SUPREME COURT COPY

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | **S104144** |
| Plaintiff and Respondent, | **Automatic Appeal** |
| | **(Capital case)** |
| v. | |
| | **Contra Costa Co.** |
| | **Superior Court** |
| JOSEPH ANDREW PEREZ, JR. | **No. 990453-3** |
| Defendant and Appellant. | |

SUPREME COURT
FILED

JAN 24 2014

Frank A. McGuire Clerk

Deputy

## APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Contra Costa

HONORABLE PETER L. SPINETTA, JUDGE

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DEATH PENALTY

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>v.<br>JOSEPH ANDREW PEREZ, JR,<br>Defendant and Appellant. | **S104144**<br>**Automatic Appeal**<br>**(Capital case)**<br><br>**Contra Costa Co.**<br>**Superior Court**<br>**No. 990453-3** |

**APPELLANT'S REPLY BRIEF**

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**INTRODUCTION**

This matter is an automatic appeal from a judgment of death made directly to this Court pursuant to Penal Code section 1239.[1] In this reply brief, appellant does not attempt to cover every issue raised on appeal. The purpose of this brief is merely to respond to those contentions made by respondent which require further comment. For a complete discussion of the issues raised on appeal, please see appellant's opening brief ("AOB") on file herein.

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

## STATEMENT OF CASE AND FACTS

Appellant hereby incorporates the statement of the case and statement of facts contained in appellant's opening brief.

## ARGUMENT

### I. THE TRIAL COURT'S SYSTEM OF GROUP *VOIR DIRE* VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

Argument I involves two unreasonable restrictions the trial court imposed on jury *voir dire*: a) the trial court did not allow the attorneys to question the prospective jurors individually and in sequestration and b) the trial court did not allow enough time for individual *voir dire* questioning of the jurors. The two facets of the argument are both stand-alone errors which, when combined, worked to deprive appellant of his right to a fair and unbiased jury. (*See* AOB at 77-93.)

Respondent in his brief ("RB") argues that sequestered questioning of prospective jurors is neither constitutionally nor statutorily required (RB at 31-33) and the time limits placed on the defense attorneys' questioning of the prospective jurors was not unreasonable. (RB at 34-35.) Both assertions are unavailing.

As to respondent's first argument, that sequestered or individual questioning is neither constitutionally nor statutorily required, this is merely

the starting point of the analysis, not the end point. Although not constitutionally prohibited, and while appellant recognizes that trial courts do have discretion in the procedures of jury selection, the manner of *voir dire* here was an abuse of that discretion in the circumstances of this case.

We start with a short summary of the facts: the defense made a motion for sequestered *voir dire* [2] (5 RT 1068; 4 CT 1300-1327) which was denied. (5 RT 1069.)[3] In that motion, defense counsel argued that the courts's proposed system gave an inherent advantage to the prosecution (5 RT 1082; 4 CT 1305-1310); that it deprived appellant of a fair trial (4 CT 1305-1310); that it denied appellant equal protection (4 CT 1316-1323) and his right to effective counsel and due process. (4 CT 1323.) The court denied the motion and restricted each side's questioning to a total of only one half-hour for each panel of 25 jurors (7 RT 1440) over further defense objections. (7 RT 1444.) Thus, the court limited the defense in its questioning to **a little over one minute per juror**.

Respondent cites various allegedly ameliorating factors. Although the "defense attorneys had been given a thorough overview of each juror's

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[2] So-called "*Hovey*" *voir dire*. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1.)

[3] As in the AOB, "RT" designates the Reporter's Transcript in these proceedings; "CT" designates the Clerk's Transcript; and "JQ" the Juror Questionnaires, with the volume number preceding the page number.

background and attitudes from their 30-page questionnaires," RB at 34, such background information was useless to the defense unless they were given an adequate opportunity to follow up on it and question those jurors based on their written answers. In fact, such detailed information from a 30-page questionnaire would have raised more grounds for inquiry than if the defense had approached them with a blank slate, certainly more than could be accomplished in one minute. Although respondent claims that "[s]ome jurors in each group were clearly challengeable for cause, so little or no time was needed to question them," RB at 34, the court did not allow any questionnaire-based stipulations as to these jurors, which would have freed up more time for questioning the remaining jurors. (7 RT 1445.)

Respondent argues that because the "questioning of the second two groups was relatively brief" and "[t]he attorneys did not ask to apply any of their unused time to question jurors from the first group," this shows that the defense "was satisfied with their overall time allotments and the final composition of the jury." (RB 34.) However, there is no evidence the court would have allowed a re-allocation of time from one group to the next, or that it was even possible. The Court's *voir dire* was completed in less than two days, on September 18 and 19, 2001. (Volumes 7 RT and 8 RT.) The first group was questioned on September 18, 2001, and was told to return the next

day. (7 RT 1594). The second and third groups were assembled and questioned on the next day, and it is not clear from the record whether the first panel would have been available to re-assemble, even assuming they had all returned the next day.[4]

Nor is it realistic to assume that because "the attorneys accepted the final jury without objection" this meant the defense "was satisfied with their overall time allotments and the final composition of the jury." (RB 34.) First, the trial court had previously severely restricted the scope of the questioning and disallowed questioning of the prospective jurors who "are clearly going to be challenged for cause," stating "[y]ou can not ask any questions of some of them, and so forth"... and "...no time will be spent by you doing improper things such as instructing them on the law." (7 RT 1444.) Second, the defense had already objected more than once to the procedure before it began and the objections were denied. (5 RT 1069; 7 RT 1442-1443.) Further objections would have been futile, as the trial court told them "[y]our record is protected." (7 RT 1444.) Thus, a lack of further objections after the completion of *voir dire* does not signify that the defense was satisfied with either the jury composition or the time allotments, as respondent argues. (RB

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[4] Some of respondent's volume references at RB 31 appear to be incorrect. RT volume 8 begins at page 1731.

at 34.)

Respondent also makes a similar argument that the "defense attorneys did not request additional time to question any jurors, and the attorneys did not object to the final composition of the jury," to imply that the argument was not preserved for appeal. (RB at 31.) The argument is fully preserved, however, as prior to the commencement of jury selection, the defense made a motion for sequestered *voir dire* [5] (5 RT 1068; 4 CT 1300-1327) which was denied. (5 RT 1069.) As to the time limits, defense objections to this procedure were also denied prior to the commencement of jury selection. (7 RT 1444.) Additionally, as mentioned *supra*, the trial court specifically assured the defense that "[y]our record is protected." (7 RT 1444.)

Even if the defense had not preserved the issue by objecting, as respondent points out in regard to Argument IV, "this Court held in *People v. Whalen* (2013) 56 Cal.4th 1, 28, that a claim of judicial misconduct during voir dire is not necessarily forfeited by the defendant's failure to object at trial." (RB at 51.) (*See also People v. Foster* (2010) 50 Cal.4th 1301 (court considered merits of biased juror claim although defendant did not challenge those jurors for cause or exhaust his peremptory challenges).) Besides, this

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[5] So-called "*Hovey*" *voir dire*. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1.)

argument invokes appellant's constitutional right to an impartial jury and a fair trial, which cannot be "waived" by trial counsel. (*Duncan v. Louisiana* (1968) 391 U.S. 145; *Morgan v. Illinois* (1992) 504 U.S. 719, 726.)

Respondent cites *People v. Famalaro* (2011) 52 Cal.4th 1, 34, in support of the proposition that "[i]ndividual sequestered jury selection is not constitutionally required." RB at 32-33. Appellant does not disagree with this general proposition. In *Famalaro,* however, although "some prospective jurors had prejudged defendant's guilt," "[t]he record reveal[ed] no incidence of a prospective juror's mention in the jury selection process of inadmissible evidence that would have prejudiced the defendant." (*Id.* at 35.)

Crucially, this is not the case here. Appellant has shown multiple examples of the non-sequestered prospective jurors being exposed to inadmissible evidence and extremely prejudicial statements and attitudes toward the death penalty that would have been inadmissible at trial. (AOB at 81-82, 89-92.) For example, prospective juror Susan B. stated that if the defendants were found guilty, she wanted them "killed like they killed her" because "I know all the details." (7 RT 1709; 4 JQ 1505.) This prospective juror stated that, based on what she had learned through trial-related publicity, she felt that appellant was guilty and, as a result, she could not be impartial. (8 RT 1835; 7 JQ 2526-2527.) She added that there was "no way" she could

set aside what she had learned about the case. (8 RT 1837; 7 JQ 2527.) The panel was again informed about the pre-trial publicity when prospective juror Mary M. stated that she was also not sure she could be fair because of what she had heard about the case. (8 RT 1837.) George H. had heard the publicity, and, as a result, thought the defendant was guilty. (8 RT 1846.) Prospective juror Jeffrey M. stated that if appellant was found guilty, he would "adamantly press for the death penalty," based on what he heard on television. (7 RT 1651; 4 JQ 1234.) He stuck to the term "press for the death penalty" even after being coaxed by the court to state that he would "give it serious consideration." (7 RT 1652.)

The group questioning also exposed the prospective jurors to various disqualifying views about the death penalty. Prospective juror Michael B. (No. 19) said that the idea that the defendant does not have to present any evidence was "problematic" with him. (5 RT 1526.) He also stated that "[i]f a person committed a crime, they should be punished without regard to mental health" (7 RT 1550; 2 JQ 498) and he would not consider psychiatric testimony. (7 RT 1551; 2 JQ 497.) As he put it, "[c]rime equals punishment." (*Id.*; 2 JQ 503.) Natalie M. thought that the death penalty should be imposed regardless of the defendant's background if he was found guilty. (7 RT 1720; 2 JQ 737.) She gave the impression that it was proper to ignore such evidence and stated that

"if a person commits a crime and he's found guilty, then he should receive the death penalty." (7 RT 1721.)

Prospective juror Jeffrey M. admitted he would draw inferences if the defendant did not take the stand (7 RT 1653; 4 JQ 1238) and that he was biased against social, mental health testimony. (7 RT 1654; 4 JQ 1242.) When he was questioned by the attorneys, Jeffrey M. again told the court that he would "adamantly" push for the death penalty (7 RT 1712) and he didn't want to hear "excuses" like "I was beat as a child." (7 RT 1713.) He admitted he had an improper bias against such evidence (7 RT 1714) and twice characterized it as a "lame excuse." (7 RT 1717, 1718.) Had individual *voir dire* been conducted, the entire panel would not have heard these improper remarks. Thus, *Famarelo* can be distinguished from the circumstances of appellant's case as here there were "incidence[s] of a prospective juror's mention in the jury selection process of inadmissible evidence that would have prejudiced the defendant." (*Famalaro, supra,* 52 Cal.4th 1 at 35.)

As discussed in detail in the AOB, the trial court's failure to grant sequestered *Hovey voir dire* resulted in prospective and actual jurors alike hearing extremely prejudicial matters relating not only to the media accounts and other inadmissible matters but also to jurors's: (1) views mandating the death penalty for anyone found guilty of murder; (2) beliefs that mitigating

evidence is of no moment and should be disregarded; (3) views about unfavorable pre-trial publicity indicating that appellant was guilty; (4) views about life-sentenced individuals being paroled; (5) views that the defendant either should or had to take the stand and that unfavorable inferences could be drawn if he did not; and (6) belief that a disadvantaged childhood background was just a lame excuse for murder.

Respondent relies heavily on *People v. Avila* (2006) 38 Cal.4th 491, 534-535, in support of his argument that because the trial court "was not required to afford defendant any time at all to question prospective jurors...it did not abuse its discretion in setting a time limit on counsel-conducted voir dire either individually or in the aggregate." (RB at 34-35.) Here too, *Avila* can readily be distinguished from appellant's case:

1) In *Avila,* the three co-defendants pooled their time and were allowed 45 minutes to question the first group of 24 prospective jurors, or almost two minutes per prospective juror, about twice the time allotment here. (*Id.* at 534.) The defense in *Avila* was allotted 30 minutes for the second and third groups of 13 jurors, which was again over two minutes per prospective juror. (*Id.*)

2) The *Avila* trial court allowed five days for jury selection, as opposed to less than two days here. Even so, the *Avila* defendants argued that "it was impossible to select a fair and impartial jury in five days." (*Id.* at 534.) The

limitation of jury selection here to less than two days in a capital case was unfair on its face.

3) In *Avila,* "[t]he court informed counsel that, on request and for good cause shown, it would allow additional time to question prospective jurors," *Id.,* and "the court did, in some instances, allow counsel to ask additional questions upon request." (*Id.* at 536.) This was in fact a decisive factor: "the court's willingness to permit additional time for counsel-conducted voir dire upon a showing of good cause ameliorated any potential concern that the limitation would somehow be unfair or violate the right to an impartial jury." (*Id.* at 536.)

4) In *Avila,* the court discussed two identified prospective jurors as to whom the trial court should have allowed further questioning. (*Id.* at 535-536.) However, one of them was questioned further by the court and the prosecutor and was ultimately excused through a defense peremptory challenge, and the other "did not make any responses suggesting he himself might have been so aligned [with law enforcement]," and the defense request for further questioning was made a day after he had been initially questioned. (*Id.*)

Significantly, there is nothing either in the record or in respondent's brief that points to any justification or rationale for the severe time restrictions placed on jury selection in this case. To the extent the trial court was

concerned solely with time, such consideration was inappropriate. "[A] court abuses its discretion if it dismisses a case, or strikes a sentencing allegation, solely 'to accommodate judicial convenience or because of court congestion.'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531, *quoting People v. Kessel* (1976) 61 Cal.App.3d 322, 326.) The record shows that the trial court simply failed to engage "in a careful consideration of the practicability of . . . group voir dire as applied to [appellant's] case." (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168,1183.) It is an abuse of discretion and a denial of the defendant's right to an impartial jury when a court places convenience above a capital defendant's right to a fair and impartial jury.

These arbitrary time limitations on *voir dire* favored the prosecution, and cannot be seen as even-handedly disadvantageous. The defense pointed this out at the trial. (5 RT 1082; 4 CT 1305-1310.) The questionnaires revealed many biases in favor of the death penalty and against mitigating evidence, as shown herein and discussed in more detail in the AOB. The exposure of the panel to these attitudes inevitably led to some degree of legitimization of these disqualifying beliefs, even if the prospective jurors in question were ultimately excused or challenged for cause. Anti-death penalty or prosecution-hostile views were few in comparison to attitudes that would be harmful to appellant's

goal of an unbiased jury.

As the Court held in *People v. Hernandez* (1979) 94 Cal.App.3d. 715, 719, 156 Cal.Rptr. 572, the "fixing of an arbitrary time limit for voir dire in advance of trial is dangerous and could lead to a reversal on appeal."[6] Under *Duncan v. Louisiana* (1968) 391 U.S. 145, and *Morgan v. Illinois, supra,* 504 U.S. 719, 726, appellant should be granted a new trial. (*Covarrubias v. Superior Court* (1998), *supra,* at 1184.)

## II. LEAD DEFENSE COUNSEL HAD A CONFLICT OF INTEREST, AS THE TRIAL JUDGE HAD FOUND HIM INEFFECTIVE IN A CASE PENDING IN THE COURT OF APPEALS.

Argument II involves a conflict of interest by lead trial counsel Mr. Egan because the trial judge had found him to have rendered ineffective assistance of counsel in a case that was currently pending on appeal at the time of appellant's trial, *People v. Eldridge* (Sept. 20, 2002)[2002 WL 31103022 (Cal. App.1 Dist.)], and Mr. Egan failed to file a motion for his recusal under

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[6] Although *Hernandez* relied on former Code of Civil Procedure section 1078 which had required trial courts "to permit *reasonable* examination of prospective jurors by counsel for the People and for the defendant," which was repealed in 1988. (*Id.* at 535 (emphasis in original).)

Penal Code Section 170.6.[7] The outcome of this appeal could have had serious implications for Mr. Egan's career, as all instances of a final finding of ineffective assistance of counsel have to be reported to the California State Bar by the court.[8] Indeed, Mr. Egan characterized it as "*definitely the worst thing that's ever happened to me in my career.* " (3 RT 608.) With this threat hanging over his career, Mr. Egan should have filed a recusal motion because, as Judge Spinetta himself acknowledged, people might later say "Mr. Egan might have had to make decisions in this case, *People v. Perez*, with an eye towards what effect it might have on...anybody who's investigating the matter." (3 RT 613.) Judge Spinetta also pointed out that Mr. Egan "may have felt he had to conduct it [this case] in a certain way because it might impact the way the judge handles that situation [the other case]." (*Id.*) The court in *Eldridge* ultimately held that Mr. Egan had rendered ineffective assistance of counsel.

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[7] Mr. Egan *did* file a motion to disqualify Judge Spinetta on different grounds, under Code of Civil Procedure sections 170.1 and 170.3: that he had made statements indicating he thought appellant was guilty. (4 CT 1135-1183.) This separate issue is discussed in the following claim. These two issues are interrelated.

[8] California Business and Professions Code section 6086.7(a)(2) provides:

"A court shall notify the State Bar of any of the following:

...(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney."

Respondent acknowledges the seriousness of the ethical dilemma, stating that "[w]e do not disagree that Egan had reason to be concerned about the *Eldridge* matter," RB at 42, but argues there was no conflict of interest and no prejudice to appellant. (RB at 40-42.)

As to the existence of the conflict, respondent's factual summary highlights and discusses in detail Judge Spinetta's comments on the situation and Mr. Egan's responses. (RB at 36-39.) Judge Spinetta properly went to great lengths to explore the potential for a conflict, but his subjective feeling that there was none is hardly probative one way or the other. Judge Spinetta would have been obliged to request Mr. Egan's removal from the case had he felt otherwise. Nor should we accord much weight to Mr. Egan's similarly subjective view that he was not conflicted. Had he felt otherwise, he would have been ethically precluded from continuing as appellant's counsel.

Respondent bases most of his argument that there was no conflict on an alleged lack of proof "that Egan had 'pulled his punches' or otherwise rendered poor performance on appellant's behalf..." (RB at 42.) However, as respondent himself points out, "where a conflict of interest causes an attorney not to do something, the record may not reflect such an omission." (RB at 41, citing *People v. Doolin* (2009) 45 Cal.4th 390, 418.) Such is the case here, as the record cannot reflect what was not done. Any claims of ineffective

assistance of counsel in this regard are clearly not properly raised here on direct appeal, but rather in habeas proceedings.

Even so, the record does show that Mr. Egan failed to do much on appellant's behalf at the guilt phase, which was his responsibility, while co-counsel Ms. Epley's efforts were much more extensive at the penalty phase, which she handled. The record also reveals that appellant expressed some dissatisfaction with Mr. Egan in the early stages of the case. (3 RT 694-698.) Mr. Egan's guilt phase presentation amounted to a virtual endorsement of the state's case, as he called only two witnesses: Lacy Harpe (14 RT 3340-3400) and a police officer briefly as to a stipulation. All told, the defense case at the guilt phase amounted to about 60 transcript pages. (14 RT 3340-3401.) Despite varying and inconsistent stories told by the chief prosecution witnesses, Maury O'Brien and Jason Hart, Mr. Egan made little effort to discredit them or point out numerous inconsistencies in their testimony. Compared with the much fuller defense prosecution at the punishment phase by Ms. Epley, the defense case at the guilt phase was a virtual abstention.

As discussed in the AOB (at 97), the record also shows some inexplicable prevarication on the part of Mr. Egan. At first he denied that the ineffective assistance of counsel issues were even raised by appellate counsel in the *Eldridge* case. (3 RT 606.) One transcript page later he said that he

found out about it from a reporter's phone call. (3 RT 607.) Immediately following this, Egan told the court that "*...this whole thing is definitely the worst thing that's ever happened to me in my career.*" (3 RT 608; emphasis added.) The key to this confusing and conflicting discourse may be Egan's statement that "the whole reason I'm doing it [having this conversation] is I don't want to file a [motion under Penal Code] 170.6."[9] (*Id.*) The logical explanation is that Mr. Egan's strong desire not to file that motion caused him to at first deny the undeniable, that his ineffectiveness was in issue in *Eldridge.* Mr. Egan's desire not to file the 170.6 motion makes sense when one considers that he would not want to jeopardize his status and good will with Judge Spinetta, who could have been in a position to refer him to the California State Bar based on *Eldridge.*

Both the United States Constitution and the state constitution guarantee a defendant the right to counsel unburdened by conflicts of interests. (U.S. Const., Amend. VI; Cal. Const., art. I, section 15; *Wood v. Georgia* (1981) 450 U.S. 261, 271; *People v. Bonin* (1989) 47 Cal.3d 808, 833.) In order to show a violation of the Sixth Amendment of the United States Constitution, a defendant who raised no objection at trial must show that his counsel was

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[9] A motion under Penal Code section 170.6 is a motion to disqualify the judge.

burdened by an "actual" conflict of interest and that the conflict adversely affected the representation. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348.) Once this showing has been made, the courts will not engage in "nice calculations as to the amount of prejudice," and the defendant will be entitled to relief without any further showing. (*Id.* at 349.) By contrast, under the California Constitution, "even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected. Proof of an 'actual conflict' is not required." (*People v. Mroczko* (1983) 35 Cal.3d 86, 105.) Like the federal "actual conflict" rule, this rule is applied even in the absence of any objection at trial. (*Id.*) Here, Judge Spinetta's reprimand in *Elrdidge* was so disturbing to Mr. Egan that it caused him "much pain" and "personal pain" (3 RT 608) and was in fact "the worst thing that's ever happened to [Egan] in my career," (*Id.*) Appellant has made a sufficient showing under either the federal or California standard.

## III. TRIAL ERROR FOR FAILURE OF THE TRIAL JUDGE TO DISQUALIFY HIMSELF AS A RESULT OF COMMENTS THAT INDICATED HE COULD NOT BE IMPARTIAL.

Argument III concerns comments made by Judge Spinetta prior to trial. These comments showed that he could not be impartial and he refused to

disqualify himself. A defense motion to disqualify the judge was denied.

Respondent discusses in detail Judge Spinetta's rulings at co-defendant Lee Snyder's post-trial hearings, and appellant's motion to disqualify Judge Spinetta. (RB at 43-48.) Once again, the argument is mainly based on one case which can be readily distinguished from appellant's. Respondent cites *In re Richard W.* (1979) 91 Cal.App.3d 960, for his conclusion that "[i]n light of these cases, Judge Spinetta had no duty to disqualify himself from presiding over appellant's trial, merely because he had presided over Snyder's trial and found that the evidence had supported Snyder's conviction and sentence." (RB at 49.) First, in *Richard W.,* the court held that "[a]ppellant is precluded from raising this issue on appeal because a timely objection was not made at the trial level." (*Id.,* 91 Cal.App.3d at 968.) However, an objection was made here, as discussed *supra.*

Second, in *Richard W.*, "the record discloses no evidence supporting appellant's contention or showing the probable existence of prejudice," (*Id.*) Here, however, appellant's jury knew that the presiding judge thought appellant was guilty and the media dissemination of Judge Spinetta's statements biased some of the prospective jurors, unlike the less-publicized burglary at issue in *Richard W.* Several of the prospective jurors formed negative opinions of Mr. Perez based on what they had heard about the case

in the media, as discussed in the AOB. This would most likely have come from Judge Spinetta's comments at the Snyder trial and sentencing, as it directly preceded appellant's trial and the judge made special provisions for media coverage of it.[10] The record reveals that several prospective jurors admitted they had seen various media reports and were biased against appellant as a result.

Third, the judge in *Richard W.* had only "a vague recollection of the minor previously being before him and in a postadjudication comment pointed out the minor had progressed to more serious violations of the law." (*Id.* at 969.) Here, however, the judge made several widely-publicized statements that indicated he thought appellant was guilty by attesting to the truth of witnesses who testified against Snyder, and those comments were seen and remembered by several prospective jurors.

In *Richard W.*, the juvenile judge "after announcing the decision, [commented] on his concern about the minor's progress into more serious violations of law." (*Id.*) The court held that the juvenile judge was not required "to be so detached as to be unconcerned about the seriousness of the offense and what appeared to be a distinct escalation in the gravity of the

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[10] Judge Spinetta granted special permission for the news media to photograph and tape portions of the Snyder sentencing proceedings. (4 CT 1137.)

violation in contrast to a past proceeding of relatively minor significance." (*Id.*) Here, there were no overriding concerns voiced by Judge Spinetta regarding the escalation of violence; appellant's future trial relied on the same facts as Snyder's; and neither Snyder nor appellant were minors.

Lastly, *Richard W.* mainly stands for the proposition that "[a] judge is not disqualified to try a case merely because he previously, in a separate proceeding, heard a case of a coparticipant or passed on the application of a coparticipant for probation." (*Id.,* at 968.) Appellant does not argue to the contrary.

Respondent also argues that

> even if Judge Spinetta had neglected such a duty, the defense easily could have remedied the problem by moving to disqualify him under Code of Civil Procedure section 170.6. In the absence of such a motion, it must be presumed that the defense attorneys did not truly consider Judge Spinetta to be biased against appellant.
> (RB at 49.)

This presumption is unwarranted, as the record shows that the defense did file a motion to disqualify Judge Spinetta under Code of Civil Procedure sections 170.1 and 170.3, as respondent points out at length. (RB at 45-48.) This is a clear indication they considered him to be biased. While Code of Civil Procedure sections 170.1 and 170.3 are not automatic disqualifications, whereas section 170.6 is an automatic peremptory challenge, the distinction

may have little meaning here, as appellant's counsel did file to disqualify Judge Spinetta.

As to why no peremptory challenge was filed, in Argument II we saw that Mr. Egan was reluctant to file such a challenge because of the pending *Eldridge* case. As he himself admitted: "the whole reason I'm doing it [having this conversation] is I don't want to file a [motion under Penal Code] 170.6." (3 RT 608.) That conflict[11] would explain the failure to file a motion under section 170.6, and not, as respondent argues, that "[i]n the absence of such a motion, it must be presumed that the defense attorneys did not truly consider Judge Spinetta to be biased against appellant." (RB at 49.)

Respondent also argues that there is no evidence that the verdicts were tainted by Judge Spinetta's comments and although some jurors responded affirmatively to the question of "whether their ability to judge appellant's case would be affected by pretrial publicity," "it does not appear that any such jurors referred to Judge Spinetta's comments at Snyder's trial." (RB at 50)

While the record does not show any explicit references to Judge Spinetta's remarks, it does clearly show that prospective jurors were exposed

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[11] As discussed in the previous argument, the basis of the conflict was that Judge Spinetta had found Mr. Egan to have rendered ineffective assistance of counsel in the *Eldridge* case and the judge would have had to report him to the California Bar.

to them. There was extensive media coverage of Mr. Snyder's sentencing hearing, with reporters from "the Contra Costa Times, the San Francisco Chronicle, KRON-TV and KGO-TV" present. (4 CT 1136-1137.) Judge Spinetta made the following prejudicial remarks at Snyder's sentencing:

> 1) "I am persuaded that the evidence that was presented in this case indicates that Mr. O'Brien was telling the truth in all material regards..." (PRT 4:18-20; 4 CT 1178.)[12]
> 2) "But having made that evaluation of the evidence in this case, I am persuaded, as I have said, that in all material respects he [O'Brien] was telling the truth." (PRT 4:26-28; 4 CT 1178.)
> 3) "I guess the way to express it is this: That I am as confident as one can be in these matters. These matters don't lend themselves to scientific precision, but I am allowing for that. I am confident as one can be that no injustice has occurred and that the jury has rightfully convicted defendant of the crimes charged in this case." (PRT 5:5-11; 4 CT 1179.)
> 4) "Evidence was presented. Based upon that evidence, the jury found you guilty of each and all the charges...I reviewed that evidence, as I indicated earlier, to assure myself that there was substantial...substantial evidence to support those verdicts....As I indicated earlier, I am persuaded as much as anyone can be in these matters, that the verdicts were supported by substantial evidence and that you, in fact, did commit the murder that you were charged with." (PRT 35:22-26; 4 CT 1156.)
> 5) "This murder was senseless. It was vicious. It was heinous. All adjectives which I found in the correspondence I received which I alluded to earlier describing the kind of murder that it was. One

[12] "PRT" refers to the partial transcript of the Snyder sentencing appended to Mr. Egan's motion, using Mr. Egan's page numbering, with the line number(s) following the page number. Although Mr. Snyder's trial transcript has been made a part of the Record on Appeal in this case, for easier reference appellant will use the pagination of Mr. Egan's motion and also the pagination of the partial transcript contained in the Clerk's Transcript of appellant's case. (4 CT 1155-1179.)

individual in his letter to me indicated that what occurred here was that the victim, Mrs. Daher, was strangled, stabbed and stepped upon. And that's all true.

This was all done with premeditation. Indeed, it's striking to me here...these individuals, including you Mr....you, Mr. Snyder, set out to go kill someone else in Solano, stopped over in Lafayette, killed someone, Mrs. Daher, and then continued on to go to Solano to kill that individual again...

This premeditation permeates the whole process. The murder itself was...cold, it was callous, and it was perpetrated by what clearly indifferent murderers, among whom you are to be counted, Mr. Snyder.

Not only were you among the three, but I sat here through the...and heard the evidence, and the evidence strongly points to the fact that Mrs. Daher was dead at the time she was stabbed. The evidence indicates that her neck was probably broken before she was stabbed, and the evidence indicated that you, yourself, along with Mr. Perez, were responsible and actively participated in that strangling, pulling the telephone cord that broke her neck."

(PRT 46:10-47:11; 4 CT 1167-1168.)

6) "*One of the reasons I allowed the TV coverage that is taking place here is I want to give as much widespread notice as possible as to what happens to people who commit horrendous crimes of this nature*. It's important to send out the message that individuals who do these things are going to be held accountable." (PRT 49:22-27; 4 CT 1170)(emphasis added.))

There were many references to appellant both in Mr. O'Brien's testimony at the Snyder trial and his testimony in this case.[13] Newspaper

[13] Some of the additional references summarized in Mr. Egan's motion, which need not be stated in detail here, are that Mr. O'Brien became acquainted with appellant shortly before the crime was committed; that O'Brien and Snyder conceived a plan to rob and, if necessary, kill a drug dealer in the Fairfield or Davis area; that appellant agreed to participate because he needed money; that they took BART and disembarked at Lafayette; that the three of them entered a house with an open garage door; and that appellant and Mr. Snyder strangled the woman they found in the house. (4 CT 1140-1141.)

accounts appended to the motion recounted the emotional nature of Snyder's sentencing hearing. (4 CT 1149-1153.)[14] The newspaper account in the Contra Costa Times stated that "Maury O'Brien told the jury in detail what he, Snyder and Joseph Perez did the day they robbed and killed Daher. O'Brien told the truth about the material facts, Spinetta said." (4 CT 1150.) The San Francisco Chronicle account stated that "[f]ellow suspect Maury O'Brien provided riveting testimony at Snyder's trial and is expected to testify against Perez." (4 CT 1153.)

While respondent argues that no jurors specifically "referred to Spinetta's prior comments at Snyder's trial," RB at 50, it would be unrealistic to expect them to do so, as this would have meant directly telling the judge, in front of other jurors, that "your comments biased me." However, the jurors did mention the publicity they had heard, which undoubtedly meant the highly-publicized Snyder sentencing. Judge Spinetta himself admitted that the purpose of allowing such extensive media coverage at the Snyder hearing, as opposed to the less-publicized trial, was to generate this publicity: "I want to give as much widespread notice as possible as to what happens to people who commit horrendous crimes of this nature. It's important to send out the

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[14] Indeed, as discussed herein, several jurors commented during *voir dire* that they had already made up their minds based on what they had seen or heard in the media about the case, based on *these* media accounts.

message that individuals who do these things are going to be held accountable." (PRT 49:22-27; 4 CT 1170.)

While the intent was laudable, Judge Spinetta's message was clearly heard by appellant's jurors as well as the public. Prospective juror Jeffrey M. stated that if appellant was found guilty, he would "adamantly press for the death penalty," based on what he heard on television. (7 RT 1651.) Prospective juror Susan B. stated that if the defendants were found guilty, she wanted them "killed like they killed her" because "I know all the details." (7 RT 1709.) Prospective juror Sharon B. stated that, based on what she had learned through trial-related publicity, she felt that Mr. Perez was guilty and, as a result, she could not be impartial. (8 RT 1835.) She added that there was "no way" she could set aside what she had learned about the case. (8 RT 1837.) Prospective juror Mary M., similarly stated that she was not sure she could be fair because of what she had heard about the case. (8 RT 1837.) George H. had also heard the publicity, and, as a result, thought the defendant was guilty. (8 RT 1846.) It would be hard to overestimate the prejudicial impact on appellant's prospective jurors and jury panel of hearing or reading that the presiding judge thought that O'Brien had testified truthfully and that appellant was therefore guilty.

Respondent's argument basically repeats the flawed holdings of Judge

Garber, who ruled on the motion to disqualify, without addressing appellant's arguments. (RB at 47-50.) Judge Garber denied the motion on the ground that "the fact that a judge presided over a prior trial does not by itself bar him or her from presiding over a retrial" and "[t]his court is satisfied that there is no prohibition that would prevent the trial judge from hearing multiple separate trials of co-defendants." (RB at 47, citing 4 CT 1240.) Of course this is true, as *In re Richard W., supra,* holds, but this was not the issue raised by trial counsel. Nor is it the argument raised here. While there is no such general prohibition, the prohibition here was created by the judge's comments, not his status as a judge presiding over the separate trials of co-defendants.

Respondent repeats the incorrect holding of Judge Garber that Judge Spinetta limited his comments "to those which were necessary in ruling upon the motion for new trial and factors in determining the appropriate sentence" for Mr. Snyder. (RB at 48, citing 4 CT 1240.) This misstated the scope of the comments, which, as Mr. Egan pointed out, "while the statements concerning Mr. Perez were not inappropriate per se, neither were they necessary for the Snyder hearings." (4 CT 1194.) As Mr. Egan pointed out in his motion, the problem was not Judge Spinetta's comments on O'Brien's testimony but the unnecessary comments that specifically related to appellant. (4 CT 1143-1144.) Appellant does not base his argument solely on the impropriety of the

judge's comments, but on the fact that, having made them, Judge Spinetta put himself in a position that mandated his disqualification.

Respondent also focuses on Judge Spinetta's written answer to this challenge in which he denied saying or doing anything that would disqualify him. (RB at 46-47, citing 4 CT 1184-1188.) The judge's answer is similarly flawed. In that answer Judge Spinetta focused on the fact that his statements were made in the course of his judicial duties (RB at 46, citing 4 CT 1185), and the language of Code of Civil Procedure 170.2(b) which states that "(i)t shall not be a grounds for disqualification that the judge...(h)as in any capacity expressed a view on a legal or factual issue presented in the proceeding..." (RB at 46, citing 4 CT 1185.) Respondent fails to note that appellant's case was of course a different proceeding from that of Mr. Snyder's, where the views were expressed, and thus Code of Civil Procedure 170.2(b) is not applicable, as argued in the AOB, pages 116-117.

Respondent also points to Judge Spinetta's argument that

> Even if the *Perez* trial is viewed as a separate proceeding from that involving *Snyder*..[m]y comments regarding the credibility of Maury O'Brien and the reasons I gave for sentencing Mr. Snyder to life without possibility of parole were exclusively based upon and related solely to the evidence presented in the *Snyder* trial. Since my comments in the *Snyder* 'case' were limited to the evidence presented there, it cannot reasonably be inferred from those comments that I have pre-judged the *Perez* 'case' in any manner.
> (RB at 46, citing 4 CT 1186.)

However, the evidence presented in *Snyder*, at least at the guilt phase, was almost identical to that presented in the *Perez* proceedings, as they involved the same crimes. Although Judge Spinetta wrote his answer prior to the commencement of appellant's trial, this similarity would have been reasonably expected by him when he wrote it. There is also a logical inconsistency in Judge Spinetta's assertion that the *Snyder* and *Perez* matters were the same proceeding (4 CT 1185) and his simultaneous assertion that his comments in *Snyder* were limited only to that case (4 CT 1186), which contradictorily assumes that they were different proceedings. (*See* AOB argument at page 117.)

Judge Spinetta also focused on his subjective feeling that "it would be unreasonable to conclude that my evaluation of the evidence presented in the *Perez* case...might be impacted by my having heard and evaluated the evidence in the *Snyder* case." (*Id.*) However, the judge's subjective feelings were not in issue. Rather, an objective person would feel that Judge Spinetta would likely have the same feelings about appellant's guilt at his trial that the judge had already expressed at the sentencing of his co-defendant. The judge's conclusion was that "[a] person familiar with the different legal issues involved and knowing the role of the judge in such matters could not reasonably conclude that the statements made by me in sentencing Mr. Snyder

and ruling on his motion for a new trial in any way compromised my impartiality regarding Mr. Perez." (4 CT 1187.) But Judge Spinetta did not explain how or what "different legal issues" were involved in the two cases with the same facts. Nor does respondent.

In a similar vein, respondent points to Judge Spinetta's explanation that

> [t]his judgment regarding Mr. O'Brien's credibility...is specific, and was limited, to Mr. O'Brien's testimony in the *Snyder* case, and I do not consider myself precluded in any way from coming to a different judgment if warranted by the evidence at the *Perez* trial.
> (RB at 47, quoting 4 CT 1204.)

But here again, Judge Spinetta had earlier asserted that the *Snyder* and *Perez* matters were the same proceeding (4 CT 1185) and then, contradictorily, that his comments in *Snyder* were limited only to that case (4 CT 1186.) As we saw previously, it is difficult to see how a person in Judge Spinetta's shoes could have reasonably expected the evidence in appellant's trial to be different from that in co-defendant Snyder's trial.

This is important because, as Mr. Egan pointed out in his reply, Judge Spinetta's answer does not address the issue as the statute frames it, that "the facts and circumstances bearing on the judge's possible partiality must be considered as of the time the motion is brought." (*United Farm Workers of America, AFL-CIO v. Superior Court (Maggio, Inc.)* (1984) 170 Cal.App.3rd 97, 105; cited at 4 CT 1199.) As that case points out, "the use of the word

'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." (*United Farm Workers* at 104-105.) It is not Judge Spinetta's subjective feelings that are in issue, but the viewpoint of the reasonable objective person. Here, "Judge Spinetta's appropriate statements in the Snyder proceedings do create an appearance of bias under the provisions of Code of Civil Procedure 170.1(a)(6)(C) insofar as the trial of defendant is concerned." (4 CT 1194.)

As we have seen, neither Judge Spinetta's statement nor Judge Garber's denial of the motion for disqualification nor respondent's arguments squarely address the issues raised by appellant. Respondent merely repeats the flawed holdings of Judges Spinetta and Garber.

## IV. THE TRIAL COURT ERRED IN "REHABILITATING" DEATH-PRONE JURORS BY ASKING LEADING AND SUGGESTIVE QUESTIONS ON *VOIR DIRE*, WHICH STACKED THE JURY IN FAVOR OF A DEATH SENTENCE, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY.

Argument IV concerns the trial court's *voir dire* "rehabilitation" of jurors who, on the basis of their questionnaires, would otherwise have been subject to challenges for cause by the defense. The court's interventions on behalf of pro-death jurors, through suggestive and leading questions, were

designed to have them change their otherwise-objectionable questionnaire answers. This had the inevitable effect of stacking appellant's jury pool with pro-death-penalty jurors, allowed pro-death-penalty jurors to conceal their disqualifying biases and basically led them to completely change their answers on the basis of the court's "guidance." Appellant was prejudiced by these actions, as some of these "rehabilitated" jurors actually served on his jury. For others, appellant had to use peremptory challenges against those who should have been excused for cause. More seriously, the cumulative effect of the improper rehabilitations was to skew the panel lopsidedly in favor of the State and in favor of a death verdict.

Respondent initially argues that "appellant never raised his appellate claim of error in the trial court" and "[n]or did appellant exhaust all of his peremptory challenges." (RB at 51.) First, appellant contends that this error is structural, *Arizona v. Fulminante* (1991) 499 U.S. 279, 309, and cannot be waived by appellant despite any failure on the part of his trial attorneys to object. (*Morgan v. Illinois, supra,* 504 U.S. 719, 729-734; *Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426.) Additionally, as respondent points out, "this Court held in *People v. Whalen, supra,* 56 Cal.4th 1, 28, that a claim of judicial misconduct during voir dire is not necessarily forfeited by the defendant's failure to object at trial." (RB at 51.) Also, "[i]n the past, we have reached the

merits of similar claims notwithstanding the defendant's failure to object to the assertedly disparate questioning in the trial court." (*People v. Whalen, supra,* 56 Cal.4th at 28, citing *People v. Martinez* (2009) 47 Cal.4th 399, 439, fn. 8; *People v. Thornton* (2007) 41 Cal.4th 391, 419-425; *People v. Navarette* (2003) 30 Cal.4th 458, 485 & fn. 2, 487-488; *see also People v. Mills* (2010) 48 Cal.4th 158, 189.)

Next, respondent cites *People v. Whalen* for the proposition that "this Court has rejected virtually identical claims many times." (RB at 51.) However, the portion of *Whalen* cited, 56 Cal.4th at 25, goes only to the standard for excluding individual jurors on the basis of their personal views, not the systemic leading and slanted questioning here that resulted in the skewing of the jury as constituted.

Respondent relies heavily on *People v. Mills* (2010) 48 Cal.4th 158, to show that the trial court did not abuse its discretion in questioning the jurors. (RB at 52-53.) However, here again, this case is readily distinguishable from appellant's circumstances. First, in *Mills* the biased-questioning claim was not well pled and ""[t]he exact nature of defendant's claim is unclear." (*Mills* at 188.) A major factor in *Mills* was the fact that "defense counsel declined the court's explicit offer to question the jurors further. Defendant thus had the opportunity to rehabilitate these jurors in an effort to show they were not

excludable, had he wanted to do so." (*Id.*) Appellant's counsel were given no such offers or opportunities. Third, *Mills* concerned prosecutorial challenges for cause and "each identified juror made it clear that the juror would not, or could not, vote to impose the death penalty." (*Id.*) Mill's "cited examples involve prospective jurors who flatly stated that they could not or would not vote to impose the death penalty." (*Id.* at 189.) Here, there were no such clear-cut statements from the prospective jurors. Most importantly, in *Mills* the appellant "does not assert the trial court applied different legal standards in granting or denying challenges for cause, that the court asked improper questions, that either the court or the parties failed to take the time or lacked a fair opportunity to ascertain the true views of the jurors, or that a biased juror was allowed to serve on the jury." (*Id.*) With the possible exception of "improper questions," all these factors are present here.

Respondent then selectively reviews some of the *voir dire* to show that "the trial court's questioning of prospective jurors was even-handed, if not favorable to the defense." (RB at 53-56.) Appellant has summarized his facts in support of this argument in detail (AOB at 126-132) and that discussion need not be repeated here. Briefly, some of the more troublesome jurors were:

1) Juror No. 37, who actually sat on appellant's jury, had several otherwise disqualifying questionnaire answers that were "clarified" by the

court in its examination. Based on the questionnaire, there was a issue in the court's mind as to whether the juror would "listen to psychiatric, psychological testimony, mental health testimony." (7 RT 1639.) By a series of leading questions, the juror agreed to consider these matters. (7 RT 1639-1640.) This juror's questionnaire answers also raised issues about an unwillingness to consider "the background and social history of the defendant." (7 RT 1640; 3 JQ 943.) The court noted " some question here about whether you'd listen to evidence about the social history of the defendant." (7 RT 1640.) After coaxing, the juror said he could (7 RT 1640) but there was insufficient exploration of this change of opinion. After being asked "would you be willing to disregard cost in arriving at your decision" the juror agreed to disregard it. (7 RT 1640; 3 JQ 942.) This juror also thought there were some cases where he/she "would always impose the death penalty." (7 RT 1641; 3 JQ 942.) After being told that "the law requires neither of these penalties" this juror stated that he/she was prepared to follow the law.

2) Juror No. 3 had many pro-prosecution answers both in the questionnaire (1 JQ at 138 *et seq.*) and at *voir dire*. Juror No. 3's brother was formerly a defense attorney for the New York Police Department (7 RT 1486-1487) and this juror was also a crime victim (7 CT 1486) and wrote "I would be sympathetic to the victim." (*Id.*; 1 JQ 144.) The judge then engaged in a

lengthy statement to the juror about the necessity to be fair and the prospective juror agreed to " try" to be fair. (7 RT 1487.) The judge finally asked the juror if he/she thought they could "pull it off." (*Id.*) Not surprisingly, the juror said "yes." (*Id.*) The judge then explained about witness credibility and ended with the leading question, "I take it you're willing to do that?" (7 RT 1489.)

3) Juror No. 4 (7 RT 1489) believed that the criminal justice system made it too hard for the police and prosecutor to convict people accused of a crime. (7 RT 1491; 1 JQ 87.) He then said that was "just a comment" The court led him to the answer: "[a]nd you're prepared to follow the law?" (*Id.*)

4) Juror No. 1 is very troubling as she had heard about the case in the media and as a result, was unsure whether she could be fair (7 RT 1626; 1 JQ 80-81) due to exposure through newspapers, people at work, a co-worker, television, radio and people who knew the victims. (1 JQ 80.) Juror No. 1 was quite knowledgeable about the case, as the co-worker knew the victim's family, their children went to school together, and "they shared driving responsibilities for extra-curricular activities e.g. sports." (1 JQ 80.) Juror No. 1 also wrote in her questionnaire that

> [w]hoever did the crime were walking by [the] home, maybe walking from BART, saw the open garage w/SUV and saw it as an opportunity to take the SUV...It must have been totally devastating for the daughter to find her mother dead. We spoke about the efforts to find whoever killed the victim of that...I was horrified about it at the time. I kept reminding my husband to

> close the garage door because he has a habit of leaving it open when he walked our dog. Why give someone an opportunity to take anything from you or possibly harm you in any way...It's human nature to feel a bit biased towards someone who takes a human life...because they want to take a car...
> (2 JQ 80-81.)

The court then asked her a leading question: "Are you prepared to say: Look, I read about these things. I formed some opinions, but basically I am going to set all that aside. I am going to listen to the evidence and the law and I am going to make my decision based upon what I hear here. Is that in fact what you are prepared to do?" (7 RT 1627.) Even after this coaxing, the juror stated only that she "thinks" she could do it. (*Id.*)

Thus, sitting on appellant's jury was a person who expressed grave doubt about her own fairness and had many reasons to be biased against appellant, by her own admission. While respondent may be correct in stating that she did not express a "categorical refusal (or inability) to consider both options" [life or death], RB at 56, Juror No. 1 certainly came very close to such an attitude.

Respondent fails to address the cumulative effect of this trial error. This argument is not simply individual *voir dire* error in failing to excuse Prospective Juror X or Y. Instead, it is a challenge to the trial court's prejudicial and skewed questioning that ensured appellant's jury pool was composed of objectionable pro-death jurors, and ensured that appellant's

actual jury was predisposed to a guilty verdict and a sentence of death. These arguments are not, as respondent puts it, simply that "appellant does not identify any juror who was either (1) dismissed for cause after expressing a willingness to consider the two sentencing options...or (2) allowed to sit on the jury after expressing a categorical refusal (or inability) to consider both options." (RB at 56.) The cumulative effect of the individual inclusions and exclusions are the gist of the arguments, not just individual errors in rehabilitating prospective juror X or Y. Ultimately, all of the court's actions must be seen cumulatively, and even if no one improper rehabilitation can be seen as depriving appellant of a fair trial, the cumulative effect deprived appellant of a fair jury.

Appellant submits that individually and collectively, the coaching and "rehabilitation" of pro-death jurors, both substantively and procedurally, resulted in the determination of whether appellant should live or die being entrusted "to a tribunal organized to return a verdict of death." (*Witherspoon v. Illinois* (1968), 391 U.S. 510, 521.)

In other cases where this has been found, the result has been reversal *per se*. (*Witherspoon, supra*; *Morgan v. Illinois, supra,* 504 U.S. 719.) That is the appropriate result here. The showing that the Court applied strenuous efforts to retain pro-death jurors is enough to invalidate the process under

*Witherspoon.* Reversal *per se* is appropriate and consistent with the long-established rule that when even one pro-life juror is erroneously excluded, reversal of the penalty phase verdict is required. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.) It is even more appropriate where the error resulted in systematic bias. Moreover, for the reasons stated in Appellant's Opening Brief, reversal of the guilt verdict is appropriate as well because the court's methodology in jury selection resulted in a jury predisposed to find appellant guilty.

The trial court's efforts to salvage pro-death jurors so skewed the jury selection process, and the available pool of potential jurors, that it amounts to a **structural** flaw not susceptible to harmless error analysis. This is one of those "very limited class of cases" where the "defects in the constitution of the trial mechanism, ... *defy analysis by 'harmless-error' standards* [,]" (*Arizona v. Fulminante* (1991), 499 U.S. 279, 309 (emphasis added)), and affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.")

## V. PROSECUTORIAL MISCONDUCT FOR PURPOSELY DELAYING FILING THE NOTICE OF AGGRAVATION.

Argument V concerns prosecutorial misconduct in failing to file the notice of aggravation in a reasonably timely fashion. This misconduct

distorted the fact-finding process and rendered both the trial and sentencing hearing fundamentally unfair. The aggravation evidence concerned an alleged rape of witness Ms. Torres by appellant.

Respondent summarizes the factual background in detail (RB at 59-63) and argues that there is no basis for reversal because 1) the prosecutor informally told the defense, six months prior to the start of the penalty phase, of the rape or attempted rape of Andrea Torres; 2) that the San Francisco Police Department was not part of the prosecution team and there was no duty to obtain the report; 3) that the report was not exculpatory and 4) appellant has not shown any prejudice. (RB at 63-66.)

First, respondent claims an informal notice of an uncharged rape by "Andrea Jones" was given to defense attorney Epley on March 1, 2001. (RB at 59.) However, at the hearing the next day, March 2, 2001, Epley told the court she has been asking for the notice for over a year and had not yet received it. (5 RT 768.) On March 8, 2001, she wrote to district attorney Paul Sequeira requesting discovery of the factors in aggravation and, specifically, the uncharged rape of "Andrea Jones." (4 CT 1218; 5 CT 1554.) At the next pre-trial hearing on March 16, 2001, Ms. Epley claimed that the letter she received from the prosecution, entitled a "Notice of Aggravation," was only a one page letter itemizing nine factors in aggravation. (5 RT 790.) She

claimed it did not meet the requirements for notice, as no discovery accompanied it. (5 RT 791.)

Even if defense counsel knew earlier that "Andrea Jones" referred to Andrea Torres, simply placing her name on the prosecutor's list, instead of the requested Notice of Aggravation with details, was not helpful to the defense and does not absolve the prosecutor from his stonewalling tactics. Indeed, on May 24, 2001 (4 RT 869), the prosecutor stated that he "will think" about when he will file the notice of aggravation; on June 15, 2001 (4 RT 896) the prosecutor said he had filed an "informal" Notice of Aggravation; and on July 27, 2001 (4 RT 960) the prosecutor promised to have the notice filed that day. At every one of these court hearings, the defense complained that they had not yet received it. The Notice of Aggravation was received by the defense only on August 16, 2001, shortly before trial. (5 RT 1017, 1165.) It included evidence of the alleged rape incident regarding which the defense had not received any discovery. (5 RT 1165.) Appellant was not provided with discovery related to the evidence which supports the aggravation until October 2, 2001, four weeks *after* the jury trial had begun. (5 CT 1558.) Much of this delay was due to the prosecutor's attempts to game the system.

Second, respondent argues that there was no duty to disclose as the San Francisco Police Department (SFPD) was not part of the prosecution team.

(RB at 63.) This fails, as pointed out in the AOB (at page 187), as *Kyles v. Whitley* (1995) 514 U.S. 419, held that "the individual prosecutor has a *duty to learn of any favorable evidence* known to the others acting on the government's behalf in the case." (*Id.* at 435.) In other words, the prosecutor cannot ignore information gathered by another police agency, here the San Francisco Police Department, to duck his duty to disclose favorable information to the defense. The State failed to timely provide the information on this alleged rape to the defense, which constitutes the suppression of material evidence which "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Id.*)

Third, respondent argues that the report was not exculpatory. (RB at 64.) Under *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny, a proceeding is rendered fundamentally unfair if: (1) the prosecution suppressed favorable evidence; and (2) the evidence was material to either guilt or punishment. (*Kyles v. Whitley, supra*; *United States v. Bagley* (1985) 473 U.S. 667, 683; *Brady*, 373 U.S. at 87; *Blackmon v. Scott* (5th Cir. 1994) 22 F.3d 560, 564.) The Supreme Court has rejected any distinction between impeachment and exculpatory evidence for purposes of *Brady* analysis. (*Bagley*, 473 U.S. at 677; *Giglio v. United States* (1972) 405 U.S. 150, 154.) Here, the discovery, even if not exculpatory, could have been used for

impeachment purposes.

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (*Kyles*, 514 U.S. 419; *Bagley*, 473 U.S. at 682.) Here, although the information was finally disclosed, it was untimely, and appellant's defense was unable to properly prepare for it, either with the juror questionnaires or in *voir dire.* The trial court erred in ruling that the prosecution had no duty to turn over the evidence which was in their constructive possession and also in allowing the prosecution to present it without any penalty. The *Brady* and *Kyles* analysis applies equally here, as the untimely disclosure prejudiced appellant.

Fourth, as to the question of prejudice, on August 16th, 2001, shortly before trial (5 RT 1017, 1555; 4 CT 1278-1281) defense counsel Ms. Epley objected, terming the notice "very untimely" when she received it. (5 RT 1165.) As to prejudice, she stated that "I cannot say to the court then that I could possibly be ready on that aggravation because I have nothing in order to prepare a defense." (*Id.*) The prejudicial effects were actually three-fold. First, the filing of the notice immediately before the trial thwarted the investigation of this incident and efforts to discredit the witness. Secondly, it rendered trial counsel ineffective in jury selection, because they could not

specifically tailor their *voir dire* toward the attitudes of the jury regarding this rape allegation. Had defense counsel been given adequate notice of this incident, jury selection would in all probability have been far more effective. Third, the late filing of the death notice prevented the defense from preparing and requesting jury questionnaires designed to ferret out the attitudes of the prospective jurors towards rape allegations. Reversal is required.

## VI. OTHER INSTANCES OF PROSECUTORIAL MISCONDUCT TAINTED APPELLANT'S TRIAL AND VERDICT.

Argument VI concerns other instances of prosecutorial misconduct.

### a. Offering improper victim impact evidence at the guilt/innocence phase.

Respondent argues that neither defense attorney objected and the testimony of the victim's husband and daughter was not impermissible. (RB at 66-67.) Respondent points out that *People v. Salcido* (2008) 44 Cal.4th 93, 151 and *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, hold that "[d]uring the guilt phase of a capital trial, a prosecutor may not present victim-impact evidence or argue to the jury for the sole purpose of appealing to sympathy for the victim." (RB at 66.) Both husband Joe Daher's testimony (*e.g.,* at 9 RT 2081) and daughter Annie Daher's (9 RT 2100-2111) were unnecessary as neither witnessed anything, they did not add anything to the State's case for

guilt, and they did not view the body. Even respondent concedes their relevance was "relatively minor." (RB at 67.) If so, there was no real need to call them at the guilt phase, and this tactic should be seen for what it clearly was, a pretext to introduce sympathy for the victims. Nor can one reasonably accept respondent's conclusion that "their testimony could not have elicited undue sympathy for Janet." (RB at 67.)

**b. The prosecutor improperly vouched for the credibility of a witness.**

The prosecutor improperly vouched for the credibility of witness Jason Hart at the guilt phase argument: "But you think Jason Hart is going to tell the cops that he gave three guys a ride from what amounted to a murder if he didn't do it? *Well, we know he didn't do it, so he's not going to do that.*" (15 RT 3578.)

Respondent argues that the prosecutor did not vouch for the credibility of Hart because he was "undoubtedly referring to the killing of Janet," the defense did not object, and Hart was not involved in the killing. (RB at 67-69.)

Respondent is probably correct in referring to the prosecutor's comments as "a bit jumbled." (RB at 68.) However, even if we accept respondent's theory that "it appears that the prosecutor was trying to argue that Hart had told the police the truth when he acknowledged having given a ride

to appellant," we still have a vouching problem, as it goes to Hart's credibility and truthfulness.

**c. Improper questioning and attempting to bias the jury.**

**d. Argumentative questions designed to bias the jury.**

The prosecutor repeatedly asked improper questions of defense penalty phase witness Susan Frankel, over repeated defense objections and the court's rulings that such questions were improper, regarding whether he confessed to crimes in his letters to Ms. Frankel.

Respondent calls Ms. Frankel a "minor witness" (RB at 69) and "minor defense witness" (RB at 72) despite the fact that her testimony covered 23 pages of transcript (22 RT 5000-5023.) Respondent also calls this a "minor matter" (RB at 71) despite devoting four pages of argument to it. (RB at 69-73.) The record shows that the questions were improper, they were objected to and the objections were sustained, yet the prosecutor persisted in this line of questioning. (22 RT 5011-5012, 5016.) The questions were clearly made for an improper and irrelevant purpose to discredit this witness by implying that Ms. Frankel would have possibly acted unethically in order to protect appellant. One cannot simply brush this off as "a bit overaggressive" and "technically argumentative," and concluding that it "could not have affected the outcome of the trial." (RB at 72-73.) The jury was left with the

impression that they could not trust Ms. Frankel's testimony about appellant. As an attorney who had served as a mentor to appellant, and saw a lot of positive factors in his background, her credibility was important.

**e. Improper references to appeals.**

At final argument, the prosecutor told the jury that he was asking them to "put him [appellant] on a bus" and have him "sit on death row until his appeals process is over and be executed." (24 RT 5407.) At the conclusion of the argument, defense counsel moved for a mistrial, stating that the mention of appeals, that he would sit in San Quentin "until all of his appeals were exhausted" "must mean, perhaps, the appeal will be successful." (24 RT 5531.)

Respondent argues that the reference to appeals was permissible because "[i]it is common knowledge that defendants convicted of capital crimes in California are entitled to appeal their convictions, regardless of the ultimate punishment imposed, i.e., death or LWOP." (RB at 74.) The point here is that the improper reference to appeals led the jury to believe that they had diminished responsibility for the sentence, as the trial judge himself commented (24 RT 5534-5535), and/or that appellant might be released from prison during the pendency of the appeals. This would be a reason for them to vote for death, to prevent that from occurring.

#### f. Improper references to lack of remorse.

At the penalty phase final argument, the prosecutor stated: "And what expressions of remorse do we hear about? Do we hear the conversation going: I can't believe we did that. Things completely whipped out of control. I don't know what happened. I mean things were—this is horrible. No, don't hear that." (24 RT 5425.) Lack of remorse was once again mentioned, in sarcastic terms, in the prosecutor's final argument: "The defendant in an extraordinary show of remorse displays his trophy, right? Big diamond earning." (sic) (24 RT 5426.)

Defense counsel, at the conclusion of the argument, objected and moved for a mistrial, citing several mentions of "where is the remorse?" (24 RT 5532-5533.)

Respondent first argues, without citation to authority, that "appellant's claim of error is forfeited on appeal" because the defense attorney did not object during the closing argument but only later in arguing for a new trial." (RT at 75.) The motion was actually for a mistrial which was made immediately after the conclusion of the prosecutor's opening remarks at the penalty phase arguments. (24 RT 5469.) Defense counsel was not obligated to interrupt the prosecutor's argument as it was being made. But he did make the mistrial motion at the first opportunity, immediately after the argument was

finished. The trial court agreed that there was no waiver of the objection, as it held the motion would be addressed after Ms. Epley's argument. (24 RT 5470.)

The trial court did exactly that. (24 RT 5531 *et. seq.*) Defense counsel pointed out several mentions of "where is the remorse?" (24 RT 5532) and then moved for a mistrial. The prosecutor claimed he did not focus on lack of remorse. (24 RT 5533.) The court ruled the references to a lack of remorse were in reference to the circumstances of the crime and denied the motion for a mistrial. (24 RT 5534.) In these circumstances, there was no waiver.

Next, respondent argues that the remarks were proper because "the prosecutor was entitled to argue that the circumstances of the killing were atrocious, and that appellant had never showed any hesitation or remorse in killing Janet Daher." (RB at 77.) However, this interpretation cannot easily be squared with the record. The prosecutor asked "[a]nd what expressions of remorse do we hear about? Do we hear the conversation going: I can't believe we did that. Things completely whipped out of control. I don't know what happened. I mean things were—this is horrible. No, don't hear that." (24 RT 5425.) This could have only been interpreted by the jury as a direct comment on appellant's failure to testify in a manner that would explain the crime, and not to "the circumstances of the killing" being atrocious, as

respondent argues. This was improper.

The prosecutor's comment on appellant's decision not to testify, by asking "[a]nd what expressions of remorse do we hear about?" (24 RT 5425) has been explicitly disapproved. In *Griffin v. California* (1965) 380 U.S. 609 (1965), the United States Supreme Court held that an argument by the prosecutor that invited a jury to consider the defendant's failure to testify as evidence of his guilt was prohibited by the privilege against compelled self-incrimination clause of the Fifth Amendment. The Court stated, "[C]omment on the refusal to testify...is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Id.*, at 614.) Federal courts have held that "[t]he test for determining whether a prosecutor's remarks constitute a comment on a defendant's silence is a two-fold alternative one: (1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence." (*United States v. Mackay* (5th Cir. 1994) 33 F.3d 489, 495.) The comment here passes both tests, as referring to a lack of "remorse" could have only had the effect of drawing the jury's attention to the fact that appellant did not testify, and, since it was a direct comment on appellant's alleged lack of remorse, it would almost necessarily

have been construed by the jury as a comment on his silence. The fact that appellant did not testify at the trial suggests that there was a high probability that the prosecutor's statement influenced the jury verdict at the penalty phase.

**g. The cumulative effect of these instances of prosecutorial misconduct deprived appellant of a fair trial.**

The effect of these individual instances of prosecutorial misconduct must be seen not only individually, but in the aggregate. Even if any one of them alone did not render the verdict unreliable or the trial unfair, their cumulative effect was to deprive appellant of a fair trial.

Respondent does not address this issue directly, as he argues there were no individual instances of misconduct, hence nothing to cumulate. (RB at 66-77.) However, both the individual and cumulative effect of these egregious errors in the prosecution's questioning and arguments was that they "infected the trial with unfairness." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637.) Thus, even if this Court holds that any one of the errors alone was not sufficient to create this fundamental unfairness, the proper framework for the analysis is to examine the argument as a whole, as the jury heard it, and not simply to evaluate the individual claims separately.

## VII. APPELLANT'S RIGHTS WERE VIOLATED WHEN THE TRIAL COURT REMOVED A SWORN AND SITTING JUROR DURING THE GUILT PHASE.

Argument VII concerns the improper removal of a sworn and seated juror during the guilt phase whose expressed scruples related solely to the penalty phase.

Respondent, after a detailed summary of the facts (RB at 77-82) argues that the discharge of Juror No. 7 was reasonable. (RB at 82-85.)

### a. The erroneous *Wainwright v. Witt* standard.

First, respondent quotes the *Wainwright v. Witt* (1985) 469 U.S. 412, 424 language that "[a] juror may be disqualified for bias, and thus discharged, from a capital case if his views on capital punishment 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (quoting *People v. Lomax* (2010) 49 Cal.4th 530, 589) (RB at 83.) However, the *Wainwright v. Witt* standard applies *before* a jury has been empaneled and sworn, and holds that a *prospective* juror may be so removed. Juror No. 7 had been sworn as a juror and had heard some testimony in the trial. *Witt* is not the proper standard.

Respondent also argues that because "the trial court was required to dismiss Juror No. 7 at some point in the proceedings because he had a crippling bias for the penalty phase of the trial...the preferable option was to

dismiss him at the outset so a single jury would hear both phases of appellant's trial." (RB at 85.) Yet there is no basis upon which to conclude that this was the "preferable option" *in this case*, although respondent cites general authority that a single jury is *generally preferable* "for the entirety of the case." (RB at 83-84, citing *People v. Fields* (1983) 35 Cal.3d 329, 352 and *Lockhart v. McCreee* (1986) 476 U.S. 162, 175-176.)

As for the possibility of leaving the juror in place for the guilt phase and telling him he would be excused at the penalty phase, the court noted, "it could be argued that his decision in the culpability phase would be affected by his desire not to participate in the penalty phase." (10 RT 2218.) However, although the court could have questioned Juror No. 7 about this possibility and then admonished him to the effect that his feelings regarding punishment had no relevance to the guilt determination, the court admitted that "we haven't voir dired him about that." (10 RT 2219.) Defense counsel offered a "third option ... to tell him that at this point it's not really an issue for him as a juror. If he wants to raise it again at a point where it does become an issue, he can do so, and the court will listen to him and ask him questions again." (10 RT 2220.) As defense counsel noted, "we don't necessarily excuse sitting jurors because of some possibility." (10 RT 2221.)

The other possibility was allowing the juror to sit in the guilt phase

without telling him about his disability for the penalty phase. On this, the court concluded that "the danger of telling him or not telling him or keeping him would – given his state of mind about the penalty, carries too great of a danger to impact him on the culpability decision." (10 RT 2225.) Yet, here again, no effort was made to question or admonish the juror about the fact that his feelings about the death penalty had no bearing in the guilt phase. This would have been a simple and readily understandable instruction, similar to many that the court had already given to the jury regarding the questionnaire answers, as discussed in Arguments I and IV.

The court dealt with the situation as if the issue with Juror No. 7 had arisen before he was sworn: "a challenge for cause here lies to excuse him from participating in this case. So I'm going to sustain the challenge to this juror." (10 RT 2226.) Yet, as argued in the AOB (at pages 160-163) this was the wrong standard, that of *Wainwright v. Witt, supra*, 469 U.S. 412. Judge Spinetta expressly determined to remove Juror No. 7 based on the principles of *Witt*, which applies to the selection of *prospective* jurors, instead of the principles embodied in Penal Code Section 1089, which applies to the removal of *seated* jurors. Judge Spinetta explicitly stated: "I believe the proper approach to this is to take the same position that would have been taken had the issue arisen before he was sworn..." (10 RT 2226.) Unlike *Witt,* jeopardy

had already attached here, when the jury was empaneled and sworn, because of the "need to protect the interests of an accused in retaining a chosen jury." (*Crist v. Bretz* (1978) 437 U.S. 28, 35.)

A trial court's decision to discharge a sitting juror for good cause from a criminal trial is reviewed for abuse of discretion. (*People v. Zamudio* (2008) 43 Cal.4th 327, 350.) The premature removal of Juror No. 7, without *voir dire* questioning and admonishment that his feelings regarding punishment had no bearing in the guilt phase, deprived appellant of the jury he had chosen.

The trial court's decision to employ the *Witt* "substantial impairment standard" was clear legal error and requires reversal. By the time the court removed Juror No. 7, the juror had completed a lengthy juror questionnaire in good faith; he had participated in *voir dire* and was placed on the jury; he was sworn as a juror (8 RT 1871); he was seated on the jury for preliminary instructions and opening statements and he had listened to the testimony of prosecution witnesses.

In short, Juror No. 7 was a fully engaged, participating member of the jury. There was no hint or suggestion that Juror No. 7 had misled or lied in his juror questionnaire or in *voir dire,* as was the case in *Lomax, supra,* where the juror was not deliberating in good faith. Removing this seated juror as if he was merely a *prospective* juror was violation of appellant's right to trial by

jury, to a unanimous and reliable verdict and to due process of law. It was also a gross abuse of discretion.

It also violated appellant's presumption of innocence. There was nothing articulated by this juror which implicated his capacity to sit as a juror for the guilt determination. By focusing on this juror's potential disability at the penalty phase, the court assumed there would be such a phase. This assumption was made explicit by the prosecutor: "It is unbelievable and inconceivable that this man can sit on the jury and not have that decision in the future." (10 RT 2222.) Judge Spinetta's comments regarding this juror echo the comments he made during co-defendant O'Brien's sentencing, in which he made assumptions about appellant's guilt, as shown *supra* in Argument III.

**b) *People v. Allen/Johnson.***

Respondent also summarily dismisses the three recent and leading cases from this Court dealing with dismissed jurors, *People v. Allen/Johnson* (2011) 53 Cal.4th 60, 264 P.3d 336, 133 Cal.Rptr.3d 548; *People v. Wilson* (2008) 44 Cal.4th 758; and *People v. Pearson* (2012) 53 Cal.4th 306. (RB at 85.) Respondent argues that as to *Allen/Johnson* and *Wilson,* "it had not been shown to a demonstrable reality that those jurors were refusing to deliberate or otherwise unwilling to follow the law," and as to *Pearson,* the dismissal was erroneous because "she had at times been ambivalent about the death penalty."

(RB at 85.)

However, in *Allen/Johnson*, involving a juror who was removed during deliberations, this Court held that "the record does not show to a demonstrable reality that Juror No. 11 was unable to discharge his duty, the court abused its discretion by removing him" (*Allen/Johnson,* 133 Cal.Rptr.3d at 552) without reaching the question of whether this removal also violated the defendants' constitutional rights. Here too, one cannot say that the record shows that Juror No. 7 would have been unable to discharge his guilt phase duties, as the trial court never made that inquiry.

In *Allen/Johnson,* this Court recognized that whether and how to investigate an allegation of juror misconduct falls within the court's discretion, citing *People v. Alexander* (2010) 49 Cal.4th 846, 926, 113 Cal.Rptr.3d 190. (*Allen/Johnson,* 133 Cal.Rptr.3d. at 556.) Although "a court should exercise caution" when investigating these allegations, "*it must hold a hearing when it hears of allegations which, if true, would constitute good cause for a juror's discharge*." (*Id.* at 556 (emphasis added), *citing People v. Lomax* (2010) 49 Cal.4th 530, 588, 112 Cal.Rptr.3d 96.) Failure to do so "may be an abuse of discretion." (*Id.*) Although the trial court here did hold a hearing, with testimony from the juror and statements from counsel, it was limited solely to the juror's penalty phase duties. But the trial court never considered Juror No.

7's ability to discharge his *guilt phase* duties at the hearing. Under *Allen/Johnson,* this was error.

In *Allen/Johnson*, the juror in question was discharged on two bases: his alleged prejudgment of the case and his reliance on facts outside the record, neither of which were supported by the record. Here, likewise, there is nothing in the record that indicates that Juror No. 7 had either prejudged appellant's guilt or relied on facts outside the record. There is nothing in the record which indicates he could not fairly and impartially evaluate the guilt phase evidence. Here, as in *Allen/Johnson,* the record "*did not indicate an intention to ignore the rest of the proceedings.*" (*Allen/Johnson,* 133 Cal.Rptr.3d at 559 (emphasis added).) Juror No. 7 evidenced no intentions whatsoever to prejudge the guilt phase, and his removal was even more improper than the removal in *Allen/Johnson.*

As in *Allen/Johnson,* Juror No. 7's statements were not "an unadorned statement" and "did not establish that he had ignored further evidence, argument, instructions, or the views of other jurors." (*Id.* at 559.) Juror No. 7 gave no indication he had any predisposition as to the guilt or innocence of appellant or that he would ignore or discount any guilt phase evidence. Juror No. 7's views regarding the death penalty represent his thought processes regarding the penalty phase alone, yet that portion of the trial had not yet

begun. Juror No. 7's views simply expressed "[t]he reality that a juror may hold an opinion...is...reflective of human nature." (*Id.* at 560.) As in *Allen/Johnson,* Juror No. 7's views did not demonstrate that he "refused to listen to all of the evidence, [would] begin deliberations with a closed mind, or declined to deliberate," (*Id.* at 560), at least as to the guilt phase.

**c) *People v. Wilson.***

Respondent similarly dismisses *Wilson* as precedent, arguing that "it had not been shown to a demonstrable reality that those jurors were refusing to deliberate or otherwise unwilling to follow the law." (RB at 85.) *People v. Wilson* (2008) 44 Cal.4th 758, 80 Cal.Rptr.3d 211, also involved the removal of a juror during penalty-phase deliberations. The juror in question had said that he could not vote for the death penalty if the defendant came from a bad family. (*Id.* at 836.) The juror had also allegedly said "this is what you expect when you have no authority figure" to another juror between the testimony of the first and second witnesses. (*Id.* at 837.)

In *Wilson,* this Court reaffirmed the principle of *People v. Barnwell* (2007) 41 Cal.4th1038 that "a court's decision to remove a juror must be supported by evidence showing *to a demonstrable reality* that the juror is unable to perform the duties of a juror...This is a 'heightened standard' and requires a 'stronger evidentiary showing than mere substantial evidence.'"

(*Wilson* at 840, quoting *Barnwell,* 41 Cal.4th at 1052.) The trial court's decision here contravened both *Wilson* and *Barnwell,* as there was absolutely no showing "to a demonstrable reality" that Juror No. 7 could not discharge his guilt phase duties.

**d) *People v. Pearson.***

Respondent also dismisses *People v. Pearson* (2012) 53 Cal.4th 306, 135 Cal.Rptr.3d 262 as precedent, arguing that the dismissal was erroneous because "she had at times been ambivalent about the death penalty." (RB at 85.) However, this Court in *Pearson* reaffirmed the principles discussed *supra.* This Court held the trial court's dismissal of the ambivalent juror to be error, because "[t]o exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process." (*Pearson,* 135 Cal.Rptr.3d at 332.) Juror No. 7 had made no statements about his views of appellant's guilt, let alone ambivalent ones.

**e) The removal of Juror No. 7 was structural error which was *per se* prejudicial.**

Respondent does not directly address appellant's argument that this was structural error and should be deemed *per se* prejudicial requiring reversal. (*See Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282 [harmless error analysis is inappropriate where jury given deficient reasonable doubt

instruction].) By erroneously excluding Juror No. 7 over the defense's objections, the trial court denied appellant the impartial jury to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution. (*Utrecht v. Brown* (2007) 551 U.S. 1, 6-9.) The erroneous removal of a juror is "not subject to a harmless-error rule, regardless of whether the prosecutor may have had remaining peremptory challenges and could have excused [Juror No. 7]." (*People v. Heard* (2003) 31 Cal.4th 946, 966, 4 Cal.Rptr.3d 131; *Pearson, supra,* 53 Cal.4th at 333.) Appellant's arguments regarding the *Heard* precedent are also not discussed.

The erroneous excusal of Juror No. 7 for cause violated appellant's right to an impartial jury, and his right not to be deprived of his life without due process of law, under the Sixth and Fourteenth Amendments to the United States Constitution. (*Witherspoon v. Illinois, supra,* 391 U.S. 510, 522-523.) Because this error deprived appellant of the guilt phase jury to which he was constitutionally entitled, the violation requires automatic reversal of both the guilt verdict and the sentence of death. (*People v. Heard*, *supra*, 31 Cal.4th. at 966.)

## VIII. TRIAL ERROR IN ADMITTING TESTIMONY RELATING TO AN ALLEGED RAPE BY APPELLANT.

Argument VIII relates to 1) the introduction of testimony regarding the alleged rape of Andrea Torres by appellant and 2) the court's ruling that the prosecution had no pre-trial obligation to disclose to the defense any information or discovery materials regarding this incident.

Respondent treats this argument as part of Argument V. (RB at 86.)

As to respondent's argument that the prosecution had no obligation to turn over the Torres rape information, (*supra* in Argument V), *Kyles v. Whitley* (1995) 514 U.S. 419, held that "the individual prosecutor has a *duty to learn of any favorable evidence* known to the others acting on the government's behalf in the case." (*Id.* at 435.) In other words, the prosecutor cannot ignore information gathered by another police agency, here the San Francisco Police Department, to duck his duty to disclose favorable information to the defense. And as required by the Supreme Court of the United States in *Brady v. Maryland* (1963) 373 U.S. 83, the State had a continuing obligation to reveal the evidence it possessed regarding the incident with Ms. Torres.

As to trial error in admitting the evidence of the rape, the State failed to timely provide the information on this alleged rape to the defense, which constitutes the suppression of material evidence which "could reasonably be

taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley, supra,* 514 U.S. 419.) The trial court erred in failing to suppress this evidence. Harmless error analysis is not applicable to *Brady v. Maryland, supra,* 373 U.S. 83, violations. (*Kyles*, 514 U.S. at 435.)

## IX. APPELLANT'S TRIAL WAS CONDUCTED IN AN INHERENTLY PREJUDICIAL ATMOSPHERE AS IT COMMENCED ON SEPTEMBER 12, 2001.

Argument IX relates to the empanelment of appellant's jury on September 12, 2001, one day after the horrific events of mass destruction and murder at the World Trade Center and the Pentagon of 9-11 (September 11, 2001).

Respondent argues that this claim has been forfeited because "[t]he defense did not object or request a continuance of trial as a result of the 9/11 attacks, so appellant's claim has been forfeited." (RB at 86.) However, this argument goes to the fairness of appellant's trial and cannot be waived by counsel. As the leading case of *Sheppard v. Maxwell* (1966) 384 U.S. 333 held, a defendant is entitled to a fair trial "in a public tribunal free of prejudice, passion, excitement, and tyrannical power." (*Sheppard* at 350.)

Appellant respectfully refers the Court to the arguments in the AOB.

## X. THE TRIAL COURT ERRED IN VOUCHING FOR A PROSPECTIVE JUROR'S INCONSISTENT ANSWERS.

Argument X concerns the trial judge's endorsement of the inconsistent comments of a prospective juror.

Respondent argues that there was no endorsement. (RB at 94-95.)

Appellant respectfully refers the Court to the arguments in the AOB.

## XI. THE JURY SELECTION PROCEEDINGS WERE BIASED IN FAVOR OF PRO-DEATH JURORS.

Argument XI concerns several jurors who should have been disqualified because of their bias.

Respondent argues that the claim is both forfeited and without merit. (RB at 95-101.)

### a. The claim is not forfeited.

Respondent's first argument is that the claim is forfeited because appellant's attorneys "exercised only ten peremptory challenges" (RB at 96), and "did not challenge any of those jurors or the panel as a whole." (RB at 101.) This ignores the fact that there were previous challenges to the court's *voir dire* methodology which were denied. Further objections would have been futile, as the trial court told them "[y]our record is protected." (7 RT 1444.) Leaving only one minute per juror for questioning left trial counsel

without sufficient bases for individual challenges.

Additionally, as respondent points out in Argument IV, "this Court held in *People v. Whalen, supra,* 56 Cal.4th 1, 28, that a claim of judicial misconduct during voir dire is not necessarily forfeited by the defendant's failure to object at trial." (RB at 51.) In that case, this Court observed that "[i]n the past, we have reached the merits of similar claims notwithstanding the defendant's failure to object to the assertedly disparate questioning in the trial court." (*People v. Whalen, supra,* 56 Cal.4th at 28; citing *People v. Martinez* (2009) 47 Cal.4th 399, 439, fn. 8; *People v. Thornton* (2007) 41 Cal.4th 391, 419-425; *People v. Navarette* (2003) 30 Cal.4th 458, 485 & fn. 2, 487-488; *see also People v. Mills* (2010) 48 Cal.4th 158, 189.)

More importantly, under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) This is a fundamental right and structural error, not capable of being waived by counsel. The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to

try a cause. (*Morgan v. Illinois, supra,* 504 U.S. 719, 726.)

The United States Supreme Court has conferred upon trial courts the final authority for ensuring that a criminal defendant receives a fair trial before an impartial jury. (*United States v. Frazier* (1948) 335 U.S. 497, 511, emphasis added ["duty reside[s] in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality."].) In appellant's case, with or without an objection by one of the parties, the trial court had a duty to see that the trial was free from structural error – in this case, a biased tribunal. (*Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 756 ["The presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge."]; *United States v. Wiles* (10th Cir. 1996) 102 F.2d 1043, 1057 ["Due to the nature of structural error, whether a defendant objects . . . is simply irrelevant."]; *Johnson, supra,* 961 F.2d at 754 [a defendant who fails to object to a juror is only without a remedy *if he fails to prove actual bias*].)

A prospective capital juror is not impartial and "may be excluded for cause because of his or her views on capital punishment [if] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt, supra,* 469 U.S. 412, 424; citing *Adams v. Texas* (1980) 448 U.S. 38, 40.) A

prospective juror who will automatically vote either for or against the death penalty regardless of the court's instructions will fail to consider in good faith evidence of aggravating and mitigating circumstances. Such a juror is not impartial and cannot constitutionally remain on a capital jury. (*Witherspoon v. Illinois, supra,* 391 U.S. 510; *Morgan v. Illinois, supra*, 504 U.S.719 at 728, 733-734.)

That standard was amplified in *Wainwright v. Witt, supra*, 469 U.S. 412, where the Court, adopting the standard previously enunciated in *Adams v. Texas, supra*, 448 U.S. 38 at 45, held that a prospective juror may be excused if the juror's voir dire responses convey a "definite impression" (*Witt, supra*, 469 U.S. at 426) that 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 424.) The *Witt* standard applies here. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

Thus, this Court's duty is to

> [E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties . . ." was fairly supported by the record.

(*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 176.)

Moreover, constitutional claims may be considered when presented for

the first time on appeal when the asserted error fundamentally affected the validity of the judgment, or important issues of public policy are at issue. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

**b. The biased jurors.**

**1. Juror L.M.D.**

Respondent analyzes this juror's testimony and claims that her "comments on voir dire showed a similar openmindedness which precluded a challenge for cause." (RB at 99.) However, among other views, this juror thought the death penalty "[i]s correct and just for victims' families and tax-paying citizens who support the justice system" (3 JQ 940); life without parole "is costly to victims' families and tax-paying citizens" (3 JQ 941); and "life imprisonment is extremely costly. However there are numerous criminals who live on death row without the sentence ever being carried out either!" (3 JQ 942.) This juror's questionnaire answers also raised issues about a willingness to consider "the background and social history of the defendant." (7 RT 1640.) This juror also thought there were some cases where he *"would always impose the death penalty."* (7 RT 1641.)

This cannot fairly be deemed to be "open-minded" as respondent argues. (RB at 99.) The counter-examples respondent offers are hardly

reassuring, as any answers contrary to those given would have resulted in automatic disqualification. Respondent points to Juror L.M.D.'s answer that both death and LWOP could be appropriate punishments (3 JQ 940-941); and that the death penalty should not automatically be imposed for any murder. (JQ 942.) (RB at 98.) But had he answered differently, it would have been grounds for disqualification.

**2. Juror No. 3.**

Respondent argues that her answers indicate she could be fair. (RB at 99.) However, among other comments, this juror was a victim of both a rape and a mugging (1 JQ 143); wrote that "I would be sympathetic to victim" (1 JQ 144); had heard that the victim had been killed in her house after leaving the garage door open and cautioned her husband to leave it closed (1 JQ 148); and had a brother in New York, who used to be a defense attorney for the New York Police Department. (7 RT 1486-1487).

The court's restrictions on *voir dire* did not allow defense questioning on these troubling questionnaire answers.

**3. Prospective juror R. R.**

Respondent points to several generic comments that indicated this juror could "follow the law" and be fair. (RB at 100.) However, he had several questionnaire answers which indicated he would not consider a defendant's

background; was "not sure" whether the details of the murder would so influence his emotions as to render him able to fairly and impartially evaluate the evidence (2 JQ 800); believed that death should be mandatory for certain crimes as "there are circumstances where the crime committed against society is so heinous those that are guilty should not live" (2 JQ 804); believed the death penalty served to "keep society safe from those who commit crimes against it" (2 JQ 805); believed there were several crimes which deserved the death penalty in all cases (2 JQ 806); and would not consider background information, a defendant's social history or childhood in determining the appropriate sentence, adding that he did not "believe childhood events or social history have a bearing on the penalty phase." (2 JQ 807.)

At *voir dire,* R.R. reiterated his disqualifying opinions and again stated that "I don't believe childhood events or social history has (sic) a bearing in the penalty phase." (7 RT 1509); repeated that view despite further questioning (7 RT 1510-1511); was not sure he could be fair (7 RT 1513); revealed that he was a crime victim and "more apt to look at the victim's right, a heightened sensitivity to them" (7 RT 1514); still insisted that he would not give consideration to the defendant's background after yet more questioning (7 RT 1559); stated that he could not promise to consider it (7 RT 1560) and it would affect his ability to be impartial (7 RT 1561). Despite further

extensive questioning, this juror was still "wrestling" with giving social background any weight whatsoever. (7 RT 1572.)

To counter this, respondent cites the trial court's comment that R.R. was "a very careful person, [a] very thoughtful person" despite a litany of answers that indicated the opposite. (RB at 100, citing 7 RT 1579.) R.R.'s answers do not show that the judge's "determination is supported by the record" (RB at 100.)

**4. Juror No. 1.**

Respondent argues that the record shows she could be fair. (RB at 100.) However, in her questionnaire and at voir dire, she admitted she had heard about the case in the media and as a result, was *unsure* whether she could be fair. (7 RT 1626; 1 JQ 80-81.) She had extensive media exposure through newspapers, people at work, a co-worker, television, radio and people who knew the victims. (1 JQ 80.) Her co-worker knew the victim's family, their children went to school together and "they shared driving responsibilities for extra-curricular activities e.g. sports." (1 JQ 80.) Juror No. 1 also wrote in her questionnaire that

> [w]hoever did the crime were walking by [the] home, maybe walking from BART, saw the open garage w/SUV and saw it as an opportunity to take the SUV...It must have been totally devastating for the daughter to find her mother dead. We spoke about the efforts to find whoever killed the victim of that...I was horrified about it at the time. I kept reminding my husband to

> close the garage door because he has a habit of leaving it open when he walked our dog. Why give someone an opportunity to take anything from you or possibly harm you in any way...It's human nature to feel a bit biased towards someone who takes a human life...because they want to take a car...
> (2 JQ 80-81.)

At *voir dire,* Juror No. 1 was still unsure and stated only that she "thinks" she could do it. (7 RT 1627.)

These answers do not bear out respondent's allegation that both the questionnaire and voir dire showed that "she could be fair." (RB at 100.)

**5. Prospective juror Q. M.**

Respondent points out this challenge was sustained. (RB at 101.) Appellant withdraws this sub-claim and apologizes to the Court for its inclusion here (which is a result of the different ways in which this juror has been identified: "N.Q.M.," "No. 28," and "Q.M.").

**c. Prejudice.**

The record shows that the only jurors who were excused for cause were those who stated on the record unequivocally that they would not follow the law. This error infected the entire *voir dire* and forced appellant's trial counsel to use peremptory challenges to remove those prospective jurors, such as the four discussed *supra,* who stated their bias, prejudice or inability to follow relevant aspects of the law. The end result was that appellant's jury was biased toward death in violation of the Fifth, Sixth, Eighth and Fourteenth

Amendments.

The trial court's methods violated the basic premise that "[t]he process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case." (*Morgan v. Illinois, supra*, 504 U.S. 719, 734.) The lengthy juror questionnaires raised many issues and problematic attitudes that could simply not be properly dealt with in less than one minute per juror.

In support of the trial court's rulings on these jurors and prospective jurors, respondent repeatedly cites their willingness to follow the law or "be fair," (RB at 97-101), but often only after considerable coaxing and coaching. However, *Morgan* v. *Illinois, supra*, 504 U.S. 719 makes it clear that a juror's recital of an alleged ability to "listen to both sides" does not justify the denial of a challenge for cause. In *Morgan,* the Supreme Court stressed that general questions such as "can you follow the law" and "can you follow my instructions," as the trial court asked here, are insufficient to weed out those prospective jurors who would always vote for death. As *Morgan* pointed out, "the entire *Witt/Witherspoon* line of cases would have been unnecessary if these questions were sufficient to detect jurors with views preventing or impairing their duties." (*Morgan,* 504 U.S. at 734-735.) This is because these jurors are exactly the ones "who cannot perform their duties in accordance

with the law, their protestations to the contrary notwithstanding." (*Id.* at 735.) And as to general questions of fairness and impartiality, "such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed." (*Id.*)

"Doubts regarding bias must be resolved against the juror." (*Burton v. Johnson* (10th Cir. 1991) 948 F.2d 1150, 1158; *United States v. Gonzales* (9th Cir. 2000) 214 F.3d 1109, 1114; *United States v. Nell* (5th Cir. 1976) 526 F.2d 1223, 1230.) The trial court appeared to believe that as long as a juror could be persuaded to say that they would be fair or consider mitigating evidence, then he or she was capable of being impartial. These jurors were nonetheless "substantially impaired," even if they could be coaxed into saying that they would consider mitigating factors. Such a position was the functional equivalent to that discussed in *Morgan* and found inadequate.

## XII. THE TRIAL COURT ERRED IN DENYING DEFENSE OBJECTIONS TO DUPLICATIVE AND GORY CRIME SCENE PHOTOS.

Argument XII concerns the introduction into evidence of various duplicative and gory crime scene photos.

Respondent argues that the trial court has extensive and broad

discretion over the admission of such evidence and, even if the photos were cumulative, they "need not be excluded from evidence." (RB at 101-104.) To reach this conclusion, respondent asserts that "only a handful of photos that showed Janet's body" were admitted; that the "photos were not particularly gory," and the most gruesome, No. 101, "was excluded from evidence." (RB at 103.)

We start with the prosecutor's explanation for wanting to admit many gory photos, his admission that "I'm highlighting every stab wound. Every stab wound is further evidence of intent to kill, express malice." (8 RT 1969.) He pressed the court to have *all* the autopsy pictures admitted in evidence. (8 RT 1969.) Thus, respondent's reliance on the fact that several photos were excluded (RB at 103) and "only a handful [were selected] for the jury to see" (RB at 104) must be seen in the light that the prosecutor wanted every single autopsy photo to be admitted. This request was clearly over-inclusive and the fact that the court refused to admit some photos is of little moment.

The defense countered that there is no need to show any photo at all "in order to establish the number of wounds" or the location of the wounds, that the photos were humiliating to the victim, they went beyond what happened at the scene of the crime, and they would provoke passion and anger in the jury. (8 RT 1974.) Respondent cites several reasons for the introduction of the

photos: "to show that Maury O'Brien's description of the killing of Janet was accurate, and that the severity of the wounds proved that the killing was intentional," and "to eliminate all doubt about the killer's intent." (RB at 103.) Yet these legitimate goals could have been well-served through either coroner testimony or, perhaps, though a handful of selected photos.

Respondent claims appellant's reliance on *People v. Marsh* (1985) 175 Cal.App.3d 987 is "inopposite" because in that case "'the jury was not enlightened one additional whit' by the admission of the photos." (RB at 103, citing *Marsh* at 998.) *Marsh* involved the defense's objection on Evidence Code Section 352 grounds to the introduction of seven slides of autopsy photos which graphically depicted the cranial injuries of the murder victims. However, in *Marsh,* unlike the instant case, the cause of death was the central issue. As here, the prosecutor argued that the slides were relevant to show the amount of force used to inflict the fatal blows, but the court held that the autopsy surgeon's testimony was adequate to make the prosecution's point. The same principle applies here.

Respondent also attempts to distinguish *People v. Smith* (1973) 33 Cal.App.3d 51. (RB at 104.) The Court of Appeal found that the photos in *Smith* "have a sharp emotional effect, exciting a mixture of horror, pity and revulsion" and held that the trial court erred in admitting them. (*Id.* at 69.) The

same effect must have been felt here, as defense counsel repeatedly pointed out.

## XIII. THE TRIAL COURT ERRED IN VOUCHING FOR THE CREDIBILITY OF A CRUCIAL PROSECUTION WITNESS.

Argument XIII concerns the trial court's and the prosecutor's vouching for the credibility of a crucial prosecution witness, Mr.Jason Hart. The trial court allowed the jury to hear the portion of his immunity agreement that would have led the jury to believe the witness was testifying truthfully. The immunity order read "It is further ordered that if Jason Hart testifies fully and truthfully, he shall be granted transactional immunity coextensive with that provided in Penal Code 1324 and shall not be prosecuted." (12 RT 2646.) At the beginning of Hart's testimony, the jury was informed that he had been granted immunity. (12 RT 2662.) The jury was told that he "got a grant of immunity that was signed by the court that you can't be prosecuted..." (12 RT 2663.) Hart told the jury that it was his understanding that in order for the grant of immunity, he was supposed to tell the truth. (12 RT 2663.)

### a. *People v. Fauber* can be distinguished.

Respondent relies heavily on *People v. Fauber* (1992) 2 Cal.4th 792 for the proposition that "full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting

the witness's credibility." ( RB at 105, citing *Fauber* at 821.) In *Fauber,* the "objection is not to admission of the agreement per se, but to the failure to excise certain portions that he views as 'vouching' for [the witness's] credibility." (*Fauber, supra,* 2 Cal.4th at 822.)[15] Appellant recognizes that the existence of a plea agreement is relevant impeachment evidence that must be disclosed to the defense, as it bears on a witness's credibility. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155.) Here, however, we are concerned not with disclosure of the agreement to the defense, but disclosure to the jury of that part of the agreement that stated that Mr. Hart was supposed to tell the truth. (12 RT 2663.)

Cited in *Fauber* were several cases holding that "a prosecutor may not express a personal opinion or belief in a witness's credibility when there is 'substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial.'" (*Fauber,* 2 Cal.4th at 822, citing *People v. Adcox* (1988) 47 Cal.3d 207, 236 (quoting *People v. Bain* (1971) 5 Cal.3d 839, 848.) Here, the disclosure of the "truthfulness" requirement meant that the jury would have assumed the prosecutor, in presenting Hart as a witness, was vouching for his credibility.

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[15] In *Fauber,* unlike the instant case, defense counsel made no objection to the reading of the plea agreement. (*Fauber,* 2 Cal.4th at 821.)

This Court in *People v. Phillips* (1985) 41 Cal.3d 29 held that "full disclosure to the jury of any agreement bearing on the witness's credibility, including the consequences to the witness of failure to testify truthfully," *Fauber,* 2 Cal.4th at 823, is required. Yet, as the *Fauber* court pointed out, "[f]ull disclosure is not necessarily synonymous with verbatim recitation, however. Portions of an agreement irrelevant to the credibility determination or potentially misleading to the jury should, on timely and specific request, be excluded." (*Id.*)

In *Fauber,* "it was critical that the jury learn what would happen to [the witness] in the event he failed to testify truthfully in defendant's trial." (*Id.*) Here, there was no such need. And in *Fauber,* "[t]he provision detailing the judge's determination of [the witness's] credibility in the event of any dispute arguably carried some slight potential for jury confusion, in that it did not explicitly state what is implicit within it: that the need for such a determination would arise, if at all, in connection with [the witness's] sentencing, not in the process of trying defendant's guilt or innocence." (*Id.*) This is because in *Fauber,* the immunity agreement was detailed and specified "in the event of a dispute, the truthfulness of [the witness's] will be determined by the trial judges who preside over these hearings," and "[f]ollowing the conclusion of the trial against Curtis L. Fauber and the preliminary hearing against

Christopher A. Caldwell, [the witness] will be sentenced on case number..." (*Fauber,* 2 Cal.4th at 821.) No such clarifying language was given to appellant's jury, so the danger of their confusion was much more than in *Fauber.* Nor was there any need for the trial judge to allow the jury to hear this portion of the agreement.

**b. Unlike *Fauber,* the defense objected to the introduction of the portion of the agreement relating to Hart telling the truth.**

In appellant's case the error was not harmless, as in *Fauber.* First, the defense objected to the wording of the agreement because "I don't feel it is necessary...in having the jury be aware of that [that he was supposed to testify truthfully]." (12 RT 2638.) Ms. Egan argued that if the jury was told about this agreement, "that the court is saying, 'Sounds like it's the truth'..." (12 RT 2640.) The court responded that the order did not address "the issue of...if and when the issue of credibility will be raised." (*Id.*) The defense responded that the jury should not hear that if Hart did not tell the truth, then he could be prosecuted for the crimes. (12 RT 2641.) In summary, the defense's objection was that the jury should not learn about the portion of the agreement that had to do with Hart telling the truth. (12 RT 2642.)

The court admitted that the jury might give enhanced credibility to a witness who could be prosecuted if they did not tell the truth. (12 RT 2643.) As the judge stated, "I mean, it is reasonable that a juror could say, gee, I

don't think the person would lie, because if he's lying, he or she could be prosecuted for these things." (12 RT 2644.) And the court added that "I'm just telling you a reasonable inference is that this supports the credibility of the witness." (*Id.*)

The defense also objected on the basis that the jury would not know that there would be a subsequent determination as to whether the witness told the truth, but might think that the determination was already made at trial, and that therefore the witness was necessarily truthful. (12 RT 2645.) The court said that was not a reasonable inference. (*Id.*) Yet in *Fauber,* the jury was fully informed that the truthfulness determination was to take place at a later date, and this was a major factor in this Court's holding that the error was harmless. (*Fauber,* 2 Cal.4th at 821-823.)

**c. This was not harmless error, as appellant was prejudiced.**

As respondent discusses (RB at 105), this Court in *Fauber* held that the disclosure of the immunity agreement *was* error, albeit harmless error. ("We agree that the pleas agreement's reference to the district attorney's preliminary determination of Buckley's credibility had little or no relevancy to Buckley's veracity at trial, other than to suggest that the prosecutor found him credible." *Fauber,* 2 Cal.4th at 822.) In *Fauber,* the error was held harmless due to the fact that 1) the prosecutor's argument did not refer to the extra-judicial

information; 2) and "[w]e note, too, that the requirement that [the witness] preliminarily satisfy the prosecutor as to his credibility 'cuts both ways': it suggests not only an incentive to tell the truth but also a motive to testify as the prosecutor wishes; " and 3) "[t]he jury could not reasonably have understood [the witness's] plea agreement to relieve it of the duty to decide, in the course of reaching its verdict, whether [the witness's] testimony was truthful." (*Fauber,* 2 Cal.4th at 822-823.)

In *Fauber*, the prosecutor clarified in his remarks that the determination of the witness's credibility would occur after the trial "if the prosecutor sought to repudiate its agreement" with the witness. (*Fauber,* 2 Cal.4th at 823.) Here, there was no such clarification, and the jury could well have assumed that the "truthfulness" agreement was a prosecutorial guarantee that Hart was testifying "fully and truthfully," per the agreement. Since the agreement was between the district attorney and Hart, the jury was given the unmistakable message that the district attorney was vouching for his truthfulness at appellant's trial, and they could rely on that voucher "in the course of reaching its verdict." (*Fauber,* 2 Cal.4th at 822-823.)

The prosecution relied heavily on the truthfulness of Hart's testimony as he was an important witness. He initially led the police to suspect appellant. (14 RT 3168.) His truthfulness was in issue, as it was undisputed that when

Hart initially met with the police, he lied to them. (*Id.*) To obtain his story and cooperation, the officers threatened Hart by telling him that he was facing the death penalty (14 RT 3194), which was a large incentive for him to say something they wanted to hear. During this questioning, the officers told Hart that "Rockhead was involved" and Hart then told the officer that appellant was known as "Joe Rockhead." (14 RT 3207.) At that time, the officers did not know who "Rock" was. (14 RT 3214.) Hart's credibility as the identifier of "Rock" as appellant was a major keystone of the prosecution's case.

Hart not only told the jury that appellant's nickname was "Joe Rockhead," but also stated that he had sold appellant drugs in the past. (12 RT 2665-2667, 2702.) Most importantly, Hart involved appellant in the murder scheme. Hart testified regarding plans he allegedly concocted with O'Brien and Snyder to rob a drug dealer in Fairfield. (12 RT 2668, 2705.) Hart told the jury that appellant volunteered for the plan to rob the drug dealer as he was broke and needed some money. (12 RT 2671.) According to the prosecution's theory of the case, this plan set into motion the events that led to the murder.

Hart was also a central witness to the events of the day of the murder. He testified that on March 24 he was asked for a ride to Fairfield and he refused and, along with appellant, O'Brien and Snyder tried to find someone else to give them a ride. (12 RT 2678.) Hart told the jury that he dropped

appellant, Snyder and O'Brien off at the Balboa BART station. (*Id.*) Later, appellant allegedly called Hart and asked to be picked up in Fairfield. (12 RT 2681.) Hart's testimony was that he and his friend Shawn drove to the Overnighter Hotel in Fairfield (12 RT 2681), pulled into the parking lot and saw appellant with O'Brien and Snyder. (12 RT 2683.) Hart told the jury that appellant said that they had gone to Lafayette and robbed a lady. (12 RT 2686.) He also testified that they admitted to tying up and strangling her with a phone cord until she was dead. Despite his own admitted history of lying, the disclosure of the district attorney's condition that he testify "fully and truthfully" led the jury to believe he was telling the truth. In actuality, Hart had abundant reason to fabricate a story that minimized his own involvement in the murder.

For these reasons, this was clear error for the jury to be informed about this portion of the agreement, and it cannot be said to be harmless, as in *Fauber.* Reversal is required.

## XIV. THE TRIAL COURT ERRED IN DENYING A MOTION FOR A MISTRIAL BASED ON THE JURY OVERHEARING IMPROPER AND PREJUDICIAL REMARKS ON TAPE.

Argument XIV concerns the trial court's erroneous denial of a motion for a mistrial when the jury overheard improper and prejudicial remarks on a

tape recording of a co-defendant. The remarks informed the jury that appellant had "just got out of the penitentiary," and included speculation that appellant wanted to kill O'Brien, and references to a test the police were to administer to Mr. O'Brien. (13 RT 3051-3052.)

Respondent argues that although "the prosecutor and the trial court agreed that the jury should not have heard the comment in question," the error was harmless because "O'Brien's brief reference to appellant's prior criminality was immaterial in the guilt phase of the trial, and redundant of other evidence in the penalty phase." (RB at 108-111.)

Respondent cites several cases where this error was held harmless due to various factors such as the strength of the other evidence introduced at trial or whether "the attorneys and the court were able to fashion a timely and appropriate remedy." (RB at 108-110.)

Here, however, there were three problems with the improperly redacted tape:

1) A reference to Mr. Perez having been in the penitentiary that was not in the printed transcript. The jury heard "[h]e (appellant) just got out of the penitentiary." (13 RT 3050.)

2) Speculation on the tape by Mr. O'Brien that appellant wanted to kill him (13 RT 3056) and another reference that "[w]ell I believe Rock wants to

kill me right now because he knows that I saw him." (13 RT 3056.)

3) Reference to a test that the police were to administer to Mr. O'Brien, and in which he says he is pretty nervous. (13 RT 3059.) There were a total of two references to this test. (13 RT 3060.)

The court stated that it did not make any difference whether the mistake was purposeful or inadvertent, "the issue remains the same," but the Court accepted that the mistake was inadvertent. (13 RT 3061.)

Respondent claims that appellant "does not argue on appeal that" the second and third instances "were prejudicial to him." (RB at 111 n.21.) Although the legal argument section in the AOB does not specifically mention these instances, they are mentioned and discussed extensively in the factual summary and were clearly presented in the AOB as instances of error. (AOB at 224-226.) The second and third instances should therefore be considered here.

Respondent seems to accept the holding of *People v. Harris* (1994) 22 Cal.App.4th 1575, at 1581, that the introduction was error,[16] but that the question is whether "in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the

[16] And at trial, the court, the prosecution and the defense all treated this as error. (13 RT 3050-3061.)

testimony and admonishing the jury rests in the sound discretion of the trial court." (RB at 108.)

The trial court itself, as to the penitentiary reference, termed it "problematic," citing *People v. Harris, supra,* 22 Cal.App.4th at 1581, where there was a good discussion of this dilemma, and "harmless error" was held to be the proper test. (13 RT 3081.) Other cases the court looked at were *People v. Williams* (1997) 16 Cal.4th 153, 211 and *People v. Rhinehart* (1973) 9 Cal.3d 139, 152. (13 RT 3083.) The defense pointed out that appellate courts use a "fait accompli" standard that trial courts are not bound by. (13 RT 3084.)

In *Harris,* where the error was found to be harmless, the jury was told of the defendant's parole status and evidence "of Harris's guilt was overwhelming and undisputed at trial. Both the victim and the witness recounted virtually identical details...[w]ithin minutes of the robbery Harris was apprehended by police and was identified...police discovered the victim's gold chain and money in Harris's jacket pocket...this was not a close case on the issue of guilt." (*People v. Harris, supra,* 22 Cal.App.4th at 1581.)

*Harris* mentions several other cases that are more in point. (*People v. Bracamonte* (1981) 119 Cal.App.3d 644, 650-651[limiting instructions insufficient to overcome prejudicial effects of trying issue of guilt with truth

of prior conviction allegations]; *People v. Morgan* (1978) 87 Cal.App.3d 59, 76, [evidence of defendant's prior criminality "obviously of a prejudicial nature"]; *People v. Cabrellis* (1967) 251 Cal.App.2d 681, [admission of evidence of other crimes offered solely to prove defendant's bad character reversible error especially when it forces defendant to give up constitutionally protected right not to have to testify in own defense.]) (*see People v. Harris, supra,* 99 Cal.App.4th at 1581.) As this Court held in *People v. McLain* (1988) 46 Cal.3d 97, 113, "[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction."

Here, neither an admonition nor an instruction would have cured the damage done by the jury hearing of appellant's past criminal record and penitentiary sentence. After considering the issues, the trial court stated that it would apply this test: "[a]ssuming the jury heard these things, is it reasonably likely that it affects the outcome?" The trial court said this was best done after hearing all the evidence (13 RT 3086-3087) and would take it under submission at that time. (13 RT 3088.) In explanation, it added that whether what the jury heard was prejudicial or not "depends upon how this case totally unfolds." (13 RT 3089.)

The motion for a mistrial was ultimately denied. However, the "outcome determinative" test the court applied was flawed. Appellant has

argued that this error violated a host of constitutional guarantees and requires that appellant's death sentence be vacated since the error is not subject to harmless error review. (*See Maynard v. Cartwright* (1988) 486 U.S. 356, 363-66; *Godfrey v. Georgia*, (1980) 446 U.S. 420, 432-433.)

Even applying the flawed harmless error test, there was nothing in the later proceedings that would indicate either that the admonition cured the problem or that the jury's hearing of appellant's record did not influence their verdict. This improper introduction of evidence of a stay in the penitentiary was evidence that appellant had committed other crimes.

While inadvertent, the error was harmful to appellant. Even though the jury was admonished to disregard the penitentiary reference, they should not have heard it in the first place and it would have been unrealistic to expect that they would simply put no weight on it or ignore it. While the court properly adopted a "wait and see" approach to the error, there was nothing that came up at trial after the problem arose that indicated it was simply harmless.

## XV. THE TRIAL COURT ERRED IN ADMITTING ACCOMPLICE TESTIMONY.

Argument XV concerns trial court error in admitting extensive testimony from accomplices Maury O'Brien and Jason Hart.

Respondent, after a discussion of the law of accomplice testimony (RB

at 112-114) argues that this testimony is not per se unreliable and subject to exclusion. (RB at 114-115.)[17] Appellant does not argue that such accomplice testimony is excludable per se, as discussed in the AOB, at 234-235. This Court has rejected the argument that accomplice testimony is so inherently unreliable that it should never serve as a basis for a death verdict. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1179-80.) Appellant's argument is that it was unreliable in *this case.*

Respondent presents a lengthy and selective summary of the facts of the case, largely without page citations, to support his conclusion that "[t]he jury had no reason to believe that either Hart or O'Brien tailored his trial testimony solely to please the prosecutor or to secure appellant's conviction." (RB at 117.)

To support that conclusion, respondent claims there were only "minor discrepancies in O'Brien's various accounts of the crime." (RB at 117-118.) However, when the police initially confronted O'Brien with the death penalty.

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[17] Respondent asserts that appellant errs in stating that both O'Brien and Hart "had been given immunity for their testimony." (RB at 115.) Counsel for appellant is unable to locate that claim in the page cited (AOB at 233-234 cited at RB at 115) but the reference may be to the statement that Hart was "also granted transactional immunity." (AOB at 231.) Appellant makes no claim that O'Brien was granted transactional immunity and hence the word "also" was in error and should be omitted. However, O'Brien did admit that the state had given him a deal that he might not be given the death penalty. (11 RT 2593-2594.)

(12 RT 2713, 2741), he completely denied his and Snyder's involvement. (*Id.*) O'Brien also admitted that the transcript of his interviews differed from his testimony. (11 RT 2522.) He admitted that his drug use has had permanent effects on his memory and personality, and that "sometimes my mind is confused and thinks unclearly." (11 RT 2524.) O'Brien fancied himself a con artist and a manipulator. (11 RT 2532-2535.) O'Brien also admitted he told many lies to the police. (11 RT 2583.)

As to Hart, he was also threatened with the death penalty. (12 RT 2713, 2741.) Hart admitted he did not know if he was telling the police the truth, he was just telling them what they wanted to hear to avoid the death penalty. (12 RT 2717.)

Thus, the jury had abundant reasons to believe that the testimony of both O'Brien and Hart was tailored to avoid the death penalty, contrary to respondent's argument (RB at 117-122.) Respondent's factual summary explains in detail that O'Brien implicated himself in the murder (RB at 118-122), yet this is hardly conclusive evidence that shows he was telling the truth. The point is that he had to minimize his involvement in the murder and robbery, and falsify and maximize appellant's role, in order to avoid being charged with the death penalty himself. Respondent points out that some of the independent evidence coincides with O'Brien's account. (RB at 118-122.)

Yet even if it does, that does not show that the account of appellant's alleged involvement was accurate or truthful, as the details were well known to O'Brien as an admitted participant in the crimes.

Respondent asserts that "appellant's attorney admitted at the outset of trial that O'Brien and Snyder had killed Janet," yet this does not support the conclusion that therefore "the attorney impliedly acknowledges that O'Brien's overall description of the killing was accurate." (RB at 120.) Nor does it support the conclusion that "O'Brien had no incentive to falsely implicate appellant (or anyone else) as one of his confederates." (RB at 120.) The incentive was avoidance of the death penalty, as discussed *supra.*

The Supreme Court has noted that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals, which are 'dirty business' may raise serious questions of credibility." (*On Lee v. United States* (1952) 343 U.S. 747, 757.) Such testimony "ought not to be passed upon ... under the same rules governing other apparently credible witnesses." (*Crawford v. United States* (1908) 212 U.S. 183, 204.) In capital cases, this need for reliable evidence is all the greater. The United States Supreme Court has made it clear that due process requires a heightened reliability for evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38.) This testimony fell far short of that standard.

## XVI. THERE WAS INSUFFICIENT NON-ACCOMPLICE CORROBORATING EVIDENCE.

Argument XVI concerns the same factual predicate as discussed in Argument XV. Appellant incorporates herein by reference the factual discussion of the previous issue.

Respondent contends there was sufficient non-accomplice evidence to support the conviction and refers the Court to the previous argument.

Appellant respectfully does likewise.

## XVII. TRIAL COURT ERROR IN ALLOWING INADMISSABLE HEARSAY TESTIMONY FROM THE PATHOLOGIST WHO WAS NOT PRESENT AT THE AUTOPSY.

Argument XVII concerns the impermissible introduction of hearsay testimony regarding the victim's death from a pathologist who was not present at the autopsy. (U.S. Const. Amends. V, VI, VIII, XIV; *Crawford v. Washington* (2004) 541 U.S. 36; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527; *Bullcoming v. New Mexico* (2011) 131 S. Ct. 2705.)

Respondent argues that 1) appellant's attorneys did not object to Dr. Peterson's testimony at trial (RB at 124), and 2) his testimony was permissible. (RB at 124-126.)

As to the first argument, that trial counsel failed to object, this error is structural and cannot be waived by failure of trial counsel to object. This

argument invokes appellant's right to a fair trial, which cannot be "waived" by counsel. (*Duncan v. Louisiana* (1968) 391 U.S. 145; *Morgan v. Illinois, supra,* 504 U.S. 719, 726.)

Here, respondent relies heavily on *People v. Dungo* (2012) 55 Cal.4th 608, which was handed down one month after the AOB was filed. (RB at 124-125.) In *Dungo,* the coroner gave his independent opinion of the cause of death by reviewing an autopsy report prepared by another doctor who did not testify "and thus could not be confronted by defendant." (*Dungo,* 55 Cal.4th at 618.) However, this Court's inquiry in *Dungo* hinged on "two significant points": 1) the autopsy report was not introduced into evidence and 2) the testifying doctor did not describe the conclusions of the actual autopsy report as to the cause of death. (*Dungo,* 55 Cal.4th at 618-619.) The testimony was solely as to "objective facts." (*Id.*) As this Court held, the out-of-court statements "which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions." (*Dungo,* 55 Cal.4th at 619.)

Here, however, Dr. Peterson went well beyond an objective presentation of the medical facts. He was not present at the autopsy but was allowed to present his speculative opinion that the victim was first strangled and then stabbed. (13 RT 3020.) This opinion was based solely on the

autopsy which he did not attend and with which he had no connection. He told the jury that "[h]er heart was still beating at the time those stab wounds were delivered." Shown People's Exhibit 46, his opinion was that the wounds were consistent with being caused by that knife. (*Id.* ) His overall opinion was that death was caused by a combination of ligature strangulation and stabbing. (13 RT 3021.)

The statements in the autopsy report was far more "formal" than those in *Dungo.* This Court's conclusion in *Dungo* was that

> Dr. Lawrence's description to the jury of objective facts about the condition of victim Pina's body, facts he derived from Dr. Bolduc's autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine Dr. Bolduc. The facts that Dr. Lawrence related to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right, and criminal investigation was not the primary purpose for recording the facts in question.
> (*Dungo,* 55 Cal.4th at 621.)

Additionally, there was an insufficient showing that the preparer of the autopsy, Dr. Hogan, was "unavailable to testify." (*Dungo,* 55 Cal.4th at 619.) "The prosecution bears the burden of establishing" that a witness is unavailable. (*Ohio v. Roberts* (1980) 448 U.S. 56, 75.) A witness is unavailable if a witness has unexpectedly gone missing and the prosecution cannot find the witness, "despite good faith efforts undertaken prior to trial to locate and present that witness." (*Id.* at 74.) If the government has not

undertaken reasonable attempts to produce the witness, then the witness is not unavailable. (*See, e.g., Barber v. Page* (1969) 390 U.S. 719, 722-25; *Hernandez v. State* (Nev. 2008) 188 P.3d 1126 (insufficient effort on State's part when simply accepted claim at time of trial of "family emergency" and did not investigate in any way); *State v. King* (Wis. App. 2005) 706 N.W.2d 181 (insufficient effort when witness contacted several times, learned of her reluctance to appear and failed to issue subpoena); *State v. Cox* (2010 Minn.) (prosecution must actively seek the witness's participation).)

Here the State merely alleged that Dr. Hogan was "out of state." (8 RT 1968.) There was no showing that the witness was permanently or at least indefinitely beyond the court's jurisdiction and "the state [was] powerless to compel his attendance...either through its own process or through established procedures." (*Mancusi v. Stubbs* (1972) 408 U.S. 202, 208.) There was no showing that the government could not find the witness or even that "good faith efforts [were] undertaken prior to trial to locate and present that witness." (*Roberts,* 448 U.S. at 74.) If the government has not undertaken reasonable efforts to produce the witness, then the witness is not unavailable. (*Barber v. Page, supra,* 390 U.S. 719, 722-25.)

But if, as here, the prosecution knows where the witness is, and "procedures exist[] whereby the witness could be brought to the trial, and the

witness [is] not in a position to frustrate efforts to secure his production," a witness outside the jurisdiction is not unavailable. (*Roberts,* 448 U.S. at 77.) Here, there was nothing to show that the prosecution ever made any efforts to procure Dr. Hogan, let alone to show that she could not have been procured or was otherwise unavailable.

Additionally troubling is Dr. Peterson's lack of connection to the autopsy of the victim. His only connection to the case was that at the time of the trial he worked for a company, Forensic Medical Group in Fairfield, that was the former employer of the physician who actually performed the autopsy, Dr. Susan Hogan. (13 RT 3001.) Forensic Medical Group had a contract with Contra Costa County to perform the autopsies. (13 RT 3004.) Dr. Peterson merely worked for the former employer of a physician whose former employer contracted to perform the autopsies in this county.

Unlike *Dungo,* the witness's testimony here was very detailed, central to the prosecution's case and theory of the cause of death, and inflammatory and highly speculative. Dr. Peterson first opined, apparently on the basis of Dr. Hogan's autopsy notes, that this was not a gunshot case (13 RT 3005) and that there was evidence of ligature strangulation. (13 RT 3007.) He opined that it was accomplished by a phone cord wrapped around the neck with sufficient force to leave a furrow in the skin. (*Id.*) He opined that there was

also bleeding in the whites of the eyes and bleeding in the muscles of the neck. (*Id.*) This was central to the State's theory of the cause of death.

Dr. Peterson also testified that the cord was around the neck when the body was received at the morgue. (13 RT 3008.) According to this witness, the hemorrhages in the victim's eyes were caused by pressure to the neck. (*Id.*) He opined that there would have had to have been considerable force to cause the furrows in the neck. (13 RT 3009.) From his view of the pictures, he stated that there were also stab wounds. (13 RT 3010.) "If an injury is deeper than it is long, that's a stab wound." (*Id.*)

This witness also provided extensive details about the nature and causation of the victim's various wounds. He stated that stab wound "A" was a cut on the right side of the neck, six inches below the top of the head and four inches long. (13 RT 3011.) His opinion was that it was relatively superficial and not potentially mortal. (13 RT 3012.) Stab wounds B, C, D and E were wounds to the left side of the chest. (*Id.*) All were superficial except E which went to the left lower lung lobe. They all had two sharp edges. (13 RT 3013.) All of this testimony came from information in Dr. Hogan's autopsy notes and apparently the autopsy photos. All of this speculative opinion came from a doctor whose only knowledge of the case came from the autopsy report.

The witness also stated that there was blood inside the chest cavity. (13 RT 3014.) According to Dr. Peterson, Wound E may have been sufficient to cause death as it may have collapsed the lung. (*Id.*) Wounds F, G, H and I are near the top of the chest and F was the deepest. (13 RT 3016.) That wound could have been lethal, the witness opined, as it caught the jugular vein, the carotid artery and the thyroid gland. (13 RT 3017.)

Dr. Peterson also gave extensive details on additional wounds, denominated as Wounds J, K, L, M, N, and O, all lower stab wounds. These were deeper. All six of them entered the lung either on the right or on the left. The entire blade was in the body. (13 RT 3018.) There was also a wound to the front of the left arm. (13 RT 3019.)

This error cannot be held to be harmless, as the prosecutor himself admitted that the photos introduced and examined by the pathologist were central to his case. In attempting to admit all of the many gory and prejudicial photos the prosecutor stated that "I'm highlighting every stab wound. *Every stab wound is further evidence of intent to kill, express malice.*" (8 RT 1969((emphasis added.) He stated that he wanted all the autopsy pictures in evidence and, to support that argument, told the court that he would present an expert to give an opinion based on these photos. (8 RT 1969.) That expert was Dr. Peterson, who was not even present at the autopsy.

Thus, this case can be readily distinguished from the situation in *Dungo*.

## XVIII. MISCELLANEOUS TRIAL COURT ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL.

### a. The victim's family sat in the courtroom.

The trial court judge stated that he did not want to exclude the victim's family from the courtroom. (5 RT 1159.) The defense objected, stating that it will be victim impact evidence if they are present. (5 RT 1160.) The objection was on the basis that it would be a denial of due process and equal protection. (5 RT 1161.) The motion was denied.

Respondent argues this was permissible. (RB at 126-127.)

Appellant respectfully refers the Court to his arguments in the AOB.

### b. Trial error for refusing to treat low-income jurors as cognizable class entitled to extra compensation.

The trial court refused to grant extra compensation to low-income jurors.

Respondent argues this Court has often rejected this claim. (RB at 127.)

Appellant respectfully refers the Court to his arguments in the AOB

**c. Court coaching of witnesses.**

The court asked Mr. O'Brien to clarify what BART station they had gotten off when they walked back to the hills as he had apparently made a mistake as to the correct station. (11 RT 2455.) The defense objected, stating that it was not appropriate for the court to ask this witness "what BART station" and then have him say "Lafayette," the correct station. (11 RT 2456.) These are matters for cross-examination, the defense asserted. The court stated it did not ask or tell him which station (*Id.*) and that there was no intent to direct the witness: "It was neutral. I asked him in a neutral way." (11 RT 2457.) The defense countered that they were entitled to point out mistakes and thereby impeach this crucial witness, not the court. (11 RT 2458.)

Respondent argues that the trial court was clarifying testimony and did nothing improper. (RB at 128-129.)

Appellant respectfully refers the Court to his arguments in the AOB

**d. Improper "snitch" instruction.**

The defense objected to CALJIC 17.41.1, the "snitch" instruction which allowed jurors to report holdout jurors to the court. (15 RT 3467.) The court cited *People v. Williams* (2001) 25 Cal.4th 441. (15 RT 3468.)

Respondent states that this argument has been rejected and appellant so recognizes this fact. (RB at 130.) However, this Court disapproved of this

instruction in *People v. Engelman* (2002) 28 Cal.4th 436 but held it was not unconstitutional. (*See also People v. Brady* (2010) 50 Cal.4th 547, 587; *People v. Wilson, supra,* 44 Cal.4th 758, 805-806.) Appellant urges this Court to reconsider these opinions in light of the inherently coercive nature of the instruction.

**e. Improper aggravating evidence due to trial court error in denying motion *in limine* to exclude CDC incidents.**

Before the commencement of the punishment phase, the prosecution stated that they intended to introduce all five California Department of Corrections incidents allegedly involving appellant. (16 RT 3773.) The prosecutor said they would not seek to introduce "nonstatutory aggravating factors" such as rule violations, but would introduce the Armenta/Contreras, Flores and Lucas incidents. (16 RT 3774.)

Respondent argues that the claim is foreclosed by *People v. Moore* (2011) 51 Cal.4th 1104, 1135. (RB at 131.) *Moore* involved several incidents where Moore had engaged in fights in prison and he argued that they were insufficient to show that he had engaged in the "willful and unlawful use of force or violence upon the person of another." (*People v. Moore, supra,* 51 Cal.4th at 1136, cited in RB at 131.) However, in *Moore,* as respondent points out, "[t]he evidence...did not raise any legal justification for defendant's

actions....[as] voluntary mutual combat outside the rules of sport is a breach of the peace, mutual consent is no justification, and both participants are guilty of criminal assault." (*Id.*)

Here, however, in the Flores incident, although the inmates were both hitting each other (16 RT 3775), there was no evidence appellant initiated the incident, according to the court: "[t]he burden's on the people to prove it wasn't in self-defense" and "..it's not enough to show that he was involved in violence, but it has to be criminal activity." (16 RT 3776.) With regard to the Lucas incident, it seemed to be consensual, according to the court (16 RT 3778) but appellant was trying to protect another inmate. (16 RT 3779.) It was pointed out that a Penal Code section allows for the defense of others. (16 RT 3780.) Appellant said he jumped in and hit inmate Armenta to protect Contreras. (16 RT 3781.) Legal justification was raised here, unlike the mutual combat situation in *Moore* cited by respondent.

**f. Trial error for failure of the court to admonish the jury to disregard emotional outburst.**

During the cross-examination of Andrea Torres, the following occurred;

Q. What were your mixed feelings?
A. First of all, I didn't want to deal with it.
AUDIENCE MEMBER: Just like a 13 year old. You're leading the witness on here.
THE COURT: One second, please. The attorneys will...
AUDIENCE MEMBER: I know. But my daughter was 13 years old, your Honor.

THE COURT: Sir, hold on one second.
(17 RT 4074.)

Respondent argues that the issue is waived because of failure of the trial attorneys to object and move for an admonition and there was *no sua sponte* obligation for the court to admonish the jury. (RB at 133.)

Respondent also argues that "the courtroom outburst of Mr. Torres could not have affected the jury's verdicts." (RB at 134.)

Appellant respectfully refers the Court to the arguments in the AOB as to this issue.

**g. Instructional error at the penalty phase by giving the instruction on lewd acts with a child under 14.**

Regarding the testimony about the alleged rape of Andrea Torres, the defense made multiple objections to the court's giving the instruction regarding lewd acts with a child under 14 in addition to the instruction on rape. Their final objection was that under CALJIC 10.65, there was no criminal intent if the person had a reasonable good faith belief that the person consented. (24 RT 5369.) They also stated that they were objecting under Evidence Code 352 (24 RT 5370) as well as on due process grounds under the Fourteenth Amendment. (24 RT 5370.)

Respondent argues that there was no error because this Court "has repeatedly rejected such claims, noting that although a trial court has no sua

sponte duty to instruct on the elements of prior crimes involving force and violence, 'a trial court is not prohibited from giving such instructions on its own motion when they are vital to a proper consideration of the evidence.'" (RB at 136, citing *People v. Hart* (1999) 20 Cal.4th 546, 651.)

Appellant respectfully refers the Court to the arguments in the AOB.

**h. Instructional error made when interrupting defense counsel's final argument.**[18]

Defense counsel told the jury at final argument in the penalty phase "[a]nd if you find that the mitigation should equal the aggravation in weight, you must vote for life." In front of the jury, the court interrupted and said, "No, that's not correct. The last instruction...the last statement of law stated by counsel is incorrect, ladies and gentlemen. You ignore that." The court then stated there was no authority for that assertion.[19] (24 RT 5483.)

Further discussion of this issue was held out of the presence of the jury in chambers. The court said that defense counsel could only say that "unless you are persuaded that the aggravating circumstances that they warrant death...you can't vote for death." (24 RT 5484.) The court then stated,

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[18] *See also* Argument XX.

[19] *Kansas v. Marsh* (2006) 126 S. Ct. 2516 (statute requiring death if aggravating and mitigating factors are in "equipose" does not violate 8th and 14th Amendment). Appellant's trial was prior to *Marsh.*

> [y]ou can only vote for life if you find that the mitigating circumstances when compared with to the aggravating circumstances warrant life. That's the only time you can do it....It's...it's...aggravating circumstances outweigh the mitigating circumstances in the sense that they warrant death, you vote for death...Life is not the default position.
> (24 RT 5485.)

The court had a problem with the "equal" argument, saying that if they feel neither life nor death is warranted, they are hung. (24 RT 5486.)

Attempting to clarify further, the court then stated

> ...before you can vote for death it's not enough to say aggravating circumstances outweigh mitigating. They must outweigh mitigating circumstances to such an extent to warrant death...Before you can vote for life, the mitigating circumstances must outweigh the aggravating circumstances as to warrant...life.
> (24 RT 5490.)

Then the court stated that "[y]ou can only vote for death when the aggravating circumstances are so substantial in comparison to mitigating as to warrant life." (24 RT 5491.) "Obviously, I have no problem with your telling the jury: Look, you can't vote for death unless you feel it outweighs it to the extent that it warrants...aggravating outweighs mitigating to the extent it warrants death." (24 RT 5492.) The court tried to simplify it again:

> What the statute is simply saying...is you weigh the aggravating and you weigh with the mitigating and you compare them and then you are led to a conclusion either death is warranted or life is warranted. And if you are led to no conclusion in that regard, then you can't make up your mind.
> (24 RT 5493.)

Respondent argues that there was no error either "in telling the jury that Epley's argument on the weighing process for aggravating and mitigating evidence had been incorrect" or "in reading the supplemental instructions on the weighing process immediately after the final arguments." (RB at 140.)

Appellant has acknowledged that this Court has approved the "so substantial" language in *People v. Duncan* (1991) 53 Cal.3d 955 and held it to be constitutional and rejected other challenges to the instruction. (*People v. Rogers* (2006) 46 Cal.4th 1136, 1179.)

Respondent's opposition to this argument rests upon the sole ground that this Court has previously rejected such arguments. (*See* RB 140-141.) Appellant respectfully requests this Court to reconsider and disapprove these cases in light of the circumstances of this case, as argued in the AOB.

## XIX. THE TRIAL COURT ERRED IN ALLOWING PREJUDICIAL VICTIM IMPACT EVIDENCE AT THE PUNISHMENT PHASE.

Argument XIX concerns the trial judge's error in allowing prejudicial victim impact evidence at the punishment phase of the trial.

Respondent cites *People v. Garcia* (2011) 52 Cal.4th 706, 751-752 which holds that the prosecution is allowed to present "a complete life history" of the victims.

Appellant does not argue that such evidence is completely inadmissible

at the punishment phase. The United States Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 111 S. Ct. 2597, held that the Eighth Amendment erects no *per se* bar to the admission of certain victim impact evidence during the sentencing phase of a capital case. The Supreme Court, however, acknowledged that victim impact evidence can be so unduly prejudicial as to render the sentencing proceeding fundamentally unfair and violative of the Due Process Clause of the Fourteenth Amendment. (*Id.* at 825, 111 S. Ct. at 2608.) Here, the victim impact evidence was cumulative, redundant, and oppressive in nature, encouraging a shifting of the focus of the sentencing proceeding away from appellant and on to the victim and the victim's family. Such a result was not intended by the Court in *Payne* which repeatedly reasoned that the sentencing authority was entitled to see only "a quick glimpse of the life petitioner chose to extinguish Y[.]" (*Payne,* 501 U.S. at 830, 111 S.Ct. at 2611 (O'Connor, J., concurring) (quoting *Mills v. Maryland* (1988) 486 U.S. 367, 397, 108 S.Ct. 1860 (Rehnquist, C.J., dissenting)).)

The defense motion objecting to this evidence cited *People v. Saunders* (1995) 11 Cal.4th 475, 549 for the proposition that the courts should limit evidence in these emotional areas. (5 CT 1548-1549.) Additionally, the motion cited Judge Kennard's concurring opinion in *People v. Fiero* (1991) 1

Cal.4th 173, 264-265 acknowledging that in Penal Code 190.3(a) the term *circumstances* "should be understood to mean only those facts or circumstances either known to the defendant when he committed the crime, or properly adduced in proof of the charges adjudicated at the guilt phase, emphasizing that the presently existing statutory authorization goes no further." (5 CT 1549.)

Thus, this victim impact evidence was improper and necessitates a new sentencing phase trial for appellant.

**XX: THE TRIAL COURT ERRED IN GIVING THE "SO SUBSTANTIAL" INSTRUCTION *SUA SPONTE*.[20]**

**XXI: THE TRIAL COURT ERRED IN DENYING A MOTION FOR A NEW TRIAL BASED ON THE COURT'S GIVING THE "SO SUBSTANTIAL" INSTRUCTION.**

Arguments XX and XXI concern the court's giving the "so substantial" instruction *sua sponte,* which misled the jurors.

Respondent refers the Court to his discussion of Argument XVIII (h), RB at 143, as does appellant

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[20] *See also* Argument XVIII(h) which is incorporated herein.

## XXII: CALIFORNIA'S SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Argument XXII concerns many features of California's capital sentencing scheme which, alone or in combination with each other, violate the United States Constitution.

Respondent notes that appellant "acknowledges that this Court has rejected each individual allegation on its own." (RB at 143.)

Appellant respectfully refers the Court to the arguments in the AOB.

## XXIII. SECTION 190.3 AND THE RELATED PENALTY PHASE INSTRUCTIONS, *AS USED AT APPELLANT'S TRIAL*, WERE UNCONSTITUTIONAL.[21]

Argument XXIII concerns the unconstitutionality of the Penal Code section 190.3 instructions used at his trial.

Respondent's opposition to this claim rests upon the sole ground that this Court has previously rejected such arguments. (*See* RB 144.) Appellant

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[21] To the extent that this Court has rejected any of these constitutional challenges to the 1978 law, as well as the other systemic issues raised, appellant respectfully renews each argument, makes other related arguments here, and asks that this court reconsider its former rulings, because they are incorrect interpretations under both the United States Constitution (per the Fifth, Sixth, Eighth and Fourteenth Amendments) and the California Constitution (per art. I, §§ 7, 15, 17 and 24).

respectfully requests this Court to reconsider and disapprove these authorities in light of the circumstances of this case, as argued in the AOB.

**XXIV. APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE TO HIS ACCOMPLICES AND AS TO BOTH HIS INDIVIDUAL CULPABILITY UNDER AN INTRA-CASE REVIEW, AND WHEN COMPARED TO OTHERS WHO HAVE COMMITTED SIMILAR OFFENSES.**

Argument XXIV concerns the disproportionality of appellant's death sentence compared to the punishment of alleged co-conspirators O'Brien and Snyder.

Respondent argues that "there is no doubt that appellant's crimes supported the imposition of the death penalty" (RB at 144) and "[i]t is irrelevant that Snyder and O'Brien did not also receive the death penalty." (RB at 145.)

However, assuming, *arguendo*, that appellant was guilty of the murder of Mrs. Daher, he was not the sole person responsible for her death. The fact that appellant has been sentenced to death while the prosecutor did not even seek death against the other defendants demonstrates a lack of proportionality. Death is different, and an LWOP sentence does not compare to a sentence of death. Appellant's death sentence is grossly disproportionate to the punishment of coconspirators Lee Snyder and Maury O'Brien.

## XXV. THE DEATH PENALTY VIOLATES EQUAL PROTECTION PRINCIPLES UNDER BOTH THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW.

Argument XXV concerns the claim that the death penalty, as presently constituted, violates both the United States Constitution and international law, specifically, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10 1984, Art 14 and 16, 23 I.L.M. 1027 (Entry into force for the United States November 20, 1994), *Inter-American Convention on Human Rights*, November 22 1969, Art 4 and 7, 1144 UNTS 123, 9 I.L.M. 673 (Entry into force July 18, 1978), *International Covenant of Civil and Political Rights*, December 19 1966, Art 2(3) and 6 -7, 999 UNTS 171, 6 I.L.M. 368 (Entry into force for the United States September 8, 1992), Second Optional Protocol to the *International Covenant on Civil and Political Rights*, December 15 1989, UN GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989) (Entry into force July 11, 1991), Article 18, *Vienna Convention on the Law of Treaties*, May 23 1969, Art 18, 1155 UNTS 331; 8 ILM 679 (Entry into force January 27, 1980), and *Bush v. Gore* (2000) 531 U.S. 98.

Without analysis, respondent relies on this Court's prior decisions rejecting similar claims. (RB at 146.) Appellant is aware that this Court has continued to reject the argument in the decisions cited by respondent. (*See,*

*e.g.*, *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Respondent's opposition to this claim rests upon the sole ground that this Court has previously rejected such arguments. (*See* RB 146.) Appellant respectfully requests this Court to reconsider and disapprove those authorities.

## XXVI. APPELLANT'S DEATH SENTENCE IS ARBITRARY UNDER INTERNATIONAL LAW

Argument XXVI considers the arbitrariness of the death penalty under international law.

Without analysis, respondent relies on this Court's prior decisions rejecting similar claims. (RB at 147.) Appellant is aware that this Court has continued to reject the argument in the decisions cited by respondent. (*See, e.g.*, *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Respondent's opposition to this claim rests upon the sole ground that

this Court has previously rejected such arguments. (*See* RB 147.) Appellant respectfully requests this Court to reconsider and disapprove them.

## XXVII. APPELLANT'S RIGHT TO BE TRIED BEFORE AN IMPARTIAL TRIBUNAL WAS VIOLATED BY DEATH QUALIFICATION PROCEDURES

Argument XXVII concerns appellant's right to be tried by an impartial tribunal due to the violation of his rights by 1) the death qualification procedures which unfairly skewed the jury pool to conviction-prone and death-prone jurors, and resulted in a biased tribunal, and 2) appellant's jury being subjected to inflammatory and irrelevant pre-trial publicity and evidence.

Without analysis, respondent relies on this Court's prior decisions rejecting similar claims. (RB at 147.) Appellant is aware that this Court has continued to reject the argument in the decisions cited by respondent. (*See, e.g.*, *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Respondent's opposition to this claim rests upon the sole ground that this Court has previously rejected such arguments. (*See* RB 147.) Appellant respectfully requests this Court to reconsider and disapprove them.

## XXVIII. APPELLANT HAS A RIGHT TO LITIGATE VIOLATIONS OF HIS RIGHTS BEFORE INTERNATIONAL TRIBUNALS

Argument XXVIII concerns the right of appellant to litigate violations of his rights before various international tribunals.

Without analysis, respondent relies on this Court's prior decisions rejecting similar claims. (RB at 147-148.) Appellant is aware that this Court has continued to reject the argument in the decisions cited by respondent. (*See, e.g.*, *People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Respondent's opposition to this claim rests upon the sole ground that this Court has previously rejected such arguments. (*See* RB 147.) Appellant respectfully requests this Court to reconsider and disapprove them.

## XXIX. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND REQUIRE THAT APPELLANT'S CONVICTIONS AND PENALTY BE SET ASIDE.

Argument XXIX concerns the violations of international law under the *Universal Declaration of Human Right*, the *International Covenant on Civil and Political Rights* (ICCPR), and the *American Declaration of the Rights and*

*Duties of Man* (American Declaration) deprived appellant of his constitutional rights to due process, equal protection and a fair trial.

Without analysis, respondent relies on this Court's prior decisions rejecting similar claims. (RB at 148.) Appellant is aware that this Court has continued to reject the argument in the decisions by respondent. (*See, e.g., People v. Virgil* (2011) 51 Cal.4th 1210, 1290; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Cook* (2006) 39 Cal.4th 566, 619-620; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Respondent's opposition to this claim rests upon the sole ground that this Court has previously rejected such arguments. (*See* RB 148.) Appellant respectfully requests this Court to reconsider and disapprove them.

## XXX. THE UNCONSTITUTIONAL USE OF LETHAL INJECTION RENDERS APPELLANT'S DEATH SENTENCE ILLEGAL

Appellant's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, because execution by lethal injection, the method by which the State of California plans to execute him, violates the prohibition of cruel and unusual punishment.

The Eighth Amendment prohibits methods of execution that involve the "unnecessary and wanton infliction of pain." (*Gregg v. Georgia, supra*, at

173.)

Respondent argues that "[a] challenge to the method of a future execution is not cognizable on appeal because such a claim does not impugn the validity of the judgment. (*People v. Burney* (2009) 47 Cal.4th 203, 270.)" (RB at 148.)

Respondent would respectfully refer the Court to the arguments in his AOB.

## XXXI. THE CUMULATIVE EFFECT OF THE ERRORS RENDERS THE VERDICT AND SENTENCE UNCONSTITUTIONAL

Argument XXXI considers the cumulative effect of the trial errors and shows that the cumulative effect of the multiple constitutional errors deprived appellant of his right to a fair trial.

Respondent, in four lines, argues that "there was no individual error" and thus there is nothing to cumulate. (RB at 148.)

Appellant's Opening Brief summarized the many errors which appellant contends occurred during his trial and the manner in which these errors had a "negative synergistic effect, rendering the degree of unfairness to defendant more than that flowing from the sum of the individual errors." (*People v. Hill* (1998), 17 Cal.4th 800, 847.) Respondent does not directly address the *Hill* case or appellant's arguments. Rather, respondent simply

denies there were any errors and avers that "[e]ven if there had been one or more errors, they were not sufficient to require reversal of either the convictions or the sentence." (RB 148.)

Respondent's arguments are not helpful to the Court in deciding the issues raised in this argument. It is, of course, up to this Court to determine whether appellant's contentions of error have merit, and these contentions have been fully briefed in the previous arguments. If, as respondent contends, there were no errors, then appellant's cumulative error argument is a moot point. If this Court does find multiple errors, then the issue becomes what relief, if any, is appropriate. Appellant and respondent have both offered their views on the relief appropriate for each individual error. If this Court finds that an individual error requires relief, then the question of cumulative error may be academic. Thus, the issue addressed in this argument is, assuming that this Court finds errors which it concludes do not by themselves require the relief appellant is seeking, whether the combination of errors it finds justifies relief.

Where this Court finds more than one error, it must carefully review not only the impact of each individual error, but the combined impact of all errors found. (*See, e.g., People v. Catlin* (2001) 26 Cal.4th 81, 180 ["Any errors we have identified, whether considered singly or together, are non-prejudicial and do not undermine the reliability of the death judgment under the Eighth and

Fourteenth Amendments or create a risk that the sentence erroneously was imposed."]; *People v. Jones* (2003) 29 Cal.4th 1229, 1268 ["Our careful review of the record convinces us the trial was fundamentally fair and the penalty determination reliable. No basis for reversal appears"].)

Assuming *arguendo* that the Court finds that the individual allegations are, in and of themselves, insufficient to justify relief, the cumulative effect of the errors demonstrated compel reversal of the judgment. When all of the errors and constitutional violations are considered together, it is clear that appellant has been convicted and sentenced to death in violation of his basic human and constitutional right to a fundamentally fair and accurate trial and his right to an accurate and reliable penalty determination, in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

The prejudicial impact of each of the specific allegations of error presented in this direct appeal must therefore be analyzed within the overall context of the evidence introduced against appellant at trial. No single allegation of error is severable from any other allegation set forth in this appeal. "Where, as here, there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the

overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381; *see also United States* v. *Wood* (10th Cir. 2000) 207 F.3d 1222, 1237.)

Appellant's conviction, sentence, and confinement were obtained as the result of a myriad of errors constituting multiple violations of his fundamental constitutional rights. Justice demands that appellant's murder convictions, special circumstance findings and sentence of death be reversed because when considered cumulatively, the errors and violations alleged herein are prejudicial and rendered the trial fundamentally unfair and unreliable.

The cumulative effect of the errors in this case resulted in a denial of fundamental fairness and violate due process and equal protection guarantees under the Fourteenth Amendment and the right to a reliable, individualized, non-arbitrary and non-capricious sentencing determination under the Eighth Amendment. (*See, Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 962.)

When considered together, the number and synergistic effect of errors is sufficient to violate due process and render the entire trial fundamentally unfair. (*People v. Hill, supra*, 17 Cal.4th at 847.)

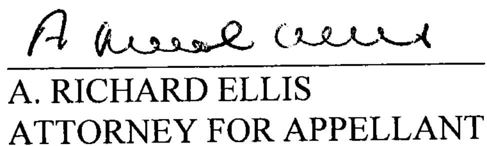
Accordingly, the combined and cumulative impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

## CONCLUSION

For all the foregoing reasons, the judgment of guilt and sentence of death must be reversed. In the event that the judgment is otherwise affirmed, the cause must be remanded for a new hearing on the automatic motion to modify the judgment of death.

**DATED**: January 24, 2014.

Respectfully submitted,

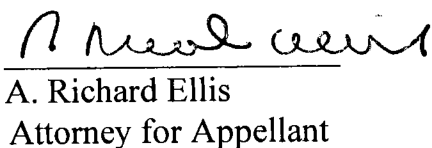


A. RICHARD ELLIS
ATTORNEY FOR APPELLANT

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

I am the attorney appointed by this Court to represent Appellant, Joseph Perez, Jr, in this automatic appeal. This brief uses a 13-point Times New Roman font. I conducted a word count of this brief using my office's computer software (WordPerfect X5). On the basis of that computer-generated word count, I certify that this brief is 28,233 words in length.

Dated: January 24, 2014.



A. Richard Ellis
Attorney for Appellant

## DECLARATION OF SERVICE BY MAIL

I, A. RICHARD ELLIS, hereby declare that I am a citizen of the United States, over the age of eighteen, an active member of the State Bar of California, and not a party to the within action. My business address is 75 Magee Ave, Mill Valley, California 94941.

On January 24, 2014 I served the within

**APPELLANT'S REPLY BRIEF**

on the interested parties in said action listed below, by placing a true and correct copy of the same in a sealed envelope, with 1st class postage affixed thereto, and placing the same in the United States Mail, addressed as follows:

Glenn Pruden, Esq.
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Martinez, CA 94553 (Attn: Margie Cousin)

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Mr. Joseph Perez
T-42655

San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Mill Valley, California, on January 24, 2014.

A. RICHARD ELLIS