement was actually a prohibited statement and it came in and it was objected to at the time. But I think that – yeah, I don't think there's any basis for even a limiting instruction. But you can ask me for it later if you want to talk about it when we finish up on the instructions.

(XII RT 2436.)

Afterward, the cross-examination of the witness by the district attorney resumed. No limiting instruction appears to have been requested and none was given concerning the testimony of Detective Olson that Bell's co-defendant told him she had washed the car subsequent to the killing.

**B. General Principles Of Law:**

Defense counsel advanced an *Aranda-Bruton* objection to Detective Olson's recitation of codefendant Travis' extrajudicial statement. In *People v. Aranda* (1965) 63 Cal.2d 518, this Court addressed the prior practice of admitting the confession of one defendant that inculpated other defendants, and instructing the jurors to disregard the one defendant's confession in determining the guilt of other jointly tried defendants. This Court recognized the reality that, in a joint trial setting, "'such a nonadmissible declaration cannot be wiped from the brains of jurors....'" (*Aranda, supra*,

at p. 525; quoting *Delli Paoli v. United States* (1957) 352 U.S. 232, 247 [1 L.Ed.2d 278, 77 S.Ct.294].) In *Aranda*, this Court held that when the prosecution seeks to introduce an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of three procedures: (1) in a joint trial, effectively delete direct and indirect identifications of the defendants; (2) grant a severance of the trials; or (3) if severance is denied and effective redaction is not possible, exclude the statement. This Court, in *Aranda*, declared that these rules were not constitutionally compelled, but judicially declared to implement the provisions for joint and separate trials embodied in section 1098. (*Id.*, at p. 530.)

Three years later, in *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620], the United States Supreme Court held that the introduction of an incriminating extrajudicial statement by a nontestifying codefendant in a joint trial violates a defendant's Sixth Amendment rights of confrontation and cross-examination, even if the jury is instructed to disregard the statement in determining the defendant's guilt or innocence. *Aranda* is now regarded as a constitutionally based doctrine, at least to the extent the decision corresponds to the federal *Bruton* Rule. (*People v. Mitcham* (1992) 1 Cal.4$^{th}$ 1027, 1045, fn. 6.)

In 1987, the United States Supreme Court decided *Richardson v. Marsh* (1987) 481 U.S. 200 [95 L.Ed.2d 176, 107 S.Ct. 1702], in which a codefendant's confession, redacted to eliminate any reference to the defendant's existence, was introduced against the codefendant in a joint trial. In that context, the high court held that the Confrontation Clause is not violated by admission of the nontestifying defendant's confession, providing a proper limiting instruction is given, and the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence. (*Id.*, at p. 21.)

In *Gray v. Maryland* (1998) 523 U.S. 185 [140 L.Ed.2d 294, 118 S.Ct. 1151], at issue was the application of the *Bruton* and *Richardson* rules where a codefendant's confession was received in evidence, redacted by substituting for the defendant's name in the confession a blank space or the word "deleted." (*Id.*, at p. 188.) The Supreme Court concluded:

> [C]onsidered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to Bruton's unredacted confessions as to warrant the same legal results.

(*Id.*, at p. 195.)

Technically, the so-called *Aranda-Bruton* rule has no application where, as here, the defendant and the codefendant whose incriminating extrajudicial statements are offered against the defendant are *not* jointly tried. (*United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 966; *People v. Richardson* (2008) 43 Cal.4th 959, 1007; *People v. Combs* (2004) 34 Cal.4th 821, 841.) In the case at bench, the hearsay declarant, Travis, was not tried jointly with Bell; Travis was jointly charged with the murder, but she died prior to Bell's trial. (XII RT 2253.) However, in context, defense counsel's objection based on *Aranda-Bruton* can reasonably be understood as an objection that the admission of the codefendant's incriminating statement denied Bell his confrontation rights guaranteed by the federal Sixth Amendment and article I, section 15 of the California Constitution and rendered his trial unfair.

In the context of a *separate* trial, whether the admission of a codefendant's extrajudicial incriminating statement violates the Confrontation Clause is analyzed under the rubric of the United States Supreme Court's decisions in *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354] [hereafter, *Crawford*] and *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224, 126 S.Ct. 2266]

[hereafter, *Davis*]. Although this case was tried prior to the *Crawford* decision, the principles of *Crawford* are applied to any case still on direct appeal. (*Whorton v. Bockting* (2007) 549 U.S. 406, 416 [167 L.Ed.2d 1, 127 S.Ct. 1173]; *People v. Cage* (2007) 40 Cal.4th 965, 970.)

In *Crawford*, the high court held that the Confrontation Clause barred the admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify *and* the defendant had a previous opportunity for cross-examination. (*Crawford*, at pp. 53-54.) The United States high court has not yet exhaustively defined what constitutes a "testimonial" statement. In *Davis*, however, the Supreme Court did provide guidance on how to distinguish between the "testimonial" and "nontestimonial" fruits of a police interrogation. *Davis* held that statements "are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to an ongoing emergency." (*Davis v. Washington, supra*, 547 U.S. at p. 822.) Conversely, statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid.*)

Under *Crawford* analysis, a Confrontation Clause violation occurs regardless of whether the declarant's testimonial hearsay statement directly incriminates the defendant who is on trial. (*Crawford v. Washington, supra*, 541 U.S. at pp. 68-69; *United States v Nguyen* (9th Cir. 2009) 565 F.3d 668, 674.) Furthermore, because *Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56 [65 L.Ed.2d 597, 100 S.Ct. 2531], the reliability of a codefendant's hearsay statement is no longer relevant in analyzing whether a Confrontation Clause violation has occurred. (*Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, 2713 [180 L.Ed.2d 610].) Parenthetically, *Crawford*

leaves untouched the rule that the Confrontation Clause does not bar admission of testimonial statements for purposes other than establishing the truth of the matter asserted. (*Crawford, supra*, at p. 59, fn. 9.)

Both *Bruton-Aranda* error and *Crawford* error are constitutional errors subject to harmless error analysis under the rule of *Chapman v. California, supra*, 386 U.S. 18; *People v. Jennings* (2010) 50 Cal.4th 616, 652.)

### C. Defense Counsel's Objection Was Timely Under The Circumstances, And Adequate To Preserve The Confrontation Issue.

Counsel's objection on *Aranda-Bruton* grounds was certainly adequate to put the Court on notice that Bell was objecting that the prosecutor's introduction of the hearsay statement of a codefendant was violative of Bell's rights guaranteed by the state and federal Confrontation Clauses. An objection will be deemed sufficient if it fairly appraises the trial court of the issue it is being called upon to decide. (*People v. Scott* (1978) 21 Cal.3d 284, 290.)

> [N]o useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.

(*People v. Yoeman* (2003) 31 Cal.4th 93, 117-118.)

Furthermore, the trial court denied the motion for mistrial, not on the merits of the *Aranda-Bruton* objection, or because Bell was being tried separately, but rather, because counsel did not object to the hearsay statement at the time it was offered. However, counsel's tactical decision not to object in front of the jury is understandable given that, within the

*Bruton* framework, an admonition to the jury to disregard evidence of a codefendant's strongly incriminating extrajudicial statement is regarded as inadequate to cure the harm. (*Bruton v. United States, supra*, at p. 136.) For reasons discussed in paragraph E., imparting knowledge to the jury that Travis had confessed was strongly incriminating under the circumstances.

Objecting in front of the jury would have had no purpose but call attention to the fact that Travis had apparently confessed, and admitted washing the car to eliminate the evidence. The elicited statement was no more susceptible to being cured by a jury admonition just because Travis had died, and was not being tried jointly with Bell. Prejudice caused by the inculpatory statement of a codefendant that also implicates other defendants cannot be dispelled by cross-examination if the hearsay declarant never takes the stand. (*Bruton v. United States, supra*, 391 U.S. at p. 133.) In this case, a limiting instruction would not have been an adequate substitute for the constitutional right of cross-examination. (*Id.*, at p. 137.) Hence, the issue was preserved despite the absence of a request by counsel for curative instructions.

### D. Counsel Did Not Invite The Error By Examining Detective Olson About Detective Olson's Failure To Pursue Test Results From The Department Of Justice.

The trial judge asserted that defense counsel "opened the door" to testimony regarding the washing of the car by examining Detective Olson about whether he did anything to force the Department of Justice to complete its forensic testing. Extrajudicial statements made by others to a law enforcement officer are not admissible for the nonhearsay purpose of explaining the conduct of police *unless* the reasons why police acted or failed to act are relevant to prove a disputed issue of fact in the action.

(*People v. Lucero* (1998) 64 Cal.App.4th 1107, 1109; *People v. Reyes* (1976) 62 Cal.App.3d 53, 67-68.)

Detective Olson testified on direct-examination that he sent possible bloodstain evidence from the doorframe of Travis' car to the Department of Justice for forensic evaluation. (XII RT 2410-2411.) He further testified that, periodically, at Olson's request, a unsworn employee of the police department would obtain progress reports from the Department of Justice to ascertain the status of *all* evidence sent in for testing, including but not limited to the possible bloodstain. (XII RT 2411, 2414.) Olson knew from the reports of the unsworn employee that the possible bloodstain had not yet been tested. (XII RT 2411.) Olson *did not recall* with certainty whether he followed up by talking to someone else, or by asking the District Attorney for assistance in getting the evidence processed. (XII RT 2413.) Olson did not say that he *failed* to take any action to obtain test results from the Department of Justice. Olson sent the evidence for testing and kept asking about the test results. Accordingly, Travis' statement about washing the car was irrelevant to explain or excuse Detective Olson's inaction.

Furthermore, even if this otherwise inadmissible hearsay was arguably admissible for the purportedly nonhearsay purpose of explaining the reasons for Olson's actions regarding the Department of Justice's test results, the statements were not in fact offered for that limited purpose. Here, the prosecutor elicited this highly damaging evidence without any limitations on its use, and then, *after* counsel objected and moved for mistrial, offered, *post hoc*, his rationalization that the evidence had not been offered for the truth of the matter asserted. (XII RT 2436.) But the jury never received any admonition to this effect. In fact, the court opined several times that Bell was not entitled to any curative instruction because defense counsel had initiated the inquiry into the subject of the bloodstain testing, and failed to object. (XII 2435-2436.) The court expressed a

willingness to entertain a request for some kind of instruction to be given during jury instructions at the end of the trial, but effectively advised against pursuing this course of action, *and* expressed doubt the request would be granted. (XII RT 2435-2436.) Consequently, the evidence was in fact received for the truth of the matter asserted. From the Olson's testimony about the car washing statement, jurors would necessarily have drawn two conclusions: (1) that Travis had confessed to participating in the robbery; and (2) that the car had been washed to prevent identification of the participants, including Travis, her son Tory, and Bell.

Although there is a dearth of state court authority specifically discussing the issue, federal cases have frequently held that testimonial hearsay may not be introduced in a defendant's separate trial simply to correct a "false impression" arguably created by the defendant's examination of a government witness. (See, e.g., *United States v. Al-Moayad* (2nd Cir. 2008) 545 F.3d 139, 168-169.) In the *Al-Moayad* case, for example the defendant was convicted of conspiring to provide material support to Hamas, a terrorist organization. Evidence included testimony by an informant by the name of Al-Anssi, who had met with the defendant several times in Yemen, and later offered his assistance to the American F.B.I. in exchange for money. Al-Anssi's notes, memorializing his meetings with the defendant were admitted as prior consistent statements or to "rebut a misleading impression" created during Al-Anssi's testimony that no documents supported his claims about the defendant's terrorist leanings. (*Id.*, at p. 166.) The federal circuit court held that the receipt of the evidence was error, and *not* harmless. (*Id.*, at p. 167.) The court held that hearsay contained in Al-Anssi's notes "could potentially have been admissible to correct a false impression only if the notes were admitted not for their truth but for the limited purpose of rebuttal, and the jury was

appropriately instructed." (*Id.*, at p. 169.) Receipt of the evidence was prejudicial error.

Similarly, in *United States v. Meises* (1st Cir. 2011) 645 F.3d 5, the defendants were arrested as the result of an undercover drug task force investigation. On cross-examination of a drug agent named Cruz, the defense elicited admissions that were damaging to the prosecution regarding the absence of the defendant's name in four or five drug enforcement investigative reports. (*Id.*, at p. 18.) Agent Cruz was then allowed to testify about his post-arrest interview with one of the participants in the controlled buy that led to the defendants' arrests, a man named Rubis. The prosecution did not elicit the actual statements uttered by Rubis. Rather, Cruz testified that, when Rubis was arrested, he offered to cooperate by giving a statement; afterward, the course of Cruz's investigation changed, to focus on the other defendants. (*Id.*, at p. 19.)

The federal district court concluded that Cruz had implicitly testified that Rubis had identified the defendants as co-conspirators, which violated the defendant's rights under the Confrontation Clause. (*Ibid.*) The court rejected the prosecution's argument that the defense *invited* the error during cross-examination by eliciting the fact that the defendants were never mentioned in the agent's prior investigative reports. The court declared that the questioning of the agent by defense counsel, properly directed at diminishing the defendants' culpability, "[b]y no means . . . require[d] or justif[ied] rebuttal that violated the Confrontation Clause." (*United States v. Meises, supra*, 645 F.3d at p. 23.)

In *United States v. Holmes* (8th Cir. 2010) 620 F. 3d 836, the defendant was arrested for firearm and drug charges following a search of a residence pursuant to a warrant. Holmes' theory of defense was that he did not live at the house where the guns were found. On cross-examination, defense counsel asked the testifying officer, "So the only information you

had was this Crime MATRIX information based on [defendant's] prior arrests." (*Id.*, at p. 840.) Thereafter, the officer was permitted to read a portion of the affidavit in support of the search warrant, quoting the statements of a confidential informant who identified the described defendant, "Carlos," as the person who was distributing crack cocaine from the searched residence. (*Ibid.*)

The government argued that, even if the informant's statements amounted to testimonial hearsay within the meaning of the *Crawford* rule, the defense had "opened the door" to the information during cross-examination of the officer. (*Holmes, supra*, at p. 842.) This argument was rejected. The circuit court stated:

> To the extent he [counsel] opened the door by asking questions of Officer Singh on cross-examination in an attempt to give the jury the impression that Officer Singh had no information tying Holmes to the Anderson Avenue residence, he did not open the door so wide as to allow Officer Singh to recite the full extent of the statements from the CI implicating Holmes in selling drugs and possessing firearms.

(*Id.*, at p. 844.)

Here, too, by examining Detective Olson about his response to the Department of Justice's failure to complete forensic testing of shoe and bloodstain evidence, counsel did *not* "open the door" to a flagrant violation of the state and federal Confrontation Clauses.

### E. The Statement Of Travis About Washing The Car Used In The Robbery Was Testimonial Hearsay.

The circumstances of Detective Olson's interrogation of Travis were not elucidated during the course of counsels' direct- and cross-examination of the witness. However, the record as a whole leaves little question that

Travis' statements to Detective Olson were testimonial within the meaning of the *Crawford* rule.

The robbery and murder took place on January 20, 1997. Subsequently, Detective Olson learned from a confidential informant that Travis had confessed to acting as the getaway driver for Bell in the Quik Stop robbery and murder. (I CT 4-8 [warrant for the arrest of Michael Bell].) Olson and Detective Bacca interviewed Travis on April 25, 1997, after they received word from the Stanislaus County Public Safety Women's Facility, where Travis was being held, that Travis wanted to make a statement to police. (I CT 6-8, 14.) Travis' statements "were no doubt testimonial because they were taken during police interrogations." (*People v. Lewis* (2008) 43 Cal.4th 415, 506.) The record does not permit the inference that the primary purpose of Olson's interview of Travis was to "enable police assistance to an ongoing emergency." (*Davis v. Washington, supra*, 547 U.S. at p. 822.) To the contrary, "the circumstances objectively indicate...that the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid.*) That is the essence of testimonial hearsay.

### F. The Judgment Must Be Reversed Because The Evidence Violated the Confrontation Clause And Federal Due Process, And Its Receipt Was Not Harmless.

Travis' statement indisputably amounted to testimonial hearsay. Travis was unavailable; she died before trial. The record shows that Bell's counsel had no prior or contemporaneous opportunity to confront and cross-examine Travis, either during the trial or at any prior proceeding. Furthermore, contrary to the prosecutor's after-the-fact claim, the evidence was not actually received for a limited, nonhearsay purpose. In the absence of limiting instructions, the jury was free to consider the deceased

codefendant's inculpatory statements as substantive evidence of *Bell's* guilt. Thus, a violation of the Confrontation Clause was committed within the rubric of *Crawford* jurisprudence. (*People v. Lewis, supra,* 43 Cal.4th at p. 506.)

Additionally, the trial court's arbitrary misapplication of California's evidentiary rule, barring the receipt of hearsay for the truth of the asserted, violated a state-created liberty interest protected by the Due Process Clause of the Fourteenth Amendment. (*Hicks. v. Oklahoma, supra*, 447 U.S. at p. 346.) Consequently, it is the People's burden to prove beyond a reasonable doubt that the evidence did not contribute to either the guilt or penalty phase verdicts. (*United States v. Becker* (2nd Cir. 2007) 502 F.3d 122, 130.)

The statements attributed to Travis did not directly identify Bell by name as the person who robbed and murdered, and did not state that Bell personally washed the car. But *Crawford* does *not* require that testimonial hearsay inculpate a defendant in order to trigger error under the Confrontation Clause. (*Crawford v. Washington, supra*, 541 U.S. at pp. 68-69; *United States v. Nguyen, supra,* 565 F.3d at p. 674.)

Within the context other evidence introduced at the trial, the statement attributed to Travis had great evidentiary significance and had tremendous potential to harm Bell's defense. Although the robbery and murder were caught on a video surveillance tape, the photographic evidence of the crimes was insufficiently distinct to permit a positive identification of Bell. Other forensic evidence, such as tire impression evidence, shoe print evidence and ballistics test results, proved inconclusive. There was no question that a terrible crime occurred. The question at trial, however, was who were the principals and what roles did they play.

The most critical evidence to identify Bell as the robber and murderer was the testimony of Travis' son, Tory. Tory admitted he participated in the crimes, and offered an account of the sequence of events

from pre-crime preparation through post-crime attempts to destroy or secrete the evidence. Tory had tremendous incentive to place blame on Bell, as did his mother; he received a sentence of credit for time served in exchange for his testimony against Bell. (X RT 2034.)

Bell's theory of defense was that someone other than Bell committed the crimes, either aided by Tory and Travis, and/or that Tory actually committed the murder with his mother and another man. (XII RT 2275-2406.) Disclosure to the jury of the *mere fact that Tory's mother had confessed her involvement in the crimes*, including the washing of the interior of the getaway car, would have been powerful evidence corroborating Tory's account of the crimes. In California, evidence of a co-participant's guilty plea or conviction of a crime is so intrinsically prejudicial that such evidence is generally not admissible to prove the guilt of a defendant. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1322.) Introducing evidence of a *confession* or *incriminating admission* by a nontestifying co-participant in crime is no less prejudicial. (*People v. Neely* (2009) 176 Cal.App.4th 787, 795.) Without the reference to Travis' apparent confession, Tory's version of the facts may well have been disbelieved. (*Ocampo v. Vail* (9th Cir. 2010) 649 F.3d 1098, 1115.)

The "car washing" statement, considered for the truth of the matter asserted, also furnished the jury an explanation for the absence of incriminating evidence found on the getaway car. This, too, would have easier to accept and believe Tory's account of how and by whom the crimes were committed.

Giving a curative admonition or limiting instruction would have been pointless. By analogy to *Bruton* error, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, that the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

(*Bruton, supra,* 391 U.S. at p. 135.) The deceased codefendant's apparent confession to participating in the robbery and murder could not, realistically "'be wiped from the brains of jurors....'" (*Aranda, supra*, at p. 525; internal citation omitted.) Under these circumstances, a limiting instruction would have been no substitute for Bell's right of confrontation and cross-examination. (*People v. Song* (2004) 124 Cal.App.4th 973, 984.) Accordingly, the receipt of the evidence was not harmless beyond a reasonable doubt.

### G. The Error Also Violated Bell's Right To A Reliable Death Judgment.

In the context of capital prosecutions, the United States Supreme Court has often observed, "death is different." (*Gregg v. Georgia, supra,* 428 U.S. at p.188 (lead opn. of Stewart, J.); accord, e.g., *Ring v. Arizona, supra,* 536 U.S. at p. 606; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [115 L.Ed.2d 836, 111 S.Ct. 2680]; *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 [51 L.Ed.2d 393, 97 S.Ct. 1197] (plur. opn. of Stevens, J.).) This Court agrees. (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728.) The greater need for reliability in a death penalty cases means that capital trials must be policed at all stages for procedural fairness and accuracy of factfinding. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 262-263 [100 L.Ed.2d 284, 108 S.Ct. 1792].)

Consistent with section 190.3, subdivision (a), Bell's penalty phase jury was instructed to consider and be guided by the guilt phase evidence and the circumstances of the crime. (IV CT 1146.) The circumstances of the crime would necessarily include Bell's role as the person who urged others to commit and cover up the crimes, and the person who purportedly shot Francis in cold blood. The erroneous receipt of Travis' car washing

statement would have lent substantial weight to the testimony of Tory, who had everything to gain for himself by painting Bell as the person primarily responsible for the robbery and murder. Under these circumstances, the reliability of the jury's death determination was severely compromised, resulting in a violation of the federal Eighth Amendment.

**WORD COUNT CERTIFICATE**
**PEOPLE V. MICHAEL BELL, S080056**

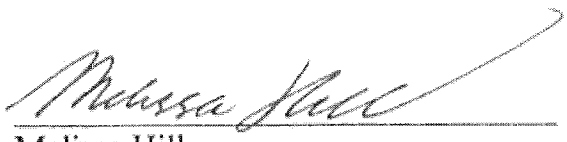
I certify, pursuant to California Rules of Court, rule 8.630, as follows:

Microsoft Word for Mac 14.2.5 (2011) was used to create this document.

The Microsoft Word for Mac properties program indicates that the attached Appellant's Opening Brief, exclusive of certificates, tables and indices, and proof of service, has a typeface of Times New Roman 13 points, and contains 125,167 words (in excess of the 102,000 allowed). A motion for permission to file a brief in excess of allowable word count limits accompanies this brief.

Dated: February 19, 2013

Respectfully submitted,



Melissa Hill
Attorney for Appellant
Michael Leon Bell

## PROOF OF SERVICE

I reside in the State of New Mexico, Sandoval County. I am over the age of 18 years and a duly-licensed California attorney. I represent Michael Leon Bell, the appellant in this action. My business address is PO Box 2758, Corrales, New Mexico, 87048.

On February 19, 2013, I served the attached Appellant's Opening Brief on the following interested parties by placing true copies thereof, enclosed in a sealed envelope with postage prepaid, in the United States mail in Corrales, New Mexico, addressed as follows:

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Michael Leon Bell*
P45400
San Quentin State Prison
San Quentin, CA 94974

Gary Wells
Attorney at Law
6737 N. Milburn Ave.
Ste. 160 PMB 227
Fresno, CA 93722-2143

Stanislaus Co. Sup. Court
Attn. Hon. David G. Vander Wall
PO Box 1098
Modesto, CA 95353

Stanislaus Co. Public Defender
Attn: Kent Faulkner
1021 I Street, Suite 201
PO Box 3428
Modesto, CA 95353-3428

California Attorney General
Attn: William Kim
2550 Mariposa Mall, Rm 5090
Fresno, CA 93721

Stanislaus Co. District Attorney
Attn: Birgit Fladager
1100 I Street, Room 200
Modesto, CA 95354

I declare under penalty of perjury the laws of the State of California that this statement is true.

Executed this 19th day of February 2013, at Corrales, New Mexico.

Melissa Hill

* Personal delivery of the Appellant's Opening Brief will be made to Michael Leon Bell within 30 days of the brief's filing date.