IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**)**	
	)	**Supreme Court**
Plaintiff and Respondent,	**)**	**Crim. S040703**
	)	
v.	**)**	**Los Angeles County**
	)	**Superior Court No.**
JAMES ROBINSON, JR.,	**)**	**PA007095**
	)	
Defendant and Appellant.	**)**	

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

DEATH PENALTY CASE

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

California Evidence Code:

CONSTITUTIONS

OTHER AUTHORITIES

INTRODUCTORY REMARKS

There are a number of misleading, incomplete and inaccurate statements of the record throughout the Respondent's Brief.[1] These misstatements are, for the most part, discussed in connection with the legal arguments they pertain to in the ARB. However, portions of respondent's statement of the facts presents a misleading picture of James Robinson his circumstances at or near the time these crimes were committed. James Robinson wishes to clarify the record in this area at the outset. Other misstatements are addressed in connection with the individual legal arguments.

Respondent's discussion of the facts of this case proceeds on the assumption that James Robinson committed these crimes for money. All of the evidence is interpreted and analyzed in keeping with this theory throughout the Respondent's Brief. In a number of instances, discussed in greater detail below, respondent ignores other evidence in the record or simply rejects testimony which conflicts with its interpretation. Instead, respondent dramatizes every piece of evidence which could arguably support its theory that James Robinson robbed the Subway Sandwich Store because he had no other options in life and was desperate for a few hundred dollars. For all of the reasons set forth below, respondent's view of the evidence is so fixed and biased that it skews the analysis of this evidence in light of the applicable law.

Respondent never misses an opportunity to portray James Robinson as desperate and destitute. The very first sentence of the introduction to respondent's statement of facts proclaims "In June 1991, 22-year-old appellant, James Robinson, Jr., needed money." (Resp. Brief at p. 2.) Respondent next states that James Robinson "had been expelled from college for failing to pay for student housing." (*Id.*) According to respondent, at the time of the crimes James Robinson was writing bad checks, being

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[1] The Respondent's Brief will be cited "Resp. Brief at pp. __." Appellant's Opening Brief is designated "AOB," and the Appellant's Reply Brief "ARB."

harassed by collection agencies, and unable to pay the mandatory union dues in order to maintain his job in the meat department of a local grocery store. James moved in to his friend Tai Williams' apartment because, according to respondent, he "could not afford to rent an apartment." (*Ibid*.) As discussed below, these assertions are contradicted by credible evidence in this record. Respondent's interpretation of the facts and surrounding circumstances, and the conclusions reached in the Respondent's Brief, should not influence this Court's perception of James Robinson's case.

I. James Robinson was employed, being partially supported by his mother, and not in need of money in 1991.

Contrary to respondent's assertions, the record does not establish that James Robinson was having tremendous difficulty supporting himself in the Spring of 1991. James had been working more or less full time throughout the year. (RT 966.) In January of 1991, he took a job at Ralph's Market, and stayed there for around three months. (RT 879-80; 2356.) Von's Market hired him in May of 1991. (RT 2357.) He worked as a meat wrapper at the supermarkets, working anywhere from 25 to 30 hours per week. (RT 879-880.) Around one month before he was arrested, James went to work for Lucky Market. (RT 2357.) He changed jobs because Lucky's offered him full-time work. (RT 880.) James cashed his paychecks at his job, and the paychecks gave him enough money to live on. (RT 966.) Any financial problems James had during this period of time were not related to unemployment or lack of earnings.

In addition to his paychecks, James could always rely on his mother, Mrs. Vesta Robinson, for anything he needed including financial support. (RT 2654.) James is Mrs. Robinson's only son, and the youngest child in the family. (RT 2639.) Mrs. Robinson raised him as a single parent and never remarried following her divorce. (RT 1493-1494; 2655.) It was very important to Mrs. Robinson that her children be well brought up, with all available social and educational advantages. (RT 2643-2646; 2664.) She arranged for her eldest daughter, James' older sister, to come out as a debutante. (RT 2643.) Mrs.

Robinson took James on a seven day cruise for his sixteenth birthday. (Id.) As her children were growing up, some of her neighbors told her that her children were "living like little rich kids." (RT 2646.)

Mrs. Robinson still considered herself a "protective" mother, even after James left home to attend California State University, Northridge ("Northridge" or "CSUN"), in January of 1990. (RT 2349; 2649-2650.) While James was at Northridge, Mrs. Robinson visited often – sometimes two to three times a week. (RT 2649.) She brought groceries and laundry soap. If James was working late at night, she would pick him up and give him a ride home. She went to check up on him and to be with him. (RT 2649.)

James knew that he could always ask his mother for help if he had a financial problem, or was short of funds. (RT 2654, 2659.) When James spent the grant money instead of using it to pay for his room in the Northridge dormitory, Mrs. Robinson went with him to speak to the Dean. She repaid over half of the $1,500 grant money, and helped James arrange to repay the balance. (RT 2660-2661.) In the Spring of 1991, Mrs. Robinson gave James money, paid for things he needed and took him and his friends out for dinner. (RT 2659.) When he moved out to Northridge, she bought him clothing, his bed, a television and utensils. Mrs. Robinson provided "everything that he needed to get an education." (RT 2660.) James Robinson also understood that he was welcome to move home at any time. (RT 2654.)

II. James Robinson was not in poor standing at California State University, Northridge.

Respondent's assertion that James was expelled from Northridge for nonpayment of dorm fees is a misleading exaggeration of the record. (See, Resp. Brief at p. 2.) Respondent implies that James had sabotaged his education, could not go back to Northridge and was running out of options in life. (*Id*, at pp. 2, 17.) The actual record is far less dramatic and does not support respondent's interpretation.

In January of 1991, James withdrew temporarily from classes at Northridge. (RT

2354.) In 1990, James received a $1,500 grant which he was supposed to use to pay for his dorm room. He spent the money on other things. (RT 2652.) Mrs. Robinson was upset with James, and she went with him to speak to the dean. The dean told her that James' behavior in regard to the grant money was typical for a college student who was unaccustomed to living away from home and handling his own money. (RT 2652.) She decided to reimburse the school for $800, and insisted that James pay Northridge the remaining $700. (RT 2652.) The dean told James that he could return to school as soon as the money was paid. (*Id*.) [2] When they left the dean's office, James told his mother that he would take a semester off from school and work full-time to repay the money. (RT 2661.)

III. The banking merger contributed to James Robinson's financial disorganization, and bank errors added to the confusion with his checking account.

Respondent states that the bank closed James' checking account because he was writing bad checks. (Resp. Brief at p. 4, citing RT 684, 685-686.) In its discussion, respondent implies that James Robinson was deliberately writing bad checks. (See, Resp. Brief at pp. 4-5; 18-19.) Here again, respondent stretches the record to invent some financial motive for this crime and to extract the maximum number of negative inferences concerning James Robinson.

James Robinson never denied that he was having trouble with his bank accounts in the Spring of 1991. (*See* RT 967.) James had a checking account and a savings account with the Matador Federal Credit Union. (RT 684.)[3] In April 1991, Matador was taken

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[2] The court would not allow Mrs. Robinson to describe a statement she had from CSUN dated August 26, 1993, asking James to return to register for classes. (RT 2653; 2661.)

[3] The checking account was opened on May 21, 1990, and closed by the Credit Union on June 7, 1991, due to overdrawn checks. (RT 686; 691) This type of account will be closed if an account holder exceeds three overdrawn checks in a six-month period.

over by Security Pacific National Bank, and new checks were issued to Matador depositors. (RT 698.) James was initially unaware that his Matador checks were no longer good. He continued using them, and many were later returned with the notation "account closed." (RT 698-699.) James' confusion about the status on his accounts during the banks' merger unleashed an unfortunate financial chain reaction. James lost track of his checking account balance because the returned checks generated overdraft charges. Several checks were then returned "NSF." (RT 890.) This generated more bank charges and, as a result, even more checks "bounced" during this period. (*Id*.)

James tried to correct the problems but he was not successful. The credit union was only open for limited hours. Because of his work schedule, James had trouble getting to the bank on the buses during business hours. (RT 891.) James finally stopped making deposits to his checking account because he was hopelessly confused about its status. During this time, he cashed his checks at the market where he worked and kept most of his money in cash. (RT 891-892.) He thought that he should just keep the cash to repay people holding the bad checks. (*Id*.)

Respondent notes several instances where James Robinson's checks were returned. (*See*, Resp. Brief at pp.18-19.) What respondent does not acknowledge is the evidence establishing that James repaid the holders of his bounced checks. James testified that he had been able to pay almost everyone holding one of the returned checks. (RT 891.) People's Exhibit 78 is a receipt confirming that James Robinson had paid for a returned check. (RT 742.) The record thus fails to establish the James Robinson was engaged in any sort of a fraudulent scheme to pass bad checks.

IV. James Robinson's outstanding bills were insufficient to cause serious

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(RT 686.) When the checking account was closed on June 7, 1991, it had a balance of $22.30. This balance was transferred to the savings account. (RT 691.) As of June 10, 1991, there was no money in the checking account. (RT 691.) A $50.00 deposit to the savings account was made on July 8, 1991, leaving a balance in that account of $97.30. (RT 692.)

financial stress, and his failure to pay union dues is not as significant as respondent contends.

Respondent attempts to create the impression that James Robinson was overwhelmed with debt. Respondent repeatedly emphasizes the following facts: James Robinson had a newspaper subscription cancelled in the Spring of 1991; he had received a collections letter from a music club; and, owed money to a shoe store. (Resp. Brief at pp. 4-5 [citing RT 746-751, People's Exh. 81, 86 and 88]; Resp. Brief at pp.18-19.) A handful of outstanding debts in an aggregate amount of less than $200 is hardly a motive for robbery and homicide.

The fact that James had not yet paid his union dues to work as a meat wrapper is also insignificant. Given the status of his checking account, it is not clear what respondent would have James do to mail in his union dues. It is interesting to note that on the one hand respondent criticizes James Robinson for "writing bad checks," and on the other hand implies that his failure to write another check from this same account is suspect. (Resp. Brief at p. 2.) The actual record concerning James Robinson's finances thus does not support the inferences respondent would like for this Court to draw from its recitation of this evidence.

V. James moved in with Tai Williams and Donna Morgan at their request and not because he had nowhere else to go.

Respondent makes it appear as though James Robinson was on the verge of homelessness in June of 1991. Respondent states that James moved in with Tai Williams because, "he could not afford to rent an apartment." (Resp. Brief at p. 2.) Elsewhere respondent states that James was "evicted" from Tai's apartment. (Resp. Brief at p. 8.) According to respondent, James was deeply upset at being told to leave. (*Id*.) Respondent next implies that, because James rented an inexpensive single apartment within a few days of Tai telling him to leave, he paid the rent with money obtained in the robbery of the Subway Sandwich Shop. (Resp. Brief at p. 3.) Once again, respondent characterizes the evidence and testimony in such a way that neutral circumstances appear

incriminating. These inferences do not hold when the entire evidentiary picture is examined.

Whether or not James was technically "evicted" by Tai Williams is not relevant. However, by using this term respondent conveys the impression that James Robinson was about to be put out in the street against his will. Respondent states that James became very upset when Tai told him to leave, and implies that the alleged "eviction" made James desperate enough to commit the robbery and homicides. (See, Resp. Brief at pp. 2-3.) Other evidence in the record is contrary to respondent's suppositions.

The record does not support respondent's contention that James "could not afford" to rent an apartment. (Resp. Brief at p. 2.) James was accustomed to paying rent before moving into Tai's and Donna's apartment. During most of 1991, James and several roommates shared a condominium near the Northridge campus. (RT 882.) The roommates decided to give up their lease (not for financial reasons) and James had to move at the end of May. (RT 883-884.) James stayed in the dorms on an interim basis while searching for an apartment to share with his friend, George Jackson. (RT 884-885.) That plan fell through when George decided to move back home. (RT 885.) These circumstances indicate that James Robinson had been paying rent before May of 1991, and that he planned to continue living in some apartment near CSUN. The record does not indicate that James Robinson was unable to pay his share of the rent for an apartment.

Respondent apparently concludes that the "eviction" made James Robinson so desperate to raise money for an apartment that he carried out the Subway Sandwich Shop crimes. James was upset about the way in which Tai told him to leave because he was concerned about the friendship. (RT 919-920.) However, he was not desperate to raise money for an apartment for several reasons. First, James was not destitute. He was working nearly full time in June of 1991, and his mother was helping him financially. (RT 2654, 2659.) Second, James was already planing to move in the near future. James moved into Tai and Donna's apartment in late May or early June of 1991. Tai had encouraged James to stay with them, and James agreed to pay $100 a month for rent

(which was to include his share of the utilities) because he realized that Tai and Donna needed extra money to cover their expenses. (RT 887.) James had never intended to be there for more than a month. (RT 886-887.) While at Tai's and Donna's, James continued searching for apartments and speaking to potential roommates. (*Id*.)

Finally, James was not desperate to find an apartment because he was never without a place to stay. James knew that he could return to his mother's home at any time. (RT 2654.) Mrs. Robinson had recently encouraged him to move back. (RT 2658.) For all of these reasons, being told to leave Tai's and Donna's apartment was not a crisis for James Robinson that would lead him to resort to robbery in order to have a place to live.

For all of the reasons discussed above, this Court should disregard respondent's characterization of James Robinson. Respondent creates a motive for James to have carried out these crimes based on a series of self-serving interpretations of the evidence. Viewed in the proper context, the evidence respondent relies upon clearly does not support the inferences respondent draws in its brief.

ARGUMENT

I.

RESPONDENT FAILS TO REFUTE JAMES ROBINSON'S CLAIMS THAT THE TRIAL COURT'S EXCLUSION OF PROFFERED DEFENSE EVIDENCE VIOLATED MULTIPLE GUARANTEES UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS AND WAS CONTRARY TO CALIFORNIA LAW.

A. Background and overview of claims.

James Robinson raises several related claims based on the trial court's exclusion of two items of evidence pertaining to the credibility of the prosecution's two star witnesses, Tai Williams and Tommy Aldridge. (*See* AOB at pp. 40-89.) During pre-trial discovery, defense counsel obtained a police report showing that Beverly Hills Police had arrested Tai Williams and Tommy Aldridge in July of 1991, only ten days after James' arrest in this case. Williams, Aldridge and another male were stopped by police while driving around Beverly Hills at 1:30 a.m., the same time of night that the Subway sandwich shop robbery/murders were committed. Williams was carrying a .9 millimeter and Aldridge had a .380, the same type of gun James owned and allegedly used to commit the crimes charged in this case. (*See*, RT 442; 2239.) Both Williams and Aldridge sustained misdemeanor convictions for unlawfully carrying concealed weapons while driving. (*Id*.)

Another piece of evidence obtained in discovery corroborated James Robinson's testimony and directly linked Tai Williams to the Subway Sandwich Shop robbery/homicides. A civilian witness, Ralph Dudley, [4] reported to LAPD Detective Peggy Mosley that he had seen a grey Mustang, the same color, make and model as Williams' car, in the alley behind the Subway sandwich shop at the time of the crimes. (RT 1186.) James Robinson testified that he had seen the grey Mustang when he ran out into the alley that night. He immediately recognized Tai Williams' car because of the

[4] Respondent places Mr. Dudley's name in quotation marks ("Ralph Dudley") throughout its discussion of this claim as if this witness were a fictional character invented by James Robinson. (See. e.g., Resp. Brief at 38-39.) Ralph Dudley is identified in a police report provided to defense counsel in discovery. According to the police report, Mr. Dudley reported seeing the grey Mustang as defense counsel stated in the trial court.

broken rear tail lights. (RT 944-945.) [5]

The trial court granted the prosecutor's motion to exclude both of these items of evidence. The court held that defense counsel had not made a sufficient showing to introduce Williams' and Aldridges's gun possession arrests as evidence of third party culpability. [6] (*See*, RT 443.) The court further found that this evidence was not relevant, and thus was not admissible to impeach Williams' and/or Aldridge's credibility under ***People v. Wheeler*** (1992) 4 Cal.4th 284, and Cal. Const. Art. 1, § 28(d). (RT 446.) In addition, the court applied Evidence Code section 352 to conclude that any slight relevance this evidence had was outweighed by the potential for confusion of the issues before the jury. (*Id*.) The trial court issued the same ruling in the retried penalty phase, where counsel argued lingering doubt as to James' responsibility for the crimes in mitigation of the death penalty. (RT 2237; 2811-2812.)

The trial court also prevented defense counsel from questioning Detective Mosley

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[5] Other evidence which was introduced at trial supported Mr. Dudley's observation and was consistent with James Robinson's testimony. Eyewitness Rebecca James saw a Black male inside the Subway Sandwich Shop around the time of the robbery. Although she identified James Robinson at trial, she had been unable to identify him from a photographic lineup shown to her shortly after the crime. (RT 271; 273.) During her cross-examination at trial, Ms. James agreed that the man she had seen was different from James Robinson in a number of significant features. Ms. James recalled that the Black male she had seen inside the Subway had a broader face and nose, fuller, thicker lips and lighter skin than James Robinson. (RT 271; 295.)

[6] Trial counsel pointed out a number of circumstances indicating that Williams and/or Aldridge may have been responsible for the crimes. Aldridge owned the same type of gun that James had purchased, at Tai Williams' urging, shortly before the crime. Aldridge's gun was also the same caliber as the murder weapon. (RT 442.) Defense counsel described in some detail the discrepancies in the expected testimony of these witnesses, and explained for the court the importance of impeaching their credibility. (RT 444-445.) Counsel also argued that the circumstances of these arrests were relevant to undermine Williams' and Aldridge's credibility generally, particularly in light of their testimony that they owned guns as a hobby and used them only for target practice.

about Ralph Dudley's sighting of the grey Mustang in the alley behind the Subway. (RT 1186.) This area of inquiry was also prohibited in the penalty phase. (RT 2239.)

James Robinson raises several related claims based on the trial court's erroneous exclusion of this evidence. As discussed in the AOB, the trial court's exclusion of relevant evidence of third party culpability violated James Robinson's federal constitutional rights to present a defense and to confront and cross-examine witnesses as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. (*See*, AOB at pp. 51-56; ***Crane v. Kentucky*** (1986) 476 U.S. 683, 690-91; ***Washington v. Texas*** (1967) 388 U.S. 14, 22-23; ***Chambers v. Mississippi*** (1973) 410 U.S. 284, 302.) Because the evidence was directly related to culpability, its exclusion undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense (See, AOB at pp. 56-58; ***Beck v. Alabama*** (1980) 447 U.S. 625, 637-38), and deprived him of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Id*., ***Zant v. Stephens*** (1983) 462 U.S. 862, 879; ***Woodson v. North Carolina*** (1976) 428 U.S. 280, 304; ***Johnson v. Mississippi*** (1988) 486 U.S. 578, 584-85.)

James Robinson raises several related claims based on this state's laws of evidence. First, the trial court's determination that the proffered evidence had only "slight" probative value was clearly erroneous. Evidence of third party culpability is highly relevant under California law, as is evidence bearing on the witnesses' motives. (See, AOB at pp. 58-62; (***People v. Hall*** (1986) 41 Cal.3d 826; ***People v. Garceau*** (1993) 6 Cal.4th 140, 177; ***People v. Alvarez*** (1996) 49 Cal.App.4th 679, 688.) Second, the evidence was relevant and admissible to as it pertained to Williams' and Aldridge's credibility. (*See* AOB at pp. 62-69; Evid. Code § 788; ***People v. Wheeler***, *supra*, 4 Cal.4th 284.) Third, the trial court abused its discretion by excluding this evidence under Evidence Code section 352 on the grounds that its probative value was outweighed by the potential for jury confusion. (*See* AOB at pp. 69-72; ***People v. Clair*** (1992) 2 Cal.4th 629.)

Finally, James Robinson argues that, because the trial court erroneously excluded this evidence in contravention of established state law, the court's action deprived James Robinson of a state-created liberty interest and denied him due process of law as required by the Fifth and Fourteenth Amendments to the federal constitution. (See AOB at pp. 72-73; ***Hicks v. Oklahoma*** (1980) 447 U.S. 343, 346; ***Lambright v. Stewart*** (9th Cir.1999) 167 F.3d 477.)

Respondent contends that the trial court properly excluded the defense evidence on all grounds. According to respondent, the defense evidence of third party culpability had only "marginal" relevance and did not sufficiently link Tai Williams or Tommy Aldridge to the Subway crimes. (See, Resp. Brief at pp. 33-34) Alternatively, respondent claims that any error was harmless because: 1.) the evidence of appellant's guilt was overwhelming; 2.) "appellant's defense was not hindered by the exclusion" because the defense had other evidence available; and, 3.) Even if the proffered defense evidence implicated Williams and Aldridge, it did not exculpate appellant. (See, Resp. Brief at pp. 35-36; 42.) Respondent also argues that the trial court did not err by refusing to allow defense counsel to impeach Williams and/or Aldridge with their misdemeanor convictions. [7]

Respondent makes essentially the same arguments regarding the exclusion of this evidence in the penalty retrial. Respondent argues that the defense was not prejudiced by the trial court's rulings in the penalty phase because "the defense was able to allude to third party culpability evidence" in the penalty retrial. (Resp. Brief at p. 46.)

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[7] Respondent refers to the misdemeanor "convictions" throughout this argument. (See, e.g., Resp. Brief at pp. 32, 43.) James Robinson's arguments, however, are not limited to the impeachment use of the misdemeanor convictions. Both in the AOB and at trial, he contends that the underlying facts of the weapons possession arrest were relevant and admissible both as substantive evidence of third party culpability and for impeachment during cross-examination. In addition, James Robinson argues that the convictions themselves were admissible because the misdemeanors constituted crimes of moral turpitude pursuant to the California Constitution, Art. I, section 28 (d), and Evid. Code section 788. (See, AOB at pp. 64-73.)

Respondent's arguments are not persuasive for all of the reasons set forth below and in the AOB. If for any reason James Robinson does not reassert any fact or argument originally included in the AOB, this should not be interpreted to mean that he concedes that fact or argument.

B. This Court should review James Robinson's claims of federal constitutional erroneous resulting from the trial court's rulings concerning this defense evidence.

Respondent argues that James Robinson has waived his federal claims based on the trial court's treatment of this evidence by counsel's failure to raise these claims below. (Resp. Brief at p. 47, citing ***People v. Sanders*** (1995) 11 Cal.4th 475, 539, fn.# 27.) Respondent's argument is wholly without merit. First, the decision respondent relies upon does not support its argument. In addition, respondent's waiver argument is contrary to the policies expressed by this Court and the United States Supreme Court.

People v. Sanders, *supra*, 11 Cal.4th 475, is not applicable and its holding does not support respondent's contention that James Robinson has waived these constitutional claims. In ***Sanders,*** this Court rejected the defendant's claims that the voir dire had been unduly restrictive under state law. (*Id* at 538-539.) In the footnote respondent cites, this Court states that, because the trial court's restrictions on voir dire had been proper under California law, the federal claims arising from the same alleged error were also rejected although not expressly stated, presumably because the state grounds were adequate and independent. Waiver, therefore, was ***not*** the primary basis of the ruling in ***Sanders***. In regard to waiver, the Sanders' Court remarked: "Defendant also asserts, for the first time on appeal, that the trial court's restrictions on voir dire violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution "***and their California counterparts***." The point has not been preserved for review." (See, ***People v. Sanders***, *supra*, 11 Cal.4th 475, 539, fn.# 27 [emphasis supplied].) Sanders is inapt because in James Robinson's case, the trial court's ruling reflects its was aware of the constitutional considerations. The trial judge specifically referenced the California Constitution when it

ruled that the evidence was not relevant. (See RT 442-446.) The court here was thus clearly on notice of the state constitutional considerations and, presumably, was aware of the federal constitutional counterparts.

Even though trial counsel did not specify federal constitutional grounds, it is appropriate for this Court to review James Robinson's federal constitutional claims concerning the erroneous exclusion of this evidence. This Court may use its discretionary power to review the constitutional issues even where no objection was raised at trial. (See ***Hale v. Morgan*** (1978) 22 Cal.3d 388, 394; ***People v. Truer*** (1985) 168 Cal.App. 3d 437, 441 [reviewing prosecution claim for the first time on appeal].) An exercise of this Court's discretion is especially appropriate here because the error here is purely legal, and does not depend upon a factual determination. (See ***People v. Vera*** (1997) 15 Cal.4th 269, 276 ["Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."]; ***People v. Blanco*** (1992) 10 Cal.App.4th 1167, 1172-1173 [reviewing a constitutional claim on appeal where it had been characterized only as an evidentiary objection in the trial court].)

The United States Supreme Court has made clear that capital cases require heightened due process, absolute fundamental fairness and a higher standard of reliability. (***Caldwell v. Mississippi*** (1985) 472 U.S. 320; ***Beck v. Alabama***, *supra*, 447 U.S. 625; ***Lockett v. Ohio*** (1978) 438 U.S. 586; ***Monge v. California*** (1998) 524 U.S. 721.) This Court has held that waiver is properly excused where the issues raised by the claim concern the fundamental fairness of a capital trial. (***People v. Hill*** (1998) 17 Cal.4th 800.) Consistent with those principles, this Court should review *de novo* the trial court's exclusion of significant defense evidence in this capital trial. (*See* ***People v. Gordon*** (1990) 50 Cal.3d 1223, 1265.) For all of these reasons, James Robinson respectfully requests that this Court exercise its discretion to review the claims of federal constitutional error.

C. The proffered defense evidence of third party culpability was relevant and the trial court's decision to exclude this evidence violated James Robinson's federal constitutional rights and was also contrary to California law.

Third party culpability evidence is generally relevant and its exclusion infringes on several fundamental guarantees of the federal constitution. In ***Thomas v. Hubbard***, 273 F.3d 1164 (9th Cir. 2001), the Ninth Circuit reversed a state murder conviction where a trial court excluded similar evidence of third party culpability. As in the present case, the defendant in ***Thomas*** sought to cross-examine the key prosecution witness to support the defense theory that he was the actual killer. The trial court refused to allow the proposed cross-examination, in part because it found the defense theory too speculative.

The Ninth Circuit reversed, and in its opinion re-affirmed the constitutional necessity of permitting a defendant to attack the credibility of his accuser. The Ninth Circuit remarked: ***"Where a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution."*** (***Thomas v. Hubbard***, *supra*, at 1178, quoting, ***De Petris v. Kuykendall***, 239 F.3d 1057, 1062 (9th Cir. 2001) [emphasis supplied].)

1. Respondent fails to meaningfully discuss ***Thomas v. Hubbard*** and the federal constitutional authority establishing the relevance of third party culpability evidence.

As discussed in the AOB, the facts of ***Thomas v. Hubbard*** are strikingly similar to those of James Robinson's case and reversal is appropriate here as well to protect fundamental constitutional rights. Respondent buries its discussion of the Ninth Circuit's opinion in ***Thomas v. Hubbard***, *supra*, 273 F.3d 1164, at the very end of its response to Claim I in the AOB. (See Resp. Brief at pp. 48-49.) When it does address this case, respondent does not analyze the relevance of the evidence proffered here in light of the

Ninth Circuit's opinion.

Respondent mistakenly attempts to distinguish this case from ***Thomas v. Hubbard*** based on the ***weight*** of the evidence rather than an assessment of its ***relevance***. Respondent never addresses the language in ***Thomas v. Hubbard*** saying that the evidence is relevant even if the defense theory is speculative. Respondent concludes that, because the third party culpability evidence at issue here was not (in respondent's view) persuasive, no error resulted from the trial court's decision to exclude this material either as a subject for cross-examination or as substantive defense evidence. (*See* Resp. Brief at p. 46.) By focusing its discussion on the evaluation of prejudice, instead of the trial court's ruling to prohibit use of this evidence on relevance grounds, respondent apparently concedes that the trial court violated the federal constitution by precluding defense cross-examination concerning Williams' and Aldridge's gun possession arrests.

Even if no such concession is presumed, respondent's argument fails. In ***Thomas v. Hubbard***, the Ninth Circuit made clear that the defense does **not** need to make any threshold showing concerning relevance. A criminal defendant is constitutionally entitled to conduct cross-examination in support of a third party culpability theory:

> ***Even if the defense theory is purely speculative . . . the evidence would be relevant***. In the past, our decisions have been guided by the words of Professor Wigmore: '[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt."

(***Thomas v. Hubbard***, *supra*, at 1177, quoting ***United States v. Vallejo***, 237 F.3d 1008, 1023 (9th Cir. 2001) (quoting 1A John Henry Wigmore, Evidence in Trials at Common Law, § 139 (Tillers rev. ed. 1983, alterations in original).)

Respondent argues that the evidence pointing to the witness as the third party suspect was stronger and more abundant in ***Thomas v. Hubbard***. Even if this were so, and James Robinson does not concede that this is the case, it does not avail respondent's

argument. As discussed in the AOB, the federal constitution protects the defendant's right to present a wide range of evidence to challenge the credibility of adverse witnesses. Assessing the strength of that evidence is the jury's responsibility. (See, AOB at pp. 51-58.)

2. Respondent fails to show that the defense evidence of third party culpability was properly excluded under California law.

(a.) *Respondent's arguments concerning the relevance of the third party culpability evidence are based on its own conclusions rather than the appropriate legal standards.*

Respondent argues that trial court correctly applied California law when it prevented the defense from using the Williams and Aldridge gun possession arrests as evidence of third party culpability. (See, Resp. Brief at pp. 33-34.) According to respondent, this evidence did not establish a sufficient connection between the witnesses and the Subway crimes. Respondent notes that Williams and Aldridge were arrested in another city, and were not in the vicinity of the Subway Sandwich Shop. It further notes that the guns involved in these arrests were not linked to the capital crimes. Finally, respondent argues that, although Williams and Aldridge were arrested at approximately the same time of night (1:30 a.m.) that the Subway Sandwich Shop crimes occurred, this information may not be considered because this particular fact was not expressly brought to the trial court's attention before its ruling. (See Resp. Brief at p.34.) For these reasons, respondent finds that the proffered defense evidence was "not capable of raising a reasonable doubt that a third party actually robbed the Subway and killed Brian Berry and James White." (*Id*.) Accordingly, respondent concludes that Williams' and Aldridge's illegal gun possession arrests were irrelevant and that the trial court properly exercised its discretion under ***People v. Hall*** (1986) 41 Cal.3d 826 when it excluded this evidence of third party culpability. (See, Resp. Brief at pp. 33-34.)

(b.) *Respondent's interpretation of this Court's standards for determining the relevance and admissibility of third*

> *party culpability evidence as established in* ***People v. Hall*** *is so unduly restrictive that it conflicts with the basic meaning of that decision*.

Respondent quotes this Court's decision in ***People v. Hall***, *supra*, 41 Cal.3d 826, for the standard California courts should apply to determine the admissibility of proffered third party culpability evidence:

> "courts should simply treat third party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] section 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion ([Evid. Code,] section 352)."

(Resp. Brief at p. 33, quoting ***People v. Hall***, *supra*, 41 Cal.3d at p. 834.)

While respondent correctly states the standard established by this Court in ***Hall***, its application of this standard to the facts of this case is incorrect. Respondent's analysis fails because it depends upon a single excerpt of the ***Hall*** opinion to define relevance in a manner that is ultimately contrary to the fundamental principles of the case. In ***Hall***, this Court established a relatively liberal standard for admitting defense evidence of third party culpability: "To be admissible, the third-party evidence need ***not*** show 'substantial proof of a probability' that the third person committed the act; ***it need only be capable of raising a reasonable doubt of defendant's guilt.***" (*Id.*, at 833-834.) In defining "reasonable doubt" in this context, the ***Hall*** court stated: "Evidence of mere motive or opportunity to commit the crime in another person, ***without more***, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime . . . ." (*Id.*, at 833 [emphasis added].)

Respondent ignores this Court's commentary in ***Hall*** about how the evaluation of relevance should proceed where the proffered evidence concerns third party culpability. In ***Hall***, trial courts were warned not to be unduly restrictive in assessing the relevance of third-party culpability evidence: "[Trial courts] should avoid a hasty conclusion * * *

that evidence of [defendant's] guilt was incredible. Such determination is properly the province of the jury." (***People v. Hall***, *supra*, 41 Cal.3d 826, 834.) This Court further advised trial courts to resolve any doubts in favor of the defense when assessing the competing risks (i.e., undue prejudice, jury confusion or consumption of time) under Evidence Code section 352:

> Furthermore, ***courts must focus on the actual degree of risk*** that the admission of relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed: 'If the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, ***the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt***. (1A Wigmore, Evidence (Tillers rev. Ed. 1980) § 139, p. 1724.).'

(***People v. Hall***, *supra*, 41 Cal.3d at pp. 834 [emphasis added].)

California law thus favors the inclusion of third party culpability evidence, irrespective of how persuasive the proffered evidence is expected to be with the jury. Neither respondent's nor the trial court's beliefs regarding the weight of the evidence should have been considered in determining whether it ought to have been admitted. The trial court should not have excluded the third party culpability evidence based on ***its*** determination that the proffered evidence was weak and/or not completely exculpatory.

(c.) *Respondent does not address the California cases decided after **Hall** indicating that the third party culpability evidence at issue here should have been admitted because it directly linked identified, alternate suspects to the crime.*

Respondent asserts that the third party culpability evidence proffered here was properly excluded because it did not establish a satisfactory link between the alternate suspects (Williams and Aldridge) and the charged crimes. (See Resp. Brief at pp. 32-34.) It is proper to exclude third party culpability evidence where the defense cannot identify a

specific suspect or suspects for the crime. (***People v. Sandoval*** (1992) 4 Cal.4th 155.) Respondent, however, avoids any comparison of the facts of this case and the California cases on third party culpability evidence decided after ***People v. Hall.*** As discussed below and in the AOB, a comparison of this case to the cases following ***Hall*** demonstrates that the evidence proffered here satisfied the established criteria for admitting third party culpability evidence.

An alternate suspect must be clearly identified for the evidence of third party culpability to be admissible. In ***People v. Sandoval***, *supra*, 4 Cal.4th 155, this Court upheld the trial court's decision to preclude defense cross-examination of police detective for purposes of showing that victim was probably involved in criminal activity and might have been killed by ***any number of*** accomplices or rivals. (*Id.*, at 176. *See also*, ***People v. Bradford*** (1997) 15 Cal.4th 1299, 1325 [evidence that victim's statement that she had previously been in fear of "a man" insufficient without more]; ***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1017-18 [defense prevented from introducing evidence that other suspects existed due to victim's association with "Hells Angel-type people" and drug dealers].)

The third party culpability evidence must, in addition to identifying a suspect, implicate the suspect in criminal activity or at least highly suspicious behavior. In ***People v. Alcala*** (1992) 4 Cal.4th 742, the defense identified an alternate suspect, but the proffered evidence consisted of nothing more than the suspect's mere presence in the area on the day after the crime. This Court noted that the "[d]efendant's offer of proof failed to include ***any*** evidence, direct or circumstantial, linking [the third party] to [the] murder." (*Id.* at 793 [emphasis added]. *See also*, ***People v. Kaurish*** (1990) 52 Cal.3d 648, 685 [third party culpability evidence properly excluded where it merely showed that another person had a reason to be angry with the victim].)

Under ***People v. Hall***, supra, 41 Ca. 3d 826, the trial Court must assume that the evidence offered is true. The defense evidence proffered in James Robinson's case meets the requirements of the foregoing cases. First, Tai Williams and Tommy Aldridge were

identified as the suspects. Second, Williams' and Aldridge's conduct was not, as in the ***Alcala*** case, simply mere presence at or near a crime scene. Their actions (driving around Beverly Hills at 1:30 a.m. with loaded guns) was unquestionably illegal activity which resulted in misdemeanor convictions for a crime of moral turpitude. Moreover, the circumstances surrounding Williams' and Aldridge's arrests are more than merely suspicious. The circumstances surrounding their arrests imply that they were engaged in a course of conduct directly connected to the crimes at the Subway sandwich shop. Williams and Aldridge were arrested in Beverly Hills, one of the country's wealthiest residential neighborhoods, with loaded guns. They were arrested only ten days after James Robinson was charged in this case, and at the same time of night as the Subway robbery/homicides. The obvious inference is that Williams and Aldridge were on a robbery spree which may have included the Subway Sandwich Shop crimes. [8]

The trial court's error is not excused because defense counsel did not mention that Williams and Aldridge were arrested at the same time of night as the Subway crimes. Defense counsel's offer of proof was more than sufficient to establish the relevance of this evidence. As discussed above and in the AOB, the defense proffer included clearly identified alternate suspects engaged in criminal activity. (See, AOB at pp. 60-64 ***;People v. Sandoval***, *supra*, 4 Cal.4th 155; ***People v. Alcala***, *supra*, 4 Cal.4th 742.) The correlation between the time of Williams' and Aldridge's arrests in Beverly Hills and the Subway sandwich shop crimes is but one small factor which increases the weight of this evidence. The relevance determination is clear with or without this added fact.

The circumstances of Williams' and Aldridge's arrests also corroborates James

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[8] This inference is especially compelling when considered in conjunction with the other excluded evidence, i.e., independent witness Ralph Dudley's sighting of a car identical to Tai's at the crime scene. Respondent concedes as much elsewhere in its brief, stating "[i]f a witness had seen Williams' car at the scene of the crimes, then Williams might have been linked to the commission of the crimes." (Resp. Brief at p. 39.) James Robinson contends, however, that the evidence of third party culpability and the evidence concerning Ralph Dudley were relevant and admissible separately or considered together.

Robinson's testimony. James testified that Tai Williams and Tommy Aldridge were discussing robbery schemes. (See RT 901; 902-904.) James Robinson's testimony also established that Tai Williams' had substantial motives for robbery. Williams had a girlfriend and a baby. (RT 894-899.) He was having personal problems, largely caused by financial stress, and was looking for a way out. (RT 900-901.)

For all of the reasons discussed above and in the AOB, the excluded evidence satisfied the criteria established by this Court for the admission of third party culpability evidence. When Williams' and Aldridge's gun possession arrests are considered in the larger context of the case, and in conjunction with James Robinson's testimony, the inferences are compelling. Under ***People v. Hall***, *supra*, 41 Cal.3d 826, James Robinson's offer of proof must be presumed true by the trial court. This evidence was, therefore, admissible under California law. The trial court's erroneous exclusion of third party culpability evidence was highly prejudicial because the excluded evidence was sufficient to raise a reasonable doubt as to James Robinson's guilt.

3. Respondent's implausible and wholly speculative explanation for Williams'and Aldridge's arrests is not relevant to this Court's review of the trial court's ruling to exclude the third party culpability evidence.

Respondent goes to great lengths to distinguish the circumstances surrounding Williams' and Aldridge's arrests and the circumstances of the Subway crimes. Respondent argues that when Williams and Aldridge were caught with illegally concealed weapons they "were in a different city, on a different night than the Subway crimes, with guns totally unrelated to the Subway crimes." (Resp. Brief at p. 34) Respondent suggests that Williams' and Aldridge's testimony explains why these two were carrying their guns at 1:30 a.m. in Beverly Hills. In its brief, respondent notes that both witnesses testified that they went shooting at firing ranges as a hobby. Williams also testified that he carried a 9 millimeter handgun "for protection," and Aldridge expressed some interest in gun collecting. (See, Resp. Brief at p. 33, fn.#4.) Respondent here is doing nothing more

than speculating. Because defense counsel was not permitted to cross-examine Williams and Aldridge in this area, it is impossible to know how Williams and Aldridge would have accounted for their presence in Beverly Hills at 1:30 a.m. with loaded guns. Moreover, respondent's manufactured explanation defies common sense. Beverly Hills is among the nation's most affluent communities. Tai Williams would not have needed protection from street crime in that city. It is equally obvious that Williams and Aldridge were not out at that hour shooting at a firing range or attending a gun show. Williams' and Aldridge's driving around Beverly Hills at 1:30 a.m. with loaded guns leads to the obvious inference that they were out to commit another robbery.

The logical inference from the witnesses' gun possession arrests under these circumstances is the very one which the jury would have made and explains why the prosecutor was desperate to keep this evidence from being admitted for any purpose. The evidence concerning Williams' and Aldridge's arrests supports James Robinson's testimony that Tai Williams often discussed robbery plots and that he was desperate for money. Respondent cannot now manufacture alternate theories to diminish the relevance and the importance of the improperly excluded third party culpability evidence.

D. The trial court's exclusion of this evidence from defense cross-examination violated the Sixth Amendment to the federal constitution and was also contrary to California law.

James Robinson contends that the trial court's ruling prohibiting defense counsel from cross-examining Williams and Aldridge about the conduct underlying their arrests for illegal gun possession violated the federal constitution and was also contrary to California law. The court's refusal to allow cross-examination in this are infringed on his constitutional rights to due process of law, and his rights to confront and cross-examine prosecution witnesses as guaranteed by the Fifth, Sixth and Fourteenth Amendments. (See AOB at pp. 51-58; ***Crane v. Kentucky,*** *supra,* 476 U.S. 683, 690-91; ***Washington v. Texas*** (1967) 388 U.S. 14, 22-23; ***Chambers v. Mississippi,*** *supra,* 410 U.S. 284, 302;

Davis v. Alaska (1974) 415 U.S. 308.) The trial court's rulings were also erroneous under California law. (See AOB at pp. 58-73; Cal. Const., Art.1, § 28(d); Evidence Code section 788; ***People v. Wheeler***, *supra*, 4 Cal.4th 284; ***People v. Hall***, *supra*, 41 Cal.3d 826; ***People v. Garceau***, *supra*, 6 Cal.4th 140, 177; ***People v. Alvarez*** , *supra*, 49 Cal.App.4th 679, 688.)

Respondent again avoids any meaningful analysis of James Robinson's constitutional claims. In ***Thomas v. Hubbard***, *supra*, 273 F.3d 1164, the Ninth Circuit held that a similar restriction on defense cross-examination of a key prosecution witness was, *inter alia*, a Sixth Amendment violation. Respondent frames its discussion as if these claims concerned only the state's laws of evidence. (See Resp. Brief at pp. 40-42.) Applying state cases construing statutory rules of evidence, respondent finds that the gun possession misdemeanor convictions were properly excluded as impeachment.[9] Next, it asserts that any error was (in respondent's view) harmless in light of the countervailing evidence. Finally, referring to its irrelevant discussion of the gun possession evidence as impeachment material, respondent states that, "for the same reasons," no Sixth Amendment violation could have occurred. (Resp. Brief at p. 42.) Respondent thus completely fails to justify the trial court's unconstitutional limitation of defense cross-examination.

1. <u>Respondent ignores United States Supreme Court authority concerning the vital importance of vigorous cross-examination as a means to secure fundamental constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments.</u>

The right to confront and cross-examine adverse witnesses in a criminal trial is protected by several provisions of the United States Constitution. (See AOB at pp. 51-58.)

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[9] In this section of its brief, respondent focuses upon the fact of conviction rather than the underlying conduct. (Resp. Brief at pp. 40-42.) As noted in the AOB, defense counsel sought to cross-examine the witnesses about their conduct, and offered to stipulate to not mentioning the convictions. (See AOB at pp. 45-47; RT 442-445.)

The United States Supreme Court has repeatedly found that strong cross-examination is essential to basic fairness, and has upheld the criminal defendant's right to vigorous cross-examination on multiple constitutional rationales. The Sixth Amendment expressly states that a criminal defendant has the right to confront and cross-examine adverse witnesses. Numerous cases decided by the United States Supreme Court emphasize the importance of cross-examination designed to test the credibility of prosecution witnesses. In ***Davis v. Alaska***, *supra*, 415 U.S. 308, the Supreme Court stated:

> Cross-examination is the principal means by which the believability of a witness and the credibility of his testimony are tested.
>
> *** * ***
>
> A more particular attack on the witness' credibility is effected by cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. ***The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." [Citation] We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [Citation]***.

(*Id.* at p. 316 [emphasis supplied].)

In ***Chambers v. Mississippi***, *supra*, 410 U.S. 284, the Supreme Court described the right to cross-examine as a fundamental component of due process. "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth determining process.' It is, indeed, "an essential and fundamental requirement for the kind of fair trial that is this country's constitutional goal.'" (*Id* at 295, citations omitted.)

United States Supreme Court precedent thus holds that vigorous defense cross-examination is essential to protect fundamental constitutional guarantees of due process under the Fifth and Fourteenth Amendments as well as the Sixth Amendment's express

guarantees of the rights to confront and cross-examine adverse witnesses. Because of the high value it assigns to these constitutional rights the Supreme Court has disfavored trial court limitations on cross-examination, especially where the proposed questioning might have exposed bias or interest on the part of a prosecution witness. (See, ***Delaware v. Van Arsdall*** (1986) 475 U.S. 673, 676 ["exposure of a witness' motivation in testifying is a proper and important function of a constitutionally protected right of cross-examination."].)

2. James Robinson has satisfied the federal constitutional standard for establishing a violation of the Confrontation Clause because the excluded evidence was directly relevant to Williams' and Aldridge's credibility.

The United States Supreme Court's standard for Sixth Amendment claims is well settled: "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury facts from which jurors . . . could appropriately draw inferences relating to the credibility of the witness.'" (***Delaware v. Van Arsdall*** , *supra*, 475 U.S. 673, 680, quoting ***Davis v. Alaska,*** *supra,* 415 U.S. 308, 318. See also ***People v. Hillhouse*** (2002) 27 Cal.4th 469, 494-495.) Respondent claims that this standard was not satisfied in James Robinson's case. As discussed below, none of its arguments in this regard are meritorious.

Respondent finds "little probative value," in Tai Williams' and Tommy Aldridge's arrests less than two weeks after the capital crimes under circumstances where they appeared to be preparing to commit an armed robbery. According to respondent, this evidence would not "produce a significantly different impression of these witnesses' credibility." (Resp. Brief at p. 43, quoting ***People v. Hillhouse***, *supra*, 27 Cal.4th at p. 494.) Respondent notes that Williams and Aldridge had testified that they owned

handguns during their direct examination. Williams stated in his direct testimony that he bought his handgun "for protection," because "the streets are crazy." (Resp. Brief at p. 42, quoting RT 506.) Respondent apparently concludes that, because the jury had already learned that the witnesses owned guns, further cross-examination about what they did with those guns was not relevant. Thus, according to respondent, defense cross-examination establishing that Williams and Aldridge were driving around Beverly Hills at 1:30 a.m. with loaded guns was not relevant. (See Resp. Brief at p. 43.)

Respondent's reasoning is obviously flawed as a matter of common sense. Williams and Aldridge were the prosecution's key witnesses. James Robinson's testimony is directly opposed to theirs, but his account was largely uncorroborated. Williams' and Aldridge's credibility with the jury was essential for the prosecution's case. These witnesses' credibility was equally significant for the defense. The defense could not hope to raise a reasonable doubt about James Robinson's guilt without offering the jury some objective reason not to accept Williams' and Aldridge's testimony at face value. It is fantastic to think that the information about the illegal gun possession incident would not cause the jurors to view Williams' and Aldridge's account more skeptically.

Respondent effectively concedes that Williams and Aldridge's gun possession arrests were relevant cross-examination, and that the trial court's exclusion of this evidence violated the Sixth Amendment. As discussed in sub-section C, *supra*, respondent buries its discussion of the Ninth Circuit's opinion in ***Thomas v. Hubbard*** , *supra*, 273 F.3d 1164, at the very end of its response to Claim I in the AOB. (*See* Resp. Brief at pp. 48-49.) When it does address this opinion, respondent tries to distinguish this case from ***Hubbard*** in order to avoid the implications of that decision for this case. In respondent's assessment, the evidence of third party culpability was stronger in that case. Respondent again equates the strength of the proffered evidence with legal relevance. On this basis, respondent concludes that the evidence was not relevant cross-examination because it did not establish Williams' and Aldridge's guilt.

By focusing its discussion on the evaluation of prejudice instead of contesting the

propriety of the trial court's ruling to exclude the cross-examination, respondent apparently concedes that the trial court violated the federal constitution by prohibiting defense cross-examination concerning Williams' and Aldridge's gun possession arrests. Even if no such concession is presumed, respondent's argument fails because it employs an unreasonably high standard for relevance which is not supported by the applicable law.

3. Respondent fails to rebut the showing of prejudice under the factors set forth in ***Delaware v. Van Arsdall***.

In ***Delaware v. Van Arsdall***, *supra*, 475 U.S. 673, the United States Supreme Court established the standard for evaluating prejudice resulting from this type of Sixth Amendment violation: "***The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.***" (*Id.*, at 684 [emphasis added].) The Supreme Court in ***Van Arsdall*** provided very specific guidance to reviewing courts applying this standard to evaluate the degree of prejudice caused by the error:

> Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. [Citations].

Delaware v. Van Arsdall, *supra*, 475 U.S. at p. 684.)

James Robinson's convictions in both phases of trial must be reversed when the Supreme Court's analysis in ***Van Arsdall*** is applied to the facts of this case. The AOB contains an extensive discussion of how the factors mentioned above from ***Van Arsdall*** apply to the circumstances of this case. (See AOB at pp. 74-81) Respondent's treatment

of James Robinson's Sixth Amendment claim echos much of its discussion concerning the relevance and admissibility of the illegal gun possession arrests as evidence of third party culpability. Respondent relies on its conclusion that the defense evidence was "marginally relevant" instead of undertaking the analysis mandated by the United States Supreme Court in ***Delaware v. Van Arsdall***. (See Resp. Brief at pp. 40-43.)

As explained in the AOB, Williams' and Aldridge's credibility with the jurors was the single most important element of the case for both the prosecution and the defense. Their testimony was directly opposed to James Robinson's testimony where he denied any responsibility for the crimes and actually placed Williams at the crime scene. James' testimony, however, was uncorroborated. Williams and Aldridge were able to enhance their credibility because they corroborated one another's testimony. These witnesses were highly credible with the jury for the added reason that they were long-standing friends of James Robinson. (See AOB at pp. 75-81.) As discussed in the AOB, they were able to maintain this false aura of veracity and credibility because the jury never heard the defense evidence about their arrests. By discrediting one or both of them the defense would have established a reasonable doubt as to James Robinson's guilt. (*Id*.)

4. Relevance is broadly construed under this state's statutes, and California law favors the inclusion of evidence concerning witness credibility.

As discussed in the AOB, California's laws of evidence are inclusive as a matter of policy. (See Evid. Code section 210.) Evidence bearing upon the credibility of a prosecution witness is generally considered relevant. (See AOB at pp.62-63.) Moreover, the strength of the evidence is immaterial to the relevance analysis. (Id.) A witness's motive for testifying is also highly relevant, especially in the context of a capital case. ***People v. Garceau,*** *supra*, 6 Cal.4th 140, 177; ***People v. Alvarez*** *supra*, 49 Cal.App.4th 679, 688.) California's Evidence Code reflects the intent to admit a wide variety of evidence bearing on witness' motive and credibility. Evidence Code section 780 provides,

in pertinent part:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of the witness ***any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony*** at the hearing, including but not limited to any of the following:
>
> * * *
>
> (f) The existence or nonexistence of a ***bias, interest or other motive***.

For all of the reasons stated in the AOB, Williams' and Aldridge's arrests for illegal weapons possession was relevant evidence bearing on their credibility and was admissible under California law. Respondent does not address these arguments. Instead, it substitutes its own judgment about the strength of the evidence for an analysis of the facts presented here under the applicable law.

5. Respondent's reliance on ***People v. Hillhouse*** is misplaced as that case affirms the need for broad inclusion of material in cross-examination.

This Court's recent decision in ***People v. Hillhouse*** (2002) 27 Cal.4th 469, does not support respondent's position. On the contrary, this Court in ***Hillhouse*** affirms the principles articulated in the AOB, i.e., that trial courts must allow a wide range of cross-examination aimed at reducing the credibility of a prosecution witness. Further, the ***Hillhouse*** case indicates that prejudice will arise where the restricted cross-examination concerns a significant witness and/or where the subject matter of the questioning reveals a "prototypical bias."

In ***Hillhouse***, the trial court sustained a relevancy objection when, during cross-examination, defense counsel asked a witness if he had refused to speak to the defense prior to trial. The California Supreme Court plainly held that "the disallowed question was relevant to credibility." (*Id* at 494.) The Court made clear that, in this context, it is not necessary to prove conclusively that the prohibited questioning would have been

damaging. This Court held that trial court erred under state law, noting that "[a] witness refusal to talk to a party is relevant to that witness's credibility because it shows the ***possibility*** of bias against that party." (*Id.* at 494, citing ***People v. Hannon*** (1977) 19 Cal.3d 588, 601-602; ***People v. Shaw*** (1896) 111 Cal. 171, 174 [emphasis added].)

Under the facts presented in ***Hillhouse***, the California Supreme Court concluded that no Sixth Amendment violation had occurred. The witness to whom defense counsel posed the question was a minor prosecution witness. Contrary to the circumstances presented in Mr. Robinson's case, there is no indication that the witness in ***Hillhouse*** was biased at all. In its opinion, the California Supreme Court notes "[a]lthough [the witness] corroborated some [ ] testimony, ***he was not a critical witness. Nor was his credibility particularly suspect***." (*Ibid* [emphasis added].) It was not asserted that this witness was himself a third party suspect. The California Supreme Court found that the question was relevant and ought to have been allowed. However, under these circumstances, the Court found that the trial court's improper exclusion of this single question during cross-examination was harmless error. As shown above and in the AOB, the error in James Robinson's case was clearly not harmless. (See AOB at pp.73-89.)

E The evidence of Williams' and Aldridge's misdemeanor convictions was relevant impeachment under California law and respondent fails to show that other, legitimate concerns justified the trial court's infringement on James Robinson's constitutional rights.

California law specifies that a witness in a criminal case may be impeached with any felony conviction or misdemeanor conduct involving moral turpitude. (*See*, Cal. Const., Art.1, § 28(d); Evidence Code section 788; ***People v. Wheeler***, *supra*, 4 Cal.4th 284.) Respondent concedes that Williams' and Aldridge's misdemeanor convictions for illegal weapons possession constituted crimes of moral turpitude. (Resp. Brief at p. 40.) Respondent, however, claims that the trial court correctly exercised its discretion under Evidence Code section 352 when it concluded that the "slight relevance" of the misdemeanor convictions was outweighed by the possibility that the jury might be

confused and would treat the impeachment material as evidence of third party culpability. (*Id.*) In the AOB, James Robinson demonstrates that the misdemeanor convictions were highly relevant and appropriate for impeachment. (See AOB at pp. 58-64.) Moreover, the trial court's ruling was in direct opposition to the policies favoring inclusion of evidence as they are expressed in this state's statutes. (See AOB at pp. 64-71.) The trial court's refusal to permit defense counsel to impeach Williams and Aldridge with these convictions was extremely prejudicial, and this abuse of the court's discretion justifies reversal of the guilt phase and the penalty phase verdicts. (AOB at pp. 78-89.)

1. Defense counsel's proposed use of this evidence for impeachment was appropriate under California law, and it is irrelevant that counsel also asserted that the evidence was admissible for another purpose.

Defense counsel stated that he wanted to use the witnesses' misdemeanor convictions for illegal possession of weapons to impeach Williams' testimony (and Aldridge's anticipated testimony) that they owned their guns for hobby use. (RT 442.) In its brief, respondent argues that defense counsel was somehow acting dishonestly by attempting to use this evidence for another purpose after the trial court had excluded it as evidence of third party culpability. Respondent describes counsel's proposed use of the evidence as impeachment during Williams' and Aldridge's cross-examinations as a "thinly-veiled attempt to circumvent [the trial court's earlier ruling prohibiting use of the evidence to prove third party culpability] by re-characterizing it as impeachment evidence." (Resp. Brief at p. 42.) This characterization is totally unfounded and does not advance respondent's argument. Respondent cites no authority stating that it is inappropriate for counsel to assert alternate theories for admitting a piece of evidence. Moreover, respondent does not explain why one piece of evidence cannot be used for dual purposes.

2. Respondent does not establish that this evidence was of "marginal significance" for impeachment purposes.

It is settled law that a witness may be impeached with a misdemeanor conviction

involving moral turpitude. (*See*, Cal. Const., Art.1, § 28(d); Evidence Code section 788; ***People v. Wheeler***, *supra*, 4 Cal.4th 284.) In its brief, respondent acknowledges that Williams' and Aldridge's misdemeanor convictions were crimes of moral turpitude. However, respondent contends that the impeachment value of this evidence was minimal because this type of crime is "not as relevant to a witness's truthfulness as a conviction for perjury, fraud, or other crime bearing directly on a witness's veracity." (Resp. Brief at pp. 40-41.) Respondent's evaluation is completely incorrect because it removes from consideration the specific facts of this case.

Even assuming, arguendo, that weapons possession charges are not generally probative of truthfulness as respondent notes, this observation does not advance respondent's position. The probative value of this impeachment material must be evaluated in the context of this case. Defense counsel explained that he wanted to use the convictions to impeach specific statements in Williams' and Aldridge's testimony. Both witnesses claimed that they only used their guns for hobby related shooting. Each portrayed himself as a peaceful and law-abiding citizen. As counsel stated, the fact that they were both convicted of illegal possession of a concealed weapon undeniably casts doubt on this aspect of their testimony. (See RT 442.)

The weapons convictions also would have challenged the images that Williams and Aldridge tried to maintain. As discussed in the AOB, Williams and Aldridge were highly credible witnesses for many reasons. The trial court's exclusion of this evidence for all purposes prevented defense counsel from challenging their credibility in any way. As a result, Williams and Aldridge maintained a false aura of veracity. This greatly benefitted the prosecution and disadvantaged the defense in a case that was largely a credibility contest between James Robinson and these two prosecution witnesses. (See AOB at pp. 75-85.) Under these circumstances, respondent cannot reasonably assert the misdemeanor weapons convictions were not relevant to these witnesses' credibility and probative of their truthfulness.

3. Respondent's analysis is not persuasive because it overvalues the trial court's stated reason for excluding this evidence, and does not give sufficient weight to the defendant's rights to due process and to present a defense.

As discussed in the AOB, the policy of the law in this state is strongly in favor of including defense evidence in criminal cases. "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to present all relevant evidence of significant probative value to his or her defense." (***People v. Cunningham*** (2001) 25 Cal.4th 926, 998. *Accord*, ***People v. Babbitt*** (1988) 45 Cal.3d 660, 684; ***People v. Reeder*** (1978) 82 Cal.App.3d 543, 552.) Other California courts are in agreement, and these cases indicate that the balance under section 352 is heavily weighted toward inclusion of defense evidence in criminal cases. In ***People v. Reeder***, *supra*, 82 Cal.App.3d 543, the court of appeal found:

> In light of the more fundamental principle that a defendant's due process right to a fair trial requires that evidence, the probative value of which is stronger than the slight-relevancy category and which tends to establish a defendant's innocence, cannot be excluded on the theory that such evidence is prejudicial to the prosecution.

(*Id.*, at 552.)

Similarly, in ***People v. De Larco*** (1983) 142 Cal.App.3d 294, the court of appeals stated:

> Inclusion of relevant evidence is tantamount to a fair trial . . . . Indeed, discretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.' (***People v. Lavergne*** (1971) 4 Cal.3d 735, 744; ***People v. Murphy*** (1963) 59 Cal.2d 818, 829).

(*Id.* at 305-306.)

These cases establish that the trial court did not properly weigh the competing

concerns under Evidence Code section 352. As the trial court itself recognized, the judge had the ability to give the jury a limiting instruction to prevent any improper use of this evidence. (RT 648.) The potential for confusing this jury was, therefore, very slight and was certainly insignificant compared to the defense's need for the evidence. The interest in avoiding jury confusion was thus greatly overstated. The importance of this evidence to James Robinson's case, however, was grossly undervalued. As discussed in the preceding sub-section, it was essential for the defense to meaningfully challenge Williams' and Aldridge's credibility. The trial court's erroneous ruling removed all possible means for the defense to do so. Its ruling was an abuse of its statutory discretion requiring reversal.

F. Respondent fails to establish that the erroneous exclusion of the third party culpability evidence was harmless error under either *Chapman v. California* or the lesser standard of *People v. Watson*.

The trial court's erroneous rulings eliminated virtually all of the independent evidence supporting the defense case and corroborating James Robinson's testimony. James Robinson contends that the standard of ***Chapman v. California*** (1967) 386 U.S. 18, 24, should apply because of the constitutional rights infringed by the trial court's actions. (See AOB at pp. 73-89.) However, reversal is required even if this Court reviews these claims under the standard of ***People v. Watson*** (1956) 46 Cal.2d 818, 836, as there is at least a reasonable probability that the result would have been different but for the trial court's error. (AOB at pp. 73-89.) Respondent, in its brief, attempts to minimize the prejudicial effects resulting from the exclusion of this evidence. For all of the reasons discussed below, its arguments are not persuasive.

1. Respondent's discussion of the appropriate standard of review is misleading because it fails to acknowledge United States Supreme Court precedent, and does not consider the distinctions between this case and the California authorities it relies upon.

James Robinson contends that the standard of ***Chapman v. California***, *supra*, 386 U.S. 18, 24, rather than the standard of ***People v. Watson,*** *supra*, 46 Cal.2d 818, 836,

should apply to his claims based on the trial court's erroneous exclusion of the third party culpability evidence. (AOB at pp. 73-81.) As discussed in the AOB, the stricter standard of review is appropriate for several reasons. Review under ***Chapman*** is necessary due to the significance of the federal constitutional rights implicated in this claim, and the nature of the penalty. (*Id.*, citing, ***Delaware v. Van Arsdall***, *supra*, 475 U.S. 673.) Respondent urges this Court to reject James Robinson's request for a higher standard of review, but its arguments are unpersuasive as they do not even address the analysis or the authorities cited in the AOB.

Respondent ignores the fact that the trial court's ruling impacted fundamental constitutional rights. As discussed in the AOB, the United States Supreme Court has applied ***Chapman*** to a case where the trial court erroneously limited defense cross-examination of a prosecution witness. (See, AOB at pp. 73-81; ***Delaware v. Van Arsdall,*** *supra*, 475 U.S. 673.) Respondent asserts that this Court has applied the standard of ***People v. Watson***, *supra*, 46 Cal.2d 818, 836, to similar claims. (Resp. Brief at p. 34, citing ***People v. Bradford*** (1997) 15 Cal.4th 1229, 1325.) However, respondent's position fails to account for the critical differences between this case and other California cases which substantially increased the prejudicial effect of this trial court's erroneous ruling. Respondent invokes the "general rule" that the ***Watson*** standard is proper because the "trial court's exclusion of third party culpability evidence did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense." (Resp. Brief at pp.34-35, citing ***People v. Bradford,*** *supra*,15 Cal.4th 1229, 1325; ***People v. Fudge*** (1994) 7 Cal.4th 1075, 1102-1103.)

As discussed in the AOB, the "general rule" respondent invokes is not appropriate here for several reasons. (*See* AOB at pp. 73-89.) This is not a case in which the trial court made a single erroneous ruling to exclude one particular item of proffered defense evidence. In this case the trial court's decision eliminated ***all*** of the independent evidence the defense had available. As noted in the AOB, there was no corroboration for James Robinson's testimony apart from the excluded third party culpability evidence. Another

significant distinction respondent overlooks is the fact that the trial court precluded any and all defense use of this evidence. Defense counsel could not introduce the evidence of Williams' and Aldridge's arrests as substantive evidence of third party culpability. Defense counsel was similarly prohibited from cross-examining these two key witnesses concerning their arrests and convictions, or the surrounding circumstances. The result was not merely an adverse evidentiary ruling but a virtual blackout of all independent evidence corroborating James Robinson's testimony.

Under these circumstances the trial court's action is not merely an evidentiary ruling but, rather, an effective barrier to James Robinson's defense. Accordingly, as discussed in the AOB, this Court should use the ***Chapman*** standard to assess the effects of this error. However, as discussed below and in the AOB, the trial court's erroneous treatment of this evidence requires reversal even under the standard of ***People v. Watson*** (AOB at pp. 73-89.)

2. Respondent's analysis of prejudice is incorrect because it misrepresents the evidence and arguments made by counsel at trial.

Respondent claims that the defense was not harmed by the exclusion of the third party culpability evidence for two related reasons. First, respondent claims that the evidence pointed overwhelmingly to James Robinson's guilt. Therefore, the result would not have been different even if the jury had heard the excluded evidence. Second, respondent argues that the jury's verdict would have been the same because, while the proffered evidence indicated that Williams and Aldridge had been involved in the crimes, it did not exculpate James Robinson. Respondent here presents a misleading picture of the evidence in an effort to justify retro-actively a highly erroneous and prejudicial ruling by the trial court.

(a.) *Respondent advances a completely new factual scenario, in which James Robinson is an aider and abettor of the capital crimes, in an attempt to excuse the trial court's prejudicial*

error.

Respondent formulates an entirely new theory of this case in its efforts to avoid the obvious conclusion, i.e., that the trial court erred by excluding the defense evidence. Respondent states that, even if the third party culpability evidence had been presented, "appellant's theory of Williams' and/or Aldridge's culpability would not exculpate him." (Resp. Brief at p. 35.) In its brief respondent implies that there was no prejudice from the trial court's ruling because, in respondent's view, the evidence was consistent with James Robinson having aided and abetted the capital crimes. Respondent states that "no evidence limited the number of perpetrators and, in fact, [James Robinson's] defense attempted to implicate Tommy Aldridge as well as Tai Williams." (*Id*.)

Respondent's argument here defies common sense. This fictional version of the events surrounding the crimes (asserted for the first and only time on appeal) has no basis in James Robinson's testimony or the testimony of any of the trial witnesses. James Robinson testified that he came upon the crime scene and discovered the victims after the robbery and fatal shootings. (See RT 929-934.) Tai Williams and Tommy Aldridge testified for the prosecution, and both claimed that James Robinson alone had planned and carried out the Subway Sandwich Shop crimes. (See e.g., RT 459-469; 564-565.) Respondent's theory directly contradicts the prosecution's theory at trial. The prosecutor's entire case at trial was designed to prove to the jury that James Robinson committed these crimes acting alone. Nowhere in the trial record does the prosecutor even allow for the possibility of any other scenario. In his closing arguments the prosecutor told the jury the alleged story of these crimes. (See RT 1220-1254; 1318-1331.) James Robinson was, at all times, the sole party responsible in the state's view. Respondent is now asserting an entirely new theory on appeal which not only lacks support in the record but contradicts the state's evidence.

In this discussion, respondent treats the excluded third party culpability evidence as if it existed in isolation. Respondent ignores the fact that this evidence corroborated

James Robinson's testimony. James testified that Tai Williams had talked about plans to rob the Subway. (RT 901-903; 904.) He described how Williams later set up a meeting at the Subway so James would be present at the crime scene. (RT 918; 923.) James Robinson identified Tai Williams' car, and testified that he had seen that car in the alley behind the Subway just after he came upon the crime scene. (RT 942-945.) The third party culpability evidence was powerful corroboration for James Robinson's testimony about Tai Williams. It was also strong evidence of Williams and possibly Aldridge's involvement, especially when considered in connection with the other erroneously excluded evidence about independent witness Ralph Dudley's sighting of a grey Mustang (the car Tai Williams drove) in the alley behind the Subway that night.[10]

(b.) *Respondent overstates the weight of the prosecution's evidence against James Robinson.*

Respondent's assessment of the weight of the evidence against James Robinson is equally self-serving and misleading. Respondent states: "Even Williams' and Aldridge's participation would not undermine the significant evidence linking appellant to the crimes." (Resp. Brief at p.35.) The significance of the evidence linking James Robinson to the crimes diminishes rapidly upon closer examination. First, respondent notes that James Robinson had worked at the Subway store before and, therefore, presumably knew their procedures for storing cash. Respondent next cites several items of testimony concerning James' alleged plans to rob the Subway. However, respondent fails to point out that these asserted "links" connecting James Robinson to the crime are ***all*** found in the testimony of Tai Williams and Tommy Aldridge. (See Resp. Brief at pp. 35-36.)

The other items of testimony respondent relies on are not inconsistent with James Robinson's testimony. James Robinson did testify that he was at the crime scene, but

[10] Respondent concedes as much in its brief: "If a witness had seen Williams' car at the scene of the crimes, then Williams might have been linked to the commission of the crimes." (Resp. Brief at p. 39.)

explained how he walked into the Subway in the aftermath of the shootings and robbery. With regard to eyewitness Rebecca James and her identification of James Robinson, respondent conveniently omits Ms. James' failure to identify James shortly after the crime. (RT 297-299; 301.) Respondent also neglects to mention that Ms. James' description of the perpetrator closely matched Tai Williams and not James Robinson. The man Ms. James saw had lighter skin. He also had a rounder, heavier build, thick lips and a less angular face. The suspect Ms. James described was "broader where the eyes are," and did not wear glasses. (RT 271; 294-296; 304.) Also, James fingerprints were not on the cash register, only those of an unidentified person. (RT 875.)

3. Respondent cannot equate defense counsel's closing argument and James Robinson's uncorroborated testimony with independent evidence of third party culpability.

As an additional argument, respondent asserts that the defense was not compromised by the exclusion of the third party culpability evidence because "[t]here was other evidence before the jury that the defense argued implicated Williams." (Resp. Brief at pp.36-37.) This effort to diminish the significance of the excluded evidence is unavailing. Respondent cannot seriously claim that no prejudice results where, due to the trial court's error, the criminal defendant must proceed to trial with only his or her uncorroborated testimony, one or two facts inconsistent with the prosecution's case, and counsel's arguments. All of the aforementioned things may be helpful to the defense case, but their persuasiveness is negligible compared to independent evidence of third party culpability. In this case, the ***only*** direct evidence of third party culpability came from James Robinson's testimony. The prosecutor argued at length to persuade the jury that James' testimony was self-serving and emphasized that his account had no other evidentiary support. (See RT 1253.) Under these circumstances, it is fantastic for respondent to assert that the defense was not irreparably prejudiced by the exclusion of evidence which both corroborated James Robinson's testimony and undercut the credibility of the two chief witnesses for the prosecution.

G. Respondent's minimal analysis of James Robinson's claims under the Eighth and Fourteenth Amendments is faulty and depends upon a self-serving view of the facts and testimony.

1. James Robinson was constitutionally entitled to present evidence to establish a lingering doubt as to his guilt.

A "heightened standard of reliability" must be met in order to sustain any capital conviction or sentence of death. (***Beck v. Alabama,*** *supra*, 447 U.S. 625, 637-638.) As discussed in the AOB, the trial court's exclusion of the proffered defense evidence of third party culpability prevented the jury from considering relevant information which was capable of raising a reasonable concerning James Robinson's culpability in the guilt phase of trial. Because the excluded evidence was directly related to culpability, its exclusion undermined the reliability required by the Eighth and Fourteenth Amendments for the conviction of a capital offense. (AOB at pp. 56-57.) As also discussed in the AOB, the exclusion of this evidence in the penalty retrial was not merely prejudicial but outcome determinative. (AOB at pp. 82-89.)

James Robinson was constitutionally entitled to present evidence of third party culpability in mitigation of the penalty. In capital sentencing, the Eighth and Fourteenth Amendments also require an "individualized consideration of the penalty," including the circumstances of the offense. (***Woodson v. North Carolina,*** *supra*, 428 U.S. 280, 304; ***Zant v. Stephens*** (1983) 462 U.S. 862, 879; ***Johnson v. Mississippi***, *supra*, 486 U.S. 578, 584-85.) The United States Supreme Court has found that the prejudice caused by the exclusion of relevant testimony may be "devastating" because the error raises the possibility that the verdict was based on "caprice and emotion." (***Gardner v. Florida*** (1977) 430 U.S. 349, 357-358.) Moreover, the Supreme Court has long held that the sentencer must be permitted to consider "[a]s a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (***Lockett v. Ohio,*** *supra,* 438 U.S. 586, 604; see also ***Hitchcock v. Dugger*** (1987) 481 U.S. 393, 394; ***Eddings v.***

Oklahoma (1982) 455 U.S. 104, 110.)

2. The evidence excluded here was essential to establishing lingering doubt at the penalty phase.

Evidence of third party culpability is highly relevant in the penalty phase of a capital trial, both as mitigation under Penal Code section 190.3, factor (k) and as a circumstance of the offense under factor (a). In ***Mak v. Blodgett*** (9th Cir. 1992) 970 F.2d 614, *cert. denied,* (1993) 507 U.S. 951, the Ninth Circuit held that exclusion of such evidence was constitutional error, since it was relevant mitigating evidence relating to the circumstances of the offense and to the defendant's character. As discussed in the AOB, the third party culpability evidence was relevant for both of these reasons.

The defense case in the penalty phase was centered on lingering doubt. James Robinson testified extensively in the penalty retrial. (See RT 2352-2590.) Not only did he deny any involvement in the Subway sandwich shop crimes, but he testified that his accusers (Williams' and possibly Aldridge) had actually committed the crimes. Combined with other defense evidence, including Rebecca James' testimony and the inconsistent physical evidence, the excluded evidence corroborating James Robinson's testimony was irreplaceable support for a life sentence based upon lingering doubt as to guilt.

3. The excluded evidence was also highly relevant to undermine the prosecution's case for a death sentence based on the circumstances of the crime.

As discussed above and in the AOB, the prosecutor argued for the death penalty based on the circumstances of the crime. The prosecution's case in aggravation depended upon emphasizing the callousness of homicides in this case. (RT 2778-2810.) Tommy Aldridge provided the testimony which allowed the prosecutor to characterize James Robinson as a remorseless and evil killer deserving of death. Through his testimony in the penalty phase, Tommy Aldridge gave the jury the impression that James was a remorseless killer. (*See*, RT 2213; 2215-2216; 2218-2219; 2223; 2224-2225; 2226.) As a longtime friend of James, he was very credible in regards to his knowledge of James' personality.

Evidence casting doubt on Tommy's judgment and undermining his credibility with the jury was, therefore, highly relevant to the defense as they tried to present a different impression of James Robinson which would incline the jury to choose a life sentence.

4. Respondent cannot establish that there was no "reasonable possibility" of a more favorable sentence absent the erroneous exclusion of this evidence.

Respondent argues that, even if the court's rulings were erroneous, any error is harmless because there is no "reasonable possibility" of a better result in James Robinson's penalty phase. (Resp. Brief at . 45, citing ***People v. Ochoa*** (1998) 19 Cal.4th 353, 480; ***Chapman v. California,*** *supra,* 386 U.S. 18, 23-24.) Respondent again notes that the excluded evidence does not exculpate James Robinson. Respondent further states that the other evidence is too strong to be overcome [11], and notes that the jury heard James Robinson's testimony inculpating Williams and Aldridge and chose to reject it. (Resp. Brief at p. 45.) Moreover, respondent notes that because defense counsel elicited from Aldridge on cross-examination that he owned a gun and carried it to Beverly Hills once, the defense was able to "allude" to the evidence of third party culpability. Respondent's arguments are not persuasive for all of the reasons previously discussed in Sub-section F, *supra*. Moreover, the considerations favoring inclusion of defense evidence are even stronger in the penalty phase of a capital case given the normative judgment the sentencer is required to make. (***Lockett v. Ohio,*** *supra,* 438 U.S. 586, 604; see also ***Hitchcock v. Dugger****, supra,* 481 U.S. 393, 394; ***Eddings v. Oklahoma,*** *supra,* 455 U.S. 104, 110.) For all of these reasons, the defense evidence of third party culpability was highly relevant in the penalty phase of James Robinson's capital trial. As Justice Traynor correctly

[11] Respondent here lists "appellant's financial difficulties, Rebecca James's identification, Dennis Ostrander's testimony, the bullets from appellant's gun, appellant's fingerprints at the crime scene, and appellant's use of cash to rent an apartment the next day." (Resp. Brief at p. 45.)

observed, “errors at a trial that deprive a litigant of the opportunity to present his version of the case . . . are . . . ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment.” (Traynor, The Riddle of Harmless Error (1970)] at p. 68.) For all of the reasons discussed above and in the AOB, it is at least reasonably possible that a life sentence would have resulted had the jury had heard the excluded evidence in the retried penalty phase. Reversal of James Robinson’s sentence of death is thus required.

II.

THE TRIAL COURT'S MISHANDLING OF THE VOIR DIRE FOR BOTH JURIES VIOLATED JAMES ROBINSON'S CONSTITUTIONAL RIGHTS ON A NUMBER OF GROUNDS AS SET FORTH IN THE AOB, AND RESPONDENT FAILS TO REFUTE ANY OF THESE CLAIMS OF ERROR.

A. Introduction and Background.

In the AOB, James Robinson raises several interrelated claims challenging the jury selection for both the first jury (guilt phase) and the second jury (re-tried penalty phase). (AOB at pp. 89-207.) The first two claims concern the constitutionality of California' statute governing jury selection, Code of Civil Procedure section 223 (hereinafter CCP section 223), both on its face and as applied to this case. (AOB at pp. 116-129.) In addition, James Robinson claims that the trial court's voir dire was so deficient in a number of aspects that the court did not have enough information to determine challenges for cause. Without information about these prospective jurors, there can be no assurances that impartial jurors were selected to hear either phase of this capital trial. The trial court's erroneous handling of the jury selection thus amounted to an abdication of its duty to ensure James Robinson's constitutional rights to due process of law, a fair trial before an impartial jury and a reliable determination of guilt and of the penalty. (AOB at pp. 129-166.)

Specific inadequacies in the voir dire are discussed separately and in detail in the AOB. They may be roughly grouped into the following categories: the trial court's failure to do sufficiently comprehensive voir dire in all areas (AOB at pp. 129-156); the trial court's refusal to properly question prospective jurors about racial prejudice (AOB at pp. 166-183); and, its failure to question the jurors concerning their possible exposure to pretrial publicity (AOB at pp. 183-193.) In addition, James Robinson challenges the trial court's refusal to grant both counsel's requests for modified voir dire procedures, including attorney conducted voir dire and sequestered questioning of jurors for "death

qualifying" voir dire. (AOB at pp. 193-200.) Finally, James Robinson contends that the trial court managed the jury selection in this case so as to exclude prospective jurors who did not strongly favor the death penalty, thereby denying him his constitutional right to a jury drawn from a representative cross-section of the community. (AOB at pp. 200-207.)

In connection with these claims, James Robinson challenges several of the trial court's specific rulings in jury selection. The trial court erroneously excused several jurors for cause at the prosecutor's request where they merely showed scruples about imposing the death penalty. (*See,* AOB at pp. 104-107; 115-116.) In several cases the trial court denied defense challenges for cause, even though prospective jurors had indicated that they were biased for one or more reasons. (*See*, AOB at pp. 102-104; 112-115.) Finally, James Robinson contends that the prosecutor's use of peremptory challenges to remove all prospective jurors who were not firmly in favor of the death penalty violated his right to an impartial jury drawn from a representative cross-section of the community. (*See*, AOB at pp. 202-205.)

Respondent repeatedly mis-characterizes the claims on appeal and/or misstates the trial record in its discussion of these claims. Some of the claims are not discussed at all. James Robinson contends that these claims are thereby conceded by respondent. In each instance where the claims are discussed, respondent fails to justify or to excuse the numerous violations of James Robinson's fundamental constitutional rights in the jury selection of his capital case. For all of the reasons set forth below and in the AOB, this Court must reverse the judgments of conviction and the penalty determination.

B. Respondent fails to address James Robinson's legal challenges to the constitutionality of CCP section 223.

James Robinson makes several challenges the constitutionality of California's statute governing jury selection, CCP section 223. The first two claims are facial challenges. First, section 223 violates the equal protection by allowing civil litigants far

greater access to voir dire of potential jurors than is afforded to the defendant in a criminal case. (See AOB at pp.116-123.) Second, the statute's limitations on voir dire in criminal trials undermines defendants' rights to due process of law pursuant to the Fifth and Fourteenth Amendments, a fair trial before an impartial jury as required by the Sixth and Fourteenth Amendments, and the reliable determination of guilt and of the penalty which the Eighth and the Fourteenth Amendments require in a capital case. (*Id*.)

Respondent quickly dismisses these constitutional challenges. By mis-characterizing the rights at issue and the competing interests respondent avoids any serious analysis of these claims. For all of the reasons discussed in detail below, respondent's arguments are not persuasive.

1. Respondent recasts these claims in an effort to avoid review under the "strict scrutiny" standard applied to statutes infringing on fundamental rights.

In the AOB, James Robinson claims that CCP section 223 substantially infringes upon multiple guarantees of the federal constitution. The restrictions on the voir dire process prevented defense counsel from gathering enough information about the prospective jurors to allow either the court or the attorneys to select an impartial jury. The statute thus infringed on James Robinson's constitutional rights to an impartial jury and to due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the federal constitution. (See AOB at pp. 116-123.) James Robinson further claims that the statute's disparate treatment of civil and criminal litigants (allowing voir dire in civil cases only) violates the Equal Protection Clause of the Fourteenth Amendment. (*Id*.)

Respondent employs an excessively narrow definition of the interests involved in these claims in order to avoid serious constitutional analysis. In its brief, respondent asserts that voir dire is "not a constitutional right but a means to achieve the end of an impartial jury." (Resp. Brief at p. 51, quoting ***People v. Bittaker*** (1989) 48 Cal.3d 1046, 1086.) The statute's limitations on voir dire thus do not "directly impact a fundamental

right." (*Id*.)

The equal protection claim in the AOB receives similar treatment. Respondent asserts that the statute's differential treatment of civil and criminal litigants is subject only to rational basis review. Respondent acknowledges that criminal defendants and civil litigants receive different treatment under CCP section 223. (See Resp. Brief at p. 51.) However, respondent asserts that strict scrutiny is not needed because "the class of criminal defendants" is not "a suspect class "such as people of a certain race or wealth." (*Id*.)

(a.) *It is irrelevant that criminal defendants are not a "suspect class" for equal protection purposes.*

Respondent's observation that criminal defendants are not traditionally regarded as a suspect class for equal protection purposes does not advance its argument. James Robinson's equal protection claim is that the statutory classification of CCP section 223 results in the ***disparate treatment*** of two similarly situated groups. (***People v. Leung*** (1992) 5 Cal.App. 4th 482, 494; ***McLean v. Crabtree*** (9th Cir. 1999) 173 F.3d 1176, 1185; ***United States v. Lopez-Flores*** (9th Cir. 1995) 63 F.3d 1468, 1472.) In the present case, the groups are criminal and civil litigants. California's statutes governing jury selection treat criminal litigants differently from parties in civil litigation. This disparate treatment is subject to strict scrutiny because the statute impacts fundamental constitutional rights.

(b.) *Strict scrutiny applies because CCP § 223 impacts fundamental constitutional rights.*

In an equal protection analysis the level of scrutiny is determined by examining the interests affected. (***Eisenstadt v. Baird*** (1972) 495 U.S. 438, 446-447; ***People v. Leung***, *supra*, 5 Cal.App.4th at 494.) Any appreciable impact or significant interference with a fundamental constitutional right is subject to strict scrutiny analysis. (***Nordlinger v. Hahn*** (1992) 505 U.S. 1, 10; ***Rodriguez v. Cook*** (9th Cir. 1999) 169 F.3d 1176, 1178; ***People v. Boulerice*** (1992) 5 Cal.App. 4th 463, 471.) A criminal defendant's right to a fair trial

before an impartial jury is clearly a fundamental personal right. (***Irwin v. Dowd*** (1961) 366 U.S. 717, 722; ***United States v. Sarkisian*** (9th Cir. 1999) 197 F.3d 966, 980; ***In re Lance W.*** (1985) 37 Cal.3d 873, 891.)

In its brief, respondent attempts to both minimize the effect of this statute and re-characterize the rights at issue. First, respondent equates CCP section 223's restrictions on voir dire to a limit on peremptory challenges. Respondent then asserts that, like the right to exercise of peremptory challenges, the right to voir dire "is not a constitutional right but a means to achieve the end of an impartial jury." (Resp. Brief at p. 51, quoting ***People v. Bittaker***, *supra*, 48 Cal.3d 1046, 1086.) This comparison is not persuasive. As a practical matter, the number of peremptory challenges is far less likely to impede the selection of an impartial jury than a severe restriction on voir dire (such as that established by section 223) which prevents counsel from gathering enough information to identify juror bias which would eliminate the juror for cause. Respondent also trivializes this claim by calling it a contest over a "right to voir dire." As noted above and in the AOB, James Robinson's does not assert a "right to voir dire." (Resp. Brief at p. 51.) He claims that his constitutional right to an impartial jury was infringed by the statutory voir dire procedures. (AOB at pp. 116-123.)

Ultimately, however, the parties' characterizations of the claim is not controlling. The level of constitutional scrutiny depends upon the statute's impact on a fundamental constitutional right. (***Eisenstadt v. Baird, supra,*** 495 U.S. 438, 446-447; ***Reed v. Reed*** (1971) 404 U.S. 71, 75-76; ***People v. Leung,*** *supra,* 5 Cal.App. 4th 482, 494.) As demonstrated above and in the AOB, this statute significantly interferes with criminal defendants' fundamental constitutional rights to a fair trial before an impartial jury. Strict scrutiny is, therefore, the proper standard of review. (See AOB at pp. 116-123.)

2. <u>CCP section 223 cannot withstand strict scrutiny analysis and respondent does not address this argument in the AOB.</u>

Under a strict scrutiny standard, the state must show that the challenged statutory classification: (1) bears a close relationship to the promotion of a compelling state interest; (2) is required to achieve the government's goal; and (3) is narrowly drawn to achieve the goal by the least restrictive means necessary. (***Craig v. Boren*** (1976) 429 U.S. 190; ***People v. Leng*** (1991) 71 Cal.App. 4th 1,11.) The state bears the burden of proving that the statutory classification meets all three prongs of the aforementioned test. (***Craig v. Boren***, *supra*, 429 U.S. 190.) Section 223 cannot satisfy even a single prong of this constitutional standard. (*See* AOB at pp. 120-121.)

Respondent does not even attempt to justify this statute under the three prong test required for a statute to survive an equal protection challenge under a strict scrutiny standard of review. Respondent states only that the statutory distinction between criminal and civil litigants is justified because "court conducted voir dire is ***rationally related*** to the state's ***legitimate interest*** in 'restor[ing] balance and fairness to the criminal justice system and creat[ing] a system in which justice is swift and fair[.]'" (Resp. Brief at p. 51, quoting ***People v. Boulerice***, *supra*, 5 Cal.App.4th 463, 478.) As discussed in the AOB, and at the motion's hearing in the trial court, it is highly questionable that this statute further those goals. (*See* AOB at pp. 116-123.) Even assuming, arguendo, that this statute served those functions, this is not sufficient to survive strict scrutiny. Under strict scrutiny the statutory restriction must bear "a ***close relationship*** to the promotion of a ***compelling state interest.***" (***Craig v. Boren***, *supra*, 429 U.S. 190; ***People v. Leng***, *supra*, 71 Cal.App. 4th at 11.) Respondent clearly has not met its burden of proving that the statutory classification meets all three prongs of the requisite test. (*See* AOB at pp. 120-121.) As discussed below, respondent cannot establish that this statute is constitutional even under the most lenient category of equal protection analysis, the "rational basis" standard.

3. Respondent fails justify CCP section 223's differential treatment of civil and criminal litigants even applying a rational basis standard.

Respondent's discussion appears to use a rational basis standard to evaluate the equal protection claim. According to respondent, this minimal constitutional standard is satisfied where the statutory classification bears "a rational relationship to any conceivable, legitimate state interest." (Resp. Brief at p. 51.) Even applying this more lenient standard, respondent cannot show that this statute satisfies equal protection.

Respondent asserts that CCP section 223's differential treatment of criminal and civil litigants is necessary to fulfil the state's interest in 'restor[ing] balance and fairness to the criminal justice system and creat[ing] a system in which justice is swift and fair[.]'" (Resp. Brief at p. 51, quoting ***People v. Boulerice***, *supra*, 5 Cal.App.4th 463, 478.) Although these are plainly legitimate state interests, there is absolutely no evidence that the statute advances these goals. Respondent invokes the "common knowledge" that defense counsel in criminal cases were prone to abuses of the voir dire process, and further states that the restrictions established by CCP section 223 address this "significant problem." (*Id* at pp.51-52.) As discussed in the AOB, this argument lacks empirical support and defies common sense. (AOB at pp. 116-123.)

Respondent's empirical support comes from the two antiquated and poorly reasoned court of appeal cases. (See, Resp. Brief at pgs. 51-53; citing, ***People v. Leung***, *supra*, 5 Cal.App. 4th at 496; ***People v. Boulerice***, *supra*, 5 Cal.App. 4th at 480.) As discussed in the AOB, the ***Leung*** and ***Boulerice*** courts had no evidence that voir dire abuses were more frequent in criminal as opposed to civil cases. (*See* AOB at pp. 116-123.) These courts relied upon two ancient cases, one 72 years old and the other 29 years old (***People v. Estorga*** (1928) 206 Cal. 81, 84; ***People v. Adams*** (1971) 21 Cal.App. 3d 972, 979), stating that in those times it was common knowledge that criminal attorneys abused the voir dire process.

The courts of appeal in ***Leung*** and ***Boulerice*** piled speculation upon conjecture and dated anecdotal evidence to justify the unequal treatment of civil and criminal litigants under section 223. This is plainly inadequate support for a statutory classification

allowing disparate treatment of two similarly situated groups. Even assuming *arguendo* that there was credible evidence of voir dire abuses, this statute's classification does not effect a cure for that problem. As discussed in the AOB, if the State were truly interested in controlling excessive voir dire, it ought to have enacted the same restrictions in civil cases. (*See* AOB at pp. 122-123.)

Respondent also ignores the empirical information from two separate studies cited by trial counsel, and discussed again in the AOB. One study establishes that attorney-conducted voir dire uses less time than a system of exclusively court-conducted questioning. (*See AOB at pgs. 123-124*; CT 200, 208, citing Bermant, Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges, (Federal Judicial Center 1977).) Another study cited by trial counsel revealed that prospective jurors are more thorough and forthcoming in their responses to questions asked by counsel rather than by the court. (*See AOB at pg. 124;* CT 200, 207, citing Jones, Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor," Law and Human Behavior 131 (June 1967). *See also*, ***People v. Williams*** (1981) 29 Cal.3d 392, 403.) As discussed on the AOB, these authorities provide far more reliable evidence about voir dire practices than the ancient anecdotal information which the courts of appeal in ***Leung*** and ***Boulerice*** relied upon. Respondent, however, never addresses this portion of James Robinson's argument.

C. The trial court's application of CCP section 223 was unconstitutional and is not entitled to deference on appeal because the court did not understand that it had the statutory discretion to expand voir dire by using open ended questions.

In the AOB, James Robinson makes several claims concerning the unconstitutional application of section 223 to his case. (See AOB at pp.124-129.) These claims address a variety of different errors in the voir dire of both juries in this case. As discussed in the AOB, trial courts customarily have wide discretion concerning voir dire procedures. The trial judge's decisions in this area are normally entitled to deference on appeal, and are

reviewed only for abuse of discretion. (*See, e.g.*, ***United States v. Baldwin***, (9th Cir. 1979) 607 F.2d 1295, 1298; ***Covarrubias v. Superior Court*** (1998) 60 Cal.App.4th 1168, 1182-1183.) James Robinson, however, contends that the normal deference given to a trial court in the conduct of voir dire should not apply in this case.

The trial court's application of section 223 is not entitled to deference on review for two basic reasons. First, the lower court did not understand the scope of its statutory discretion to modify the voir dire process under CCP section 223 (AOB at pp.126-127.) As a specific illustration of the court's lack of awareness of its authority in this regard, James Robinson notes the trial judge's misreading of ***People v. Taylor*** (1992) 5 Cal.App. 4th 1299. (See AOB at pp.127-129.) The second reason that the lower court's decisions here are not entitled to deference concerns a more general lack of understanding on the part of this court. The trial court did not understand that it not only had specific statutory authority to modify voir dire procedures, but that it was obligated to do so in order to ensure fairness. (See AOB at p.129.)

Respondent ignores most of these points in its brief. Respondent never addresses the argument that deference on appeal is inappropriate and that this Court should independently review the claims of error concerning the jury voir dire. The trial court's obligation to conduct effective voir dire is also not discussed. Where respondent does address the trial court's awareness of its discretion under CCP section 223, its discussion is irrelevant because it misstates one of the bases of the claim. For all of the reasons set forth below and in the AOB, James Robinson's claims regarding the voir dire are entitled to independent review by this Court.

1. <u>Respondent concedes that the trial court had specific, statutory authorization to modify voir dire procedures.</u>

Section 223 provides for expanded voir dire where necessary to ensure juror impartiality in a particular case:

> In a criminal case, the court shall conduct the

> examination of prospective jurors. However, ***the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper***, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, ***where practicable***, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

[Emphasis added.]

Although the statute codifies a system of court-conducted voir dire, CCP § 233 thus expressly grants trial judges considerable latitude to adapt voir dire procedures to meet the needs of specific cases. (***People v. Chapman*** (1993) 15 Cal.App.4th 136, 141.) Section 223 both expanded the trial court's participation in voir dire and increased its discretion to adapt jury selection procedures. The statute also increased the trial court's responsibility to ensure a thorough voir dire of prospective jurors.

2. The trial court's misunderstanding of its authority to modify voir dire by asking open-ended questions reflects the court's general lack of understanding concerning its statutory discretion.

Respondent asserts that the trial court was aware of its discretion to modify CCP section 223. In this regard, respondent cites one or two instances in which the court indicated that counsel could submit proposed questions for the juror questionnaire (See Resp. Brief at p. 52, citing RT 31), and where the court stated that it would permit the attorneys to submit questions as needed for particular jurors (See Resp. Brief at p. 52, citing RT 83; 1803).[12] Respondent's discussion misstates this portion of James Robinson's

[12] Respondent's use of this example is misleading. Although the trial court indicated that it would entertain suggestions for supplemental questioning, it never did so even where further questioning was needed to gather information relevant to challenges for cause based on racial bias. Defense counsel specifically advised the trial judge that more voir dire regarding racial bias was needed based on counsel's reading of the

claim on appeal and thus does not address the arguments made in the AOB.

James Robinson cites a specific portion of the record which demonstrates that the trial court was confused about its role in the voir dire process. The trial court mistakenly believed that it lacked the discretion to use open-ended voir dire questions. As discussed in the AOB, the trial court denied the defense requests for expanded voir dire based on its reading of the Court of Appeal's opinion in ***People v. Taylor***, *supra*, 5 Cal.App.4th 1299. In its discussion of the ***Taylor*** opinion, the trial court stated: "A trial court is not allowed to ask open-ended questions but may ask those questions that could call for a yes or no answer." (RT 82.)

The trial judge's remarks are plainly an incorrect statement of the holding in ***Taylor.*** The ***Taylor*** opinion does ***not*** state that trial judges are prohibited from posing open-ended questions to prospective jurors during voir dire. On the contrary, in ***Taylor***, the court of appeals remarked favorably upon the use of open-ended questions:

> We do not say that the use of open-ended questions would have been inappropriate in this case, or that they may not be required in some cases. We do say that they were not constitutionally compelled in this case.

(*Id.* at 1316.)

As discussed in the AOB, the trial court in James Robinson's case mis-read the ***Taylor*** opinion. Based on its misunderstanding of that case, the court held that it lacked the discretion to use open-ended questions during voir dire. This instance reveals that the court did not understand the scope of its discretion under CCP section 223. Where a trial court is mistaken about the scope of its discretion under section 223, and rules on the basis of that mistaken impression, no true exercise of discretion has occurred. (AOB at pp. 124-129; ***Covarrubias v. Superior Court***, *supra*, 60 Cal.App.4th 1168, 1182-1183.) The trial court's ruling on the defense motion for expanded voir dire is thus not entitled to

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questionnaire responses. (RT 74-75.) The trial court refused the request. (See AOB at p. 169; RT 82-84.)

deference on appeal.

3. Respondent fails to discuss the trial court's affirmative duty to modify voir dire processes to ensure fairness in jury selection.

The trial court in James Robinson's case plainly had the discretion under section 223 to grant the defense requests concerning voir dire.[13] Although the statute codifies a system of court-conducted voir dire, CCP § 233 expressly grants trial judges considerable latitude to adapt voir dire procedures to meet the needs of specific cases. (***People v. Chapman,*** *supra,*15 Cal.App.4th 136, 141.) Section 223 thus gave trial courts more control over voir dire while simultaneously expanding their discretion to adapt jury selection procedures to the needs of particular cases.

Respondent ignores the authority discussed in the AOB concerning the trial court's obligation to ensure fairness by modifying jury selection procedures. As discussed in the AOB, CCP section 223 permits the trial courts to exercise greater control over voir dire but, also, imposes a heightened responsibility to insure that the voir dire process is meaningful and sufficient to discover the biases and prejudices harbored by prospective jurors. (See AOB at p. 129; ***People v. Wilborn*** (1999) 70 Cal.App.4th 339, 347.)

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[13] The statute provides, in relevant part:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, ***the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper***, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, ***where practicable***, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

[Emphasis added.]

"Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (***People v. Earp***, (1999) 20 Cal.4th 826, 852, quoting ***Rosales-Lopez v. United States*** (1981) 451 U.S. 182, 188.)

Under CCP section 223, the trial court has not only the ability to modify the voir dire procedures but a clear duty to do so to ensure fairness. Consequently, "where the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, [the trial court] commits reversible error." (***People v. Chapman***, *supra*, 15 Cal.App.4th 136, 141, quoting ***United States v. Baldwin***, *supra*, 607 F.2d 1295, 1298.)

4. <u>This trial court's handling of voir dire was clearly an abuse of discretion under California law.</u>

In its brief, respondent states the following standard for abuse of discretion under section 223: "section 223 is constitutionally valid, and its application does not violate a criminal defendant's rights unless he can show on the facts of the case that the scope of voir dire was so narrow that it constituted an abuse of discretion." (Resp. Brief at p. 52, citing ***People v. Banner*** (1992) 3 Cal.App.4th 1315, 1324; ***People v. Leung***, *supra*, 5 Cal.4th at p. 496.) James Robinson contends that this standard has been satisfied here. As discussed below, defense counsel made a strong showing for the necessity of expanded voir dire through the written motion and the hearing. The trial court's voir dire was completely ineffective and failed to gather enough information to determine challenges for cause. Assuming, arguendo, that the trial judge's handling of the voir dire was a valid exercise of its statutory discretion, the voir dire was so inadequate that it constituted an abuse of discretion.

D. Respondent fails to establish that the trial court's general voir dire was sufficiently comprehensive or that the voir dire procedures yielded enough information upon which to determine challenges for cause.

1. Introduction and overview.

In addition to the facial constitutional challenges to CCP section 223, James Robinson raises several claims challenging the constitutionality of the statute as applied to the selection of both juries in his capital case. (See AOB at pp.124-166.) As discussed above and in the AOB, trial courts have the discretion to modify voir dire methods under CCP section 223. The trial court has an affirmative obligation to exercise this discretion to ensure fairness in jury selection. (See AOB at pgs 124-129; ARB Arg. II, Sub-section C, *supra*.) Thorough voir dire is essential to selecting an impartial jury. (***Turner v. Murray*** (1986) 476 U.S. 28; *see also*, ***Aldridge v. United States*** (1931) 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182; ***People v. Wheeler*** (1978) 22 Cal.3d 258, 283; see also ***People v. Gilbert*** (1992) 5 Cal.App.4th 1372, 1397; ***People v. Martinez*** (1991) 228 Cal.App.3d 1456, 1460.) In James Robinson's case the trial court's voir dire was not sufficiently comprehensive and did not provide enough information to determine challenges for cause.

In the AOB, James Robinson describes several different ways in which the trial court's voir dire was inadequate. The standard form questionnaire so poorly administered that the jurors provided inaccurate and incomplete information. (AOB at pp.132-139.) The trial court refused to permit attorney questioning during voir dire, in spite of the fact that both the defense and the prosecution requested the opportunity to do so and had agreed to be brief and mindful to the court's time. (See AOB at pp.193-195; RT 74-75; 79.) The trial court insisted on doing all of the voir dire, and did little if any substantive questioning. (AOB at pp. 139-144.) The court rushed through the voir dire, selecting both juries in only a few hours of court time. James Robinson was sentenced to death by a jury selected and seated within 167 minutes. (AOB at pp. 139-140.)

Both the substance and the style of the trial court's style of questioning created further problems with the voir dire in this case. The trial court typically did no follow-up questioning on the prospective jurors' completed questionnaires. (AOB at pp.140-144.)

On the rare occasions when the trial court did engage in further questioning, the trial judge blatantly coached and/or coerced the prospective juror into stating the desired response. (AOB at pp.144-149.) For all of these reasons, the trial court's handling of the voir dire was an abuse of its statutory discretion under section 223 and an abdication of its duty to protect James Robinson's right to an impartial jury.

Respondent contends that the trial judge's handling of the voir dire was appropriate, and that the process gathered enough information for the court to determine challenges for cause. Respondent's discussion of these claims is not persuasive for several reasons. In its brief, respondent repeatedly mis-characterizes James Robinson's legal claims. (*Compare*, Resp. Brief at p. 66, [incorrectly stating that the AOB contains a claim asserting a constitutional right to voir dire regarding pre-trial publicity], *with* AOB at pp.183-189.) Where respondent cites the trial record to support its arguments, the record is related in a highly misleading manner. Portions of the record containing relevant facts are frequently omitted from the discussion where they do not support respondent's position. (See, e.g., Resp. Brief at p. 70, [denying that the prospective jurors were pressured to complete form before lunch].) Respondent's analysis of the applicable law is similarly lacking. United States Supreme Court precedents are misstated. (See, e.g., Resp. Brief at pp. 64-65 [discussion of ***Turner v. Murray***, *supra*, 476 U.S. 28].) In its discussion of California law, respondent fails to address critical distinctions which compel a different conclusion in the context of a capital case. (See, e.g., Resp. Brief at pp. 61-62, [discussing ***People v. Chaney*** (1991) 234 Cal.App. 3rd 853]; Resp. Brief at p.66 [discussing ***People v. Avena*** (1996) 13 Cal. 4th 394, and ***People v. Sanchez*** (2001) 26 Cal. 4th 834].) Finally, respondent completely ignores several arguments made in the AOB concerning the court's disparate treatment of jurors not displaying pro-death attitudes. (*See* AOB at pp.131, 200-204.)

2. <u>The trial court's general voir dire was wholly inadequate for determining challenges for cause, and respondent fails to demonstrate that the procedures used were sufficient.</u>

(a.) *Respondent misstates the claims concerning the adequacy*

of the voir dire, and incorrectly asserts that these claims were waived in the trial court.

In its brief, respondent argues that James Robinson has waived claims concerning the sufficiency of the voir dire by failing to submit questions for use in the standard form juror questionnaire. Respondent states: "[t]he record contains no evidence that either party sought to alter the questionnaire before it was provided to the prospective jurors. Appellant's failure to object to the form and/or substance of the questions on the questionnaire waived his claims of error on appeal." (Resp. Brief at p. 53, citing ***People v. Avena***, *supra*, 13 Cal.4th 394, 413.) Respondent's conclusion is incorrect, and reflects a misunderstanding of the claim on appeal.

Contrary to respondent's assertion, James Robinson does ***not*** contend that the standard form juror questionnaire was improper in and of itself. His claim is that the trial court did not have enough information to determine challenges for cause. As discussed in the AOB, the juror questionnaire was significant part of the voir dire process in this case. The trial court's ***handling*** of the questionnaire is, therefore, relevant to that claim. The trial court mishandled the questionnaire by not allowing the prospective jurors enough time to provide thoughtful, complete and accurate responses. The court then failed to follow-up by posing appropriate questions to the prospective jurors so that they could explain, confirm or elaborate on their written responses. The combined effect of these errors was that there was very little information upon which to determine challenges for cause. Because James Robinson's claim does not concern the ***content*** of the questionnaire, it is irrelevant that defense counsel did not submit questions to be included on the form and did not object to the questions as they were written.

It is abundantly clear that James Robinson has not waived any claims concerning the adequacy of voir dire through a failure to object. Prior to trial, defense counsel filed a noticed motion requesting additional, attorney-conducted voir dire. In the motion and again at the hearing, counsel argued for expanded voir dire because the information

gathered through the questionnaires was insufficient. (See RT 72-82; CT 200-214.) Defense counsel noted that the panel had not been given enough time to complete the forms. In addition, defense counsel cited substantial legal authority, public information and relevant facts concerning this case to demonstrate the need for further voir dire in the specific areas of race and pre-trial publicity. (*Id*.) The trial court denied the motion and all requests for further questioning. Once voir dire began, defense counsel renewed requests for additional, follow-up questioning of specific jurors. These requests were also denied. (See AOB 94-98; RT 82-84.) James Robinson could scarcely have done more to preserve these claims.

(b.) *Respondent fails to demonstrate that the trial court provided the prospective jurors enough time to complete the questionnaire and/or that the time pressure did not affect the quality of the responses.*

The prospective jurors in both the first and second trial were not given a reasonable amount of time to complete the trial court's standard form juror questionnaire. The questionnaire was 24 pages long, with 56 multi-part questions. Prospective jurors had to provide around 96 separate responses. Although prospective jurors were required to state some basic background information, the questionnaire also demanded answers on a number of complex subjects, such as their attitudes on the death penalty and the criminal justice system in general. At the very end of this long form, the jurors were told to describe their views on capital punishment. (CT 232-255.)

As discussed in the AOB, the prospective jurors were forced to provide all of this information in a very short period of time. In the first trial, the questionnaire form was distributed at around 11:00 a.m.[14] (See AOB at pp.132-134; RT 46.) The trial court

[14] Consistent with the AOB and Respondent's Brief, in this section of the ARB the jury selected for the guilt phase and the mis-tried penalty phase will be referred to as the "first jury," and the jury selected for the penalty phase will be referred to as the "second jury."

announced that the courtroom would be closed for lunch at 12 noon and would not re-open until after 1:30 p.m. (RT 43.) The court told the prospective jurors that they were free to leave after handing in their completed questionnaire, and stated that they could complete it before 12:00 p.m. or wait and hand it in after 1:30 p.m. that same day. (RT 39-42.) The panel was expressly told that they were ***not*** to take the form home and return with it on the next court date. (*Ibid*.)

Most prospective jurors returned the questionnaire before the noon recess at 12:00 p.m. (RT 74.) They had, therefore, approximately 45 minutes to complete a form which required detailed explanations and no less than 96 separate responses. Defense counsel noted that this time period allowed prospective jurors an average time of only 28 seconds per response. (CT 214; RT 74-75.)

The panel of prospective jurors for the second jury had even less time to complete the trial court's questionnaire. Prospective jurors for the second jury did not receive the form until well past 11:00 a.m. (RT 1729; 1734.)[15] The trial court made it clear that the jurors were pressed for time to complete the questionnaire. Three times the trial judge stated on the record that the form was to be turned in by 12:00 noon. (*See*, RT 1729; 1731; 1732; 1734.) The court's final word to the prospective jurors about the questionnaire was "turn it in before noon or 11:30." (RT 1734.) It was well past 11:00 a.m. when the court made this statement.[16]

Respondent's efforts to minimize the extreme time pressure on these jurors are unavailing because they ignore the larger atmosphere of the courtroom. Respondent notes

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[15] The record indicates that the panel entered the courtroom at 10:58 a.m. (RT 1729.) The prospective jurors were sworn, and the court addressed them for at least 10 to 15 minutes before they were excused. The record does not state when the panel of prospective jurors left the courtroom. (*See*, RT 1734.)

[16] The panel was told to turn in the questionnaire by 1:30 p.m. at the latest. However, they were also informed that the courtroom would be locked from 12:00 noon to 1:30 p.m., and that they were free to leave after turning in the form. (RT 1732.)

one or two remarks by the trial court which, taken out of context, convey the impression that these prospective jurors took more time with the questionnaire forms.[17] (Resp. Brief at p. 70.) As discussed in the AOB, the questionnaires were distributed in an atmosphere certain to encourage speed of completion over thoughtful, considered written expression. The trial court gave these jurors every incentive to complete the questionnaires as quickly as possible. The judge told the panel that their day's jury duty was over once they turned in their questionnaire form. The trial judge emphasized that any prospective juror not finished with the questionnaire form before the courtroom closed for lunch would need to turn in the form at 1:30 p.m. The jurors thus faced an unnecessary wait of up to 90 minutes if they did not hurry to complete the form before noon. (See AOB at pp. 132-139.)

Respondent asserts that the prospective jurors had enough time to complete the questionnaire because some of the questions called for short answers about routine matters. (Resp. Brief at p. 71.) Respondent offers no new evaluation of the record, and makes this assertion based on the trial court's faulty finding at the hearing on the defense motion for expanded voir dire. (*Id.*)

Respondent next argues that the time allowed must have been sufficient because the prospective jurors' responses were thoughtful and informative. Here again, respondent relies primarily on the trial court's erroneous remarks to this effect at the motion's hearing. (Resp. Brief at p.71, citing RT 83.) In addition, respondent includes in its brief some representative samples of jurors' written responses to the question concerning death penalty attitudes. (Resp. Brief at p. 71-73.) These questionnaire excerpts supposedly illustrate the point that these prospective jurors provided thoughtful responses. James Robinson disagrees. Most of the replies range from one to three sentences. More significantly, the content of the responses suggests that more questioning is needed to

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[17] Respondent notes the trial court's remarks prior to distributing the questionnaire forms to the first jury panel. In reference to when the completed forms were to be returned, the trial court remarked, "hopefully, by noon today, no later than 1:30 p.m. this afternoon." (Resp. Brief at p. 70; RT 41-42, 45, 59.)

discover whether the juror is capable of being fair and impartial. The jurors' written statements of their feelings about the death penalty reveal ambivalence and confusion. (*See, e.g.*, response of Prospective Juror Pascuzzi, CT 126.)

Clearly, defense counsel believed that much more information was needed to determine challenges for a number of reasons, not simply in regard the jurors' views on the death penalty. The prosecutor was also in favor of some amount of attorney voir dire. Only the trial court was satisfied that the completed questionnaires contained enough information. As discussed below and in the AOB, the numerous incomplete, inaccurate and confused questionnaire responses which were revealed during voir dire demonstrate that the trial court's conclusion was incorrect.

(c.) *The number of incomplete questionnaires suggests that the time constraints affected the thoroughness and accuracy of the information.*

James Robinson contends that the substantial number of questionnaire responses left blank indicates that the jurors did not have enough time to provide accurate and detailed information. (AOB at pp.132-139.) Respondent dismisses this observation, calling it "speculation" and an "unfounded assumption." (Resp. Brief at p. 72.) Respondent provides an alternate interpretation for the blank answers: "the record demonstrates that several prospective jurors meant the non-responses to mean that the answer was 'no' or 'not applicable.' (Resp. Brief at p. 72-73.) However, respondent's interpretation is actually far more speculative than James Robinson's and has less support in the record. Respondent cites only two instances (one in the first and another in the second jury) in which the jurors confirmed that they made no written response when a question was inapplicable or called for a negative response. (See Resp. Brief at p. 73; RT 112-113; 1913-1914.) This is hardly a representative sample and creates a misleading impression of what really occurred during voir dire.

While respondent cites only two examples to support its interpretation, the AOB

notes ***twelve*** instances where jurors omitted significant information from the questionnaire. Seven jurors failed to respond to questions in the first jury selection. In selecting the second jury, five jurors left blank answers on the questionnaire. (See, AOB at p.134.) These prospective jurors did not omit the answers because the question was not applicable or required a negative response. An exchange between the court and one of these prospective jurors is excerpted in the AOB. The juror had not completed a number of questions, but had no difficulty answering those questions when posed by the court during voir dire.[18] The logical interpretation is that he left answers blank or incomplete in order to turn in the questionnaire by the noon recess. Another prospective juror's questionnaire

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[18] The court: I have read your questionnaire. Is there anything here that you wish to have changed?
P.J. Bianci: No.
The Court: Do you wish all the answers [to] remain the same?
P.J. Bianci: Yes.
The Court: There are certain questions you didn't answer, and I want to ask you those questions.
'15. Are you or any close friend or relative associated with any attorney who practices criminal law or any individual who practices psychology or psychiatry?'
P.J. Bianci: No.
The Court: '16. Have you or any close friend or relative ever been involved in a criminal incident or case either as a victim, suspect, defendant, witness, or other?'
P.J. Bianci: No.
The Court: '21. Is there a crime prevention group in your neighborhood?
P.J. Bianci: I am not sure.
The Court: Okay. 'And if so, do you participate in it?
P.J. Bianci: What?
The Court: 'If so, do you participate in it? I take it the answer is no?
P.J. Bianci: I am not sure.
The Court: '26. Would you characterize yourself as a leader or follower?
P.J. Bianci: Leader.
The Court: That was definite.

contained four completely empty pages. The questions calling for the prospective juror's views on capital punishment, arguably the most relevant information in this context, were among the omitted responses. (RT 1913-1915.) As discussed in the AOB, the logical inference from the number of incomplete questionnaires is that the trial court did not give the prospective jurors an appropriate amount of time to complete the forms. The result was that the jurors ignored some of the questions and/or provided brief and superficial answers in their rush to return the form on time. (*See* AOB at pp. 132-136.)

(d.) The numerous mistakes, mis-statements and inaccuracies in the questionnaire responses is further evidence that the time allowed was not sufficient.

As discussed in the AOB, the number of confused, incomplete and inaccurate responses is further proof that the prospective jurors did not have enough time to comprehend the questions and to complete the questionnaire in a careful manner. (AOB p. 136-138.) James Robinson has identified ***fifteen* (15)** instances where prospective jurors' responses were incorrect because they did not understand the questionnaire. (*See*, RT 137-139 [prospective juror did not know if her prior jury service in a prostitution case counted as jury duty in a criminal trial, and did not comprehend why an information would be filed if defendant was presumed innocent]; RT 141-143 [social worker confused between presumptions applying to custody petitions and criminal information]; RT 165 [juror gave ambiguous response to question regarding pre-trial publicity]; RT 205 [juror explained that her response to a particular question should be read in light of later response to another part of the questionnaire]; RT 205 [juror misstated her views on the death penalty because she did not understand that those issues would be discussed in another section of the questionnaire]; RT 222-224 [prospective juror inclined to find defendant guilty because charges were filed but elsewhere stated belief in presumption of innocence]; RT 232-234 [juror expressed similar conflict between belief in defendant's probable guilt and the presumption of innocence].) Similar misunderstandings surfaced during voir dire of the

second jury. (*See,* e.g., RT 1811 [;1818 [juror was not fluent in English language]; 1855 [same]; 1862 [juror mistakenly did not answer question on form]; 1882 [juror made mistake indicating that he had been in jail but had only visited]; 1913 [juror left questions blank where the answer were "no."].) These problems were discovered ***only*** because the prospective jurors' questionnaires contained blatant inconsistencies or nonsensical responses. As discussed in the AOB, it is uncertain how many other prospective jurors had similar misconceptions or provided other misleading or inaccurate information which was never revealed because nothing obvious appeared in their questionnaire. (*See* AOB at pp. 137-138.)

Despite this parade of instances of juror confusion, respondent asserts that "there is no evidence that prospective jurors were unable to thoughtfully complete the questionnaire." (Resp. Brief at pp. 71-72.) Respondent claims that the prospective jurors' gave intelligent and considered responses to important questions. To illustrate its point, respondent notes four questionnaire responses from jurors in the first trial and four examples from the second jury. (Resp. Brief at pp. 71-72, citing CT 236; 126; 60; 280; 1922; 1925; 3353; 3374.) Whether or not these examples reflect intelligence and consideration is subject to debate. In respondent's very first example of clear thinking, the prospective juror frankly admits to feeling confused about the death penalty! Respondent's excerpt provides:

> "Confusion. [I] [d]on't necessarily believe it is a deterrent. However, as time goes by and violent crimes are on the increase as are jails overcrowding and repeat offenders, I find it difficult to justify housing criminals at tax payers expense and/or relocating them to further [] society. In the past [I] have had no strong feelings either way – other than violence and death at the hand of another (including capital punishment) have bothered me. However, the crime and violent crime have gotten so out of control I am less bothered by the thought of death penalties than I once was." (Resp. Brief at pp. 71-72, quoting CT 126, [questionnaire response of Prospective Juror Pascuzzi].)

James Robinson does ***not*** mean to imply any criticism of these prospective jurors. These prospective jurors did the best they could given the completely inadequate amount of time

they were given to compose a written response to one of society's most difficult issues. Capital punishment involves a vast array of complex moral, philosophical, emotional and spiritual issues. James Robinson's contention, as discussed in the AOB, is that it was unfair to the prospective jurors and totally unrealistic to expect honest and reflective answers to this and other inquiries on a questionnaire which was handled by this court like a "pop-quiz" given in elementary school. (*See* AOB at pp. 132-134.)

Even accepting, arguendo, respondent's characterization of the eight answers noted in its brief as clear and well-considered, respondent has not demonstrated that the ***majority*** of the prospective jurors had sufficient time to read and understand the questions and then to compose accurate and complete responses. Respondent dismisses the obvious inference from the examples of juror confusion discussed above and in the AOB. Respondent views one of the examples of juror confusion discussed there (the voir dire of Prospective Juror Alcantar, RT 160-161) as an "isolated" instance of misunderstanding.[19] (Resp. Brief at p. 74.) Clearly, this instance was not as isolated as respondent would have this Court to believe. Elsewhere in its brief, respondent states that the trial court had to clarify "missing, ambiguous, conflicting or otherwise problematical answers" some 30 times during voir dire. (Resp. Brief at pp. 74-75.)

James Robinson has established that a significant number of prospective jurors had misconceptions in areas affecting their qualifications to serve in this case. These problems were discovered ***only*** because the prospective jurors' questionnaires contained blatant inconsistencies or nonsensical responses. Given the wholly inadequate voir dire conducted by the trial court, it is uncertain how many other prospective jurors had similar

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[19] Prospective Juror Ms. Alcantar admitted being "very confused" in response to the trial court's inquiry about her answers to questions 13 and 16 on the questionnaire. She also admitted misunderstanding the presumption of innocence in a criminal case, and that attorneys should not be disfavored for raising objections at trial. When questioned by the trial judge, Ms. Alcantar stated: "No. I didn't mean that. I must have definitely misunderstood the question." (RT 160-161.)

misconceptions or provided other misleading or inaccurate information which was never revealed because nothing obvious appeared in their questionnaire. (*See*, AOB at pp.133-134.)

(e.) *The trial court's hurried and minimal voir dire was insufficient to clarify any ambiguities or misunderstandings revealed in the prospective jurors' questionnaire responses, and completely failed to gather new information.*

The completed questionnaires contained many omissions, and inaccurate and confused responses as discussed previously. Common sense dictates that the prospective jurors would have provided better information on the questionnaire if they had been given a reasonable amount of time to reflect and to complete the form. Clearly the trial court should have given the prospective jurors more to complete the questionnaires. The court compounded this mistake by failing to conduct a thorough voir dire to uncover and clarify inaccuracies and misunderstandings.

The trial court's voir dire was so cursory that it yielded very little if any additional information. Moreover, as previously discussed here and in the AOB, it is highly probable that other misconceptions and inaccurate statements were never discovered because the trial court routinely did no follow-up questioning. Therefore, the only problems which were addressed were those that were readily apparent from the hastily completed questionnaire form. Respondent fails to explain how the trial court's hurried and superficial voir dire of both juries could have gathered adequate information.

(i.) *Respondent cannot justify the trial court's failure to allot sufficient time for jury selection.*

The trial court took a hurried and superficial approach to jury selection at all phases of the process. The court rushed through jury voir dire just as it had hurried the prospective jurors with the questionnaire. Respondent makes no mention of the timetable for voir dire, recognizing that this is indicative of the trial court's cavalier approach to ensuring James

Robinson's Sixth Amendment right to an impartial jury.

The first jury was selected in just over one court day, [20] approximately 199 minutes of court time. The second jury was empaneled in a record 167 minutes.[21] The average voir dire of a prospective juror in the guilt phase was something less than three minutes. In the penalty phase voir dire was even more rapid. Prospective jurors were questioned for less than two minutes each.

As discussed in the AOB, these are generous estimates of the average time spent questioning each juror. In reality the actual average time of the questioning in both phases was significantly less because the figures noted above were determined by dividing the amount of court time in voir dire by the number of jurors examined. The average times for juror voir dire therefore include time not devoted to voir dire, such as time the trial judge spent speaking to counsel about challenges for cause and other matters, and time spent on peremptory challenges. (See AOB at pp. 93-101.)

(ii.) *The alleged examples of searching voir dire Respondent cites actually demonstrate that this court's questioning was hurried, superficial and biased in favor of the prosecution.*

Respondent defends the adequacy of the voir dire, and implies that the trial court had

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[20] The panel of prospective jurors for the first jury entered the courtroom at 10:52 a.m. (RT 86.) Twelve prospective jurors were questioned before the lunch recess was taken at 12:01 p.m. (*See*, RT 90-127.) Returning after lunch at 1:42 p.m. the court completed its voir dire of forty jurors, taking one ten minute recess (RT 176), and adjourned for the day at 4:02 p.m. (*See*, RT 128-228.) Counsel exercised several peremptory challenges, and the 12 jurors and six alternates were chosen in the first few minutes of the next court day. (*See* RT 231-244.)

[21] The court began voir dire at 10:42 a.m. (RT 1804.) Lunch recess began at 11:55 a.m., and ended at 1:43 p.m. (RT 1865-1866.) A 15-minute recess was taken in the afternoon. (RT 1920.) The jurors and the alternates were selected, sworn and admonished and court was adjourned at 3:32 p.m. (RT 1937.)

enough information to determine challenges for cause based on the combined information gathered through the written questionnaire responses and the trial court's questioning. Respondent states in its brief: "The record shows that the trial court identified missing, ambiguous, conflicting or otherwise problematic answers to the questions and further questioned the prospective jurors to clarify their responses." (Resp. Brief at pp.74-75.) To support its assertion respondent provides citations to a total of 32 instances from jury selection in both the first and second trials. (*Id*.) Respondent's citations not only fail to support its argument, but demonstrate the gross inadequacies in the trial court's questioning of these prospective jurors.

It is irrelevant how many times the trial court posed ***some*** question during voir dire. The claim on appeal concerns the ***substance*** of the court's questions and, the judge's complete failure to ferret out additional, relevant information. (See AOB at pp. 140-144.) Only one of the 32 instances respondent cites demonstrate an acceptable level of questioning. (See RT 98.) The remaining 31 instances reveal the multiple problems with this court's questioning as discussed here and in the AOB.

In four instances cited by respondent ***the prospective jurors themselves*** initiated further inquiry into their responses. (See RT 134-135, 182, 1877, 1895-1898.) If these prospective jurors had not called the court's attention to changes in the written responses, the information would never have been discovered. These instances, therefore, do not demonstrate any initiative on the trial judge's part as respondent claims. Two more alleged examples of probing voir dire reveal that the court did nothing more than fill in blank responses left on the written questionnaire. (RT 112-114; 123; 1820-1822; 1824.)

Several other instances respondent cites are pale examples of searching voir dire. The trial court asked a few additional questions of one prospective juror whose questionnaire indicated that her cousin was a court commissioner to see if the court was acquainted with the relative. (See RT 1815.) Another prospective juror indicated that she would have trouble not talking about the case (RT 1859), and in another instance the

prospective juror had visited a friend in jail for a minor offense. (RT 1833.) One prospective juror's son was arrested for driving on a suspended license. (RT 1872-1873.) In all of the afore-mentioned instances, the court asked only one or two more questions. More significantly, the subjects of the court's follow-up voir dire were largely unrelated to the prospective jurors' suitability for this capital case.

The remainder of respondent's examples actually demonstrate the gross inadequacy of this court's voir dire. In a number of instances the trial court failed to probe responses which were highly relevant to prospective juror qualifications. During the voir dire of one juror, the trial court stated: "On some of the questions regarding the death penalty, your answers were a little ambiguous, ***so I am going to ask you the same four questions again***." This prospective juror provided the "correct," "yes" or "no" answers, and the court asked nothing more. (RT 144-145.) The trial court took the same approach in other instances where prospective jurors equivocated on the death penalty questions. (See RT 1889; 1820-1822; 1824; 1809-1810.) The court quickly disposed of two prospective jurors who indicated opposition to the death penalty. (RT 1896, 1897.) Other highly relevant areas received similar treatment. One prospective juror indicated that some of her "close" personal friends had been suspects in a kidnap/murder case. The trial court asked three or four questions. However, the judge did ***not*** probe for additional information but merely restated the written form's inquiries, e.g., "[d]o you feel they were treated fairly by the court system?" and, "[a]nything about that that would cause you to be unbiased [sic] in this case?" (RT 198-199.) The prospective juror gave the "correct," desired responses and was retained. (RT 199.) Another prospective juror with a close relative working for the Subway sandwich corporate office at the time of the crime was asked only one or two questions and retained. (RT 1877-1878.)

The largest number of respondent's instances of allegedly thorough voir dire involved prospective jurors who were honest enough to admit to a pro-prosecution bias in their written questionnaire responses. Here again, the trial court made little or no effort to

determine how deeply rooted these biases were or to discover anything more about the prospective jurors' views. Instead, in each case, the court noted that the prospective juror had given an "inappropriate" response, briefly lectured the prospective juror on the presumption of innocence, and then obtained an "acceptable" response to a leading question. (See RT 134-135; 138-139; 141-143; 165; 178; 224; 233-234; 1808-1810.) Respondent's list includes other examples of the trial court posing only one or two leading questions to get the "right" answer rather than searching out the person's views. (See, RT 1887 [juror *might* be able to set aside racist views]; RT 1883 [juror would "possibly" resent attorney objections] RT 224 [same]; RT 131 [prospective juror might have trouble following an instruction he disagreed with].)

As previously noted, the trial court had no interest in rehabilitating prospective jurors who expressed any inclination to favor a life sentence in the penalty phase. (See RT 1895; 1896.) The instances involving the most extensive voir dire (i.e., those in which the trial court departed from its standard, scripted questioning based on the written form) concerned prospective jurors whose views on capital punishment did not strongly favor the prosecution. (See RT 102-106; 117-121; 1849-1852.) The other instance of more extensive voir dire respondent notes reflects the same pro-prosecution bias. The trial court re-opened the voir dire of one prospective juror, at the prosecutor's request, because her questionnaire response indicated that she would require an eye witness to vote for a death sentence. (RT 1904-1906.)

(iii.) *The voir dire process overall reflects this trial court's lack of interest in jury selection.*

An overview of the voir dire process in this case is useful for demonstrating the trial court's utter lack of interest in gathering pertinent information about the prospective jurors who would determine James Robinson's capital case. As discussed in the AOB, the trial court asked ***no*** follow up questions as a rule during the general voir dire. (*See*, e.g., RT 122-123; AOB at pp. 140-144.) As each prospective juror was seated, the trial judge asked if

there was anything about the prospective juror's questionnaire responses he or she wished to change. (*See*, e.g., RT 90.)[22] If the prospective juror said "no," it was highly likely that no further questions would be asked.[23] In the first trial, eleven prospective jurors were excused by stipulation for a variety of reasons. (*See*, RT 99; 100; 169; 177; 185; 187; 207; 217; 232; 235; 236.) The prosecutor made two challenges for cause, both of which were sustained. (RT 121; 204.) The defense made three challenges for cause, all of which were denied. (*See*, RT 153-155.) The jury was selected from a remaining pool of forty-seven (47) prospective jurors. Of these forty-seven, thirty-two ***(32) prospective jurors had answered no substantive questions on voir dire***. (*See*, AOB at pp. 98-101.) Sixteen (16) of the eighteen (18) jurors ultimately chosen to try the case answered no questions whatsoever apart from the four death qualifying questions.

As discussed in the AOB, the fact that sixteen out of eighteen jurors in a capital case answered virtually no questions on voir dire speaks for itself. (See AOB at pp. 140-144; 156-166.) The trial court's truncated voir dire process did not yield enough information to determine whether these prospective jurors were qualified to hear his capital case. Moreover, James Robinson is not merely speculating about the prejudice resulting from the trial court's inadequate questioning. As discussed in the AOB, he contends that 10 of the 47 prospective jurors ought to have been excluded for cause, or at least questioned further, due to various indications of bias. (*See*, AOB at pp.163-166; RT 112; 123; 137; 142; 178; 181;

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[22] If the juror did not remember a problem with the questionnaire and the confusion was not obvious from the completed form, it was not likely to be discovered. In some instances the jurors admitted that they did not recall what their responses had been. (*See*, RT 93-94.) The questionnaires were completed quickly, and several days had elapsed between the time the forms were completed and the voir dire. Given several days to ponder the issues posed in the questionnaire, it is highly likely that many other prospective jurors would have altered their responses if given the opportunity to do so through further questioning to probe and clarify their written responses. (CT 199, 256.)

[23] In all cases, the trial court asked the four "death qualifying" questions.

194; 199; 223; 227.)

(f.) *The trial court coerced and coaxed prospective jurors into modifying their responses in order to avoid disqualification.*

This court was only interested in retaining the greatest possible number of prospective jurors in the shortest possible period of time. The voir dire in this case was a virtual catalog of pressure tactics and disapproved methods for juror questioning. As discussed in the AOB, state and federal courts have expressed disapproval of the same methods used in this case. (AOB at pp. 148-155; ***State v. Williams*** (1988) 113 N.J. 393, 550 A.2d 1172 [where the Court noted with disapproval that in several instances the trial court improperly led the prospective jurors to the "correct" response by the tenor of the questioning.]; ***State v. Harris*** (1998) 716 A.2d 458, 156 N.J. 122.)

The court in James Robinson's case never used open ended questions during the voir dire, even where responses were confusing or equivocal. (*See, e.g.*, RT 1886-1887.) Jurors were frequently cued to the desired responses. (*See* AOB at pp.144-155; RT 134; 138, 141; 161; 178; 205; 223; 234.) The court lectured the prospective jurors, and extracted "correct" answers through the use of leading questions. There was no genuine interest in searching out the prospective jurors' views.[24]

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[24] The following is a typical example:

The Court: There is one question I want to talk to you about. It's question 32(B) regarding what you have learned about this case already, and the question is, 'Did this information make you favor the prosecution or the defense'" and you said, 'with the little facts I heard, my sentiment would be with the prosecution.'

P .J. Stevens: Yes. Sir.

The Court: Do you understand that as I told you, things on t.v., things in the news, they are wrong anyway. And, also, a defendant in a criminal trial has an absolute presumption of innocence. Do you understand that?

P. J. Stevens: Yes.

The Court: Is your mind made up right now?

P. J. Stevens: No.

Even where a juror's questionnaire responses merited a thorough inquiry because biases were revealed, the court coerced the juror into adopting an acceptable view. Prospective Juror Thompson's answer to the only question dealing with racial bias in the court's standardized form questionnaire cried out for searching voir dire. Instead, the trial court lectured the juror and bullied him into adopting the "correct" position. [25] The trial judge's lectures during voir dire were far from subtle. While questioning another prospective juror concerning the same question, 32(B), the court browbeat the juror with the "correct" response. By the end of the exchange, the prospective juror is trying to justify and explain away her answer on the questionnaire to obtain the trial judge's approval.

The Court: The last one is 32(B). You put your initials down on the question that's dealing – the question dealt with outside information 'Did it make you favor the prosecution or the defense' and you put down 'the prosecution. You said 'If a wrong had not been committed, there would be no charges brought against the defendant.' Then you put your initials.

The Court: Okay. Can you give both sides an impartial trial?
P. J. Stevens: Yes.
The Court: Okay, thank you. (RT 134-135.)

[25] The Court: Question number 47, regarding a party or an attorney or a witness may come from a particular national, racial or religious group or has a life-style different from your own. And the question is would that affect your judgment or the weight you would give to his or her testimony? And your answer is 'possibly.
P. J. Thompson: No.
The Court: Do you understand I am going to give the jury instructions how to view a witness? What you use to base the believability of a witness, certain factors. No factors concern ethnicity, race, life-style. Do you understand that is not to be taken into account?
Do you follow that?
P.J. Thompson: Yes. (RT 1886-1887.)

P. J. Levans: I can't say by reading that question, black or white, whether I thought he was guilty or not guilty. I would have to hear the evidence.

The Court: Now, do you understand that, first of all, both sides are entitled to a fair or impartial jury?

P.J. Levans: That's true.

The Court: Do you also understand the sacrosanct presumption of innocence? That is, defendant is presumed to be guilty until the contrary is proved. Do you understand that?

P.J. Levans: Uh-huh.

The Court: If a wrong had not been committed, there would be no charge brought against the defendant. I have no idea if there is any evidence.

P.J. Levans: I guess I was just trying to explain why I couldn't answer 'Yes' or 'No' at the time.

The Court: Okay, can you give both sides a fair or impartial trial?

P.J. Levans: Yes, Sir.

The Court: Right now, do you understand the presumption of innocence?

P.J. Levans: Yes, Sir.

The Court: Would you abide by that?

P.J. Levans: Yes, Sir.

(RT 138-139.)[26]

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[26] The trial judge's strong arm tactics in voir dire were not confined to questions concerning the presumption of innocence. The court lectured the prospective jurors and pressured them for acceptable responses in all areas as the following exchange demonstrates.

The court often phrased an inquiry so as to blatantly suggest the correct response. (*See*, RT 134-135 [voir dire of Mr. Stevens].) In other cases, the court summarily granted challenges for cause or excused jurors on its own motion where they appeared to be even slightly inclined to favor life without possibility of parole over the death penalty as a general matter. (*See*, e.g., RT 194; 203; 207.)

(g.) *Respondent cannot negate the trial court's ineffective and improper voir dire tactics with an isolated example of appropriate questioning.*

Respondent defends the trial court's voir dire, and asserts that the court was both sufficiently thorough and neutral in its questioning. (Resp. Brief at pp. 75-76.) The two examples respondent uses in this connection are isolated instances which are not representative of this court's approach to jury selection. Moreover, both of the examples respondent cites are discussed in the AOB because they each illustrate a different failure in the trial court's voir dire methods. (*See* AOB at pp. 142-144; 201-202.)

Respondent refers to the voir dire examinations of Prospective Jurors Nagle and

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The Court: There is one question that I do want to ask you about, and again, this may be my problem, question number 50. It says, 'You will be given instructions by the court about the rules that apply to this case. Do you feel that you will be able to follow those rules with which you do not agree.' And you answered 'No.'

P. J. Ward: Yes.

The Court: Would you be able to follow the instructions if you don't agree?

P. J. Ward: Yes.

The Court: Do you understand – I have got to find a better way to word that. Do you understand if you are not happy with the law, your problem and your dealings should be with the legislature in Sacramento and not with the instructions here? Do you understand that?

P. J. Ward: Yeah.

(RT 130-131. *See* also, RT 141; 161; 178; 223.)

Slettedahl to refute James Robinson's contentions that the trial judge improperly pressured the jurors for desired responses. (Resp. Brief at pp. 75-76, citing RT 99; 119-121.) These two instances, however, do not reflect the trial court's typical approach. Several examples of the court's usual methods of questioning (in the rare instances when ***any*** questioning was done) are set forth above and are discussed in the AOB. (See AOB at pp. 144-155.) In these exchanges with the prospective jurors the trial judge uses several distinct forms of coercion to achieve the desired result.

As discussed in the AOB, this court was much more inclined to question a prospective juror who expressed some reluctance about the death penalty. The trial court's aggressive follow-up with Prospective Juror Slettedahl was not, as respondent would have this Court believe, an example of the trial court's normal investigation into prospective jurors' attitudes. Rather, this instance demonstrates the trial court's desire to disqualify Prospective Juror Slettdahl (among others) because she expressed scruples regarding capital punishment. (See AOB at pp. 200-202.)

Respondent's argument is not furthered through its other excerpt from the record. The voir dire of Prospective Juror Nagle (RT 98-99), which respondent cites as an example of correct and thorough questioning (Resp. Brief at p. 75), is also noted in the AOB. (See AOB at pp. 142-144.) There, it is contrasted to the voir dire of Prospective Juror Rodrigues to demonstrate how the trial court's questioning grew briefer throughout the day. (*Id.*) The trial court was less willing to educate prospective jurors about the presumption of innocence and/or to probe their abilities toward the end of each session. In the AOB James Robinson notes that the trial court spent more time with Prospective Juror Nagle's voir dire, which took place early in the day, than with Mr. Rodrigues' questioning which was twenty-ninth in the order (RT 172.) As this section of the AOB demonstrates, the court's voir dire of Prospective Juror Nagle may have been reasonably thorough but this was an aberration.

(h.) *Respondent cannot establish that a written questionnaire is sufficient voir dire, especially in the context of a capital case.*

It is beyond dispute that both juries were selected based on the written questionnaire. As discussed above and in the AOB, counsel had a pool of forty-seven (47) prospective jurors from which to select the first jury.[27] Thirty-two (32) of these prospective jurors, approximately 70% of those determined eligible to hear this case, had ***answered no substantive questions on voir dire***. (*See* AOB at p.107.) Sixteen (16) of the eighteen (18) jurors ultimately chosen to try the case answered no questions whatsoever apart from the four death qualifying questions. (*Id*.) In the second jury, eleven (11) of the twelve (12) jurors ***answered only the two death qualifying questions from Witherspoon v. Illinois*** (1968) 391 U.S. 510. (*See* AOB at p. 112.)

In its brief, respondent repeatedly suggests that the voir dire was not deficient because the trial court's written questionnaire followed the basic outline recommended by the California Standards of Judicial Administration (Cal. Stds. Jud. Admin., section 8.5.) (Resp. Brief at p. 60, 62.) However, respondent cites no authority stating that the written questionnaire is sufficient alone. James Robinson submits that the written questionnaire was not sufficient and that the trial court's virtually total reliance on the standard form was improper.

As discussed in the AOB, California's reported cases clearly indicate that a standard form questionnaire is only a starting point for obtaining information and should be used in conjunction with thorough and probing voir dire. (*See*, ***People v. Sanchez*** (1989) 208 Cal.App.3d 721, *review denied*, *cert. denied*, 493 U.S. 921 [trial court complied with obligations to ensure fair jury where in addition to questionnaire the judge examined prospective jurors in chambers concerning any indications of bias and permitted counsel to voir dire prospective jurors].) Other state and federal courts are in agreement. In ***State v. Williams***, *supra*,113 N.J. 393, 550 A.2d 1172, the New Jersey Supreme Court reversed the

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[27] Eleven prospective jurors were excused by stipulation for a variety of reasons. (*See*, RT 99; 100; 169; 177; 185; 187; 207; 217; 232; 235; 236.) The prosecutor made two challenges for cause, both of which were sustained. (RT 121; 204.) The defense made three challenges for cause, all of which were denied. (*See*, RT 153-155.)

defendant's conviction and death sentence where the trial court relied heavily on prospective jurors' responses to a standardized form questionnaire. (See also, AOB at pp. 147-149.)

(i.) *Respondent creates a misleading impression of the court's willingness to allow expanded voir dire.*

In connection with several claims concerning the inadequacy of the voir dire, respondent asserts that James Robinson has waived the claims regarding the sufficiency of the court's voir dire because defense counsel did not avail themselves of opportunities to request further questioning. (Resp. Brief at pp. 52, 57, 58, 63.) Respondent is not only incorrect, but repeatedly misrepresents the record by taking specific statements out of context to support its argument. In each instance respondent creates the mistaken impression that this court was flexible in its approach to voir dire, and was willing to allow further inquiry where counsel expressed a need for more information. The record as a whole reveals that the trial court was remarkably rigid in its approach to voir dire and gave counsel virtually no opportunity to participate in the voir dire questioning.

Respondent states that, although the trial court denied the defense motion for additional voir dire, it invited counsel to approach to request further questioning if the need arose. (Resp. Brief at pp. 52, 57; RT 82-84.) Respondent places far too much significance to the trial court's gratuitous remark. In addition, respondent demands far more than the law requires for the defense to preserve an objection.

The defense could hardly have been more vocal in objecting to the adequacy of the voir dire process. The need for further voir dire in specific areas was detailed in the defense motion along with an extensive discussion of the supporting legal authority. At the motion's hearing defense counsel argued extensively to show that additional questioning was essential to discover information relevant to challenges for cause on several grounds ranging from racial bias to exposure to publicity. Counsel noted that, having reviewed the prospective jurors' responses, follow-up was needed with respect to many prospective jurors. (RT 74-75.)

The trial court denied the various requests for additional voir dire and individualized voir dire made in the defense motion. (RT 82-84.) At the time it made this ruling, the court invited counsel to request individual voir dire as respondent notes. (RT 83.) However, the trial court promptly demonstrated that its offer to consider further juror questioning was not to be taken seriously. Defense counsel several times challenged jurors because their responses (both in writing and in court) revealed attitudes about capital punishment making them inappropriate for this case. Defense counsel specified in this connection: "Counsel has not had the opportunity to question this juror. It may very well be that he would be predisposed in this case to vote in favor of death given his feelings, as evidenced by the questionnaire, without deference to other factors such as mitigation." (RT 154-155.) The trial court denied the challenge without considering further voir dire. (*Id.*) In the second trial, defense counsel advised the court that the prospective jurors' questionnaires revealed some problems warranting further inquiry. Specifically, some prospective jurors indicated that they favored the death penalty based on their belief that it would save tax payer money as opposed to life imprisonment. (RT 1800-1801.) The trial court refused to address this in voir dire, either by questioning prospective jurors about this belief or by advising them that perceived tax-payer savings was not an appropriate consideration in sentencing. (RT 1801-1802.) However, when defense counsel later challenged prospective jurors on this basis the court disallowed the challenges. (RT 1837-1839.) Defense counsel in both trials thus did everything possible to alert the court to the need for more questioning. Respondent cannot convincingly argue that defense counsel failed to preserve the challenges to the adequacy of the voir dire.

Respondent asserts that, in contrast to defense counsel, the prosecutor requested further questioning of two prospective jurors. (Resp. Brief at p. 63; citing RT 1822, 1903-1904.) As discussed above, the record refutes respondent's claim that defense counsel made no such requests for additional voir dire. Moreover, as discussed below and in the AOB, the fact that the trial court honored the prosecutor's request indicates another problem in the

court's approach to voir dire. (See AOB at pp. 200-204.)

This court exhibited strong pro-prosecution and pro-death penalty biases which were especially evident during jury selection. Jurors whose questionnaire responses indicated any scruples concerning capital punishment were singled out for additional questioning. (See AOB at pp. 200-202.) The trial court allowed the prosecutor to use peremptory challenges to remove jurors who, although they provided "correct" answers satisfying the ***Witherspoon*** and/or ***Witt*** criteria, expressed any reservations about the death penalty or a willingness to consider a life sentence. (See AOB at pp. 202-204.) The trial court granted the prosecutor's request for additional questioning in one instance only because the prosecutor was concerned that this juror might be reluctant to return a death verdict:

> Mr. Barshop: As to juror, Ms. Goldstein, I have a request. That the court follow-up on the questionnaire in regards to question 53 where she states she could give the death penalty in cases where he admits the crime or if there is an eye-witness.
>
> I'd ask the court to follow up on that and see if there is a circumstantial – if she would require an eyewitness or require an admission. And that would be the only circumstances that she could give the death penalty. (RT 1903.)

The other instance respondent cites does not concern a significant issue of bias, or an indication of views affecting the prospective juror's suitability. Here the prosecutor is calling the trial court's attention to a questionnaire response indicating that the prospective juror may not be willing to serve in a long trial. (RT 1822; Resp. Brief at p. 74.) Neither of respondent's examples, therefore, is indicative of the trial judge's willingness to explore the jurors' views.

3. <u>The inadequate voir dire requires reversal of the verdicts in both phases of James Robinson's trial under any applicable standard.</u>

The trial court's mishandling of the voir dire requires reversal under any legal

standard this Court applies. As discussed in the AOB, reversal is required without a showing of prejudice because the trial court's failure to gather enough information to determine challenges for cause undermined the very structure of the capital trial. (*See* AOB at pp. 156-160.) Respondent apparently concedes the question of the appropriate standard of reversal, as its brief does not address this discussion in the AOB. Alternatively, James Robinson contends that reversal is mandated even under the more deferential abuse of discretion standard. Here again, a specific showing of prejudice is not necessary because the entire voir dire was so inadequate that it failed to ensure that an impartial jury was selected. (*See* AOB at pp.160-163.) Finally, James Robinson demonstrates that the trial court's ineffective methods of jury selection caused several specific instances of prejudice. Reversal, therefore, is necessary because the error was not harmless in the context of this case. (*See* AOB at pp.163-166.)

(a.) *Respondent does not address the state and federal authority discussed in the AOB holding that significant errors in voir dire constitute a structural defect requiring per se reversal.*

(i.) *It is not necessary to show prejudice where the error amounts to a structural defect in the trial process.*

As discussed above and in the AOB, the trial court's multiple errors in jury selection resulted in a nearly complete denial of general voir dire. This type of error is reversible per se without a showing of prejudice for two reasons. First, the consequences of a refusal to allow voir dire are necessarily unquantifiable and indeterminate. Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied. (***Morgan v. Illinois***, *supra*, 504 U.S. at p.739; ***People v. Cash*** (2002) 28 Cal.4th 703; ***People v. Wheeler*** (1978) 22 Cal.3d 258, 283.)

The second reason concerns the importance of the rights involved. The inadequate jury selection procedures undermined the very structure of the capital trial. (*See* AOB at pp. 156-160.) Given the lack of a meaningful jury voir dire, there is no assurance that either of

the two juries were impartial. The trial court's errors in the voir dire are, therefore, presumptively prejudicial and reversal is mandated without a showing of prejudice. (AOB at pp. 156-157; ***People v. Wheeler,*** *supra,* 22 Cal.3d 258, 283 ["The right to a fair and impartial jury is one of the most sacred and important of the guaranties of the constitution. Where it has been infringed, no inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."]; see also ***People v. Gilbert*** (1992) 5 Cal.App.4th 1372, 1397; ***People v. Martinez*** (1991) 228 Cal.App.3d 1456, 1460.) Federal authority affirming the fundamental values associated with the right to a public trial also suggests that interference with this right requires reversal without any showing of prejudice. (See ***Judd v. Haley***, 11th Cir. 2001) 250 F.3d 1308; ***Waller v. Georgia*** (1984) 467 U.S. 39, 49.)

The errors in this case affected the very foundation of the criminal trial, the guarantee of an impartial jury. Because the basis of the entire trial is questionable, the error is necessarily prejudicial. Where "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair" (***Rose v. Clark*** (1986) 478 U.S. 570, 577. *See also*, ***Neder v. United States***, (1999) 527 U.S.1, 9.) Reversal is automatic because, with the entire trial apparatus in question, there is no *object*, so to speak, upon which harmless error scrutiny can operate.

(ii.) *Respondent's discussion of this Court's opinion in* ***People v. Cash*** *is irrelevant and does not address the standard of reversal.*

In ***People v. Cash*** (2002) 28 Cal.4th 703, this Court held that a capital defendant does not need to show specific instances of prejudice where the voir dire is inadequate. Under these circumstances, prejudice is presumed and the judgment is not subject to harmless error review. In ***Cash***, the trial court neglected to voir dire the jury in ***one*** area (the defendant's

prior murder convictions) which might have been outcome determinative in sentencing.[28] As discussed in the AOB, the limitation on voir dire in ***Cash*** was far less significant than the restrictions imposed by the trial court in the voir dire of James Robinson's case. This Court reversed the death judgment in ***Cash*** and, in so holding, it made clear that ***no specific showing of prejudice is needed where the error concerns the comprehensiveness of the entire juror voir dire***:

> A defendant who establishes that any juror who eventually served was biased against him" is entitled to reversal. (***People v. Cunningham***, *supra*, 25 Cal.4th at p. 975; ***People v. Avena*** (1996) 13 Cal.4th 394, 413.) ***Here, defendant cannot identify a particular biased juror, but that is because he was denied an adequate voir dire*** about prior murder, a possibly determinative fact for a juror. By absolutely barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empaneled and acted upon those views, thereby violating defendant's due process right to an impartial jury. (*See* ***Morgan v. Illinois***, *supra*, 504 U.S. at p. 739.) ***The trial court's restriction of voir dire "leads us to doubt" that defendant "was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment"*** (*Ibid.*). (***Cash***, *supra*, at 557 [emphasis added.].)

Respondent ignores the obvious relevance of this decision in so far as it plainly determines the appropriate standard of review for the claims about inadequate jury voir dire. Instead, respondent simply applies a harmless error analysis and reaches its desired conclusion by drawing an irrelevant factual distinction between ***Cash*** and James Robinson's

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[28] In ***Cash***, defense counsel anticipated that two prior murders would be introduced in aggravation during the penalty phase of trial. During voir dire counsel wanted to ask prospective jurors if there were "any particular crimes" or "any facts" that would cause them to automatically recommend death over life without possibility of parole. The trial court refused to allow the inquiry, holding that counsel could not "go past the information." (*Id*. at 554-555.) This Court reversed the death judgment.

case. In its brief, respondent states:

> "Here, however, voir dire was not deficient as to any fact or circumstance of the crimes which was likely to be of great significance to prospective jurors. For this reason, any error is harmless because the record establishes that 'none of the jurors had a view about the circumstances of the case that would disqualify that juror.'" (Resp. Brief at p. 77, quoting ***People v. Cash***, *supra*, 28 Cal.4th at p. 772.)

Respondent not only fails to address the standard of review but misstates the claims on appeal. James Robinson ***does*** contend that the voir dire in this case was deficient as to several specific "fact[s] or circumstance of the crime," race and media publicity among them. (*See* AOB at pp. 166-192.) Apart from this misrepresenting of the claims on appeal, respondent's discussion demonstrates nothing about the proper standard of review for James Robinson's claims concerning the inadequate jury voir dire. For all of the reasons set forth above and in the AOB, the voir dire in this case was far too minimal and superficial to ensure James Robinson's right to an impartial jury in either phase of this capital trial. Pursuant to the decisions of the United States Supreme Court, and according to this Court's decision in ***People v. Cash***, reversal is required without a showing of prejudice.

(b.) *Reversal is required even under the "abuse of discretion" standard without a showing of prejudice.*

According to this Court's decision in ***People v.Cash,*** James Robinson's convictions and sentence should be automatically reversed. However, reversal is also required if this Court chooses to apply the more deferential abuse of discretion standard. Here too, a specific showing of prejudice is not necessary.

Inadequate voir dire bears directly on, and necessarily impairs, the criminal defendant's right to an impartial jury. (***In re Hitchings*** (1993) 6 Cal.4th 97, 110.) As discussed in the AOB, several appellate courts have held that a trial court abuses its discretion under section 223 when the scope of its voir dire is too narrow to produce sufficient information related to challenges for cause. (***People v. Banner***, *supra*, 3

Cal.App.4th 1315; ***People v. Wilborn***, *supra*, at 347.) These courts and federal courts have reversed in cases involving inadequate voir dire applying an abuse of discretion standard. (***People v. Wilborn***, *supra*, 70 Cal.App.4th 339, 347; ***People v. Chapman***, *supra,* 15 Cal.App.4th 136, 141. *See also*, ***United States v. Jones*** (9th Cir. 1983) 722 F2d 528, 529; ***United States v. Baldwin***, *supra*, 607 F2d 1295, 1297.) State courts in other jurisdictions have also reversed convictions applying an abuse of discretion standard where the overall comprehensiveness of the voir dire was challenged. (***State v. Williams***, *supra,* 113 N.J. 393, 550 A.2d 1172, 1186.)

The voir dire in James Robinson's demonstrates the same inadequacies which lead to reversal in the above-mentioned cases. Moreover, there were multiple problems in this voir dire - not merely one or two weak areas in the trial court's handling of jury selection. James Robinson's juries were selected almost entirely on the basis of a hastily completed, written questionnaire which was found to contain numerous mistakes, inaccuracies and incomplete responses. The trial court refused defense counsel's requests for attorney voir dire, which was not opposed by the prosecutor. The court rushed through the voir dire process, selecting the juries in record times. Counsel's requests for more complete information were dismissed in similar fashion. The court insisted upon maintaining exclusive control over jury selection, and then conducted virtually no substantive questioning. In the rare instances when the court did make an inquiry of a prospective juror, the questioning was superficial at best and, in several cases, was actually coercive and/or leading. (*See* AOB at pp.129-155.)

The result of these multiple errors by the trial court was a "lack of significant information regarding jurors' attitudes on a host of issues [which] effectively denied both parties the ability to challenge jurors for cause, and perhaps most importantly left the trial court unable to fairly evaluate their fitness of many jurors to serve." (***State v. Williams***, *supra*, at 1179.) The trial court did not have enough information about these prospective jurors to determine challenges for cause. Its decisions about voir dire and jury selection procedures thus cannot constitute a valid exercise of judicial discretion and are not entitled

to deference on appeal. This Court should independently review the record and reverse the convictions and judgment because there is no assurance that impartial jurors were selected to hear James Robinson's capital case.

(c.) *Respondent fails to refute the showing of prejudice in the AOB resulting from the trial court's ineffective voir dire.*

The virtual absence of useful information about these prospective jurors, due to the trial court's wholly insufficient voir dire, was inherently prejudicial as discussed above. This type of error (where information was not discovered) is necessarily difficult to quantify. However, in the AOB James Robinson notes a few specific instances of identifiable prejudice. (See, AOB at pp. 163-166.) Obvious indications of bias appeared in the voir dire of two jurors who served on the jury in the guilt phase. (CT 257.) One juror plainly stated that he was unable to apply the presumption of innocence.[29] Another juror admitted that he was familiar with the case and suggested that he had been influenced by pre-trial publicity.[30]

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[29] In his questionnaire, Mr. Merager suggested that he would find it difficult to keep an open mind until he had heard all of the evidence.

The Court: There is one question I want to ask you about. This is number 46. 'Will you have any difficulty keeping an open mind until you have heard all the evidence, and you have heard the arguments of both counsel, and the court has given you all the instructions?' Your answer is you would go with that expectation, but something could be said that would form an opinion.
If that happens could you keep that in the back of your head and as to both sides be a fair and impartial juror until the case is finally submitted to you?

P. J. Merager: Yes.

(RT 178.)

[30] Mr. Bianchi indicated that he was familiar with James Robinson's case. He also stated that he routinely followed criminal trials.

The Court: [referring to question number 32 on the questionnaire] '32. What, if anything, have you already learned about this case or about the defendant?

These two jurors provided responses which raised obvious concerns. The trial court failed, in both instances, to probe the jurors' views. The trial judge simply directed the first juror, Mr. Merager, to the desired response. The court learned nothing about the juror's predispositions or biases, or how he might approach the task of sitting on a jury in a capital case. Instead, the judge simply told the juror how he ***ought*** to respond. In the other instance, the trial court did no follow up to determine whether, and to what extent, Mr. Bianchi may have been influenced by pre-trial publicity. In fact, the trial court interrupted Mr. Bianchi when he was trying to answer. Both Mr. Merager and Mr. Bianchi were seated on the jury that convicted James Robinson in the guilt phase of his capital case. (CT 257.)

Respondent finds that there was no need to further question either Juror Merager or Juror Bianchi. According to respondent it is sufficient that, in response to the trial judge in open court both jurors "correctly" answered leading, "yes or no" questions affirming their abilities to be fair and impartial. (Resp. Brief at pp. 78-79.) Respondent further contends that James Robinson has waived any claims regarding the seating of these two jurors because defense counsel did not request further questioning of either Merager or Bianchi. (*Id*.) In connection with this waiver argument, respondent notes that defense counsel did not

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P.J. Bianci:	I don't know anything about the defendant. I read it when it first came out in the paper. That's all. This is close to where I live.
The Court:	Did this information make you favor the prosecution or the defense?
P. J. Bianci:	No.
The Court:	Okay. '35. What are the most serious criminal cases you have followed in the media during the past year?
P. J. Bianci:	All I put down is that King and Milken and Keating, but those aren't . . .
The Court:	'36. Do you try to follow stories about the functioning of the criminal justice system? Do you try?
P. J. Bianci:	I read 'em, yeah.

(RT 123-125.)

exhaust his allotted number of peremptory challenges in selecting the first jury. (Resp. Brief at p. 78.) Neither the facts nor the applicable law support respondent's interpretation.

(i.) *These jurors' responses were not valid and sufficient proof of their fitness to determine this case.*

James Robinson maintains that, for all of the reasons set forth above and in the AOB, the responses of Jurors Bianchi and Merager were not sufficient to satisfy the legitimate concerns about their suitability for this case. Respondent urges this Court to accept the answers at face value in spite of the indications in the record to the contrary. In addition, respondent completely ignores the context in which Jurors Merager and Bianchi answered the court's questions on voir dire.

As discussed in the AOB, the setting of the voir dire encouraged conformity rather than frankness. In ***People v. Williams***, *supra*, 29 Cal.3d 392, 403, this Court recognized that juror responses during voir dire are significantly influenced by what the individual believes the trial court wants to hear. In support of the request for attorney-conducted questioning, defense counsel cited several empirical studies showing that during voir dire jurors tend to avoid contradicting or displeasing the judge, who is perceived as the most highly respected authority figure in the courtroom. Based on this perception, jurors attempt to respond to questions in ways which they believe the judge will approve of. (*See*, CT 200, 207, citing "Judges' Non-Verbal Behavior In Jury Trials: A Threat To Judicial Impartiality," 6 Va.L.Rev. 1226 (1975); Jones, Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation Of Juror Candor, Law and Human Behavior 131 (June 1967).) In the AOB James Robinson also pointed out that holding voir dire in open court with the entire panel present created an additional incentive for jurors to conform to avoid appearing biased or unreasonable. (See AOB at pp.144-147.) Respondent does not address these arguments in the AOB, and fails to account for these influences in its interpretation of the Juror Merager's and Juror Bianchi's responses.

(ii.) *Respondent's own example of thorough voir dire stands in contrast to the court's treatment of these two jurors.*

In its brief, respondent cites the trial court's questioning of Prospective Juror Mrs Nagle as an example of thorough and probing voir dire designed to uncover a prospective juror's biases. (Resp. Brief at p. 75.) Like Juror Merager, Mrs Nagle expressed some potential difficulty maintaining the presumption of innocence in her questionnaire responses. The trial court's questioning of Juror Merager is far less reaching than the voir dire of Mrs. Nagle. [31] The comparison of the voir dire in these two instances is striking. The

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[31]

The Court:	There is one question I want to talk to you about, that's number 29. It says "Does the mere fact that an information," this is an accusatory pleading, "was filed against the defendant cause you to conclude that the defendant is more likely to be guilty or not guilty?" And you wrote "He is more likely to be guilty." Do you understand this information is an accusatory pleading? It is a piece of paper. It is just an accusation. Do you understand that?
P. J. Nagle:	Yes.
The Court:	Do you understand that in every case, every criminal case, from the smallest of traffic tickets to any death penalty case, the defendant is presumed to be not guilty until the contrary is proved. Do you understand that?
P.J. Nagle:	Yes, I do.
The Court:	Do you still feel he is more likely to be guilty because there is a charge against him?
P.J. Nagle:	No, probably not.
The Court:	"Probably" is not good enough.
P.J. Nagle:	No.
The Court:	When I say it is not good enough, I don't want you to change your answer just to please me. Don't worry about me. I like all of you. I don't care how you think. Do you understand this is very, very important? Now again, I am asking you honestly, do you feeling [sic] he is more likely to be guilty because a charge is pending against him?
P.J. Nagle:	I have to say yes. (RT 98-99.)

In his questionnaire, Mr. Merager suggested that he would find it difficult to keep an open

trial court took far more time with Mrs. Nagle. Posing even a ***single*** open-ended question, the court obtained much franker responses. James Robinson contends that, at a minimum the trial court ought to have taken as much time to probe Juror Merager's views. Mr. Merager was seated on James Robinson's jury while Mrs. Nagle was excused for cause.

(iii.) *It was not necessary for counsel to renew objections to the lack of adequate voir dire with respect to these two jurors.*

It is wholly irrelevant that defense counsel did not specifically object and request further questioning of Jurors Merager and Bianchi. (Resp. Brief at p. 78.) Defense counsel had filed an extensive pre-trial motion requesting expanded voir dire. In this connection, counsel noted that the written questionnaires had not provided enough information. Counsel observed that a number of prospective jurors had given troublesome or equivocal responses which needed further clarification in order to assess their ability to serve on this case. (CT 200-212.) The defense motion was heard and argued in the morning of the day when the voir dire was done. Only a few hours before its questioning of Jurors Merager and Bianchi, the trial court had rejected the defense requests for additional voir dire, attorney conducted voir dire and/or sequestered voir dire. Defense counsel had nothing new to add to the

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mind until he had heard all of the evidence. The trial court's voir dire proceeded as follows:

The Court: There is one question I want to ask you about. This is number 46. 'Will you have any difficulty keeping an open mind until you have heard all the evidence, and you have heard the arguments of both counsel, and the court has given you all the instructions?' Your answer is you would go with that expectation, but something could be said that would form an opinion. If that happens could you keep that in the back of your head and as to both sides be a fair and impartial juror until the case is finally submitted to you?

P.J. Merager: Yes. (RT 178.)

previously made objections at the time these two jurors were questioned. The cases respondent cites do not further its argument. Both of these cases involve counsel's failure to object in the first instance. Neither of these cases holds that an issue was waived by failure to renew a previously made objection. (See Resp. Brief at p. 66, ***People v. Avena***, *supra*, 13 Cal.4th 394, 413; ***People v. Sanchez*** (1995) 12 Cal.4th 1, 61-62.)

(d.) *These claims are not waived by defense counsel's failure to exhaust all peremptory challenges.*

Respondent asserts that James Robinson's claims concerning the jury selection in the first trial are waived because counsel did not exhaust all of the peremptory challenges. (Resp. Brief at p. 78.) The same waiver claim is made for the second jury. Although respondent notes that counsel in the second trial did exhaust all 20 peremptory challenges, defense counsel "did not express dissatisfaction with the jury as sworn." (*Id*. at 78, citing ***People v. Bittaker***, *supra*, 48 Cal.3d 1046; ***People v. Avena***, *supra*, 13 Cal.4th at p. 413.) Respondent concludes that "Appellant's claim of prejudice fails because 'when the jury was finally selected, defendant did not claim that any juror was incompetent, or was not impartial.'" (Resp. Brief at 78-79, quoting ***People v. Bittaker***, *supra*, 48 Cal.3d at 1087.)

Here again respondent mis-characterizes the claims on appeal and then supports its position with inapplicable case law. As previously discussed, defense counsel objected strenuously to the sufficiency of the trial court's voir dire. The basic objection at trial and on appeal is that there was not enough information about the prospective jurors for the court or counsel to select an impartial jury. Due to the trial court's inadequate voir dire, counsel had little or no reason to select one juror over another. Under these circumstances, is nonsensical to require that counsel exhaust every peremptory challenge.

People v. Bittaker, *supra*, 48 Cal.3d 1046, does not advance respondent's argument. In that case the defendant challenged the adequacy of the death qualifying ***(Witherspoon***) voir dire. This Court found that no prejudice was shown because either the prosecutor or defense counsel had exercised peremptory challenges to exclude all prospective jurors

whose voir dire questioning was insufficient. In James Robinson's case, there is a complete absence of information and, as discussed above, it is impossible to quantify the extent of the prejudice. Moreover, James Robinson has identified two instances where jurors (Merager and Bianchi) were seated despite obvious indications of bias. ***People v. Avena***, *supra*, 13 Cal.4th 394, 413 is also inapplicable. There this Court found that counsel had waived a claim by not making an objection in the first instance. As discussed above, defense counsel in James Robinson's case made a substantial record of specific objections to the adequacy of the trial court's voir dire. On this record, it cannot be credibly argued that these claims are waived.

E. Respondent Fails To Justify Or Excuse The Trial Court's Failure To Conduct A Voir Dire Sufficient To Discover Racial Prejudice.

James Robinson challenges the overall comprehensiveness of the voir dire as previously discussed. In addition, he raises specific challenges to the sufficiency of the trial court's questioning in two areas: racial bias and exposure to prejudicial pre-trial publicity. (See AOB at pp. 166-192.) The trial court's voir dire in these areas was especially lacking and surely resulted in the retention of biased jurors. As discussed below, in Sub-section F, *infra*, and in the AOB, these failures alone justify reversal of the convictions and sentence.

1. The circumstances of James Robinson's case made voir dire on race essential to selecting an impartial jury.

Racial issues were especially sensitive in James Robinson's case for several reasons. James Robinson, an African-American, was charged with killing two young Whites. This fact alone required thorough voir dire on racial issues. Because this was a capital case, there was an even greater need to ferret out inappropriate racial attitudes through voir dire. As discussed below and in the AOB, in this case additional circumstances compelled a thorough and searching inquiry into the prospective jurors' racial attitudes.

The trial court was well aware of the racial tensions pervading the Los Angeles area at the time of this trial. Defense counsel pointed out that, in the then current environment, the prospective jurors, the vast majority of whom were White, would likely be feeling some subtle or subconscious animosity or fear about Blacks. Counsel further noted that the atmosphere of racial friction would make it even more difficult for these prospective jurors to publicly admit that they might be biased. As discussed in the AOB, the trial court's refusal to sequester the voir dire made such an admission even less likely. (*See* AOB at pp. 166-182.)

Despite these circumstances calling for a greater than average amount of thorough voir dire on racial and ethnic attitudes, the trial court virtually ignored the subject. Only one general question in the written questionnaire called for information on prospective jurors' racial attitudes. Even where the prospective jurors' completed questionnaires indicated possible bias, the court undertook no significant voir dire concerning race.

James Robinson could not receive a fair trial before an impartial jury unless the court excluded prospective jurors who could not be impartial because of their racial prejudices. The trial court's voir dire was wholly inadequate for discovering this information. As result of the court's abdication of its duty to conduct a constitutionally appropriate voir dire, it is highly likely that biased jurors decided this case. Accordingly, the judgments of conviction and the sentence must be reversed. (***Turner v. Murray***, *supra*, 476 U.S. 28. *See also*, ***Aldridge v. United States***, *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.)

2. Respondent fails to show that the trial court adequately investigated racial prejudice during voir dire.

Respondent contends that the trial court adequately covered the subject of racial bias. (Resp. Brief at pp. 56-60.) The support for this argument, however, is scant. In addition, respondent overlooks other facts which reveal that the trial court was not interested in uncovering possible racial bias in the jury pool.

(a.) *The single general question in the standard form juror questionnaire was not sufficient to identify racial prejudices.*

Respondent cites the trial court's questionnaire, which contained only one general question concerning racial prejudice, to support its contention that race was adequately covered in the voir dire. (Resp. Brief at p. 57.) [32] Respondent further notes that "the question was followed by several blank lines, allowing prospective jurors to explain their answers." (Resp. Brief at p. 57.) However, as discussed previously and in the AOB, it is irrelevant that the prospective jurors had space on the paper to write an answer when the trial court gave them nowhere near enough time to reflect and to compose a meaningful response. Even if the written responses had been thorough and, as previously noted, defense counsel clearly stated that they were inadequate, this would not resolve the claim as respondent implies.

Voir dire on racial and ethnic prejudice is constitutionally required where a defendant is accused of a violent crime against a victim of another race or ethnicity. (***Turner v. Murray***, *supra*, 476 U.S. 28; *see also*, ***Aldridge v. United States***, *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.) Fundamental constitutional rights merit far more protection than they were given here. Because this was a capital case, the trial court was obligated to be especially vigilant. The single general question on the Prospective Juror Questionnaire may have been a starting point, but it was vastly inadequate in a case involving a Black defendant and White victims. The trial court's management of the voir dire compounded the problem by making it virtually impossible to obtain any useful information from the prospective jurors as they were questioned. The court refused to allow any attorney questioning. The trial court failed to follow up even where the prospective jurors' responses indicated serious racial bias. Respondent cites no authority, and James

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[32] The question stated: "A part(ies), attorney(s) or witness(es) may come from a particular national, racial or religious group or has a lifestyle different from your own. Would that fact affect your judgment or the weight and credibility you would give his or her testimony?" (CT 247.)

Robinson is aware of none, holding that the voir dire was adequate based on a single written question with little or no follow-up. As discussed below and in the AOB, this set of circumstances cannot be considered a constitutionally adequate voir dire on race.

(b.) *The trial court failed to do appropriate follow-up questioning, even where juror responses indicated racial bias.*

Respondent tries to justify the trial court's handling of voir dire concerning racial bias based on three examples taken from the voir dire of the first and the second juries. (Resp. Brief at p. 57-58.) These instances do not support respondent's interpretation. On the contrary, as discussed in the AOB, the court's exchanges with the prospective jurors demonstrate its complete lack of concern with ferreting out bias.

In respondent's first example, Prospective Juror Mr. Gilbert frankly admitted his racial biases in his written response on the questionnaire. Mr. Gilbert wrote: "I might - I try to control my prejudices but depending on what the differences were I might ascribe more or less weight to that person." (CT 564.) The trial court's response was to state:

> "I am going to give you instructions on how to judge the credibility of a witness, how you can tell whether the witness is telling the truth and telling a lie, and it has nothing to do with any racial characteristics or ethnic characteristics or any different life-style than yours. That is not to be considered in determining whether a witness is telling the truth or not."
>
> "Do you think you can follow that?" (RT 196.)

Mr. Gilbert, predictably, gave the desired affirmative response. The trial court retained the prospective juror, and defense counsel had to remove him with a peremptory challenge. (RT 212.)

As discussed in the AOB, this is not a probing exploration of the prospective juror's racial views. The trial court lectured the juror, told him the proper response, and then posed a leading question which, if answered candidly, would have the prospective juror publicly admit to holding socially unacceptable, racist views. Mr. Gilbert had every incentive to go along with the trial judge's agenda. The trial court's handling of this instance in voir dire

demonstrates far more about the judge than it does about this prospective juror. This court is clearly interested only in obtaining the "correct" response, i.e. the answer which avoided disqualification and permitted the court to continue its race through jury selection without further delay.

Respondent notes two other instances where "the trial court specifically addressed prospective jurors whose written answers on the questionnaire indicated potential racial issues." (Resp. Brief at p. 59.) Here again, respondent misrepresents the record to support its argument. One of the instances which respondent notes as an example of appropriate voir dire had nothing to do with racial bias. Prospective Juror Bradley was African American. The trial court posed some additional questions to Prospective Juror Bradley not because of his race but because he indicated on the questionnaire that he might be unable to serve due to other circumstances. Mr. Bradley was reluctant to serve on this jury for several reasons which had nothing whatsoever to do with racial bias. As respondent notes, Mr. Bradley told the court that "he did not want to use race or color for any excuse," but his mother had a brain tumor, he was under severe pressure at his job and, for several other reasons, might have trouble serving in a long trial. (RT 1849.) Counsel, and not the prospective juror, expressed concern with racial issues. The prosecutor was willing to stipulate to excuse Mr. Bradley. Defense counsel immediately realized that the prosecutor wanted to eliminate the only African American prospective juror. Defense counsel was unwilling to stipulate to excuse Mr. Bradley because the entire venire contained only a handful of people of color. (RT 1849-1852.)

Respondent's other example from the second trial, the voir dire of Prospective Juror Thompson, not only fails to further respondent's argument but demonstrates the inadequacy of this court's voir dire when confronted with an unequivocal statement of racial bias. On his questionnaire, Prospective Juror Thompson stated that he would "possibly" be biased. (RT 1886.) Here again, the trial court asked no questions to discover more information about the nature and extent of the prospective juror's admitted prejudices. The court

delivered another short lecture, and then coerced a "correct" response which avoided the necessity of excusing this prospective juror for cause. (RT 1887.) The exchange between the trial court and Mr. Thompson took place in open court and not at side bar. As discussed above and in the AOB, this put undue pressure on the prospective juror to provide the socially acceptable response. (*See* AOB at pp.171-172.) Defense counsel was forced to remove Mr. Thompson with a peremptory challenge. (RT 1908.) As respondent notes in another context, defense counsel exhausted all 20 peremptory challenges in the second jury's selection. (Resp. Brief at p. 78; RT 1884, 1863-1864, 1879-1880, 1891-1892, 1907-1909, 1923, 1929, 1932.)

As discussed in the AOB, the trial court did nothing to learn more about these prospective jurors' racial biases. The court did not ask any substantive questions, and neglected the most obvious and relevant inquiry, i.e., how the prospective juror might react to a situation where the victim(s) and the defendant were of different racial or ethnic backgrounds. In the first trial, the prospective jurors were not informed that the victims were white. There were no questions designed to discover whether these people could be fair and impartial in this case where James Robinson, a Black man, was accused of killing two young White men.

(c.) *The trial court's failure to effectively voir dire the second jury venire concerning racial attitudes is not overcome by its general admonishments against bias.*

At defense counsel's request, the trial court made a blanket statement about race before beginning voir dire for the second jury. The court stated:

> One thing I will mention is the defendant, as you can see, is African American. The victims in this case are White. Now race is not an issue at a penalty trial and is not to be considered by you.
> Is there anyone on the panel before me that would ignore this dictate?
> (RT 1807.)

As respondent notes, the court reminded the group of prospective jurors not to consider race

four other times during voir dire. (Resp. Brief at p. 59; RT 1845, 1867, 1880, 1893.) The trial court repeated this dictate three more times during the voir dire of a particular prospective juror. (RT 1895-1897;1906;1923.) Apart from the trial court's useless exchange with Prospective Juror Thompson as discussed above, these instances are the ***only*** mentions of racial prejudice throughout the entire voir dire for the penalty phase jury.

Respondent contends that the trial court's voir dire on racial bias was adequate. (Resp. Brief at p. 60-65.) However, respondent cites no case law, and James Robinson is aware of none, holding that simply admonishing a jury is an adequate safeguard against racial bias. On the contrary, as discussed below and in the AOB, the United States Supreme Court and this Court have made clear that more must be done to ferret out bias, especially in the context of a capital case. (*See* AOB at pp. 166-182; ***Turner v. Murray,*** *supra* 476 U.S. 28; *see also*, ***Aldridge v. United States***, *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182; ***People v. Holt*** (1997) 15 Cal.4th 619, 660.)

(d.) *Respondent minimizes the significance of racial issues in this case by ignoring the larger social context of this trial which increased the probability and severity of racial prejudice.*

Respondent's assertion that racial issues were not significant in this case is almost incredible given the facts of the case and the surrounding circumstances. Defense counsel made a substantial showing in support of the motion for expanded voir dire concerning racial attitudes. In the pretrial motion and at the hearing counsel described for the trial court the numerous ways in which racial attitudes impacted this trial. Some of the racial aspects of this trial were obvious. James Robinson, an African American, was accused of killing two young White males. As counsel pointed out in the request for additional voir dire concerning race, African Americans comprised only 4% of the venire in the North Valley District, as opposed to 11% county-wide. (*See*, CT 200, 203.) Moreover, the immediate residential community where the crime occurred was almost entirely White. These

circumstances alone justified careful and searching voir dire of the sort designed to reveal subtle biases which might alter the prospective jurors' views of the evidence. (*See* AOB at pp. 168-170.)

Defense counsel also discussed the more subtle racial aspects of this trial, and the position of this case in the larger social context. James Robinson's case was being tried during a time of heightened racial tensions in Los Angeles. This case went to trial in April of 1993, less than a year after several White police officers were acquitted of charges arising from their videotaped beating of a Black man, Rodney King. The announcement of the verdict in the King case set off several days of rioting, looting and violence in the city. In April of 1993, the Rodney King case was being tried again, this time in a federal court. In another high profile trial, a jury was determining whether male black suspects were guilty of beating white truck driver Reginald Denny during the unrest which followed the verdict in the first King case. (*See*, RT 78-79; CT 200-215.) Defense counsel cautioned that this climate would make prospective jurors extremely reluctant to acknowledge any racial prejudices in open court. (RT 74-82.)

As discussed in the AOB, counsel observed that the racial tensions in Southern California were likely to affect the voir dire responses in several ways. The prospective jurors, the vast majority of whom were White, would likely be feeling some subtle or subconscious animosity or fear about Blacks. This atmosphere of racial friction would make it even more difficult for these prospective jurors to publicly admit that they might be biased. The trial court's failure to sequester the voir dire made such an admission even less likely. (*Id.*)

3. <u>The guilt phase voir dire concerning racial bias was grossly inadequate under clearly established United States Supreme Court precedent and under California law.</u>

(a.) *Respondent cannot excuse the trial court's failure to inform the first jury that this was an inter-racial crime.*

Prospective jurors in the first jury never learned that the victims were White. In spite

of this glaringly obvious error, respondent maintains that the trial court conducted sufficient voir dire on possible racial bias in the first jury's selection. (Resp. Brief at pp. 64-65.) Respondent's position is plainly contradicted by established state and federal law.

In ***Turner v. Murray,*** *supra,* 476 U.S. 28, the United States Supreme Court held that a defendant accused of an interracial capital crime is constitutionally entitled to have prospective jurors informed of the victim's race ***and*** questioned on the issue of racial bias. (*See also,* ***Aldridge v. United States****, supra,* 283 U.S. 308; ***Rosales-Lopez v. United States****, supra,* 451 U.S. 182.) This Court too has expressly held that "adequate inquiry into possible racial bias is . . . essential in a case in which an African-American defendant is charged with commission of a capital crime against a White victim." (***People v. Holt****, supra,* 15 Cal.4th 619, 660.)

(b.) *The trial court's failures to disclose the victims' race and to conduct thorough voir dire on race in selecting the first jury was not harmless error as respondent contends.*

Respondent concedes that the trial court erred by failing to tell the first jury that the victims were White. (Resp. Brief at pgs. 58-59; 64.) Respondent argues, however, that the error was harmless for two reasons. First, relying on the United States Supreme Court's decisions in ***Turner v. Murray****, supra,* 476 U.S. 28, and ***Ristaino v. Ross*** (1976) 424 U.S. 589, respondent contends that no harm resulted because the first jury did not determine the penalty. (Resp. Brief at pp. 64-65.) Second, respondent claims that the erroneous failure to inform the prospective jurors that this was an interracial crime was harmless because the single written question in the standard form Prospective Juror Questionnaire would reveal whether prospective jurors could be impartial in a case involving an inter-racial crime. (Resp. Brief at p. 65.) Neither of these arguments have merit.

(i.) *The single general question on the standard form was not framed so as to reveal prospective jurors' biases about interracial crimes.*

Respondent asserts that there was no prejudice from the trial court's failure to tell prospective jurors in the first jury that this was an interracial crime because, in respondent's view, the single question on the standard form questionnaire "was adequate to reveal such bias among the prospective jurors." (Resp. Brief at p. 65.) This contention has no legal support and is logically incorrect. ***Turner v. Murray*** requires probing voir dire on racial attitudes. There is no law holding that one question is sufficient. In the AOB, James Robinson describes how inadequate this single question was, especially under the circumstances present here, i.e., an interracial capital case tried in an almost all White community in a time of unusual racial tension in the surrounding area. Defense counsel made the same observations in the pretrial motion and hearing asking for expanded voir dire on racial attitudes. (*See* AOB at pp. 166-170.)

Moreover, the question in the standard form did not address the issue of interracial crime. The prospective jurors were asked to state whether the fact that an attorney or a witness might come from a particular national, racial or religious group or has a life-style different from the juror's would affect that prospective juror's judgment or the weight he or she would give to the testimony. This inquiry is not designed to elicit information about how the prospective jurors would react to case where the victims and the defendant are of different races. As the Supreme Court recognized in ***Turner v. Murray***, the interracial nature of the crime is likely to be an area of special sensitivity. The prospective jurors in the first jury had no idea that the defendant was accused of killing two White boys. Thus, they had no reason to address this at all in their written responses or even in the rare instances when the trial court raised a brief inquiry about their responses to this question. Under these circumstances, respondent cannot reasonably rely on the questionnaire to produce information about possible bias in an interracial case.

(ii.) *It is irrelevant that reversal in* ***Turner v. Murray*** *was limited to the penalty judgment.*

In ***Turner v. Murray***, *supra,* 476 U.S. 28, the United States Supreme Court held that

a defendant accused of an interracial capital crime is constitutionally entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias. The United States Supreme Court reversed the death judgment in ***Turner***, holding that the trial court's refusal to question prospective jurors about possible racial bias compelled automatic reversal of the penalty phase verdict. Although the Court in ***Turner*** applied automatic reversal only to the penalty phase, the Court did not hold, as respondent appears to believe, that the extent of guilt phase voir dire on race is a matter of trial court discretion which is insulated from reversal on appeal.

The ***Turner*** Court made clear that voir dire on racial bias must be adequate in capital cases involving an interracial crime. The Supreme Court recognized that careful constitutional scrutiny is needed in assessing the adequacy of voir dire in the guilt phase because prejudice may also color a juror's view of the evidence during the guilt determination. In his dissent from the portion of the opinion affirming the guilt phase conviction, Justice Brennan observed that "the opportunity for racial bias to taint the jury process is . . . equally a factor at the guilt phase of a bifurcated capital trial." (***Turner*** at p. 41.)

This Court has not differentiated between the guilt and penalty phases when assessing the adequacy of voir dire on race issues in capital cases. A failure to voir dire sufficiently on racial bias is considered an equally serious error where it occurs in the guilt phase of a criminal case. As discussed in the AOB, this Court's decision in ***People v. Holt***, *supra*, 15 Cal.4th 619, indicates that prospective jurors on both juries in James Robinson's case were not sufficiently questioned about racial issues. Several circumstances which made the voir dire in ***Holt*** constitutionally adequate were conspicuously absent here. In ***Holt***, this Court found that the voir dire on race had been sufficient because:

> Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias and took advantage of that opportunity. The voir dire conducted in this case covered substantially all of the areas of inquiry in the Standards, and followed completion

> by each prospective juror of a questionnaire that covered an even broader range of topics. Those inquiries were supplemented by
> additional questioning of the jurors by counsel.

(*Id.* at 661.)

As discussed in the AOB, James Robinson's case is readily distinguishable and those distinctions indicate a different result here. The trial court in ***Holt***, specifically asked whether the prospective jurors had beliefs about Black people as crime perpetrators. The trial judge repeatedly reminded prospective jurors that the defendant's race was not a factor - something which the court in James Robinson's case did only a few times in selecting the second jury. Most significantly, the trial court in ***Holt*** allowed the attorneys thorough voir dire concerning racial bias. (See AOB at pp. 175-177.)

The defendant in ***Holt*** had ample opportunity to discover racial prejudices. In James Robinson's case, there was virtually ***no*** opportunity to make such a discovery. The standardized form questionnaire only asked whether the juror would give different weight to a witness' testimony if that witness was from a particular national, racial or religious group. (CT 247.) As a result, it is impossible to determine whether members of the first jury were impartial or whether their racial prejudices impacted their evaluation of the evidence in the guilt phase. (***People v. Holt,*** *supra*, 15 Cal.4th at 661; ***People v. Cash***, *supra*, 28 Cal. 4th 703.) This fundamental unfairness is a structural error which requires automatic reversal of the verdicts obtained in the guilt phase. (***Arizona v. Fulminante*** (1991) 499 U.S. 279.)

4. <u>The voir dire on race was inadequate in both phases of this capital trial.</u>

(a.) Respondent misstates relevant *decisions of the California and United States Supreme Courts requiring adequate voir dire on racial attitudes in a capital case involving an inter-racial crime.*

The other United States Supreme Court decisions respondent cites do not advance its argument for the sufficiency of the voir dire on race. Respondent's observation that "'the mere fact that a defendant is black and that a victim is white' does not constitutionally mandate an inquiry into racial prejudice " is irrelevant because, as respondent must acknowledge, ***Ristaino v. Ross*** was not a capital case. (Resp. Brief at 65, quoting ***Ristaino v. Ross***, *supra* 424 U.S. 589, 597.) The law for capital cases is clearly established by ***Turner v. Murray*** which holds that a defendant accused of a capital crime is constitutionally entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias. (***Turner v. Murray***, *supra*, 476 U.S. 28.) It is similarly immaterial that "'there is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups,'" because this is not the basis of James Robinson's claim. (Resp. Brief at p. 65, quoting ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182, 189-190.) James Robinson's claim concerns the lack of sufficient voir dire to discover racial biases. He does not contend that presumptive prejudices required additional voir dire beyond what was reasonably adequate to discover unacceptable racial attitudes which could affect the prospective jurors' abilities to be impartial.

(b.) *It is irrelevant that race was not "inextricably bound up" with the trial issues.*

Respondent contends that more extensive voir dire on racial bias is not necessary unless "racial issues are "inextricably bound up with the conduct of the trial.'" (Resp. Brief at pp. 61-62, quoting ***Ristaino v. Ross,*** *supra,* 424 U.S. 589, 597-598.) According to respondent, James Robinson did not make a showing sufficient to meet this standard. (Resp. Brief at pp. 62-63.) Respondent characterizes the defense argument for expanded voir dire in this area as being based on "racial tensions" affecting the Los Angeles area, and the fact that the victims were White and James Robinson is Black. (Resp. Brief at pp. 63-64.) Because the specific facts of the case do not involve racial hatred according to the theories advanced by either side, respondent concludes that "[t]here were simply no salient racial

issues in the instant case." (Resp. Brief at p. 64.) Respondent here mis-states the record and mis-characterizes the claims on appeal.

(i.) *The defense motion made a substantial showing of possible racial bias deserving increased attention in voir dire in this capital case.*

As discussed above and in the AOB, the defense made a substantial showing of possible racial prejudice in the community from which the jury venire was drawn. Counsel did not, as respondent suggests, simply rely on generalized, unsupported allegations of racial prejudice. As counsel pointed out, African Americans comprised only 4% of the venire in the North Valley District, as opposed to 11% county-wide. (*See*, CT 200, 203.) The community in which the crime occurred was almost entirely White. Defense counsel pointed out for the court several other specific features surrounding this case. James Robinson's case was being tried during a time of heightened racial tensions in Los Angeles. This case went to trial in April of 1993, not quite a year after several White police officers were acquitted of charges arising from their videotaped beating of a Black man, Rodney King. The announcement of the verdict in the King case touched off several days of rioting, looting and violence in the city. In April of 1993, the Rodney King case was being tried again, this time in a federal court. In another high profile trial, a jury was determining whether male black suspects were guilty of beating white truck driver Reginald Denny during the unrest which followed the verdict in the first King case. (*See*, RT 78-79; CT 200-215.) In this historical context, prospective jurors would be extremely reluctant to be candid when asked about racial bias. As defense counsel noted:

> That would conclude my submission with just one additional caveat, and that is, that we are at a particularly unusual moment in history here in Los Angeles County in the sense that there are two major publicity cases, not this one, pending in downtown Los Angeles. At least one seems to have the prospect of going

> to the jury by the end of this week. Almost all of the jurors have indicated a familiarity with one, or both, of those particular cases, and I have a concern with respect to the expression of opinion by each individual juror that would have to do with their feelings relative to their duties as jurors in light of this particularly unusual and significant period of legal history in this country.

(RT 78-79.)

The trial court was also on notice of specific indications of racial prejudice appearing in this panel of prospective jurors. At the motion's hearing, defense counsel stated that, after reading the jurors' responses to areas of the questionnaire concerning racial biases, further questioning was indicated. (*See*, RT 74-75.) The trial court disagreed and found based on its review of the completed questionnaires that no further inquiry was necessary. (RT 82-84.)

(ii.) ***People v. Chaney*** *does not advance respondent's argument*.

People v. Chaney (1991) 234 Cal.App.3d 853, is not similar to James Robinson's case as respondent claims. ***Chaney*** was not a capital case. As discussed above and in the AOB, voir dire must be more thorough in capital cases involving victims and defendants of different races. (See AOB at pp. 173-178; ***Turner v. Murray***, *supra*, 476 U.S. 28. *See also*, ***Aldridge v. United States***, *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.) In addition, there was far more evidence of potential bias here than was presented in ***Chaney***. Defense counsel there "presented no evidence to support her hypothesis [of potential bias]" ***(People v. Chaney***, *supra*, 234 Cal.App. 3rd 853, 862-863.) James Robinson's counsel supplied the trial judge with several, verifiable reasons for expanded voir dire on race. This trial court had every reason to undertake a more thorough inquiry on racial attitudes.

(c.) *It is irrelevant that the crime itself did not appear to be*

racially motivated.

Respondent next argues that no further voir dire was needed because "the circumstances of the crime - the late-night robbery of a sandwich shop and the murders of a shop employee and visitor - were unlikely to raise the issue of race." (Resp. Brief at p. 63.) Respondent further notes that James Robinson's defense did not rely on racial prejudice, and that two of the prosecution's main witnesses were Black. (*Id*.) These factors are completely irrelevant and the cases respondent cites do not hold otherwise.

As discussed above and in the AOB, the United States Supreme Court and this Court have held that voir dire must be adequate to discover whether racial prejudices might prevent a prospective juror from being impartial. Particularly in a capital case, voir dire in this area is constitutionally required where the defendant and victims are of different races. (See AOB at pp. 173-178; ***Turner v. Murray***, *supra*, 476 U.S. 28; ***People v. Holt***, *supra*,15 Cal.4th 619, 660. *See also*, ***Aldridge v. United States***, *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.) There is no requirement that race be "inextricably bound up" with the facts or the issues to be tried. As respondent notes, additional voir dire on racial bias is needed where race is a central factor in the crime or a predominant theme for the defense. However, these cases plainly do not limit the need to ferret out racial bias to those circumstances. (See, Resp. Brief at p. 63, citing ***Ham v. South Carolina*** (1973) 409 U.S. 524; ***In re Jackson*** (1992) 3 Cal.4th 578, 588, fn.#5; ***People v. Wilborn***, *supra*, 70 Cal.App.4th 339, 344.)

5. <u>The trial court's voir dire of the second jury was inadequate to discover racial prejudice and this error requires reversal of the penalty decision.</u>

The trial court's voir dire on racial attitudes was equally inadequate in the selection of the second jury which determined the penalty in James Robinson's case. As discussed above and in the AOB, the trial court used the same standard form juror questionnaire containing only one general question about racial bias. The court allowed no attorney

questioning in the second jury's selection. At defense counsel's request, the court did make the following announcement:

> Now, one thing I will mention is the defendant, as you can see, is an African-American. The victims in this case are White. Now race is not an issue at a penalty trial and is not to be considered by you.
>
> Is there anyone on the panel before me that would ignore this dictate?
>
> Negative response. (RT 1807.)[33]

This was the extent of the court's investigation into racial prejudice in the penalty phase. Even where prospective jurors' written responses clearly indicated racial biases, the trial court failed to probe the issue. As discussed above and in the AOB, the trial judge virtually put the proper words into jurors' mouths to avoid either more questioning or an excusal for cause.[34] (See AOB at pp. 193-197.) The questioning was done in open court, which undoubtedly inhibited prospective jurors from stating a less than politically correct viewpoint by admitting to some bias. (*Id.*)

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[33] The trial court reminded the jurors not to consider race four times as new groups of prospective jurors were called for questioning. The court did nothing more. (*See*, RT 1845; 1880; 1906; 1910.)

[34] The Court: Question number 47, regarding a party or an attorney or a witness may come from a particular national, racial, or religious group or has a life-style different from your own. And the question is would that fact affect your judgment or the weight you would give his or her testimony? And your answer is 'Possibly.'

P.J. Thompson: No.

The Court: Do you understand I am going to give the jury instructions how to view a witness? What you use to base the believability of a witness, certain factors. No factors concern ethnicity, race, life-style. Do you understand that is not to be taken into account?

Do you follow that?

P. J. Thompson: Yes. (RT 1886-1887.)

Respondent apparently contends that the trial court's voir dire of the second jury was constitutionally adequate because the Court announced that the victims were White and the defendant Black, and repeated a general admonishment to the jurors not to consider race on several occasions during jury selection. (Resp. Brief at p. 61.) Respondent is incorrect and its analysis is not supported by the decisions of the United States Supreme Court or the California Supreme Court.

As discussed above and in the AOB, the essence of the Supreme Court's decision in ***Turner v. Murray*** is that voir dire must be probing and thorough and the questioning adequate to discover racial bias. The ***Turner*** decision establishes that penalty phase reversal is automatic where the court fails to inform the prospective jurors that they may be chosen to hear an interracial case. Nowhere in ***Turner*** does the Supreme Court state that it is constitutionally ***sufficient*** to merely announce that the victims and the defendant are of different races.

In the ***Turner*** opinion the United States Supreme Court suggests that more attention should be paid to racial issues in voir dire, particularly in the context of a capital case:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are more violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

(*Id* at p. 35.)

As discussed in the AOB, this Court and other California courts have also

recommended searching voir dire to discover both overt and more subtle racial biases. (*See*, AOB at pgs. 179-181; ***People v. Taylor***, *supra*, 5 Cal.App.4th 1299, ["bias is seldom overt and admitted. More often, it lies beneath the surface. An individual juror 'may have an interest in concealing his own bias or may be unaware of it'" (*Id.* at 1312, quoting ***Smith v. Phillips*** (1982) 455 U.S. 209, 221, 222 [concurring opinion by O'Connor, J.].) ***People v. Wells*** (1983) 149 Cal.App.3d 721, 727.

The trial court's voir dire in ***Taylor*** was similar to the court's questioning on racial prejudice in James Robinson's case. In ***Taylor***, the trial court pointed out the fact that the defendant was African-American and the victim Hispanic. The court told the jurors that race should be a neutral factor under the law and that people should not be judged based on race or ethnicity. The court then asked the jurors is anyone disagreed with that principle. The court of appeal found that this voir dire on racial bias was inadequate. The court in ***Taylor*** noted that the trial court had told the jurors about the defendant's and victim's races, and informed them that race should not be a factor. The trial court also asked whether the prospective jurors could put side any biases they may have had as required by the United States Supreme Court's decisions in this area.[35] However, the court of appeal was not satisfied with this voir dire:

> [T]he [trial] court asked no questions designed to elicit whether any juror actually held such bias. In a case such as this, where there is a potential of racial or other invidious prejudice against the defendant, a further inquiry should be made.

(People v. Taylor, *supra*, 5 Cal.App.4th 1299, 1316.)

6. <u>The judgment returned in the penalty phase is subject to automatic reversal.</u>

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[35] *See*, ***People v. Taylor***, *supra*, 5 Cal.App.4th at 1313-1316, discussing, inter alia, ***Mu'Min v. Virginia***, *infra*, 500 U.S. 415; ***Turner v. Murray***, *supra*, 476 U.S. 28; ***Aldridge v. United States,*** *supra*, 283 U.S. 308; ***Rosales-Lopez v. United States***, *supra*, 451 U.S. 182.

For all of the reasons discussed above and in the AOB, the voir dire concerning racial bias was completely insufficient for both the first and the second jury. Respondent argues that the voir dire (consisting of the single written question and minimal follow-up by the trial court) was sufficient to disclose racial prejudices. However, should this Court find that the racial voir dire was inadequate, the penalty judgment must be reversed. Respondent does not contend otherwise. (See Resp. Brief at pp. 60-65.) Without searching voir dire in this area, there can be no assurances that the second jury was fair and impartial. Because there is no assurance of impartiality for either the first jury or the second jury, James Robinson was denied several fundamental constitutional rights: the right to a fair trial before an impartial jury; the right to due process of law; the right to fundamental fairness; and, the right to a reliable determination of guilt and of the penalty. (U.S. Constit. Amends, V, VI, VIII and XIV; ***Irwin v. Dowd***, *supra*, 366 U.S. 717, 722; ***Rose v. Clark***, *supra*, 478 U.S. 570, 577; ***Beck .v. Alabama***, *supra*, 447 U.S. 625; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***People v. Cash***, *supra*, 122 Cal.Rptr.2d 545.) This result is intolerable, particularly in the context of a capital case.

7. Respondent misstates the trial record and the applicable law where it claims that James Robinson has waived any claims concerning the adequacy of the voir dire on racial bias.

Respondent claims that James Robinson has waived any claims concerning the sufficiency of the trial court's voir dire on racial issues. Two points are made in support of the waiver argument. Referring to both the first and second jury selection, respondent notes "Defense counsel did not submit additional questions regarding racial biases for the questionnaire, despite the trial court's invitation to do so." (Resp. Brief at pp. 62-63, citing RT 31.) Again referring to both the first and second juries, respondent continues: "Nor did defense counsel request any additional questioning of any particular juror, despite the trial court's pledge to 'consider each request individually as they come up' (Resp. Brief at p.63,

citing RT 83, 1803.) The trial court considered the prosecutor's requests for further questioning of particular jurors, and granted one request and rejected another." (Resp. Brief at p.63, citing RT 1822, 1903-1904.) Based on these two alleged failings of defense counsel, respondent concludes that claims about inadequate investigation of racial bias through the voir dire process are waived: "Because the defense did not request further questioning of any juror, appellant's claim of error is waived." (Resp. Brief at 62-63; citing ***People v. Avena****, supra,* 13 Cal.4th 394, 413; ***People v. Sanchez,*** *supra,* 12 Cal.4th 1, 61.)

Respondent blatantly misstates the trial record where it claims that the defense failed to object to the amount of voir dire concerning race. Defense counsel filed an extensive motion seeking, inter alia, additional voir dire on race related issues. The motion was filed and argued in the trial court immediately after counsel had received and reviewed the completed questionnaires and before the trial court began voir dire. (CT 200-215; RT 72-85.) At the hearing, defense counsel specifically stated that more voir dire on race was needed because the written responses had been incomplete and equivocal. (RT 74-75.) It is difficult to see what else counsel ought to have done to preserve the objection to the sufficiency of voir dire in this area.

It is irrelevant that defense counsel did not submit additional questions for the written questionnaire. As previously noted, this claim does ***not*** assert that the questionnaire is inherently defective. If the questionnaire had been properly administered it might have yielded valuable information about the prospective jurors' racial attitudes which would have been relevant to determining challenges for cause. James Robinson contends that the problems lay in the court's handling of the questionnaire. First, the trial court did not allow prospective jurors enough time to respond thoroughly and accurately to this and other complex questions. Second, even after defense counsel complained that the completed questionnaires did not have enough information, the trial court refused allow the lawyers to conduct follow up questioning. (RT 72-75.) The trial court's rare attempts at follow up questions in this area were so minimal as to be ineffective in discovering hidden juror bias.

(See AOB at pp. 166-182.)

The cases respondent cites do not support its argument that James Robinson has waived claims concerning inadequate investigation of racial biases during jury voir dire. ***People v. Avena****, supra,* 13 Cal.4th 394, and ***People v. Sanchez,*** *supra,* 12 Cal.4th 1, are cases in which counsel made no objection to errors in the first instance. This is a completely different situation. As discussed above and in the AOB, counsel objected numerous times to the adequacy of the voir dire on race. There is no requirement that the same objection be repeated over and over.

E. The Trial Court Erred By Failing To Conduct Adequate Voir Dire Concerning Prejudicial Exposure To Media Publicity.

Both at trial and on appeal, James Robinson argues that the trial judge's voir dire was inadequate in another specific area: prejudicial pre-trial publicity. (AOB at pp. 183-193.) The defense motion for attorney conducted voir dire and sequestered death qualification questioning was based in part on the publicity which this case generated in the area from which the panel was drawn. Respondent in its brief misstates the facts to minimize the importance of the possible media exposure. Respondent also mis-characterizes the claim on appeal as discussed below.

1. Respondent does not address the highly prejudicial content of the news reports and the community's extraordinary interest in this case.

In support of the motion, defense counsel lodged with the court copies of twelve newspaper articles written about the case both before and after the preliminary hearing. (RT 75; CT 232-255.) As counsel argued at the hearing, the sheer volume of publicity was not the sole issue. The tone of many of these articles was cause for concern about the impartiality of this jury pool. As stated by defense attorney Bruce Hill:

> Without pointing to any one article in detail, it is significant to note that at least several of those articles dealt with what I would characterize and classify as human interest aspects of the case; that is to say, the funeral of the two young men, the appearance at the funeral by their families, and in at least one instance, a

> girlfriend. This has created a concern on my part and on the part of the defense.

(RT 75.)

As defense counsel further noted, the prejudicial impact was likely to be higher than average because the case had generated a great deal of local interest. Various members of the community followed James Robinson's case for different reasons. The crime took place in the neighborhood of California State University, Northridge, in a fast food restaurant of the type frequently visited by the local students. The victims in this case were young men from the surrounding community who had been popular as high school students. The shootings and robbery also alarmed small business owners and people working in fast food restaurants in the Northridge area.

Respondent points out that by the time voir dire began some of the news articles the defense cited were around fifteen months old. (Resp. Brief at p. 66.) However, respondent does not mention that there had recently been renewed interest in the crimes charged in this case. Defense counsel advised the court that a similar crime had occurred in the same neighborhood approximately one year after the crimes charged in this case. The second crime generated its own publicity and renewed public interest in James Robinson's case. (*See,* CT 200, 204.)

2. Respondent ignores the fact that over one third of the prospective jurors' questionnaire responses indicated awareness of the case which ought to have been thoroughly investigated through voir dire.

Defense counsel had reviewed the questionnaires prior to the motion's hearing. As defense counsel informed the court, the questionnaires completed by the first jury revealed that many prospective jurors ***had***, in fact, been exposed to these prejudicial media reports. Of the 84 questionnaires returned at the time of the hearing 33 prospective jurors, or 39% of the group, were somewhat familiar with the case. (RT 75-76.) Counsel again expressed the defense's concern with undue prejudice resulting from not only the quantity of coverage but

the quality and tenor of the news reports in this case:

> [S]everal of those articles dealt with certain issues of poignancy and drama and could create a favorable tone with respect to the prosecution and a negative tone with respect to the defense. We would submit that the questionnaire, in and of itself, is inadequate with regard to addressing those issues.

(RT 76-77, citing ***Mu'Min v. Virginia*** (1991) 500 U.S. 415.)

3. Respondent incorrectly treats this claim as if it were based on the sufficiency of the questionnaire form rather than the overall adequacy of the trial court's investigation into possible bias resulting from pre-trial publicity.

Respondent devotes a significant amount of space in its brief to defending the comprehensiveness of the questionnaire in this area. Respondent notes that there were thirteen separate questions concerning prospective jurors' media exposure. (See Resp. Brief at pp. 66-68.) It is interesting to note that only one question on the Prospective Juror Questionnaire used in this case concerned biases based on race, religion, ethnicity or life style. In any case, respondent has misstated the basis of this claim. James Robinson is not attacking the specific phrasing or comprehensiveness of the questionnaire itself. Rather, he contends that the trial court's overall voir dire in this area was lacking because the court did not investigate further based on the prospective jurors' written responses.

4. Respondent's assertions about the thoroughness of the voir dire in this area are contradicted by the record.

Respondent repeatedly states that the trial court followed up on indications that a prospective juror had been exposed to media reports of the case. (See Resp. Brief at pp. 67-69.) James Robinson's claim concerns not only the number of prospective jurors receiving additional voir dire in this area, but the substance of the court's questioning. Defense counsel noted at the motion's hearing that further questioning about publicity was necessary for approximately 39% of the panel. The trial court followed up on the questionnaire

responses of only a handful of prospective jurors. Even the cursory and superficial voir dire in this area revealed that a significant number of prospective jurors were aware of the case. (RT 125 [juror read newspaper articles because the crime was near his home]; RT 134-135 [prospective juror who had learned of the case was inclined to favor the prosecution]; RT 138-139 [same]; RT 166 [juror uncertain if inclined toward defense or prosecution based on information available]; RT 181 [prospective juror had heard about the case in the news].) One prospective juror changed her response to the questionnaire, telling the court that she recalled hearing news reports about the case. (RT 181-182.)

As discussed in the AOB, the trial court's questioning about potential bias resulting from previous media exposure was not designed to discover any relevant information. The court's only purpose was to avoid disqualifying these prospective jurors by forcing them into a "correct" response. [36] As discussed in the AOB, this exchange demonstrates the trial court's cursory approach to voir dire. The court cuts off the prospective juror before he has

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[36] Even where a prospective juror stated that he was aware of the case and follows stories about criminal law, the court asked no further questions to probe the juror's attitudes to determine whether he could be impartial.

The Court:	That was definite. '32. What, if anything, have you already learned about this case or about the defendant?
P.J. Bianci:	I don't know anything about the defendant. I read it when it first came out in the paper. That's all. This is close to where I live.
The Court:	Did this information make you favor the prosecution or the defense?
P.J. Bianci:	No.
The Court:	Okay. '35. What are the most serious criminal cases you have followed in the media during the past year?
P.J. Bianci:	All I put down is that King and Milken and Keating, but those aren't . . .
The Court:	'36. Do you try to follow stories about the functioning of the criminal justice system? Do you try?
P.J. Bianci:	I read 'em, yeah.

(RT 123-125.)

a chance to complete an answer. The trial judge does no follow up, and almost appears not to be paying attention to the responses. Mr. Bianchi, who was seated as a juror in this case, plainly states that he follows criminal cases and that he has read about and recalls James Robinson's case. In spite of these obvious red flags indicating possible bias, the trial court forgoes the opportunity to explore the juror's state of mind. Instead, the court pressures the juror into a "correct" response, i.e., where Mr. Bianchi agrees with the court that he does not favor the prosecution or the defense. The trial court has not only failed to probe an obviously important area of possible bias but has also cued the juror to the correct answer.

5. James Robinson does not claim that there is a constitutional right to voir dire concerning publicity and respondent misrepresents this legal claim.

In its brief, respondent states "detailed questioning of jurors regarding their awareness of the case from the media is not constitutionally required." (Resp. Brief at p. 66, citing ***Mu' Min v. Virginia,*** *supra*, 500 U.S. 415, 424-426.) Respondent then observes that "[a] trial court's failure to ask specific questions about the content of publicity is an error of constitutional magnitude only if it 'render[s] the defendant's trial fundamentally unfair.'" (Resp. Brief at p. 66, quoting ***Mu' Min v. Virginia***, *supra*, 500 U.S. 415, 424-426.) Only the latter proposition applies to James Robinson's claim on appeal. Nowhere in the AOB does James Robinson assert a specific constitutional right to questioning prospective jurors about media publicity. The basis of this claim is that the voir dire was so superficial that it did not gather enough information upon which to determine challenges for cause. The trial court's cursory treatment of this subject (exposure to prejudicial publicity) demonstrates the insufficiency of the voir dire in an clearly significant area affecting the prospective jurors' abilities to be impartial.

As discussed in the AOB, the right to a fair trial before an impartial jury is a fundamental constitutional guarantee. (***In re Murchison***, (1955) 349 U.S. 133, 136.) This right may be compromised by prejudicial publicity surrounding the crime and or the legal

proceedings. (***Irwin v. Dowd***, *supra*, 366 U.S. 717; ***Mu' Min v. Virginia***, *supra*, 500 U.S. 415.) Prospective jurors who have been influenced by media accounts of events and issues to the extent that they cannot give the accused a fair hearing must be excused for cause. "'The theory of the law is that a juror who has formed an opinion cannot be impartial.'" (***Reynolds v. United States***, (1878) 98 U.S. 145, 155, quoting Chief Justice Marshall in 1 Burr's Trial 416 (1807).)

The due process clause of the Fourteenth Amendment requires the trial court to undertake voir dire questioning sufficient to determine whether prospective jurors have been so biased by media reports that they cannot be fair to the defendant. (***Mu' Min v. Virginia,*** *supra*, 500 U.S. at p.428.) Particularly in the context of a capital case, the inquiry must probe beyond the jurors' assurances of impartiality. "[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." (*Id.* at 429, quoting ***Patton v. Yount*** (1984) 467 U.S. 1025, 1031.)

Respondent asserts that it is sufficient that those jurors whom the court did question stated that they were able to be impartial. (Resp. Brief at p. 69.) The United States Supreme Court has found that this type of assertion is not sufficient without further probing of the juror's state of mind. In ***Irwin v. Dowd***, *supra*, 366 U.S. 717, the Supreme Court remarked further on the psychological tendency of jurors to assert their ability to be fair to the defendant even where the circumstances indicate that impartiality is unlikely:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellow's is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you see and hear.'

(*Id.* at 728, citing ***Stroble v. State of California*** (1952) 343 U.S. 181; ***Sheperd v. State of Florida*** (1951) 341 U.S. 50 [concurring opinion]; ***Moore v. Dempsey*** (1923) 261 U.S. 86.)

6. The circumstances of this case increased the likelihood of severe prejudice resulting from the combination of an interracial crime and extensive negative publicity.

As discussed above and in the AOB, the atmosphere surrounding James Robinson's trial was uniquely prejudicial. (See AOB at pp. 183-192.) Under these circumstances, the trial court should have paid special attention to ferreting out bias. The facts of the case alone were sufficient to trigger prospective jurors' prejudicial tendencies. James Robinson, an African American male, was accused of killing two white boys who were widely known and well thought of in the immediate community. The crime gathered considerable media interest for several reasons noted by counsel including the tragic "human interest" aspects of the case involving young victims from local families and the Subway Sandwich shop's proximity to the University neighborhood which alarmed both students and small business owners.

The larger social context at the time of this trial was another factor tending to encourage prejudice and this cried out for more searching voir dire. As discussed above and at the hearing, James Robinson's trial took place during a time when race relations in Los Angeles were especially tense and unstable. Prospective jurors could not avoid being affected by the pervasive atmosphere of fear and distrust between the White and African-American communities. This particularly volatile atmosphere not only increased the chances that jurors would be biased by news accounts, but decreased the odds that they would feel comfortable admitting even a mild tendency toward any sort of prejudice. By conducting a public voir dire, without using probing questions and, instead simply cuing the jurors to the acceptable answer, the trial court effectively foreclosed any possibility of prospective jurors disqualifying themselves by acknowledging their real views. (See AOB at pp. 183-192.)

F. Respondent Does Not Address The Claims Concerning The Trial Court's Differential Treatment of Pro-death Jurors During Voir Dire.

In the AOB, James Robinson claims that the trial court's handled voir dire in a manner that reflected an obvious preference for prospective jurors appearing to be pro-death penalty and/or pro-prosecution. (*See* AOB at pp. 193-204.) Several facets of the jury selection process caused prospective jurors with these views to be retained in greater numbers than jurors with other viewpoints. As discussed in the AOB, the group questioning on death qualification desensitized the panel concerning the death penalty in general and also, through repeated exposure to the charges, inclined them to believe that James Robinson was guilty and deserving of the ultimate penalty. (*See* AOB at pp. 197-200.) The trial court singled out prospective jurors with scruples against the death penalty for more extensive questioning. (*See* AOB at pp. 200-204.) Jurors with pro-prosecution or pro-death views were "rehabilitated" through leading voir dire questions, while those who were more open to considering a life sentence were discouraged from serving in this case. (*Id*.) The trial court allowed the prosecutor to exercise peremptory challenges to remove prospective jurors who, although not excludable under the criteria established by ***Witherspoon v. Illinois*** (1968) 391 U.S. 510, 522, and/or ***Wainwright v. Witt*** (1985) 469 U.S. 412, had expressed reservations about the death penalty. (*Ibid*.)

The Sixth, Eighth and Fourteenth Amendments to the federal constitution guaranteed James Robinson the rights to a jury drawn from a representative cross-section of the community, to a fair trial in the guilt phase and a fair and reliable determination of the penalty. The United States Supreme Court has found that the Sixth and Fourteenth Amendment guaranty of a fair trial prohibits the exclusion of all potential jurors who express general objections to the death penalty, or moral or religious scruples against its imposition. (***Witherspoon v. Illinois,*** *supra,* 391 U.S. 510, 522; ***People v. Mattson*** (1990) 50 Cal.3d 826, 844, [superceded on other grounds].) As discussed in the AOB, James Robinson was tried and sentenced by biased juries due to the trial court's treatment of the prospective jurors during voir dire. (*See* AOB at pp. 200-204.) Excusing all jurors who

expressed scruples about capital punishment resulted in a jury comprised of people strongly in favor of capital punishment. This skewed the results in both the guilt phase and at sentencing. Studies establish that persons with pro-death attitudes generally favor the prosecution and are likely to believe that a criminal defendant is guilty. (*See*, CT 200-215.) The effects were far more serious in the penalty determination where, due to the jury composition, the verdict was almost a forgone conclusion. "[A] state may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (***Witherspoon v. Illinois***, *supra*, at 520.)

Respondent apparently concedes this issue, as it does not address this claim in its brief. For all of the reasons set forth above and in the AOB, James Robinson submits that reversal of both the guilt and penalty verdicts is required due to the composition of the juries in his capital trial.

G. Conclusion.

As discussed above and in the AOB, James Robinson's case presents a virtual catalogue of every form of error possible in voir dire and jury selection. Any one of these deficiencies alone would justify reversal. The combined effects of these errors mandates reversal of the convictions and sentence because there can be no assurance of fairness or impartiality for either of the jury selections in James Robinson's capital case. (See, ***People v. Hill***, *supra*, 17 Cal.4th 800, 844-846.)

The voir dire in this case was deficient in two obvious areas: racial prejudice and pretrial publicity. (See, Sub§§ D and E, *supra*; AOB at pp. 166-192.) While significant at all times, especially where the case involves an inter-racial homicide, the court's refusal to question jurors in these areas was absolutely unsupportable in the social context of James Robinson's capital trial. The court's deliberate ignorance of the prevailing atmosphere of bias and suspicion existing in Los Angeles at that time certainly prevented it from discovering prejudices in the panel of prospective jurors. Similarly, the court's refusal to question prospective jurors further about pretrial publicity, even where the jurors stated that

they were familiar with the case, reveals the court's cavalier attitude toward ensuring James Robinson's constitutional rights to due process of law and a fair trial. (*Id*.)

The problems in jury selection were not limited to these two significant areas. This court refused to exercise its statutory authority to revise voir dire procedures by, for example, allowing the attorneys to conduct some questioning and/or sequestering some or all of the voir dire. (*See,* AOB at pp. 124-165.) The trial court's voir dire was woefully inadequate overall. As discussed above, the standardized form questionnaire was so poorly administered that the prospective jurors had an average of 28 seconds each to provide a written response to some 90 complex inquiries, including their views on capital punishment and the criminal justice system. The court's follow up questioning was rushed and superficial if it occurred at all. In many cases, the prospective jurors answered no questions apart form the two (four in the first trial) "death qualifying" questions. The average juror spent between 2 and 3 minutes in voir dire, and the entire jury selection was accomplished in ***under one court day*** in each phase of trial. (*See*, AOB at pp. 129-155.) The trial judge clearly conveyed, through the style and tenor of his questioning, that the important thing was for the jurors to provide the "correct" answer. This court did not approach voir dire with an interest in discovering information about these prospective jurors' real views and attitudes. Rather, it was solely interested in impaneling a jury as quickly as possible. (*See*, AOB at pp. 156-165.)

Apart from speed in jury selection, this trial judge was concerned with impaneling a "pro-death" jury. The court's treatment of prospective jurors who had scruples about capital punishment and its patterns for granting challenges for cause are further evidence of the judge's inclination to direct the outcome by selecting jurors who would favor the prosecution and would then be inclined to impose a death judgment. (See, AOB at pp. 200-205.)

For all of the reasons stated above and in the AOB, the trial court's handling of jury selection compromised James Robinson's most significant constitutional rights: the right to

a fair trial before an impartial jury; the right to due process of law; the right to fundamental fairness; and, the right to a reliable determination of guilt and of the penalty. (U.S. Constit. Amends, V, VI, VIII and XIV; ***Irwin v. Dowd***, *supra,* 366 U.S. 717, 722; ***Rose v. Clark***, *supra*, 478 U.S. 570, 577; ***Beck .v. Alabama***, *supra*, 447 U.S. 625; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***People v. Cash***, *supra*, 122 Cal.Rptr.2d 545.) Reversal is required to give meaning and effect to these fundamental constitutional rights.

III.

RESPONDENT FAILS TO SHOW THAT THE CORONER WAS QUALIFIED TO RENDER AN EXPERT OPINION IN THIS AREA OR THAT THE ERRONEOUS ADMISSION OF THE EXPERT TESTIMONY WAS NOT OVERWHELMINGLY PREJUDICIAL TO THE DEFENSE.

A. Introduction.

1. The defense motion in limine and the claims on appeal.

Several of James Robinson's claims in this appeal concern the erroneous admission of expert opinion testimony in each phase of his capital trial. (AOB at pp. 208-243. Los Angeles Deputy Coroner Christopher Rogers, M.D. was called as a prosecution witness in the guilt phase and in the retried penalty phase of James Robinson's trial. (RT 626; 2008.) Dr. Rogers testified concerning the medical causes of death, and described the victims' injuries. The coroner also described the bullets' trajectories and stated that, in his opinion, the shots in this case had been contact wounds or fired at a very close range. (RT 617-618.) Defense counsel did not object to any of this evidence or opinion testimony. (*Id.*) However, prior to the coroner's testimony in the guilt phase, counsel filed a motion in limine concerning one specific area of the proposed testimony.

The prosecutor planned to have Dr. Rogers give his (allegedly) expert opinion concerning the likely positioning of the victims and the shooter(s). The coroner's theory was that the victims were shot execution style while kneeling in front of the shooter(s). (*See*, RT 618-619.) Dr. Rogers based his opinions on the forensic evidence about bullet trajectories and the probable distance of the gun from the victims. (*Id*.) Defense counsel raised several specific objections to this novel area of expert testimony. First, counsel noted that the proposed testimony was not relevant. An expert opinion was not needed in this area because the jurors were fully capable of drawing their own conclusions about how the crimes occurred based on the relevant and admissible medical testimony and other evidence. (RT 618-619.) Counsel also made a foundational objection, noting that the coroner was not an expert in this distinct area. (RT 618.) In addition, defense counsel argued that the expert's opinion would be speculative. (RT 647.) Finally, defense counsel objected that this testimony was more prejudicial than probative and therefore should not be admitted under Evidence Code section 352. (RT 647.) The trial court denied the defense motion, and

allowed the testimony. (RT 647.)

As discussed in the AOB, the court's denial of the defense motion in limine and its admission of this testimony was erroneous in several respects. First, the coroner's opinion in this area was not relevant under California law. As the court itself recognized, the jurors could draw their own conclusions about the probable positions of the victims and the shooter(s). (RT 623.) Because the jury received no appreciable help from the coroner's opinion testimony about the likely positions of the persons at the crime scene, this testimony was not relevant and should not have been admitted. (*See,* AOB at pp. 220-224; ***People v. Champion*** (1995) 9 Cal.4th 879, 924; ***Soule v. General Motors Corp.*** (1994) 8 Cal.4th 548, 567.) Second, even assuming that an expert opinion regarding the positions of the victims and shooter would have been useful for the jury, the prosecutor did not lay a proper foundation for this witness to render an opinion on this precise question. (*See,* AOB at pp. 225-230*;* ***Alef v. Alta Bates Hospital*** (1992) 5 Cal.App.4th 208, review denied.) Finally, the court erred in its analysis under Evidence Code section 352 by concluding that the probative value of this opinion testimony outweighed the resulting prejudice. (*See,* AOB at pp. 231-234; ***People v. Clark*** (1980) 109 Cal.App.3d 88; ***People v. Roscoe*** (1985) 168 Cal.App.3d 1093.)

California law thus established that the trial court erred by allowing the coroner to testify as an expert in this area. As discussed in the AOB, the erroneous admission of this evidence was highly prejudicial in both the guilt and penalty phases of the capital trial. As a result, James Robinson was denied his state and federal constitutional rights to due process of law, to a fundamentally fair trial and reliable determination of guilt and penalty. (*See,* AOB at pp. 234-243; U.S. Const., Amends. V, VI, VIII and XIV; Cal.Const., Art. I, §§7(a), 15 and 17; ***Gardner v. Florida****, supra,* 430 U.S. 349; ***Beck v. Alabama****, supra*, 447 U.S. 625; ***Ford v. Wainwright*** (1986) 477 U.S. 399.) In the AOB, James Robinson further argues that, because the trial court's actions were contrary to California law, the court's erroneous ruling deprived him of a state created liberty interest and denied him equal

protection of the law as guaranteed by Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.)

2. Respondent mis-characterizes the basis of the defense objections at trial and the appellate claims.

Respondent's description of the events at trial is inaccurate and incomplete, and conveys a misleading impression of the basis of this claim in James Robinson's appeal. Respondent states, "defense counsel argued that Dr. Rogers should not be allowed to testify as an expert as to matters beyond the cause of death, entry wounds, and the angles of the bullets' paths." (Resp. Brief at p. 80, citing RT 618-619.) The impression conveyed in respondent's brief is that, through the motion in limine, the defense attempted to limit the coroner's testimony to a report of scientifically verifiable facts, leaving the prosecution with no opportunity to present the expert's opinion and interpretations from those clinical findings. Nothing could be further from the truth as the trial record reveals.

Trial counsel did ***not*** argue for any extreme or unusual restrictions on the scope of the coroner's testimony. Defense counsel expressly stated that the objections ***did not*** preclude the presentation of evidence and expert opinion concerning the bullet trajectories or the coroner's conclusions regarding the nature of the wounds, i.e., whether these were contact wounds or shots fired at a close range. (RT 617-618.) The defense objected to only ***one precise area*** of the coroner's proposed testimony: an allegedly expert opinion on the relative positions of the victims and the shooter(s) when the shots were fired. The coroner testified that, in his expert opinion, both victims had been shot in the back of the head while they were kneeling in front of the shooter(s). (RT 621–622.) The coroner's testimony in this area was bootstrapped onto his interpretation of other medical evidence, specifically, his opinion that these were contact wounds and his findings about the bullet paths and bullet trajectories.

B. The trial court's error not only violated state law but infringed on fundamental guarantees of the federal constitution.

Respondent attempts to eliminate the multiple federal bases for this group of claims. In its brief, respondent notes that "not every state law violation is a violation of federal due process." (Resp. Brief at p. 85, citing ***People v. Ashmus*** (1991) 54 Cal.3d 932.) However, as discussed in the AOB, the state law errors at issue here were not only contrary to California law but also directly infringed on James Robinson's fundamental constitutional rights. (*See* AOB at pp. 234-237.)

Specifically, James Robinson was denied his state and federal constitutional rights to due process of law, to a fundamentally fair trial and reliable determination of guilt and penalty. (*See*, AOB at pp. 234-243; U.S. Const., Amends. V, VI, VIII and XIV; Cal.Const., Art. I, §§7(a), 15 and 17; ***Gardner v. Florida***, *supra*, 430 U.S. 349; ***Beck v. Alabama***, *supra*, 447 U.S. 625; ***Ford v. Wainwright***, *supra*, 477 U.S. 399.) The trial court's actions in contravention of California law also deprived James Robinson of a state created liberty interest and denied him equal protection of the law as guaranteed by Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.) The erroneous admission of this evidence was highly prejudicial, and the error justifies reversal of both the guilt and penalty phases of the capital trial.

C. Respondent's contentions that this claim has been waived are all meritless.

1. It is irrelevant that defense counsel did not voir dire the coroner.

Respondent contends that the claims are waived on appeal because defense counsel declined the opportunity to voir dire the coroner before this witness testified. (Resp. Brief at pp.82,90; RT 647.) Respondent cites no authority and James Robinson is aware of none supporting this position. As the moving party, the prosecution had the burden of showing that the evidence was admissible. (***Alef v. Alta Bates Hospital***, *supra*, 5 Cal.App.4th 208, review denied.) The proponent of the testimony must affirmatively show that the witness' expertise is directly and specifically related to the subject of the opinion they plan to offer. (*See*, ***Salasguevara v. Wyeth Laboratories, Inc.*** (1990) 222 Cal.App.3d 379 [reversing grant

of summary judgment in favor of the defense in a medical malpractice action where the defendants relied on the deposition testimony of the plaintiff's own doctor because nothing in the record demonstrated that the doctor was a specialist qualified to render an opinion on the precise issues involved in the action].) Defense counsel made the motion in limine and clearly stated the grounds for the defense objection. There was nothing further to be gained by defense voir dire of this witness, and counsel had no obligation to do more to preserve the defense objections.

2. Counsel's failure to renew the objections in the penalty phase is excused under either of two legal doctrines.

Respondent argues that defense counsel's failure to renew the objections to the coroner's testimony on the penalty re-trial waives the claims of error for purposes of the penalty phase. (Resp. Brief at p. 84.) Respondent is incorrect and counsel's failure to renew the defense objections to this testimony may be excused for two related reasons. Because the penalty phase was being re-tried before a new jury, much of the guilt phase evidence was admitted in the penalty retrial. This trial judge had denied the defense motion to exclude this testimony in the guilt phase. There was no reason to believe that the trial court would change its ruling in the penalty re-trial, especially where many of the guilt phase issues had to be re-litigated for the benefit of the new jury. Under these circumstances, trial counsel reasonably presumed that it would be futile to renew the defense objections to the coroner's testimony in the penalty phase. (***People v. Hamilton*** (1998) 48 Cal.3d 1142, 1189, fn. 27.)

Defense counsel could also have concluded that the trial court would refuse to reconsideration its ruling in the penalty phase based on the doctrine of the law-of-the-case. This doctrine is routinely applied to avoid re-litigation of evidentiary and procedural claims. Capital cases have invoked the law-of-the-case in a number of circumstances. (*See*, ***People v. Keenan*** (1988) 46 Cal.3d 478, 505-507 [doctrine applied to discovery claims]; ***People v. Ghent*** (1987) 43 Cal.3d 739, 758-760 [severance ruling]; ***People v. Horton*** (1995) 11 Cal.4th 1068 [validity of stipulation allowing a commissioner to try a capital case].)

3. This Court should exercise its discretion to review these claims.

Respondent next argues that review of these claims on federal constitutional grounds is precluded in both phases of trial because counsel did not state precise federal grounds when objecting to the coroner's testimony. (Resp. Brief at p. 85.) Respondent is incorrect, and review is appropriate for two reasons. As noted above, waiver is excused where an objection would have been futile. The trial court here was made aware of multiple state law bases for the defense objections, and overruled all of them. Under these circumstances, it would not have availed counsel to object to the same evidence on federal grounds. This Court has held that waiver is excused where it would have been futile to object on federal grounds. (***People v. Hamilton***, *supra,* 48 Cal.3d 1142, 1189, fn. 27.)

This Court may also use its discretionary power to review the constitutional issues raised in these claims. (See ***Hale v. Morgan,*** *supra,* 22 Cal.3d 388, 394; ***People v. Truer***, *supra,* (1985) 168 Cal.App. 3d 437, 441 [reviewing prosecution claim for the first time on appeal].) An exercise of this Court's discretion is appropriate here because the error here is purely legal, and does not depend upon a factual determination. (See ***People v. Vera***, *supra,* 15 Cal.4th 269, 276 ["Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."]; ***People v. Blanco***, *supra,* 10 Cal.App.4th 1167, 1172-1173 [reviewing a constitutional claim on appeal where it had been characterized only as an evidentiary objection at trial].)

Review is particularly appropriate here because the errors affected the fundamental fairness of a capital trial. (***People v. Hill*** (1998) 17 Cal.4th 800.) As discussed below and in the AOB, the erroneous admission of the coroner's testimony in this area was highly prejudicial and that error undermined the reliability of the guilt and penalty verdicts. (See AOB at pp. 234-237; ***Lockett v. Ohio,*** *supra,* 438 U.S. 586, 604; ***Gardner v. Florida***, *supra,* 430 U.S. 349; ***Ford v. Wainwright***, *supra,* 477 U.S. 399.) Under these circumstances, an exercise of this Court's discretion is warranted even if the Court determines that trial

counsel did not properly preserve the federal constitutional objections to the coroner's testimony.

D. The description of the coroner's testimony in Respondent's Brief is inaccurate and misleading.

Respondent's characterization of Dr. Rogers' testimony is calculated to minimize the prejudice arising from the trial court's erroneous ruling which allowed the coroner to testify regarding the likely position of victims and shooter(s). In describing this portion of the expert's testimony, respondent makes it appear as though the coroner's statements were brief, general, equivocal and directly related to the wound examinations. (Resp. Brief at 91.) Respondent's description is misleading and ultimately inaccurate. As discussed in the AOB, the coroner's testimony concerning the parties' positions in the crime scene was a central feature of the prosecution's case, and its inclusion was particularly prejudicial in the penalty phase of this trial.

1. The coroner's opinion testimony in this area was presented in a dramatic manner and was not strictly based on his medical examinations of the victims.

In the guilt phase, the prosecutor posed a series of supposedly hypothetical questions involving a victim who stood 6'1" tall, and a shooter with a height of approximately 5'10" to 5'11". The coroner agreed that, because the entry wound to victim White was on the top or crown of the head, the shooter must have been holding the gun above the victim's head. (RT 649-650.) The bullet path, which extended straight down at a slight (ten degree) angle from the crown of the head to the front of the head, also indicated that the shooter had been positioned above the victim. (*Id.*) Respondent's description makes it appear that the witness was somewhat equivocal and did not state a firm opinion about the positions of the victims to the shooter(s). As discussed in the AOB, the trial record plainly shows otherwise. The coroner clearly stated that, in his opinion, the most likely scenario was that victim White had been kneeling when the shooter placed the gun in contact with his scalp at or near the

top of the head, and shot him at an angle of approximately 90 degrees. (RT 650-651.) The doctor testified that the shot to victim Berry's head was also a lethal contact wound, with the bullet entering the side of the head. (RT 651.)

Respondent also fails to mention the prosecutor's discussion of the manner of the shootings in his guilt phase closing argument. Trying to explain a discrepancy between the prosecution's theory of the case and Dennis Ostrander's testimony regarding James Robinson's alleged confession, the prosecutor argued that it was not significant that Ostrander stated that James had shot the victims in back of the head rather than on top of the head while they were kneeling. (RT 1334-1336.) The prosecutor argued that James changed his story about the way he shot the victims to appear more "macho." (RT 1335.)[37]

Not surprisingly, respondents brief contains almost no discussion of the coroner's testimony and the prosecution's use of this evidence in the retried penalty phase. In the penalty phase, the coroner's same opinion testimony was revisited repeatedly and used in closing argument for increased impact. This allegedly expert determination about the relative positions of the victims and the shooter(s) became a central feature of the penalty phase case, and was directly coordinated with the planned testimony of the victim impact witnesses and also with the prosecutor's closing argument. In the guilt phase this portion of the coroner's testimony covered only three transcript pages. (RT 649-652.) Dr. Rogers stated his opinion, i.e., that the victims were probably shot while in a kneeling position, only one time. (RT 652.) In the penalty retrial, Dr. Rogers' testimony in this area expanded to cover thirteen pages of trial transcript. (*See* RT 2016-2029.)

For the penalty retrial, the prosecutor had the coroner review every possible scenario

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[37] Referring to Ostrander's testimony, the prosecutor argued:

"He didn't tell you he was there. He didn't tell you that he knew his facts were accurate or not. All he could tell you was that he got his information from the defendant. If the defendant lied to him, he would be restating exactly the same statements and which sounds more macho, which is better, if you are going to try to talk about doing it? That I had somebody on their knees when I shot them at the top of their head or I shot him in the head as he was going by. I shot him in the face." (RT 1335.)

for the parties' relative positions in detail. (*Id.*) The prosecutor again asked the coroner to speculate concerning possible scenarios for the shootings. However, the prosecutor did not simply rely upon verbal descriptions of the hypothetical possibilities. Instead, the prosecutor actually re-enacted what he believed to be the likely positions of the victims and the shooter. During these demonstrations, the prosecutor was holding James Robinson's gun, the alleged murder weapon. (RT 2024-2025.) First, the prosecutor stood up straight and held the gun in the awkward angle that would have been required to shoot victim White on top of the head at or near the entry wound. (*See* RT 2025-2026.) The coroner agreed that it was unlikely that both the shooter and victim White had been standing, unless the shooter stood on a counter top or was otherwise elevated above the victim. (RT 2026.)[38] Next, the prosecutor lay on the ground on his stomach and asked the coroner to speculate as to whether the shooter had crouched down to hold the gun in contact with the victim's head at the downward ten degree angle. (RT 2026-2027.) Finally, the prosecutor demonstrated the position which he would later argue was the only viable scenario of how the crime had occurred:

> Q: Mr. Barshop: Now, if we were to have Mr. White on his knees with head slightly forward, is that consistent? If I am holding the gun in a manner straightforward with the same angle, if I am on my knees such as this, would that be consistent? (RT 2027.)
>
> A. That is consistent.
>
> * * *
>
> Q: What about an individual who was on his knees, head forward, and was consistent with a shot, the arm held straight out, the gun to the top of the head. This is consistent with the angle of the bullet?

[38] Eyewitness Rebecca James believed that she had seen the person on the customer side of the counter jump on top of the counter and chase the person standing in the employee area. (RT 268.)

A: This is consistent.

Q: This is consistent with the contact wound to the top of the head?

A: Yes.

Q: And this is a perfectly normal position to be in, is it not?

A: It appears to be a normal position.

Q: The person's head is down perhaps praying for their life?

A: It is consistent with the head down position.

Q: Again, there was no exit wounds [sic]?

A: That's correct.

Mr. Barshop: I have nothing further. (RT 2027.)

The calculated effect was to elevate the prosecution's scenario, in which the victims are kneeling with their backs to their killer, to the level of an established scientific fact in the minds of the jurors.

2. <u>The prosecutor coordinated the coroner's testimony with the other penalty phase evidence and argument for maximum effect.</u>

The victim impact witnesses testified after the coroner. These witnesses modified their testimony for the penalty phase retrial in order to place greater emphasis on the coroner's opinion regarding the positions of the victims and the shooter(s). In the penalty retrial the family members of the two victims specifically described their horror and distress at having their sons killed while kneeling before the killer, begging and praying for their lives. (*See*, RT 2253; 2283.) Based on Dr. Rogers' testimony about the victims' positions, the family members gave their opinions about the despicable and cowardly type of person who could kill in this fashion. (*Id*.)

The coroner's opinion about the victims' likely positions was a centerpiece of the prosecutor's closing argument in the retried penalty phase. The "execution style" manner of the killings was, according to the prosecutor, the strongest aggravating factor in the crime.[39] The prosecutor began his closing argument with this evidence:

> Let's start with the testimony of Dr. Rogers.
>
> * * *
>
> And is there any one of you who reasonably does not believe that Mr. White was on his knees, head down, praying for his life when the defendant took the gun that he was holding, his .380, placed it to the top of his head and fired the death shot?
>
> * * *
>
> And I submit to you, ladies and gentlemen, that is an aggravating factor. The manner in which James White was executed on his knees, asking that the defendant just take the money, don't hurt him, don't hurt his friend Brian Berry, because we have evidence of that, remember – we will get to that in a bit – that that's what they said, just take the money, don't hurt us.
>
> What did Dr. Rogers tell us about Brian Berry?
>
> That he was shot twice. He has the shot to the side of his nose from a distance of six to 18 inches. The eye was open at the time of this shot. He saw the gun in his face. He saw his killer. He saw what was going to happen when the defendant pulled the trigger for that shot. And then to put the coup de grace he takes his gun and places it to the side of his head, behind the ear, as a contact wound and shoots him again. The acts of a coward. (RT 2779-2780.)

E. <u>Respondent fails to show that there was a proper foundation for the coroner's testimony in this area.</u>

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[39] The prosecutor asked for the death penalty in this case based on the way in which the crimes were carried out. However, there is no evidence that the jurors were in unanimous agreement concerning the manner of the homicides. The jury made no findings concerning the relative positions of the victims and the shooter and the prosecution's version of events was not proven beyond a reasonable doubt. (*See* AOB at pp. 264-335; Argument V, *infra*.)

Although the record reflects that Dr. Rogers' only training and experience was in pathology, respondent maintains that there was a sufficient foundation for the coroner to give an expert opinion on a subject normally reserved for criminalists: the relative positions of the victims and shooters at the time of the crime. (Resp. Brief at p.90-92.) At the outset, respondent notes that trial courts have wide discretion to evaluate expert witness qualifications. (Resp. Brief at p. 90, citing ***People v. Davenport*** (1995) 11 Cal.4th 1171, 1207.) Respondent then reiterates the coroner's medical qualifications, and his pathology training in gunshot wound examination. (Resp. Brief at pp. 90-91.) Respondent concludes that Dr. Rogers was qualified to state an opinion about the parties' positions at the time of the crime because "[t]he issue did not require expertise *beyond* that of an experienced forensic pathologist," and, "Dr. Rogers's training and extensive practical experience in examining gun shot wounds was useful to the jury in its consideration of the circumstances of the victims' murders." (Resp. Brief at p. 92.) Respondent's argument fails to address the argument raised in the AOB.

As discussed in the AOB, the trial court must have sufficient information upon which to exercise its discretion. (See AOB at pp. 225-230; ***Mayer v. Alexander*** (1946) 73 Cal.App.2d 752.) The court is also obligated to ensure that the expert's opinion is confined to his or her true area of expertise. (***Korsak v. Atlas Hotels, Inc.*** (1992) 2 Cal.App.4th 1516, review denied.) The trial court in James Robinson's case had ***no*** information concerning the coroner's training or experience in crime scene reconstruction. The court's ruling permitting the coroner to testify in this area does not, therefore, reflect a true exercise of judicial discretion. (*See*, e.g., ***Agnew v. City of Los Angeles*** (1950) 97 Cal.App.2d 557; ***Valdez v. Percy*** (1939) 35 Cal.App.2d 485.) Respondent ignores this argument in the AOB, and merely recites the coroner's qualifications to assess gunshot wounds and to make other determinations concerning forsenic pathology. (Resp. Brief at pp. 90-91.)

Respondent relies in part on this Court's decision in ***People v. Farnam*** (2002) 28 Cal.4th 107, 162, to support its contention that Dr. Rogers was qualified to give an expert opinion about the relative positions of the parties at the time of the crime. Relying on

Farnam, *inter alia*, respondent asserts that a trial court's discretion concerning expert witness qualifications is virtually unassailable and will be only reversed for "manifest abuse of discretion." (Resp. Brief at p. 90.) The cases cited in respondent's brief, however, are instructive and the reasoning of those decisions indicates that the defense objections to the pathologist's testimony in this case were well taken. This Court's discussion in ***Farnam*** indicates that Dr. Rogers, as a pathologist, was ***not*** qualified to give an opinion in the area of crime scene reconstruction because this was not the coroner's area of expertise.

In ***People v. Farnam***, this Court affirmed that expert qualifications must be ***closely and directly related to the subject of their testimony***. (See, ***People v. Farnam***, *supra*, 28 Cal.4th at 162.) The defense in that case specifically stated that there was ***no*** objection to a criminalist's reconstruction of how the crime may have been carried out. However, as in James Robinson's case, defense counsel in ***Farnam*** objected to one proposed area of the expert witness's testimony: the interpretation of blood stain spatters. This Court found that the defense had not shown an abuse of discretion by the trial court. However, this Court also made clear that its decision was dependent upon a careful review and comparison of the witness's qualifications to the precise area of opinion to be offered. Regarding the criminalist's qualifications in ***Farnam***, this Court noted that the expert had extensive training and over ten years experience with blood spatters, crime scene reconstruction and serological evidence.

In ***People v. Farnam***, this Court specifically compared that expert's qualifications to the facts presented in ***People v. Hogan*** (1982) 31 Cal.3d 815. (*See* discussion in AOB at pp. 228-229.) In ***Hogan***, the trial court had abused its discretion by allowing a criminalist to offer blood spatter testimony where that expert had merely observed many bloodstains without any inquiry, analysis or experiment." (***People v. Farnam***, *supra*, at 162, citing ***People v. Hogan*** at 852-853.) Respondent avoids any comparison of James Robinson's case to ***People v. Hogan,*** because the coroner in this case was similarly untrained and not qualified to give an expert opinion in the precise area at issue.

The other cases cited in respondent's brief actually undermine its argument that coroners and/or pathologists are universally qualified to testify as experts concerning all aspects of homicide. In ***People v. Mayfield*** (1997) 14 Cal.4th 668, 766, this Court held that there had been no abuse of discretion where a trial court allowed a pathologist to testify ***ruling out*** certain possible positions for the victim and shooter. However, this Court ***expressly warned against using pathologists to testify as experts in crime scene reconstruction***. As respondent acknowledges, this Court in ***Mayfield*** stated that pathologist's should not "give a legally prohibited opinion . . . on what positions [the victim] and defendant were in when the fatal shot was fired." (Resp. Brief at p. 91, quoting, ***People v. Mayfield***, *supra,* 14 Cal.4th at p. 766..)

Respondent ignores the cases discussed in the AOB which require that an expert's qualifications be far more closely related to the topic of the proposed testimony than Dr. Rogers's training was to the opinion he offered in this case. (See AOB at p. 227-229; ***People v. Fierro*** (1991) 1 Cal.4th 173, rehearing denied, *certiorari* denied, 506 U.S. 907, rehearing denied, 506 U.S. 1029 [licensed private investigator could not be certified as an expert in ballistics and crime scene reconstruction where his experience was based on military service 20 years earlier at which time he took photographs of plane and car crashes; witness had never photographed a crime scene involving a gun shot death, and his opinion on the effects of bullets on the victim's body was based on viewing of documentary films of men in combat]; ***People v. Bolin*** (1998) 18 Cal.4th 297, modified on denial of rehearing, *certiorari* denied 526 U.S. 1006 [criminalist was qualified to give expert testimony in murder prosecution regarding the positions of the victims at the time they were shot in view of his educational background in biochemistry and serology and his training for 13 years as criminalist which included attending and giving lectures on blood-spatter analysis and crime scene investigation]; ***People v. Clark*** (1993) 5 Cal.4th 950, rehearing denied, cert. denied, 512 U.S. 1253.) [witness was qualified to give expert "blood-spatter" testimony in capital murder prosecution where the witness had attended lectures and training seminars on the subject of blood dynamics, read relevant literature, and conducted relevant experiments and

visited crime scenes where blood spatter tests were conducted].) As discussed above and in the AOB, the coroner's qualifications here were similarly lacking in regard to this precise area of expertise. Accordingly, the trial court abused its discretion by permitting the pathologist to testify concerning the likely positions of the victims and the shooter(s) at the time of the crime.

F. Respondent fails to show that the coroner's testimony was relevant.

Even assuming, *arguendo,* that Dr. Rogers was properly qualified, the coroner's testimony concerning the relative positions of the parties should not have been admitted because it was not relevant. (*See* AOB 231-237.) Respondent makes two contentions concerning relevancy. First, respondent asserts that the coroner's testimony in this area was relevant because the subject was "beyond the common experience" of the average juror. (Resp. Brief at p. 87-89.) Respondent next claims that this testimony was relevant and admissible because the manner in which wounds were inflicted is a proper subject for expert medical testimony under California law. (Resp. Brief at p. 87-88, citing ***People v. Steele*** (2002) 27 Cal.4th 1230, 1274 [conc. opn. of George, C.J.]; ***People v. Cole*** (1956) 47 Cal.2d 99, 104-106.) Neither of respondent's contentions are correct, and both lack support under California law.

1. The coroner's testimony was not necessary to the jurors' understanding.

As discussed in the AOB, in order to be relevant and admissible the expert's opinion must concern a subject "beyond common experience," and must also be of appreciable help to the jury. (***People v. Champion***, *supra*, 9 Cal.4th 879, 924; ***Soule v. General Motors Corp.,*** *supra,* 8 Cal.4th 548, 567.)[40] The California standard for qualified expert opinion is

[40] Evidence Code section 801(a) codified pre-existing California law on expert opinion testimony. (*See*, ***People v. Cole***, *supra*, 47 Cal.2d 99, 103 ["[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education

set forth in Evidence Code section 801 which provides, in pertinent part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

Both factors listed in Evidence Code 801 sub-section (a) must be satisfied. The portion of the coroner's testimony at issue here fails to meet this standard.

Expert testimony is properly excluded "where the subject does not need expert illumination and the proponent is otherwise able to elicit testimony about the subject." (***United States v. Seschillie*** (9th Cir. 2002) 310 F.3d 1208, 1212 [expert criminologist could not give an opinion on probability that the shooting in question was accidental]; ***United States v. Ortland*** (9th Cir. 1997) 109 F.3d 539, 545.) California law similarly holds that where the jurors are able to draw a conclusion from the facts in evidence as easily and intelligently as the expert could, expert testimony is not admissible. (***McCleery v. City of Bakersfield*** (1985) 170 C.A.3d 1059, 1074, n 10.) As counsel argued at trial, and as discussed in the AOB, the jurors in this case did not need an "expert" opinion to reach a common sense conclusion based on a full explanation of the medical evidence.

The jury in this case heard the coroner's testimony, with no defense objection, regarding the placement of the entry wounds and the angles of the bullet paths. The coroner's testimony was accompanied by a number of autopsy photographs showing the exact placement of the entry wounds. The coroner described the medical evidence concerning gunshot residue in and near the wounds, and stated his interpretation of those findings as indicating close range or contact shots. While, as respondent notes, "[t]he jurors

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could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."]; ***People v. Hopper*** (1956) 145 C.A.2d 180, 191.)

undoubtedly lacked the experience of shooting a six-foot man in the crown of his head," the average person would have no difficulty understanding the testimony describing the bullet angles and trajectories, especially when assisted by an exhibit such as the styrofoam model used here. Neither of the juries in this case needed expert opinion to understand this evidence or to comprehend the prosecution's argument about how the shootings occurred. Based on the coroner's properly admitted testimony, and the prosecutor's closing argument, the jurors were fully able to draw their own conclusions about the parties' relative placements in the crime scene.

Respondent ignores the fact that even the trial court agreed that the jurors could use common sense to draw their own conclusions about the probable positions of the victims and the shooter(s) unassisted by expert testimony. As discussed in the AOB, the trial judge noted that the testimony was simple and straightforward:

> The Court: ***It doesn't take much imagination, or much of an expertise based upon trajectory and the angle and the contact nature of a wound, to proffer an opinion*** whether a person was standing on a stepladder or on tiptoes or laying on his stomach when he fired a weapon or aiming down when a victim is on his knees.

(RT 623 [emphasis supplied].)

Under these circumstances, this portion of the coroner's testimony ought to have been excluded for lack of relevance.[41]

2. <u>The disputed portion of the coroner's testimony did not concern a strictly medical evaluation, and exceeded the area</u>

[41] Respondent advances conflicting arguments in its discussion of this claim. Respondent contends that, because even a lay person could figure out the relative positions, then this expert could also regardless of his background in this precise area. (Resp. Brief at pp. 91-92.) Elsewhere, respondent asserts that the jurors were aided by the expert's opinion regarding the parties probable positions at the crime scene because they could not understand the evidence "relying on intuition alone." (Resp. Brief at p. 89.)

of this witness's expertise.

Respondent relies on several cases to support its contention that Dr. Rogers's testimony about the relative positions of the parties at the time of the shooting was a proper subject for a pathologist's expert testimony. However, the cases respondent cites deal with more traditional areas of medical expert testimony. These cases are easily distinguishable on their facts and, therefore, are not useful here.

James Robinson raised ***no*** objections (either at trial or in this appeal) to the types of testimony at issue in the cases respondent notes in its brief. (See Resp. Brief at pp. 87-88, citing ***People v. Steele***, *supra*, 27 Cal.4th 1230, 1274, conc. opn. of George, C.J. [pathologist may testify to the manner in which the wounds were inflicted]; ***People v. Cole***, *supra*, 47 Cal.2d 99, 104-106 [pathologist was qualified to testify that the fatal wound could not have been self-inflicted]; ***People v. Bemore*** (2000) 22 Cal.4th 809, 819 [pathologist could testify concerning defensive knife wounds].) As defense counsel stated at trial, James Robinson's objections were limited to a specific area of Dr. Rogers's testimony: the coroner's opinion about the relative positions of the victims and the shooter(s). There was ***no*** defense objection to any other portion of the coroner's testimony, including the expert's opinions concerning the nature of the gunshot wounds, the bullet paths or trajectories, the likely causes of death and the times of death, and the close or "contact" nature of the wounds. (RT 617-618.)

3. There was no dispute concerning the circumstances of James White's fatal wound which justified the admission of this opinion testimony.

Respondent invents an additional justification, which was never advanced at trial, for allowing the coroner to give an opinion on the relative positions of the victims and shooter(s). In its brief, respondent claims that the coroner's testimony was relevant to resolve a dispute in the evidence. Respondent notes that James Robinson testified that he came in upon the crime scene after James White's shooting and heard the "chirping" sound of tennis shoes and other footsteps on the floor at the rear of the store. (Resp. Brief at p. 88;

RT 931.) Respondent further notes that the prosecution's evidence contradicted James Robinson's: "[t]he prosecution presented evidence through the testimony of several witnesses that appellant executed the unresisting victims." (Resp. Brief at p.88, citing RT 527, 555, 565.) In conclusion, respondent finds that Dr. Rogers's testimony about the parties' positions at the crime scene was relevant because "the circumstances of James White's fatal wound were actively disputed." (Resp. Brief at p. 88.) There are multiple flaws in respondent's reasoning, and its analysis does nothing to establish the relevance of Dr. Rogers's testimony.

Dr. Rogers's testimony has absolutely no bearing on the "conflict" between the prosecution's evidence and James Robinson's testimony. James Robinson maintains that he did not shoot the victims ***at all***. Two prosecution witnesses (Aldridge and Ostrander) testified that James had admitted shooting both victims in their heads. The undisputed medical evidence established that both victims sustained fatal gunshot wounds to the head. The only "dispute" between the prosecution and the defense concerned who had done the shootings, not the ways in which the killings were accomplished. Dr. Rogers's opinion testimony concerning the precise manner in which the fatal shots were inflicted does not resolve the dispute between James Robinson's account of the events and the prosecutions witnesses' testimony.

Respondent's reliance on ***People v. Welch*** (1999) 20 Cal.4th 701, 750-751, is misplaced. (Resp. Brief at pp. 88-89.) ***People v. Welch*** did ***not*** concern the admission of expert opinion testimony, or even a determination of relevance. The evidence at issue there was a series of autopsy photographs. The defendant in ***Welch*** argued that the photos were unduly prejudicial and that the trial court abused its discretion under Evidence Code section 352 by admitting the evidence. (***People v. Welch***, *supra*, 20 Cal.4th 700, 750-751.) There was no dispute in ***Welch*** regarding relevance or concerning the proper foundation for the evidence. (*Id*. at p. 750-751.)

Respondent's contention that the coroner's testimony was necessary to the jury's understanding of the other medical evidence is equally incorrect. Contrary to respondent's

assertions, the jury was not left to "intuition alone" to determine exactly how the fatal shots were fired. (Resp. Brief at p. 89.) The coroner presented and explained a plethora of other evidence and graphic exhibits demonstrating, *inter alia*, bullet paths, bullet trajectories, and indicia of contact wounds. (*See* RT 626-653; 2016-2029; People's Exh.#s 49, 50, 51, 52, 53, 54, 55, 56, 57 and 58.) The jury had a very clear picture of how where the fatal wounds were located and how they could have been inflicted. As previously noted, even the trial court concurred that the medical evidence plainly supported the prosecution's preferred interpretation without additional expert opinion testimony. (*See* RT 623, 647.) The prosecutor strenuously argued for his interpretation of the properly received medical evidence, i.e., that the victims had knelt in front of the shooter and had been shot "execution style." (*See* AOB at pp. 212-213; RT 1334-1336.) Under these circumstances, it was not necessary to add the weight of expert authority to a theory about the probable events at the crime scene.

4. Dr. Roger's opinion about the parties' positions did not assist the jury in its evaluation of the witnesses' credibility.

In another related after the fact attempt to justify the trial court's erroneous admission of this irrelevant opinion testimony, respondent claims that the coroner's testimony about the parties' probable positions at the time of the shooting assisted the jury "in determining whether the murder was premeditated and deliberated, and in evaluating the credibility of witnesses testifying to the execution-style murder." (Resp. Brief at p. 89.) Here again, respondent's reasoning is faulty and its discussion is misleading because it does not accurately reflect the trial record. Prosecution witness Tommy Aldridge's testimony on this point differs from prosecution witness Dennis Ostrander's testimony, and the coroner's opinion evidence conflicts with both of their accounts.

Both Dennis Ostrander and Tommy Aldridge testified about James Robinson's alleged statements describing how he committed these crimes. According to Ostrander,

James Robinson described shooting James White "in the back of the head" after White opened the safe. (RT 793, 811.) According to Ostrander, James Robinson then shot Brian Berry "on the left side of the temple" as Berry tried to run. (RT 793, 812.) Aldridge's version was different. According to his testimony, in the weeks preceding the Subway Store robbery James Robinson had, referring too any witnesses to the robbery, spoken of his plans to "lay them down and blow them away in the back of their heads." (RT 527, 555.) Aldridge testified that when he saw James Robinson after the Subway Store crimes, James Robinson described the shootings: "he shot one of them behind the head and the other one on the side of the head and he wasn't sure if he was dead yet, so he shot the other guy behind the head again." (RT 565.)

The trial record thus reveals that Ostrander's testimony concerning James Robinson's alleged admissions contradicts Aldridge's testimony on the same subject. Moreover, neither Ostrander's nor Aldridge's account is consistent with the coroner's evidence about the likely positioning of the victims and the shooter(s). The coroner testified that victim White was fatally close to the top or "crown" of the head, and the bullet traveled slightly forward toward the face at an approximate ten degree angle. (See RT 652.) Victim Berry was shot twice. One bullet entered the front of his face, in the left cheek. The other gunshot would was located on the top right hand side of the head. (RT 628-631.) Aldridge's testimony was that three shots were fired: both victims were shot once each in the back of their heads and one was shot a second time on the side of the head. (See RT 565.) According to Ostrander, one victim was shot in the back of the head and the other "on the left temple." (See RT 793, 812.) The coroner's opinion about the probable positions of the victims and the shooter is consistent with neither of these accounts. This evidence does not, therefore, bolster the credibility of the prosecution witnesses and its admission cannot be justified retroactively for this purpose.

G. The trial court's admission of the coroner's opinion in this area was an abuse of its discretion under Evidence Code section 352, abridging James

Robinson's state and federal constitutional rights.

The trial court admitted the coroner's testimony over defense objections under Evidence Code section 352 that its probative value was outweighed by potential prejudice. According to the trial court, the coroner's opinion that the victims had been killed while kneeling in front of the shooter was relevant and probative because this testimony supported an alternate theory for the prosecution, i.e., premeditated and deliberate murder. (*See*, RT 648.) The court also found that this evidence was highly probative because it was "relevant as to the aggravating nature of these crimes." (*Id.*) With respect to prejudice, the court held "it will be no more prejudicial than that evidence which the jury has already received regarding the 'execution style' slaying as admitted to by the defendant if the people's witnesses thus far are believed." (RT 648.) As discussed above and in the AOB, the trial court's reasoning was incorrect for several reasons and its ruling was an abuse of its discretion under California Evidence Code section 352.

1. <u>The coroner's opinion lacked probative value</u>.

The trial court here assigned far too much probative value to the coroner's opinion in this area. As demonstrated above, the jury did not need expert testimony to understand the evidence. Extrapolating the positions of victims to shooter(s) was a matter of common sense well within the ability of an average person. (*See*, AOB at pp. 231-232.) Where there is no need for an expert opinion that testimony has no probative value. (*See* AOB at pp. 220-224; 231-233.)

The trial court was also incorrect to find that the coroner's testimony was probative of credibility. (RT 647-648.) As discussed above, the coroner's testimony was irrelevant in terms of resolving any questions of credibility. The testimony did not confirm the details of the prosecution witnesses' testimony. As discussed above, the details stated in the coroner's opinion did not match the testimony of these two witnesses. The coroner's opinion cannot, therefore, corroborate their testimony or enhance their credibility. It is equally obvious that this evidence had no bearing on James Robinson's credibility. James denied having shot the

victims at all, so the expert's testimony did not assist the trier of fact in determining whether his description of how the shootings occurred was truthful.

Even if this testimony was slightly relevant to a credibility determination, its admission was not justified on these grounds. It is error under Evidence Code section 352 to admit expert opinion testimony in a criminal case where the need for any expert opinion is questionable and, on the other hand, the result depends upon a "credibility contest" between defense and prosecution witnesses. (***People v. Clark,*** *supra,*109 Cal.App.3d 88 [error to admit testimony of rape expert that the victim's conduct was reasonable where the case was a close contest on credibility and the trial court had questioned the need for any expert opinion]. *See* also, ***People v. Roscoe****, supra,* 168 Cal.App.3d 1093 [probative value of psychologist's testimony regarding specific responses of the victim in that case was far outweighed by the prejudicial effect especially where the expert could have relied upon general studies and not a detailed, case specific analysis].)

As discussed in the AOB, the coroner's testimony was unnecessary to support the prosecution's argument for premeditation and deliberation as an alternative theory to felony murder. (*See* AOB at pp. 232-234.) The prosecutor had all of the factual, medical evidence from the un-objectionable portions of the coroner's testimony to support its theory that the victims had been killed while kneeling. Other prosecution witnesses testified that James had confessed to planning to kill the victims, and to shooting them in a similar "execution" style. (*See*, RT 647-648.) The prosecutor was able to argue that the shootings occurred this way in both phases of the trial based the unobjectionable medical evidence and on the prosecution witnesses' testimony about James Robinson's alleged admissions. As the trial court itself pointed out, the coroner's opinion testimony was cumulative on this point. (*See* RT 647-648.)

2. <u>The trial court underestimated the prejudicial effects of the expert opinion</u>.

Respondent largely ignores the trial court's failure to correctly assess and weigh the prejudicial effects of expert testimony in this area as required by Evidence Code section

352. The trial court concluded that any prejudice from the coroner's opinion was slight because, according to other prosecution witnesses, James had confessed to killing the victims in a manner consistent with the opinion the prosecutor was eliciting from the coroner. Respondent merely reiterates the trial court's reasoning, and ignores the contrary authority. As discussed in the AOB, the analysis of prejudice does ***not*** depend upon the existence of other testimony on the same point. (See AOB at pp. 234-237.) Thus, even where an expert's opinion is briefly stated and cumulative of other testimony, the prejudice resulting from that evidence may be "devastating," especially when considered in combination with other errors. (*See*, ***Smith v. AC and S, Inc.*** (1994) 31 Cal.App.4th 77, 92; ***Maben v. Lee*** (1953) 260 P.2d 1064.)

In this case, the supposedly "expert" opinion of the coroner lent undue credibility to the prosecution's witnesses and caused the jurors to overlook the contradictions in their testimony. Two prosecution witnesses, Tommy Aldridge and Dennis Ostrander, testified that James had confessed to killing the victims "execution style." [42] As discussed above, there were significant discrepancies between Ostrander's testimony and Aldridge's testimony regarding what James Robinson allegedly said about how he shot the victims. Both witnesses, however, testified that James admitted carrying out "execution style" killings. The "execution style" scenario was advanced through the coroner's opinion. The addition of the coroner's expert opinion undoubtedly caused the jury to overlook the discrepancies in Ostrander's and Aldridge's accounts and, instead focused the jurors attention on the points of agreement in their stories. The coroner's opinion testimony thus bolstered Aldridge's and Ostrander's credibility, and made it falsely appear that scientific fact supported their testimony. As the court itself recognized, the prosecution's chances of proving that James Robinson was responsible for carrying out the "execution style" shootings depended upon the credibility of the prosecution witnesses. Their testimony, and

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[42] *See*, testimony of Dennis Ostrander (RT 783-797) and testimony of Tommy Aldridge (RT 547-573).

the case in aggravation against James Robinson, gained tremendous support with the admission of this allegedly objective and scientific "expert" opinion stated by the coroner. Respondent also fails to discuss the other significant prejudicial impact of the trial court's erroneous ruling admitting this opinion testimony. Eyewitness Rebecca James testified that the person on the customer's side of the counter jumped over the counter in pursuit (which, at the time, she believed was playful rough housing) of the person in the employee area. (RT 268.) Ms. James' testimony thus directly contradicted Ostrander's and Aldridge's accounts and, if it had not been overshadowed in the jurors' minds by the coroner's "expert" opinion, would have cast serious doubts on the truth of Ostrander's and Aldridge's testimony concerning James Robinson's alleged confessions to the "execution style" killings. At the very least, her testimony undercut the "execution style" shooting scenario, because it supported the alternate version of the events the coroner had postulated, i.e., that the trajectories of the shots were consistent with the shooter having been standing on the counter top and firing down on the victims. (*See,* RT 2026.) Under these circumstances, it can hardly be doubted that the expert's testimony was highly prejudicial if not outcome determinative.

H. The erroneous admission of this testimony was not harmless error, and reversal is required under any applicable standard because the trial court's error violated California law and infringed on several federal constitutional rights.

For all of the reasons discussed above and in the AOB, the trial court erred by allowing the coroner to give an expert opinion concerning the relative positions of the victims and the shooter(s) at the crime scene. (*See,* AOB at pp. 234-244.) The trial court's admission of this expert opinion testimony was contrary to established California law, and deprived James Robinson of several federal constitutional rights. Respondent finds that, even if the trial court erred in allowing the coroner's testimony, any error was harmless. (Resp. Brief at p. 94.) For all of the reasons set forth below, respondent's analysis is inaccurate and incomplete. As discussed below and in the AOB, reversal of both the

convictions and sentence of death is required under any applicable standard.

1. Respondent's evaluation of prejudice in the guilt phase is misleading because it does not consider the entire evidentiary picture.

Respondent finds that, assuming the trial court erred by admitting this evidence, there was no prejudice because the coroner's testimony was cumulative of testimony given by prosecution witnesses Ostrander and Aldridge. Respondent characterizes the coroner's testimony as "relatively sterile" and, applying the standard of ***People v. Watson***, *supra*, 46 Cal.2d 818, 836, finds that there is no reasonable probability of a more favorable result if this evidence had been excluded. (Resp. Brief at 94.) [43]

As discussed above, respondent's analysis is flawed by its failure to evaluate the effects of this error in the greater context of the trial. The prejudicial effects of the coroner's testimony must be assessed in conjunction with the other guilt phase evidence. (***People v. Hill***, *supra*, 17 Cal.4th 800, 844-846.) The verdict in the guilt phase depended upon the outcome of a credibility contest between the prosecution's witnesses and James Robinson. Prosecution witnesses Dennis Ostrander and Tommy Aldridge testified that James confessed to the Subway robbery/murders, and admitted shooting each of the victims in the head. (*See* RT 564-565; 792-795.) James flatly denied any involvement in the Subway crimes, and testified that he had never made any statements to either Ostrander or Aldridge. (RT 905; 959; 2362.)

As discussed above and in the AOB, the jury had good reasons to be suspicious of Dennis Ostrander's testimony. Ostrander did not come forward with the information about

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[43] As discussed in the AOB, James Robinson acknowledges that errors involving a trial court's decisions to admit evidence are typically reviewed under the ***Watson*** standard. He contends that the errors at issue here should be subject to the higher standard this Court has applied to state law errors implicating important constitutional rights. ***People v. Fudge***, *supra*, 7Cal.4th 1075, 1102-1103. (See AOB at pp. 237-238.) However, reversal is required under any applicable standard for the reasons set forth above and in the AOB.

James Robinson's alleged confession, even when asked directly by his supervisor, until after the reward had been announced. He also tried to coerce a financial settlement out of Lucky Market, and attempted to get the police to compensate him for his testimony. (*See*, AOB at pp. 75-80; 239-240.) Tommy Aldridge's testimony was suspect as well.[44] The discrepancies in the stories told by these two witnesses concerning how the killings allegedly occurred ought to have caused the jury to question their testimony entirely. The prosecution, however, was able to bolster the credibility of these witnesses with the coroner's supposedly "expert" opinion testimony.

The prosecutor framed his questioning of the coroner so that the expert's testimony was consistent with the confessions James allegedly made to Ostrander and Aldridge. The coroner's testimony reinforced Aldridge's and Ostrander's testimony by adding the credibility of expert opinion to confirm their stories. When the coroner's testimony about the likely scenario at the crime scene was added to these witnesses' testimony, the prejudice was surely overwhelming. Because the coroner's testimony confirmed the "execution style" aspects of the crimes, and was thus consistent with these witnesses' testimony, the jury was sure to disregard any doubts they may have had about Tommy Aldridge's and/or Dennis Ostrander's credibility. The jurors were also likely to overlook the discrepancies between each of their versions of James Robinson's alleged admissions. In addition, the coroner's allegedly "expert' opinion overshadowed eyewitness Rebecca James' testimony which was inconsistent with not only the coroner's scenario but Ostrander's and Aldridge's testimony. As discussed in the AOB, the direct result of the trial court's erroneous ruling was that this jury convicted James Robinson without seriously examining the inconsistencies in the witnesses' testimony and without considering the defense evidence about what had taken place at the Subway Sandwich Shop. (*See*, AOB at pp. 237-244.)

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[44] As discussed in the AOB and in Argument I, *supra*, the jury was largely unaware of the reasons to doubt Tommy Aldridge's credibility as a result of the trial court's erroneous exclusion of evidence bearing on his motives and on his truthfulness. (See, AOB at pp. 75-80; 239-240.)

2. Respondent's analysis of prejudice in the penalty phase ignores the prosecutor's use of this testimony in closing argument and in the presentation of victim impact evidence.

Respondent's evaluation of prejudice in the penalty phase is equally flawed, and its discussion suffers from similar refusals to consider the entire record and to assess the prejudice in that context. Respondent applies the standard of ***People v. Jackson*** (1996) 13 Cal.4th 1164, 1232, holding that penalty phase error "will be considered prejudicial when there is a reasonable possibility such error affected a verdict." (Resp. Brief at p. 94.) Applying this standard to the present case, respondent concludes that the evidence was "overwhelming," and that "it is not reasonably possible that admission of Dr. Rogers's testimony made the difference between a verdict of death and one of life imprisonment without possibility of parole." (*Id*., citing ***People v. Brown*** (1988) 46 Cal.3d 432, 446-449.)

Respondent's cursory dismissal of the prejudice evaluation is almost incredible given the state of this record. As discussed in the AOB, the coroner's penalty phase testimony was perhaps the single piece of evidence most responsible for the death verdict in this case. (See, AOB at pp. 234-244.) Dr. Rogers' testified that, in his expert opinion, the likeliest scenario was that the victims had been kneeling with their backs to the shooter when the fatal shots were fired. (*See* RT 2027-2029.) The testimony was accompanied by the prosecutor's dramatic re-enactment of the victims' possible positions, featuring the prosecutor himself acting out the scene by kneeling and then lying on the courtroom floor. During this demonstration the prosecutor held the alleged murder weapon. (*See* RT 2025-2029.)

The jurors were also subjected to an excessive amount of very disturbing and highly prejudicial victim impact testimony from several witnesses. (*See*, Argument V, *infra*; AOB at pp. 264-335.) These witnesses adopted as proven fact the "execution style" scenario, and this imagery was used in emotional and disturbing pleas for the ultimate punishment. The family members of the two victims described their horror and distress at having their sons killed while kneeling before the killer, begging and praying for their lives. (RT 2253;

2283.) Based on Dr. Rogers' testimony about the victims' positions, the family members gave their opinions about the despicable and cowardly type of person who could kill in this fashion. (*Id.*)

Finally, the jury was left with the imagery induced by the prosecutor's closing argument. There, supported by the coroner's testimony, the prosecutor repeatedly invoked the image of the helpless victims kneeling in prayer before their killer. (RT 2779-2780; 2791; 2805.) The prosecutor's argument continued in this emotional and inflammatory manner, with him encouraging the jury to impose a death sentence for the sole reason of how the crimes were allegedly carried out. (*See,* RT 2782-2785; 2791; 2805; 2810. *See also,* Argument VII, *infra;* AOB at pp. 350-365.)

3. The erroneous admission of the coroner's opinion testimony created additional prejudice by encouraging the jury to disregard evidence which was not consistent with the prosecution's version of events.

Without Dr. Rogers' testimony, the prosecutor would have had little credible basis for the "execution style" killing scenario. In fact, as discussed above and in the AOB, there is reliable evidence directly contradicting this version of events. Due to the trial court's erroneous ruling which permitted this expert opinion testimony, the jurors disregarded any doubts about Ostrander's and Aldridge's credibility, did not question the discrepancies in their stories and/or the ways in which their testimony differed from the coroner's opinion.

Equally significant, the coroner's "expert" confirmation of the prosecution's scenario caused the jury to disregard Rebecca James' eyewitness account of the shooting and the physical evidence which corroborated her testimony but ***did not*** comport with the prosecution's execution style killing scenario. Ms. James saw three men, two Whites and a male Black, inside the Subway Sandwich Shop. (RT 268.) The Black man was standing on the customer's side of the counter, and he appeared to be holding a gray or black metal bread pan. (RT 267.) Ms. James glanced away, but looked inside the Subway sandwich shop for a second time a few moments later when she heard a startling noise. It sounded like a "bang," as if the metal bread pan had been dropped on the floor. (RT 289.) Ms. James

then saw the Black male either run around the counter or jump over the counter. At the preliminary hearing, Ms. James stated, "I thought I saw him get taller like he jumped." (CT 22.) Ms. James was not alarmed because she thought that the people were roughhousing or playing. (RT 268.) The active scene Ms. James witnessed clearly does not match the cold calculated "execution style" killings described by the prosecution witnesses and supported by the coroner's opinion stating that the victims' were kneeling in front of the shooter(s).

There was significant physical evidence which matched Ms. James' testimony but was not consistent with the prosecution's "execution style" killing scenario. A shoe print was obtained from atop the counter at the Subway sandwich shop (RT 756), confirming Ms. James description of the suspect leaping on top of, and then over, the counter.[45] Other evidence failed to implicate James Robinson, and supported his testimony. There was no evidence of James having touched anything inside the Subway store.[46] Ms. James was unable to identify James Robinson from a photo "Six Pack" that the police showed her shortly after the crime. (RT 297-299; 301.) At trial, she described the customer at the Subway sandwich shop as being approximately 5'10" tall and identified James as the person she had seen. (RT 269.) However, Ms. James also agreed that there were a number of dissimilarities between James and the man she had seen in the Subway. (*See*, RT 294-296.) Ms. James did not recall the suspect wearing glasses. (RT 302.) The man she saw appeared to be somewhat rounder in his build and had a rounder face. Ms. James noted that James had a more slender and angular face than the man she had seen. (RT 295.) She described the suspect as having full lips, being "broad where the eyes are" and having short hair. (RT

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[45] During the search of James' apartment at the time of his arrest, the officers seized shoes to attempt to match that print. No match could be made to any of James Robinson's shoes. (RT 757.)

[46] Fingerprints were obtained from the cash register but none of them matched James Robinson. (RT 779-780.) Latent prints were also found on a bag of potato chips, but none were matched to James Robinson. (RT 780-781.) One identifiable fingerprint was obtained from the floor safe, and this was matched to victim White. (RT 875.)

271.) She also remembered telling the police that the male Black she saw was not very dark-skinned. (RT 294.)

I. Conclusion.

The jury's disregard for all of the evidence contrary to the prosecution's "execution style" killing scenario indicates the force of the coroner's testimony. Dr. Rogers' allegedly expert opinion about the victims' probable positions relative to the shooter was the central underpinning for this theme. Particularly in combination with the improper and excessive victim impact testimony in the penalty phase, in which the witnesses invoked the image of the kneeling victims, the prejudice was surely overwhelming. (***People v. Hill***, *supra*, 17 Cal.4th 800, 844-846; Argument V, *infra;* AOB at pp. 264-335.) Under these conditions, it is simply fantastic to believe that the jury was capable of calm and rational deliberation on an appropriate sentence. Having been so moved by their emotions, the jurors were primed to disregard the entire defense case in mitigation and to follow the prosecutor's directive to return a death verdict.

Under the circumstances of this case, the state cannot meet its burden of establishing that the error was harmless beyond a reasonable doubt. (***Chapman v. California***, *supra,* 386 U.S. 18, 24.) It is equally clear that there was at least a reasonable possibility that the jury would have returned a life sentence but for the admission of this testimony. (***People v. Brown***, *supra*, 46 Cal.3d 432.) Accordingly, this Court should reverse James Robinson's sentence of death.

IV.

RESPONDENT FAILS TO ESTABLISH THAT THE TRIAL COURT CORRECTLY HANDLED THE JURY'S REQUEST FOR A READBACK OF TESTIMONY, OR THAT THE COURT'S ERRONEOUS DELEGATION OF AUTHORITY WAS NOT HIGHLY PREJUDICIAL TO JAMES ROBINSON.

A. Background and introduction.

1. Proceedings in the trial court.

James Robinson raises several claims arising from the trial court's mishandling of the jury's request for certain testimony to be re-read during their deliberations in the guilt phase. (*See*, AOB at pp. 244-263; CT 308; RT 1392-1396.) The jurors sent a note to the court asking to have three areas of testimony re-read. The trial judge summoned both counsel and James Robinson into court to discuss how the jury's request would be handled. (RT 1392.) The court stated on the record that the jury had asked for: "testimony of Barbara Phillips regarding the position of fingerprints on the bag. Also, the number of prints and whether put on at the same time." Secondly, they are requesting "testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning." Finally, the jury had asked to hear "whether James had the gun Sunday morning after he returned home." (RT 1392-1393.) The court then stated: "[a]nd I take it all the testimony has been found as to those items and the jury and alternates will be read those in the jury room." (RT 1393.)

As discussed in the AOB, the record reveals that the trial judge directed the court reporter to locate the testimony responsive to the jury's requests. The court reporter made these determinations without input from or supervision by the trial judge. (*See*, AOB at pp. 250-252.) At the trial court's suggestion, defense counsel and James Robinson waived their rights to be present during the read back. (RT 1393-1394.)[47] The jurors were then directed

[47] The waiver of rights to be personally present does not undermine this claim. The defense was entitled to rely, and did rely, on the trial judge's representation that the appropriate testimony was selected for the read back. Defense counsel would have

to return to the jury room for the court reporter to read back the testimony.

This claim concerns the testimony which was re-read in response to the jury's request for James Robinson's testimony concerning whether he had the gun when he returned to Tai's apartment early on Sunday morning. (RT 1396.) [48] The reporter selected a very lengthy excerpt from James Robinson's cross-examination. Only the last few lines of the excerpt (set forth below in boldface) were responsive to the jury's question, i.e. whether or not James Robinson had the gun when he was at the apartment early in the morning hours of June 30th. The majority of the readback, some four transcript pages, was not only non-responsive but was also highly prejudicial to the defense and created a misleading picture of the evidence:[49]

> Q: At any time after 2:20 in the evening [sic] could you have walked out of the apartment, walked that hundred yards over to Von's, put a quarter in the phone, dialed 911 and said "there are two kids injured at the Subway at Zelzah and Devonshire" and hung up. Could you have done that?
>
> A: Yes sir, that could have been done.
>
> Q: It was not a difficult task, was it?
>
> A: No, sir.
>
> Q: You chose not to do it, right?
>
> A: I didn't choose against doing it, I just didn't make any decisions. I just didn't come to any decisions.
>
> Q: And you didn't do it?

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objected if he had been present during the readback.

[48] The court reporter read back appropriate and responsive excerpts from fingerprint examiner Barbara Phillips's testimony in response to another of the jury's requests. (RT 1396.)

[49] The court reporter re-read James Robinson's testimony located in Volume 11, page 1176, line 19 to line 24; page 1069, line 23 to page 1073, line 17. (RT 1396.)

A: No, sir.

Q: Now during this two and a half hour period – actually, you left at about six o'clock in the morning?

A: Yes, sir.

Q: This two and a half hour period, did you call the police and tell them about Tai?

A: No, sir.

Q: Were you afraid of Tai at this time?

A: Yes, sir.

Q: Terrified, right? Would that be a fair statement?

A: I was scared but I was – I was terrified but I was still trying to assume that I knew him and that maybe I could talk to him, but then I didn't think the risks of finding out, you know, one or the other was worth it. I –

Q: Do you think that he had set you up?

A: No, sir.

Q: Why do you think, in your own mind, what's going through your mind at that time because he has told you to meet him at the Subway?

A: I had thought, well, I didn't understand if he wanted to meet me there, and I was thinking, did he want to meet me there and then just do this just because he had thought about it or did he plan to do this or did he think I would help him do this. Or did he plan to kill me or I didn't, you know, I thought of all those and I couldn't tell which one might have been, what I just wasn't sure.

Q: So you thought he might want to kill you too, right?

A: Yes, sir.

Q: So you are in fear for your life at this time, right, because you think he is going to kill you?

A: No, sir. I just wondered if he had planned to.

Q: So you are not in fear for your life?

A: I was in fear.

Q: And you are in fear because you think he is going to kill you, right?

A: Well, I thought he had intended to. I wasn't sure if he still was or – I wasn't sure why his reason was for him wanting me to be there after what I saw and I was wondering, you know, did he, you know, think that I was going to go along with something like this or did he want to do me or did he just not intend to do any of this and he just did it. I swear, I didn't know.

Q: So it is 2:30 in the morning, Tai has committed the robbery, Tai has injured these two people. You think that Tai is going to kill you, might want to kill you?

A: Yes, sir.

Q: And you sit in the apartment and wait. Is that what you do?

A: Yes, sir.

Q: And watch television, right?

A: I had the t.v. on to keep me awake because I was tired.

Q: Killing people wears you out, doesn't it?

A: I never –

Q: Then at six o'clock in the morning you get up and you decide, well, now I am going to go get an apartment,

right?

A: No, sir. I decided to go to the hotel.
Q: Because you decided these two and a half hours you have thought and you have planned and you said, 'well, Tai might want to kill me. Maybe I ought to leave now and get an apartment, get a motel room?'

A: No, sir. I didn't think or plan anything. I had just assumed as soon as he wake up, you know, came in and said, 'I want you gone,' this and that, and then I figured, you know, now that it is daylight out, and I can do a lot of things, a lot of things that are not open are open now.

Q: You got the apartment – well, when you left Tai's apartment, you took all your money with you, right?

A: Yes, sir.

Q: You took your gun with you?

A: Yes, sir.

Q: As a matter of fact, when you were waiting there with Tai, you had your gun because you were afraid of him, right ?

A: Yes, sir. I – yes, sir, I did.

(RT 1069-1073.)

The re-reading of testimony continued with the following passage from defense counsel's redirect examination:

Q: In response to Mr. Barshop's questions, you have indicated for us that you did have the gun in the apartment in the period of time between 2:00 or three o'clock in the morning and somewhere around six o'clock in the morning when you left.

A: Yes, sir.

The court reporter ***omitted*** the very next question:

> Q: Did you have it during the hours of, say, 11 o'clock on Saturday night and the time when you returned to the apartment?
>
> A: No, sir.

(RT 1176.)

Following the readback, the jury resumed deliberations. (RT 1396.) The jurors reached a verdict the next day, finding James Robinson guilty on all counts charged in the information. (CT 310; RT 1399-1402.)

2. Claims on appeal.

The trial court completely mishandled the jury's request for a re-reading of testimony. (*See,* AOB at pp. 244-263.) The court failed to maintain control and supervision of the readback process as required by the applicable California statute, Penal Code section 1138. [50] (***See,*** AOB at pp. 253-261; ***People v. Litteral*** (1978) 79 Cal.App.3d 790, 794.) The trial judge was not authorized to allow the court reporter to select the portions of testimony responsive to the jury's specific requests. The trial court compounded this unauthorized delegation of its authority by failing to review the court reporter's choices of testimony for the readback, and by failing to supervise the proceedings when the testimony was re-read. (*Id*.)

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[50] California Penal Code section 1138 sets forth the trial court's duties where a deliberating jury has requested a readback of testimony. The statute provides:

> After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

As discussed in the AOB, the trial court's actions in this instance are not entitled to deference on review. Trial courts generally have the discretion to manage readback procedures. (*See* AOB at pp. 253-256; Penal Code section 1138.) However, this court's handling of the readback cannot be considered a valid exercise of judicial discretion. The court improperly delegated all responsibility for the readback to the court reporter and then failed to oversee the reporter's handling of the procedure. (*See AOB 253-256;* ***Fisher v. Roe*** (9th Cir. 2001) 263 F.3d 906; ***Riley v. Deeds*** (9th Cir. 1995) 56 F.3d 1117.) The court's unauthorized delegation of its judicial function constitutes a structural error, and reversal is required without a showing of prejudice. (*Id*.)

Should this Court determine that the trial judge exercised some discretion in connection with the readback, James Robinson contends that the trial court abused its discretion. (*See*, AOB at pp. 256-261.) As discussed in the AOB, the reporter's choice of testimony was inappropriate in several respects and was also highly misleading and prejudicial. (*See*, AOB at pp. 261-263.) First, the four-page excerpt of James Robinson's cross-examination was largely irrelevant to the question asked. A great deal of non-responsive material was included while other relevant testimony was omitted. Second, because the excerpt consisted almost entirely of the prosecution's cross-examination, it presented a skewed picture of the evidence. It was as if the state was allowed to re-introduce its evidence on an *ex parte* basis. Because James Robinson's credibility was crucial to the state's case, the readback, with its emphasis on the prosecutor's cross-examination, acted as an argumentative pinpoint instruction. The excerpt of defense counsel's redirect examination included in the readback was limited to a single question and answer while the selection of cross-examination covered four transcript pages. Third, the court reporter omitted some material which was relevant to the jury's request. The very next question and answer in James Robinson's redirect testimony was directly responsive to the jury's request and should have been included in the readback. Finally, the majority of the testimony re-read to this jury was not only irrelevant but highly prejudicial. The prosecutor's cross-examination of James Robinson contained a number of inappropriate comments and

insinuations about the defendant's character, creating a highly prejudicial and misleading view of the evidence. (*Id*.)

The jury thus heard irrelevant, incomplete, and misleading testimony during the guilt phase deliberations in James Robinson's capital trial as a direct result of the trial court's unauthorized delegation of responsibility to the court reporter. The fact that this testimony was reread during deliberations, and at the jury's request, increased the prejudicial effect. The trial court's actions thus denied James Robinson his rights to due process of law and to a fair trial as required by the Fifth, Sixth and Fourteenth Amendments to the federal constitution. The erroneous inclusion of this testimony in a capital trial also undermines the heightened reliability required by the Eighth Amendment. For all of the reasons set forth in greater detail below and in the AOB, reversal of the convictions is required.

3. Respondent's contentions.

Respondent contends that any and all claims of error concerning the readback are waived for failure to object. (Resp. Brief at pp. 96-97, 99.) Assuming arguendo, that these claims are preserved for review on appeal, respondent asserts that trial judge's handling of the readback was correct in every aspect. According to respondent's interpretation of the record, the trial court was actively involved in selecting the testimony to be re-read and supervised the proceedings. (Resp. Briet at pp. 97-98.) Respondent next contends that the selection of testimony re-read to the jury was responsive to the jury's questions and was otherwise entirely appropriate. (Resp. Brief at pp. 98-99.) Finally, respondent concludes that any errors concerning the readback were harmless, "in light of the substantial evidence" of James Robinson's guilt. (Resp. brief at p. 99.)

B. These claims are preserved for appeal, and respondent's assertions that they are waived reflects its failure to understand the applicable law and the trial record.

According to respondent, this entire group of claims has been waived and may not be considered by this Court. Respondent asserts that James Robinson's claims of error under state law are waived because trial counsel failed to object under Penal Code section 1138.

(Resp. Brief at p. 96; citing ***People v. Frye*** (1998) 18 Cal.4th 894, 1007; ***People v. Rodrigues*** (1994) 8 Cal.4th 1060, 1193; ***People v. Price*** (1991) 1 Cal.4th 324, 414.) Elsewhere in its brief, respondent states that the federal constitutional claims are waived because counsel did not specifically object on these grounds at trial. (Resp. Brief at p. 99.) Respondent's only mention of the structural error discussion in the AOB is to state "there is no support for appellant's claim that automatic reversal is required." (Resp. Brief at p. 99.) None of respondent's waiver arguments are meritorious.

1. Respondent does not understand the basis for these claims.

While respondent contends that James Robinson has waived all state and federal claims arising from the trial judge's handling of the readback by not raising these issues in the trial court, it is unclear when and on what grounds respondent would have had defense counsel object. The defense did not object ***in general*** to having relevant and appropriate testimony read back to the jury. James Robinson was, however, entitled to rely on the court to ensure that only those portions of the testimony which were responsive to the requests would be included in the readback. This is not what occurred due to the trial court's failure to exercise its discretion to manage the readback pursuant to Penal Code section 1138.

Because James Robinson and counsel were not present during the readback, there was no opportunity for a contemporaneous objection. Respondent cites no authority, and James Robinson is aware of none holding that the defendant waives the right to have the readback properly supervised and conducted by waiving the right to be personally present during the proceeding. As noted in the AOB, if counsel had been present he surely would have objected to the selection of testimony read to the jury. (*See*, AOB at p. 245, fn.#46.) It is unreasonable to conclude that James Robinson has waived either state or federal claims, because ***none*** of the claims were discernible until the record on appeal was prepared.

Should this Court determine that James Robinson's federal constitutional claims were somehow waived in the trial court, this does not preclude review on appeal. This Court may also use its discretionary power to review the constitutional issues raised in these claims. (See ***Hale v. Morgan,*** *supra*, 22 Cal.3d 388, 394; ***People v. Truer,*** *supra*, 168 Cal.App. 3d

437, 441 [reviewing prosecution claim for the first time on appeal].) An exercise of this Court's discretion is appropriate here because the error here is purely legal, and does not depend upon a factual determination. (See ***People v. Vera,*** *supra,*15 Cal.4th 269, 276 ["Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."]; ***People v. Blanco,*** *supra,*10 Cal.App.4th 1167, 1172-1173 [reviewing a constitutional claim on appeal where it had been characterized only as an evidentiary objection in the trial court].)

C. Respondent misstates the factual bases of the claims on appeal and misinterprets the record to suit its position.

At several points in its discussion of these claims, respondent interprets the trial record to suit its position even where that interpretation is contrary to common sense. Respondent also misstates the factual basis of James Robinson's claims, making the claims appear to be thinly supported in the record. Respondent's discussion in these areas is misleading and inaccurate and should be disregarded for the reasons set forth below.

1. <u>The logical interpretation of the trial court's statements supports the claims made in the AOB.</u>

Respondent contends that there is no evidence that the trial judge abdicated control of the readback. In its brief, respondent states:

> "First, appellant claims the trial court erroneously 'failed to participate in the planning and supervision of the readback[.]' (AOB 254-256.) Appellant bases his claim on the trial court's statement, after listing the jury's requests for the record, that ' . . .I take it all the testimony has been found as to those items and the jury and alternates will be read those in the jury room.' (AOB 245; see also RT 1393.)" (Resp. Brief at p. 97.)

Respondent then provides its interpretation of the trial court's remarks. According to respondent, "[t]he trial court's statements merely acknowledged the procedure for fulfilling the jury's requests, i.e., the jury's requests are received by the trial court, the trial court reads

the requests and notifies counsel, the requested testimony is located and re-read to the jury." (Resp. Brief at p. 97.)

Respondent interprets the trial court's remarks in a manner which is divorced from common sense and ordinary meaning. Contrary to respondent's contentions, there is no reason for the trial court to reiterate for counsel's benefit the process for handling jury requests to re-read testimony. The phrasing of the trial judge's remarks, "I take it that . . ." clearly indicates the court is posing a question to others. The judge is not stating what he himself has done in regard to the readback. Rather, the trial judge is stating for the record his understanding of what has occurred, i.e., that the requested testimony "***has been located***" by the reporter, and indicating that the readback is ready to proceed.

Respondent also abbreviates the factual basis for James Robinson's claim to suit its position. The claim does ***not*** depend solely on this one remark by the trial court. There are other clear indications that the court did not maintain control of the readback. As noted above and in the AOB, the majority of the testimony selected for the readback was not responsive to the jury's request. This fact, along with the trial court's remarks, indicates that the trial judge not only had the court reporter select the testimony for the readback, but failed to review the court reporter's selections.

2. Defense counsel's remarks do not indicate that counsel participated in selecting testimony for the readback.

One remark by defense counsel is interpreted in respondent's brief to mean that counsel had actively participated in selecting the responsive testimony. (Resp. Brief at pp. 97-98.) Respondent relies on defense counsel's statements to his client after the trial court suggested that James Robinson should waive his right to be present for the readback. Defense counsel stated: "Let me explain this to you, Mr. Robinson, before you answer. The lady who has been here, who is the court reporter, has not only taken down the testimony of the witnesses but she has transcribed it. *We have had an opportunity to read it for any errors.*" (Resp. Brief at pp. 97-98; citing RT 1393.)

Here again, respondent ignores the rest of the record in order to make use of a

solitary phrase which may be construed to support its position. Defense counsel is ***not*** stating that he has searched the record for testimony responsive to the jury's other requests, or that he has participated in choosing those selections for the readback. At the start of trial, the court had ordered that the day's proceedings be transcribed immediately and delivered to both counsel. Defense counsel here is referring to the "dailies," and assuring his client, Mr. Robinson, that the readback will be accurate insofar as it conforms to what was stated in court. Counsel is not, contrary to respondent's assertions, vouching that the testimony selected to be re-read will be responsive to the jury's request.

3. The trial court's other statements not only fail to support respondent's interpretation, but establish that this court took no part in selecting testimony for the readback.

Respondent in its brief makes a final desperate effort to support its position with a strained interpretation of the trial court's remarks. In its brief, respondent contends that "when the trial court addressed the jury's request for a readback of appellant's testimony regarding whether Tai Williams was home when appellant returned to the apartment, the trial judge personally vouched for the careful consideration of the jury's request." (Resp. Brief at p. 98.) Respondent relies on the court's statement to the jury: "*After a thorough search, and after discussion with counsel*, I can tell you right now there was no testimony of James Robinson regarding whether Tai was home when James returned on Sunday morning." (*Id.*, citing RT 1395 [emphasis added].) According to respondent, these comments demonstrate that the trial judge personally searched the record and selected testimony for the readback.

Respondent is mistaken. Viewed in context, the court's comments support James Robinson's claim and reveal that the trial judge abdicated ***all*** responsibility for the readback and took no part in selecting the testimony. Upon receiving the jury's note, the court called both counsel and James Robinson into court to discuss how the request for a readback would be handled. The trial judge's remarks here flatly contradict respondent's claims that this court actively participated in selecting responsive testimony for the readback.

The Court: All right, People versus Robinson. The defendant is present, all counsel are present, the jury and the alternates are not present.

I have received the following communication from the jury:

They are requesting "testimony of Barbara Phillips regarding the position of fingerprints on the bag. Also, the number of prints and whether put on at the same time."

"Secondly, they are requesting "testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning."

The reporter informed me that there is no such testimony. And I take it that counsel recalls that there was no such testimony by the defendant.

Mr. Hill: That's correct.

Mr. Barshop: That is correct, your Honor.

The Court: The jury will be informed as such. (RT 1392.)

Shortly thereafter, the court ordered the jury brought into the courtroom. (RT 1393-1394.) The court addressed the jury concerning each of the three requests. Each request was reiterated on the record. In connection with the second request, the court made the remark which respondent finds so compelling:

Two, you want testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning.

After a thorough search, and after discussion with counsel, I can tell you right now there was no testimony of James Robinson regarding whether Tai was home when James returned home on Sunday morning."

(RT 1395 [emphasis added].)

The trial court's remarks to the jury are clearly based on the discussion between the court and counsel just before the jury was called in. The court here is merely relaying the representations of counsel and the court reporter that this portion of the testimony requested

does not exist. The trial court's references to a "thorough search," and "discussion with counsel," do ***not*** support respondent's assertions that the judge was personally involved in locating and reviewing testimony for the readback. On the contrary, viewed in light of the earlier discussion with counsel and the reporter just before the jury entered the courtroom, the court's remarks to the jury clearly indicate that this judge did not participate in selecting the testimony for the readback. The obvious interpretation of this record is that the court delegated the choice of testimony to the court reporter.

D. Respondent does not show that the trial court's delegation of responsibility to the court reporter was a valid exercise of judicial discretion entitled to deference on review.

As discussed in the AOB, the trial court here delegated most of the responsibilities for the readback of testimony to the court reporter. The court had no discretion (in Penal Code section 1138 or elsewhere in California law) to make this delegation of responsibility. As a result, the trial court's actions do not constitute an exercise of discretion, and are not entitled to deference on appeal. (*See*, AOB at pp. 254-256.) Moreover, the court's unauthorized delegation of its judicial function undermined the very structure of the criminal trial. In ***Riley v. Deeds***, *supra*, 56 F.3d 1117, the Ninth Circuit reversed the defendant's conviction based on the trial court's improper delegation of responsibility in connection with a readback.. The Ninth Circuit found that it was not necessary to show prejudice because the district court's lack of participation constituted structural error. (*See, AOB at pp. 261-262;* ***Arizona v. Fulminante***, *supra*, 499 U.S. 279, 309-310.)

Respondent contends that ***Riley v. Deeds*** is distinguishable from this case, but does not explain the relevant distinctions in its brief. (See Resp. Brief at p. 97.) The distinctions respondent notes however, are not central to the holding and do not affect the case's application to these facts. As discussed in the AOB, the district court judge in ***Riley v. Deeds*** was not physically present in the courthouse when the testimony was reread. (*See* AOB at pp. 251, 253-256.) This factual difference was not, however, central to the legal analysis. The Ninth Circuit was primarily concerned with the district court judge's failure to select

the testimony for the readback and to supervise those proceedings. The Ninth Circuit stated:

> In this case, the judge was not only absent from the readback, ***he exercised no discretion in the decision whether to permit Leatrice's testimony to be read back, or how much of it should be read or whether other testimony also should be read. This complete absence of judicial discretion distinguishes this case*** . . . .

(*Id.* at 1120; *see also*, ***People v. Litteral***, *supra*, 79 Cal.App.3d 790, 794 [suggesting that "strong supervision" by trial court is appropriate in context of jury readbacks].)

Riley v. Deeds is directly analogous to James Robinson's case and its reasoning compels the same result. The trial judges in both cases allowed other, unauthorized, parties to perform judicial functions in connection with jury requests to have testimony reread in a criminal case. Both courts failed to exercise their discretion in the same specific manner. Like the court in that case, the judge in James Robinson's case failed to determine "how much testimony should be read or whether other testimony also should be read." (***Riley v. Deeds***, *supra*, 56 F.3d 1117,1120.) This court's abdication of the same responsibilities for a readback compels the same result. The trial judge's failure to meaningfully participate in selecting testimony and overseeing this readback constituted structural error which undermines the entire judicial process. James Robinson's convictions must be reversed. (***Arizona v. Fulminante***, *supra*, 499 U.S. 279, 309-310.)

E. The trial court's handling of the readback was an abuse of its discretion requiring reversal of James Robinson's convictions.

Should this Court find that the trial court exercised some discretion in connection with the readback, the trial court's actions constituted an abuse of its discretion. As discussed above and in the AOB, this court did not participate in selecting the material responsive to the jury's requests. The trial court abused its statutory discretion by delegating the task initially and by subsequently failing to oversee and supervise the court reporter. Having delegated the job of locating and selecting the portions of the record responsive to the jury's request the court was, at a minimum, responsible for seeing to it that

the court reporter had carried out the task correctly. (*See,* AOB at pp. 256-261.)

Here again, respondent does not undertake a meaningful analysis of James Robinson's legal claims. In its brief, respondent tries to distinguish the cases discussed in the AOB concerning trial courts' obligations to supervise jury requests for rereading of trial testimony. Respondent focuses on slight factual differences between the cited authorities and James Robinson's case: "[u]nlike the cases cited by appellant (see ***Fisher v. Roe***, *supra*, 263 F.3d 906; ***Riley v. Deeds,*** *supra,* 56 F.3d 1117; see also AOB 251, 253-256), this is not a case in which the readback occurred without the knowledge and participation of trial court and/or counsel." (Resp. Brief at p. 97.) Respondent deliberately focuses on relatively insignificant distinctions to avoid applying the principles stated in these cases to the present case.

Both state and federal courts have considered the extent of trial judges' discretion in connection with jury requests for readbacks of testimony. The cases reveal several criteria for a proper exercise of judicial discretion concerning a readback. Trial courts must be actively involved in selecting the testimony and in supervising the way in which the readback is conducted. (*See*, ***People v. Litteral***, *supra,* 79 Cal.App.3d 790, 794.) The testimony which is reread must be responsive to the jury's request. (***People v. Rogrigues***, *supra,* 8 Cal.4th 1060, 1123; ***People v. Cooks*** (1983) 141Cal.App.3d 224.) The testimony must be repeated accurately (***People v. Aikens*** (N.Y. 1983) 465 N.Y.S. 480) and in such a way that no undue emphasis is placed on any portion of the readback. In addition, the testimony selected should also present a balanced view of the evidence. (***Fisher v. Roe***, *supra,* 263 F.3d 906; ***United States v. Hernandez*** (9th Cir. 1994) 27 F.3d 1403.) The better practice is to include both the direct and the cross-examination. (*See, e.g.*, ***State v. Wilson*** (2002) 165 N.J. 657, 762 A.2d 647.) The excerpts of testimony chosen for the readback in this case failed to satisfy these minimal requirements.

Trial courts are under an affirmative duty to ensure the fairness of any readback ordered. In ***Fisher v. Roe***, *supra,* 263 F.3d 906, 917 the Ninth Circuit stated:

> Moreover, we have reversed convictions and said that a trial

> judge abuses his discretion if he fails to take measures to present a balanced view of testimony when a jury requests a readback.

(*See*, *e.g.*, ***United States v. Hernandez***, *supra*, 27 F.3d 1403, 1409 [district court abused its discretion where it allowed jury to re-read transcript of critical testimony without admonishing jury that it must weigh all evidence and not rely solely on the transcripts].)

The trial court in James Robinson's case abused its discretion in every respect noted above. The court made no effort at supervision. The court apparently concluded that its responsibilities were over after summoning counsel, and subsequently the jury, and then announcing its decision to provide the jury with the requested testimony. The trial court's remarks clearly indicate that it had no involvement in selecting the testimony. The court stated: "And I take it all the testimony has been found as to those items and the jury and alternates will be read those in the jury room." (RT 1393.)

The trial judge's failure to provide even minimal supervision of the readback process resulted in the jury not receiving testimony which was relevant and responsive to their request. In addition, the testimony which was provided was misleading as it portrayed a slanted view of the case. This was not only misleading for the jurors, but was also highly prejudicial to James Robinson.

F. The testimony the court reporter selected for the readback was non-responsive, mis-leading and highly prejudicial to the defense.

The testimony included in the readback was largely irrelevant and non-responsive to the jurors' request.[51] Testimony which was directly responsive to the jury's inquiry was omitted, contributing to the imbalance in the evidentiary picture created through the readback. As discussed in the AOB, the prejudice was amplified by the inappropriate tone and gratuitous remarks the prosecutor made during cross-examination. (*See*, AOB at pp.

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[51] As noted in the AOB, the jurors' request was clear and concise -- they wanted to hear again James' testimony about whether he had the gun while at Tai's apartment early in the morning of June 30th. (AOB at p. 259; RT 1393; CT 308.)

261-262.) The prosecutor used his cross-examination to make a number of damaging and unsupported insinuations about James Robinson's character. This excerpt of the record provided little or no information responsive to the jury's request for a readback, while emphasizing a highly prejudicial and irrelevant attack on the defendant.

1. The jury heard testimony which was largely irrelevant and non-responsive to their request.

As may be seen from the excerpt set forth above in Sub-section A, the court reporter read ***four pages*** of James Robinson's cross-examination testimony which was not responsive to the jury's request. The relevant portion of James Robinson's testimony comprised only a few lines, and came at the end of this extensive excerpt of largely irrelevant material. Respondent notes that "[Penal Code] section 1138 'does not forbid giving the jury more than it requests so it also receives the context'." (Resp. Brief at p. 98, quoting ***People v. Hillhouse***, *supra*, 27 Cal.4th at pp. 506-507.) ***People v. Hillhouse*** does not, however, suggest that juries should be given extra material where additional context is not necessary to the jury's understanding. Moreover, respondent cites no authority holding that proper "context" includes an excerpt of testimony which is irrelevant, non-responsive, highly misleading and prejudicial, in addition to being ***five times longer*** than the relevant selection of transcript. This is precisely what occurred here due to the trial court's failure to review the court reporter's selection of testimony for the readback.

2. The reporter omitted relevant testimony from the readback.

The excerpt of testimony selected for the readback presented an unbalanced picture of the evidence by being both over-inclusive and under-inclusive. As discussed above and in the AOB, the court reporter's selection was over-inclusive insofar as four of the five transcript pages re-read to the jury were not relevant to the request. The selection was also under-inclusive, because the reporter did not re-read the very next question and answer from James Robinson's cross-examination which was directly responsive to the jury's inquiry. (*See*, AOB at pp. 258-261.)

It is inexcusable that obviously relevant testimony was omitted from the readback. The jury's request was sufficiently clear. In their note, the jurors asked for testimony about "whether James [Robinson] had the gun Sunday morning after he returned home." (RT 1392.) The reporter re-read some four pages of testimony having no bearing on this point. Only the very last few lines included in the readback addressed the jury's request:

Q: You got the apartment – well, when you left Tai's apartment, you took all your money with you, right?
A: Yes, sir.
Q: You took your gun with you?
A: Yes, sir.
Q: As a matter of fact, when you were waiting there with Tai, you had your gun because you were afraid of him, right ?
A: Yes, sir. I – yes, sir, I did.

(RT 1069-1073.)

The re-reading of testimony continued with the following passage from defense counsel's redirect examination:

Q: In response to Mr. Barshop's questions, you have indicated for us that you did have the gun in the apartment in the period of time between 2:00 or three o'clock in the morning and somewhere around six o'clock in the morning when you left.
A: Yes, sir.

The court reporter ***omitted*** the very next question, although it was obviously relevant to the jury's request:

Q: Did you have it during the hours of, say, 11 o'clock on Saturday night *and the time when you returned to the apartment*?
A: No, sir.

(RT 1176 [emphasis added].)

Respondent states that there was no error. The omitted question and answer "was clearly unresponsive to the jury's question" because, as respondent interprets the inquiry,

"the jury did not ask whether appellant had his gun with him at the time of the robbery and murders." (Resp. Brief at p. 99.) Respondent's argument here defies common sense. The omitted question set forth above is obviously responsive to the question of ***whether James Robinson had the gun*** when he returned to Tai Williams' apartment early on Sunday morning. This testimony is not only equally responsive but ***more*** relevant to the jury's request than most of the testimony which was provided and which respondent so vigorously supports.

Elsewhere in its discussion of this claim, respondent asserts that the full five page excerpt of testimony re-read to the jury was complete and responsive to their inquiry: "[t]he testimony properly answered the jury's inquiry as to 'whether James [Robinson] had the gun Sunday morning after he returned home'." (Resp. Brief at p. 98; RT 1392.) However, as discussed in the AOB, four of the five pages of testimony included in the readback were not responsive because the gun is not mentioned. The focus of the questioning on these four pages of the record is different. The prosecutor is seeking information about James Robinson's thought processes, his fears and his failure to inform authorities of the crimes he discovered between 2:00 a.m. and 6:00 a.m. on Sunday morning. (RT 1069-1073.) The gun is not mentioned until the last several lines of testimony included in the readback. The omitted testimony, however, deals directly with the gun. In spite of this, respondent contends that the four page excerpt where the gun is not mentioned is responsive while the omitted question and answer are not. Respondent's argument here is nonsensical and ignores the plain language of the jury's request.

3. <u>The testimony selected for the readback gave the jury a misleading picture of the evidence and contained a great deal of highly prejudicial insinuations.</u>

The selection of testimony re-read to the jury was highly prejudicial for several reasons. As discussed above and in the AOB, the readback included far more of James Robinson's cross-examination than his testimony on re-direct examination. (*See*, AOB 245-251.) The content of the prosecutor's questions and the tone of the questioning were highly

prejudicial. Through his questions about matters wholly unrelated to the jury's request, the prosecutor repeatedly insinuated that James was a heartless killer. Several questions concerned whether James ever thought about helping the victims. (RT 1069-1070.) Elsewhere, the prosecutor asked James whether he considered calling the police. (RT 1070.) Apparently not satisfied with the answers to these questions, the prosecutor resorted to a blatantly hostile attack. After James said that he had been tired upon returning to the apartment early in the morning hours after discovering the scene at Subway, the prosecutor stated: "Killing people wears you out, doesn't it?" (RT 1072.) The repetition of this cross-examination, and particularly the gratuitous remark about killing people, emphasized the prosecutor's irrelevant and highly prejudicial point of view. This was not a balanced presentation of relevant testimony which the jury could use to arrive at a verdict. The readback in this case amounted to an argumentative pinpoint instruction for the prosecution. It was as if the prosecution was allowed to re-introduce, *ex parte*, highly prejudicial evidence. The day after the readback, the jury reached a verdict finding James Robinson guilty on all charged counts. (CT 310; RT 1399-1402.)

G. Conclusion.

For all of the reasons discussed above and in the AOB, the trial court abdicated all of its responsibility under Penal Code section 1138 to ensure that the readback was responsive the jury's request and fairly presented the evidence. Because the trial court abdicated all responsibility to the court reporter, its actions cannot be considered an exercise of discretion. Even if this Court determines that the trial court's handling of the readback was in some sense an exercise of judicial discretion, the trial judge's failure to participate in selecting the transcript to be re-read or, at a minimum, reviewing the court reporter's selections, was an abuse of its discretion in this area.

In this case a jury deliberating in a capital case heard several pages of highly prejudicial cross-examination of the defendant, James Robinson. There is no question that James Robinson's testimony was significant to the jury because they had specially requested the readback. What the jury received, however, was largely non-responsive while relevant

testimony was omitted from the readback. This alone skewed the presentation in the readback in favor of the prosecution. In addition, this jury was read over four pages of irrelevant and highly prejudicial material featuring the prosecutor attacking James Robinson on cross-examination with unfounded and irrelevant insinuations about his character. The combined prejudice to the defense resulting from these errors in the selection of testimony for the readback was impossible to overcome. For all of the reasons discussed above and in the AOB, the trial court's handling of the jury's request for a readback of testimony was error under California law and denied James Robinson his federal constitutional rights to due process of law and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra,* 447 U.S. 343, 346; ***Lambright v. Stewart,*** *supra,*167 F.3d 477.) Moreover, because the error here contributed to the convictions in a capital case, the judgment is not sufficiently reliable to satisfy the Eighth Amendment. (***Beck v. Alabama,*** *supra*, 447 U.S. 625, 637-38). The trial court's erroneous handling of the jury's request for a readback of testimony thus requires reversal of James Robinson's conviction and sentence of death.

V.

RESPONDENT MISCONSTRUES THE APPLICABLE STATE AND FEDERAL LAW AND FAILS TO ADDRESS THE UNIQUE CIRCUMSTANCES OF THIS CASE IN ITS TREATMENT OF THE CLAIMS BASED ON THE VICTIM IMPACT EVIDENCE AND ARGUMENT.

A. Introduction.

1. Overview of the evidence and the claims on appeal.

The presentation of victim impact evidence in James Robinson's case was exceptional for several reasons. As discussed in the AOB, this case involved a substantial amount of victim impact testimony. Four members of the victims' immediate families (three of the parents and the twin sister of Brian Berry) spoke at length, their testimony taking up approximately forty pages of trial record. (RT 2247-2285.) James Robinson's claims on appeal do not depend solely on the quantity of victim impact testimony. The content of the victim impact testimony was deeply disturbing and contained several recognized forms of prejudice. The witnesses touched on highly evocative subjects like religion and thoughts of suicide. In other portions of their testimony, the witnesses spoke of the victims as young children. The three parents and the twin sister each described the central role these young men had held in their families. They described deep and incurable emotional loss and suffering as a result of the deaths. Family members testified about the crimes' effects on grandparents, friends, extended family and on the community. The picture which emerged from all of this testimony was, as one of the witnesses put it, the complete "devastation" of all of their lives as a result of the crime. (*See* RT 2253.) In the course of their testimony, the witnesses related that the justice system was prolonging and worsening their suffering and implied that the jury could end their suffering by returning a death verdict. (*See*, AOB at pp. 288-314.)

The witnesses' testimony was presented in dramatic fashion. The witnesses testified largely in narrative form which increased the emotional effect because their testimony was

seldom interrupted by the prosecutor interposing a question. The witnesses were visibly distraught as they described the ongoing effects of the crimes. Often crying on the witness stand, the parents of both victims described feelings of intense grief, despair and hopelessness which had continued unabated in the three years between the crime and the penalty phase.

The trial court admitted a substantial quantity of victim impact evidence, which was presented in an inflammatory fashion by the distraught family members of the two victims. This evidence was exceptionally prejudicial because it was coordinated with other features of the prosecution's case in aggravation and with the prosecutor's closing argument in order to maximize the emotional effect. (*See* AOB at pp. 279-280.) The prosecutor capitalized on the victims' distress to gather additional support for the "execution style killing" theory of how the crime had occurred. (*Id*.)

The trial court's handling of the victim impact evidence and argument violated James Robinson's constitutional rights in several respects as discussed in the AOB. First, the victim impact evidence in this case was so overwhelmingly prejudicial that it created a fundamentally unfair atmosphere for the penalty trial and resulted in an unreliable sentence of death. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15 17 and 24; ***Payne v. Tennessee*** (1991) 501 U.S. 808; ***People v. Edwards*** (1991) 54 Cal.3d 787.) Second, the trial court arbitrarily and capriciously applied California's death penalty law by admitting irrelevant victim impact testimony which did not concern the circumstances of the crime, thereby denying James Robinson a state created liberty interest as well as his state and federal constitutional rights to due process of law. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.)

2. Respondent's contentions.

Respondent urges this Court to reject James Robinson's claims concerning the admission of the victim impact evidence. As it has done in connection with every claim raised in this appeal, respondent first asserts that these claims are waived by counsel's failure to make "a timely and specific objection" at trial. (Resp. Brief at p. 100.)

Respondent next claims that James Robinson's claims must fail on the merits. (*Id*. at p.101.) Finally, respondent contends that any error was harmless. (Resp. Brief at pp. 110-112.) For all of the reasons set forth below in detail and in the AOB, respondent is incorrect.

B. This Court should review James Robinson's claims concerning the erroneous admission of highly prejudicial victim impact evidence.

For several reasons, it is appropriate for this Court to review James Robinson's claims concerning the victim impact evidence even though trial counsel in the second penalty phase did not specifically object to the testimony. The United States Supreme Court has made clear that capital cases require heightened due process, absolute fundamental fairness and a higher standard of reliability. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320; ***Beck v. Alabama***, *supra*, 447 U.S. 625; ***Lockett v. Ohio***, *supra*, 438 U.S. 586; ***Monge v. California***, *supra*, 524 U.S. 721.) Consistent with those principles, this Court should review *de novo* the trial court's admission of victim impact evidence in this capital trial. (*See* ***People v. Gordon,*** *supra* 50 Cal.3d 1223, 1265.) This Court has held that waiver is properly excused where the issues raised by the claim concern the fundamental fairness of a capital trial. (***People v. Hill,*** *supra*, 17 Cal.4th 800.)

This Court may use its discretionary power to review the constitutional issues raised in this claim. (See ***Hale v. Morgan,*** *supra*, 22 Cal.3d 388, 394; ***People v. Truer,*** *supra*, 168 Cal.App. 3d 437, 441 [reviewing prosecution claim for the first time on appeal].) An exercise of this Court's discretion is especially appropriate here because the error here is purely legal, and does not depend upon a factual determination. (See ***People v. Vera,*** *supra*, 15 Cal.4th 269, 276 ["Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."]; ***People v. Blanco,*** *supra*, 10 Cal.App.4th 1167, 1172-1173 [reviewing a constitutional claim on appeal where it had been characterized only as an evidentiary objection in the trial court].) For all of these reasons, James Robinson respectfully requests that this Court exercise its discretion to review the claims concerning the erroneous admission of victim

impact evidence.

C. Respondent misinterprets California law and the decisions of the United States Supreme Court concerning the proper uses and limitations of victim impact evidence.

As discussed in the AOB, an excessive quantity of victim impact testimony was admitted in James Robinson's trial. Apart from the sheer volume of evidence, the quality of the victim impact material was so disturbing and emotional that it rendered the penalty phase fundamentally unfair. (*See*, AOB at pp. 281-318.) Respondent's analysis of James Robinson's constitutional claims concerning the victim impact evidence is incorrect because it proceeds upon several self-serving misinterpretations of the applicable state and federal law.

1. Respondent's discussion of **Payne v. Tennessee** is incomplete.

In ***Payne v. Tennessee***, supra, 501 U.S. 808, the United States Supreme Court reasoned that states should not be absolutely barred from presenting any evidence whatsoever about the victim and the effects of his/her death in capital sentencing proceedings. The purpose for admitting this "victim impact" evidence was to ***counterbalance*** the virtually limitless amount of mitigation evidence the defendant is constitutionally entitled to present to the sentencer. (See ***Payne v. Tennessee***, *supra*, at 809.) ***Payne*** opened the previously barred door to victim impact testimony and argument in capital sentencing. That decision, however, did not remove all constitutional constraints on this type of evidence. The Supreme Court in ***Payne*** specified that victim impact evidence could be so prejudicial in a particular case that its admission would undermine the reliability required by the Eighth Amendment in capital sentencing. In addition, the ***Payne*** Court stated that the admission of sufficiently prejudicial victim impact evidence could result in a capital sentencing which was "fundamentally unfair" thereby violating the Due Process Clause of the federal constitution. (*Id*. at 825.)

Respondent confines its discussion of ***Payne v. Tennessee*** to the Supreme Court's general statements regarding the potential for legitimate uses of victim impact information.

(See Resp. Brief at pp. 102-103; citing ***Payne v. Tennessee***, *supra*, 501 U.S. 808, 824-825.) Based on the these statements, and the ***Payne*** Court's holding that the Eighth Amendment enacts no ***per se*** bar to victim impact evidence, respondent concludes that states have virtually unfettered discretion to admit victim impact evidence and argument. (Resp. Brief pp. 102-103.) Respondent ignores the ***Payne*** Court's warnings that victim impact evidence which is excessively emotional or unduly inflammatory will violate federal due process and the Eighth Amendment.

The Supreme Court's decision in ***Payne v. Tennessee*** is only the starting point in any analysis of the admissibility of victim impact testimony. The United States Supreme Court did not consider in ***Payne***, or in any subsequent case, precisely which types of victim impact evidence are constitutionally permissible. However, as discussed below and in the AOB, the Supreme Court's reasoning in ***Payne*** and the decisions of various state courts applying that decision provide some guidance regarding the federal constitutional limitations on victim impact evidence. Respondent does little or no analysis of the victim impact evidence in this case in light of constitutional standards. As discussed below and in the AOB, the constitutional limitations were exceeded in this case. (*See*, AOB at pp. 281-285.)

2. Respondent misinterprets this Court's cases to mean that any and all victim impact evidence is relevant and admissible as circumstance of the crime.

This Court has allowed victim impact evidence or argument in a number of cases based on its conclusion that this evidence may be relevant as a circumstance of the crime under California Penal Code section 190.3(a). (*See* AOB at pp. 319-326; Resp. Brief at pp. 103-105.) Respondent grudgingly acknowledges that the "outer reaches" of permissible victim impact evidence have not been defined in California, and that this Court has stated that victim impact evidence remains subject to some as yet undefined standards for relevance and undue prejudice. (Resp. Brief at p. 104, citing ***People v. Edwards***, *supra*, Cal.3d 787; ***People v. Haskett*** (1982) 30 Cal.3d 841.) However, in its brief there is no attempt to examine the specific facts and holdings of those cases to determine whether and

to what extent they may apply to James Robinson's case. Instead, respondent proceeds as though no limitations on victim impact evidence were desirable or even possible under California law. This Court's decisions concerning victim impact evidence are read to authorize the prosecution to present any and all victim impact evidence without regard to its potential for prejudice or established standards of relevance.

(a.) *The California Supreme Court's decisions clearly hold that victim impact evidence must be relevant and not unduly prejudicial.*

Shortly after the United States Supreme Court's decision in ***Payne v. Tennessee***, this Court decided ***People v. Edwards***, *supra*, 54 Cal.3d 787. In ***Edwards*** this Court held that victim impact evidence and argument could be properly admitted under factor (a) of Penal Code § 190.3 – which allows the sentencer to consider the circumstances of the capital murder underlying the defendant's conviction in that case. The opinion clearly states that even victim impact evidence falling within the statutory provision is subject to exclusion or limitation like any other proffered evidence. (*Id.* at 835-836.)[52] In ***People v. Edwards***, this Court emphasized the unacceptable risk of prejudice resulting from excessively emotional victim impact evidence:

> Our holding does not mean that there are no limits on emotional evidence and argument. In ***People v. Haskett***, *supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, ***the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason***. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction.

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[52] James Robinson contends that in addition to being unduly prejudicial the victim impact evidence admitted here did not concern "circumstances of the crime" and therefore was not properly admitted under California Penal Code section 190.3(a). (*See* AOB at pp. 319-326.)

> On the other hand, irrelevant information or ***inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.***

(*Id.* at p. 836 [emphasis added].)

Neither ***People v. Edwards*** nor any subsequent case defines the scope of admissible victim impact evidence and argument under California law.[53] This Court has, however, considered a variety of cases concerning the admission of victim impact evidence first under ***Booth v. Maryland*** (1987) 482 U.S. 496, and later under ***Payne v. Tennessee***. In most of these decisions the capital defendants' claims of error were based on only one or two prejudicial aspects of the prosecution's penalty phase case. Claims in several cases did not concern victim impact testimony per se but, rather, prosecutorial arguments about the crime's impact on the victim. (*See*, e.g., ***People v. Lewis*** (1990) 50 Cal.3d 262, 282-84 [prosecutor's closing argument containing mention of murder victim's dreams and aspirations]; ***People v. Malone*** (1988) 47 Cal.3d 1, 38-39 [prosecutor's comment that jury should consider the feelings of one of the defendant's prior three murder victims and the feelings of that victim's family found harmless in context of case where evidence in aggravation was "overwhelming."]; ***People v. Haskett***, *supra*, 30 Cal.3d 841, 846 [in closing argument prosecutor invited jury to consider the murder victim's point of view].) In other cases prosecutors' arguments touching on victim impact have been upheld because they directly related to the circumstances of the crime already established in the guilt phase of trial. (*See*, e.g., ***People v. Clark***, *supra*, 5 Cal.4th 950, 1033 [upholding argument concerning victim's age, vulnerability and innocence]; ***People v. Zapien*** (1993) 4 Cal.4th 929, 991-92 [prosecutor's argument concerning impact of crime on victim's children];

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[53] In ***Edwards***, this Court stated: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that [Penal Code § 190.3] factor (a) necessarily includes all forms of victim impact evidence and argument allowed by ***Payne*** . . ." (*Id*. at p. 835-836.)

People v. Fierro, *supra*, 1 Cal.4th 173, 235 [comment that victim was shot in front of his business of 40 years and that his wife, who was present, will have to live with the memory of the shooting].)

As discussed below and in the AOB, James Robinson's case is distinguishable because the victim impact evidence here was more plentiful, its content more inflammatory and the manner of its presentation more emotional than in any other case yet considered by this Court. (See, AOB at pp. 327-335.) This case contains several highly prejudicial forms of victim impact evidence, any one of which could support a claim for reversal. The combination of these circumstances created an overwhelmingly prejudicial atmosphere in which the jury was unable to perform its proper function at sentencing. Under these circumstances, there is an unacceptable risk that this jury's decision to impose a death sentence was based on emotion rather than reason violating the Eighth Amendment requirement of reliability in capital sentencing and the Fourteenth Amendment requirement of due process. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320; ***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

Under California law, trial courts not only have the discretion but the obligation to exclude victim impact evidence which is marginally relevant or which may be unduly prejudicial. (*See*, ***People v. Edwards***, *supra*, 54 Cal.3d 787.) Nothing in the cases respondent cites hold otherwise. Respondent's use of ***People v. Anderson*** (2001) 25 Cal.4th 543, to argue that trial court's have less discretion to exclude victim impact evidence is misleading, and that case has little if any application here. (Resp. Brief at p. 105.) Victim impact evidence was ***not*** the issue in ***People v. Anderson.*** In ***Anderson***, the prosecution successfully moved to introduce crime scene photographs which had already been admitted in the guilt phase of trial to show the circumstances of the crime in the penalty phase. This Court upheld the trial court, finding that it "has *narrower* discretion under Evidence Code section 352 to *exclude* photographic evidence of the capital crimes from *the penalty trial* than from the guilt trial." This Court explained that there were two reasons for its holding:

1) the crime scene photographs, which were not unduly gruesome or upsetting, showed statutorily permitted "circumstances of the capital crime"; and, 2) the potential for prejudice on the issue of guilt was not present because the defendant had already been found guilty of the capital crime. (***People v. Anderson***, *supra*, at pp. 591-592 [emphasis in original].)

(b.) *Respondent's definition of "circumstance of the crime" is not supported in California law or by the United States Supreme Court.*

In the years following ***People v. Edwards***, this Court has not expressly defined the boundaries for admitting victim impact evidence as a circumstance of the crime under Penal Code § 190.3(a). However, as discussed in the AOB, under California's statute the phrase "circumstances of the crime" has been applied to only two basic forms of victim impact evidence: (1) testimony describing the effect on a family member who was personally present at the crime during or immediately after the homicide; and/or, (2) victim impact describing circumstances known or reasonably foreseeable to the defendant at the time of the alleged crime. (*See* AOB at pp. 319-326.) The majority of the victim impact evidence admitted in James Robinson's case does not satisfy either of these criteria.

Respondent contends that "[v]ictim impact properly includes the impact of the loss of the victims," which "does not require the victims family to have been present." (Resp. Brief at p.109.) Respondent here relies on ***Payne v. Tennessee***, and three cases decided by this Court: ***People v. Taylor*** (2001) 26 Cal.4th 1155; ***People v. Edwards,*** *supra*, 54 Cal.3d 787; and, ***People v. Fierro***, *supra*, 1 Cal.4th 173, 235. These cases actually ***support*** James Robinson's position, i.e., that victim impact is not a "circumstance of the crime" unless the witness is in immediate proximity to the crime or the defendant knew about the survivors who would be affected by the victim's death.

Respondent states that in ***People v. Taylor,*** *supra,* 26 Cal.4th 1155, this Court upheld the admission of victim impact testimony "even where the defendant had no prior knowledge of the victim when he killed her." (Resp. Brief at p.110.) Respondent's use of

People v. Taylor not only fails to advance its argument but reinforces James Robinson's position. In ***Taylor***, the prosecution sought to present victim impact testimony from several family members. Two members of the victim's family were permitted to testify: the victim's son who was at home just before the crimes and had been introduced to the defendant, and the victim's husband who, by sheer luck, was severely injured but not killed in the course of the capital homicide. The prosecution in ***Taylor*** was ***not*** allowed to introduce victim impact testimony from the family's two other children who, although extraordinarily close to their late mother, had not been either present at the time or known to the defendant. In upholding the trial court's ruling in ***Taylor***, this Court emphasized the significance of the surviving victim's proximity to the capital crime: "[e]vidence of the impact of the defendant's conduct on victims other than the murder victim ***is relevant if related directly to the circumstances of the capital offense.***" (*Id.* at 1172 [emphasis added], quoting ***People v. Mitcham*** (1992) 1 Cal.4th 1027, 1063.) This holding is proper because otherwise the exception would swallow the rule.

People v. Fierro, *supra*, 1 Cal.4th 173, 235, also cited by respondent, is consistent with this principle. (See Resp. Brief at p. 110.) In ***Fierro*** the victim was accompanied by his wife when he was shot to death in front of a business he had owned for 40 years. This Court held that the prosecutor could properly argue that the victim's wife would be traumatized for life as a result of witnessing her husband's murder. Respondent's reliance on ***Payne v. Tennessee*** is equally misplaced. Respondent cites ***Payne*** in support of its conclusion that "[victim impact] does not require the victim's family to have been present at the murder." (Resp. Brief at p.109.) ***Payne***, however, is not correctly cited for this proposition because the victim impact evidence at issue there ***did*** address the impact on someone immediately present at the murder: the victim's two year old son who was critically injured in the same crime. (*See*, ***Payne v. Tennessee***, *supra*, 501 U.S. 808, 816.) As discussed in the AOB, this Court has ***never*** upheld the admission of victim impact testimony as a "circumstance of the crime" where the witness was not personally present at the scene during or immediately

following the homicide. (*See*, AOB at pp. 321-326.) On the contrary, the cases suggest that personal presence is necessary for victim impact testimony to concern a circumstance of the crime under the statute. The victim impact witnesses in this case do not meet this description.[54] Without such a limitation, virtually any evidence is admissible.

In this case, the victims' family members testified extensively about how they learned of the crime and then described their immediate and long term reactions. None of these witnesses, however, were physically present at the crime scene. Their emotional reactions concerned the death of their loved one, not the circumstances of the crime. All of the emotions experienced by the family members here would normally occur under any circumstances in which parents or siblings are told that their child/twin brother has been killed. Such emotions are not unique to cases involving capital murder. These feelings would naturally occur even for the family of someone killed as a result of manslaughter. The evidence concerning the witnesses' reactions, therefore, should not have admitted.

D. Respondent's analysis of the victim impact evidence is premised upon significant misconceptions about the fundamental rights and values at issue in capital sentencing.

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[54] As discussed in the AOB, other state statutes with similar language concerning "circumstances of the crime" have been applied in a manner consistent with James Robinson's interpretation. The death penalty statute in the state of Texas also authorizes the jury to consider all of the evidence "including the circumstances of the offense." (Tex. Code Cri. Proc., Art. 37.071, § 2(e).) The Texas Court of Criminal Appeals has held that the only type of victim impact evidence qualifying as a circumstance of the crime is evidence describing the impact on a family member who was present during or immediately after the crime. (***Ford v. State*** (Tex.Crim.App. 1996) 919 S.W.2d 107, 115-116; ***Smith v. State*** (1996) 919 S.W.2d 96, 97, 102.) In ***Ford v. State***, the court upheld the admission of testimony from the victim's family members who were present at the shootings resulting in the capital murder charge and also the testimony of the victim's father who described arriving at the crime scene and how he was affected by seeing members of his family murdered and injured. (***Ford v. State***, *supra*, 919 S.W.2d at p. 109-113.)

1. The prosecution's right to present evidence in aggravation are not equivalent to the capital defendant's right to present evidence in mitigation of a death sentence.

In its brief, respondent discusses the jury's normative role in capital sentencing and the wide variety of evidence which may be considered in that context. (See Resp. Brief at pp. 104-105.) After noting that ***Lockett v. Ohio***, *supra*, 438 U.S. 586, 604, allows the defense to present "any mitigating evidence," respondent apparently concludes that the prosecution shares this constitutional entitlement permitting the state to introduce a vast range of evidence in aggravation. Respondent states that "in the penalty phase of a capital trial, a trial court has less discretion to exclude evidence as unduly prejudicial than in the guilt phase, ***because the prosecution is entitled to show the full moral scope of the defendant's crime.***" (Resp. Brief at p.105 [emphasis added], citing ***People v. Anderson***, *supra*, 25 Cal.4th 543, 591-592.) Shortly thereafter, respondent finds that "[t]here is nothing unconstitutional about balancing [defense mitigation evidence] ***with the most powerful victim evidence the prosecution can muster***, because that evidence is one of the circumstances of the crime." (Resp. Brief at p. 105 [emphasis added], citing ***People v. Kirkpatrick*** (1994) 7 Cal.4th 988,1017; ***People v. Edwards***, *supra*, 54 Cal.3d at pp. 833-836.)

Respondent's conclusions are erroneous because it does not recognize the fundamental constitutional values present in capital sentencing. The constitutional basis of the Supreme Court's decision in ***Lockett v. Ohio*** and the values connected with defense mitigation evidence do not apply to the prosecution's use of evidence in aggravation. Neither the United States Supreme Court in ***Payne v. Tennessee,*** nor this Court has ever suggested that the state's right to present evidence in aggravation is equivalent to the capital defendant's interests in presenting evidence in mitigation. On the contrary, decisions of both the United States Supreme Court and this Court recognize the unique status of mitigation evidence. (*See*, *e.g.*, ***Lockett v. Ohio***, *supra*, 438 U.S. 586, 604; ***People v. Edwards***, *supra*, 54 Cal.3d 787.) Respondent cites no case, and James Robinson is aware of none, holding

that the prosecution was entitled to present as broad a range of evidence as the defense in capital sentencing. ***People v. Kirkpatrick***, *supra*, 7 Cal.4th at p. 1017, does not support respondent's contention here. In that case, this Court held that there was no error in allowing the prosecutor in closing argument to urge that the jury draw "reasonable inferences" about the crime's effect on the victim's family.

2. Respondent's analysis fails to account for the inherent conflict between the emotional force of victim impact and the particular need for rationality in capital sentencing.

Respondent's analysis is lacking for the additional reason that it does not acknowledge the emotional force of victim impact evidence. Victim impact evidence and argument are highly likely to evoke an irrational response. (***Payne v. Tennessee***, *supra*, 501 U.S. 808; ***South Carolina v. Gathers*** (1989) 490 U.S. 805; ***Booth v. Maryland***, *supra*, 482 U.S. 496; ***People v. Edwards***, *supra*, 54 Cal.3d 787; ***People v. Haskett***, *supra*, 30 Cal.3d 841, 864.) Jury decisions should, in all contexts, be based on reason. In the context of a capital case, the jury's rational deliberation at sentencing is essential to attaining the fundamental fairness, heightened reliability in capital sentencing and due process of law required by the federal constitution. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320; ***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.) Therefore, evidence which may evoke a strong emotional reaction must be carefully scrutinized. In ***Satterwhite v. Texas*** (1988) 486 U.S. 249, the Supreme Court noted that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." (*Id.* at p. 258.) The "most powerful victim evidence the prosecution can muster," is ***not*** necessarily admissible as respondent asserts, even where it directly concerns a "circumstance of the crime." (Resp. Brief at p. 105.) [55]

[55] As discussed in the AOB, James Robinson contends that an undue amount of victim impact material has been admitted in California as a "circumstance of the crime." (*See*, AOB at pp. 319-326.)

In ***People v. Edwards***, this Court emphasized the unacceptable risk of prejudice resulting from excessively emotional victim impact evidence:

> Our holding does not mean that there are no limits on emotional evidence and argument. In ***People v. Haskett***, *supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, ***the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason***. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or ***inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.***

(*Id.* at p. 836 [emphasis added].)

As previously noted, respondent's discussion of ***Payne v. Tennessee*** focuses on the United States Supreme Court's comments about the potential for legitimate consideration of victim impact information in capital sentencing. Respondent neglects, however, to account for the ***Payne*** Court's express holding that the uses of victim impact material remain constrained by the Eighth Amendment and federal due process concerns. Respondent's treatment of California law is similarly one sided. According to respondent's interpretation, virtually any and all victim impact evidence is relevant as a "circumstance of the crime." Respondent proceeds as though there were no constitutional limitations on victim impact evidence regardless of how emotional and inflammatory. There is no analysis of the numerous forms of prejudice resulting from the victim impact evidence presented in this case. Instead, respondent makes the blanket assertion that: "highly emotional victim impact evidence will not divert [the jury] from its proper role." (Resp. Brief at pp. 105-106.) Respondent is incorrect for all of the reasons discussed below and in the AOB.

3. <u>It is irrelevant that the prosecutor did not urge the jury to return a death verdict based on a blatantly unconstitutional basis such as race.</u>

It is virtually impossible for victim impact evidence or argument to be unduly prejudicial under respondent's definition. Respondent states "[b]ecause of the penalty phase jury's particular duties, even highly emotional victim impact evidence will not divert it from its proper role." (Resp. Brief at p. 106.) In order to conclude that the evidence or argument was unduly prejudicial, respondent would require that the prosecutor expressly request a death sentence on an unconstitutional basis. In its brief, respondent notes that "an improper diversion might occur if, for example, the prosecution were to urge that a death sentence should be imposed on the basis of the victim's or defendant's race." (*Id.*) Respondent's position has absolutely no support in the law and is contrary to the express statements of this Court in ***People v. Edwards*** and the United States Supreme Court in ***Payne v. Tennessee***.

E. Respondent ignores the fact that multiple forms of extremely prejudicial victim impact evidence were presented in this case.

Respondent's treatment of these claims is inadequate and misleading in part because it fails to consider the specific features of the record in this case. Respondent does not account for the quantitative and qualitative differences between the victim impact evidence presented here and the types of victim impact evidence this Court has considered in other capital cases arising after ***Payne v. Tennessee***. As discussed below and in the AOB, this case features an unusual amount of victim impact evidence which was highly emotional and improper on multiple grounds. The prejudice was amplified by the manner in which the testimony was presented and by the prosecutor's careful coordination of the victims' testimony with the coroner's opinion concerning the alleged "execution style" shootings and the prosecutor's closing argument. These circumstances combined to create an atmosphere of overwhelming prejudice which undermined James Robinson's rights to due process of law and to a fundamentally fair sentencing in violation of the Eighth Amendment. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320; ***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

1. <u>The victim impact witnesses' testimony was largely irrelevant,</u>

cumulative and unduly prejudicial.

As discussed in the AOB, all four family members described how they learned of the victims' deaths. (*See* RT 2249; 2257; 2262; 2272.) Each witness related a long narrative answer containing a great deal more information than the bare facts about when, how, and by whom they were told of the crime. The witnesses described in detail their emotional reactions ranging from shock, horror and disbelief to hysteria. (*See*, RT 2249-2251; 2257-2258; 2272-2275.) While these are certainly understandable responses to dreadful news, this testimony was irrelevant to any issues at sentencing.[56] Obviously, it would be shocking and traumatic for parents and siblings to learn that their 18 year old son/brother had been killed under any circumstances. However, there is no reason to believe that the impact on these families would have been lessened if the victims had been killed in an accident.

This testimony was not only irrelevant but tremendously cumulative. Two witnesses, Mr. and Mrs. Berry, were together when they received the news from their daughter, Shannon, who also testified in the penalty phase as a victim impact witness. All three of the Berrys related what was said on the telephone that morning. Mr. and Mrs. Berry's testimony is virtually identical regarding the circumstances surrounding the phone call and their reactions to the news. (*Compare*, RT 2249-2251, and 2262-2265.) Having each of them repeat the story imparted no new information whatsoever. The only plausible purpose for posing the same question to all of them was to have the jury hear a horrible and sympathetic tale told three times over. Testimony which is objectionable on the multiple grounds that it is cumulative, irrelevant and unduly prejudicial has no place in capital sentencing. (AOB at pp. 327-335; ***People v. Love*** (1960) 53 Cal.2d 843, 856; ***People v. Edwards***, *supra*, 54 Cal.3d 787; ***People v. Haskett***, *supra*, 30 Cal.3d 841, 846.)

2. The testimony about the victims' exceptional qualities, their unusually

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[56] As discussed in the AOB, California's statute permits only those ***actually present*** at the crime scene to describe their reactions. In this case none of the witnesses were physically present at the crime scene. (AOB at pp. 321-323.)

close and loving relationships with their families and friends, and their longstanding childhood friendship was highly prejudicial and irrelevant.

Numerous authorities have held that victim impact evidence is especially prejudicial and inappropriate where it concerns admirable aspects of the victim's character and/or indicates that his/her loss will be unusually difficult for the family or community. (*See* AOB at pp. 291-308; ***Cargle v. State*** (Okla. Crim.1995) 909 P.2d 806; ***Smith v. State,*** *supra*, 919 S.W.2d 96, 97 [reversible error for victim's sister and one friend to testify about victim's good qualities, her education and ambitions and the effect her death had on her students].) The prosecution in this case manipulated the jurors' emotions through a huge quantity of testimony describing the victims' exceptionally good characters, their central roles in close and loving families and their value to the community. None of this evidence was relevant to issues the jury could legitimately consider in the penalty phase. These numerous instances of prejudicial victim impact evidence overwhelmed the jury, causing the sentencing decision to be determined by pity and emotion rather than reason. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320; ***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

Mr. and Mrs. Berry's testimony portrayed an unusually close relationship between a son and his parents. (RT 2235; 2264-2267.) Mrs. White also described a special bond with her child. (RT 2278.) She related a number of anecdotes illustrating her close relationship with her son as he was growing up. She reminisced about running out of milk, about having all of her son's friends for sleep overs and pool parties. (RT 2279.) Mrs. White fondly recalled that all of the kids he knew called her "Mom." (RT 2279.) Mrs. White's lengthy descriptions of her extreme and ongoing grief also revealed the closeness of the relationship she had enjoyed with her son. (*See*, RT 2280-2284.)

Both Brian Berry and James White were survived by sisters who were deeply affected by the deaths. Brian Berry's twin sister, Shannon Berry, testified about her special relationship with her twin brother (RT 2258-2259), and described how her life had been

ruined forever by his death. (RT 2259-2260.) Mrs. White gave an extensive description of how James White's death had affected his younger sisters emotionally, from the moment when the police contacted the family up to the time of her testimony at the penalty phase. (RT 2273; 2281-2283)

The witnesses spoke in detail about the victims' longstanding friendship with one another, and the impact their deaths had on their friends and their extended families. This especially poignant feature of the penalty phase case was emphasized by all of the victim impact witnesses. Mrs. Berry stated:

> Brian Berry and James White were childhood friends. They became friends in the fourth grade. Their friendship remained strong through elementary, junior high and senior high school. They were like brothers. They had plans to share an apartment and life's experiences together, but instead, they died together.

(RT 2266.)

Mrs. White also testified about the boys' close friendship, and reminisced about watching them grow up together. (RT 2279.) She also spoke of her son and Brian Berry's closeness in death as well as in life.

> We had to have a memorial service for the boys. We couldn't have the burial service right away because the bodies were with the coroner.
>
> The boys are buried together for some reason. We figured that they'd want that.
>
> * * *
>
> James' friends were all close to him, the Berry family, my family, because they traveled as a group.

(RT 2277.)[57]

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[57] Both mothers showed the jury photographs of the victims together throughout their lives. (See, AOB at pp. 293-294; People's Exhs.106; 107, 108, 111 [senior high school graduation photos]; People's Exhs. 110; 112 [together with friends at the senior prom and on other social occasions].)

Elsewhere in the witnesses' testimony the jury learned of other friends and family members affected by the victims' deaths. Mr. Berry spoke of his son's friends being "left behind, empty and hurting and asking why." (RT 2254.) Shannon Berry mentioned her brother's girlfriend, who he had been dating for one year and five months when he died. (RT 2257.) Mrs. White expressed concern about her parents, and the effects of losing their grandson. She told of calling her family immediately when the police told her that her son had been injured and was in the hospital. (RT 2273.) They met her there, drove her home and stayed with her to help. (RT 2276.) In describing the impact of her son's death on the family, Mrs. White stated "I worry about my Mom and Dad who loved him dearly. My Dad was more like a father to him than anyone else in the world." (RT 2281-2282.)

3. The parents' descriptions of the victims as responsible members of society, and their aspirations for their sons were irrelevant and highly prejudicial.

As discussed in the AOB, the parents' hopes and aspirations for their murdered child are irrelevant to the sentencing decision and this type of testimony carries an unacceptable risk of creating prejudice. In ***Conover v. State*** (Okla. Crim.1995) 933 P.2d 904, the Oklahoma Court of Criminal Appeals observed that "[c]omments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death . . .[but] address only the emotional impact of the victim's death . . . [and increase] the risk a defendant will be deprived of Due Process." (*Id*. at 921.)

Both Mr. and Mrs. Berry and Mrs. White testified about their hopes and aspirations for their sons. Mr. White expressed the frustration of raising, and then losing, his son.(RT 2253-2254.) Mrs. Berry gave similar testimony. (RT 2266.) Mrs. White also voiced her disappointment not seeing her son live out the dreams she had for him.(RT 2282-2283.) Both families depicted the victims as an exemplary young men who, as adults, were certain to become valued members of the community. Mr. and Mrs. Berry described Brian's upbringing and how their son's good character had developed through hard work and

dedication to his family and the community. (RT 2265.) Mrs. White described her son in similar terms, stating "[h]e had become a wonderful young man," who was "thoughtful of others." (RT 2279.) She told the jury about his plans to go to college that Fall. (RT 2276.) Mrs. White testified that her son intended to get a teaching credential at California State University, Northridge, so that he could teach history to high school students. (RT 2281.) Finally, she stated "[h]e would have been a great teacher and helped lots of other people in the world." (RT 2282-2283.)

4. This jury heard extensive and highly inflammatory descriptions of the victims as young children.

In their penalty phase testimony, the three parents reminisced at length and with great emotion about their sons as young children. Brian Berry's parents described him as a friendly, eager and active little boy. The jury learned that he was good at many sports; and excelled at soccer which he played competitively from age 5 to age 17. (RT 2252.) His parents testified about how they had enjoyed participating in Brian's childhood activities. (RT 2252.) Mrs. Berry testified that, from the time he was born, Brian had been "a perfect son," who was "full of love and life for his family and friends." (RT 2264.) She fondly recalled for the jury how close she and Brian were when he was little, and how that closeness continued as he grew up. (RT 2264-2265.) Mrs. Berry described how Brian "had smiling blue eyes, a big warm smile, and sometimes a silly grin." (RT 2264.)

Mrs. White's description of her son's personality in early childhood was equally glowing and sentimental. "He was always, always happy. Always cheerful. When he was little, he loved people. He would have been the world's best salesman if that would have been what he chose to do. I can remember him pushing a cart around in the market and to anybody, "Hi, what's your name?" He wanted to talk and get to know them. (RT 2278.) Mrs. White reminisced about her son James' sense of humor. She related stories of practical jokes he played on her and his sisters. (*Id*.) According to her testimony, she and her son were very close throughout his life. (RT 2278-2279.)

The testimony about the victims' early childhoods was enhanced with a number of

family pictures. Several photographs showed the victims and their families at various times throughout their lives. In one picture, James White is shown at age 7 holding his baby sister who is only one month old. (People's Exh. 119.) Mrs. White identified this photo stating "[t]hat's one of my favorite pictures ever." (RT 2272.) The Berry family introduced a family portrait photo taken when the twins were around 14 years old. (People's Exh. 99; RT 2248.) In another vacation picture Brian and his sister would have been around 10. (People's Exh. 100.)

5. The victims' testimony was accompanied by twenty-two photographs showing the victims as central members of especially close and loving families.

Not only the content of the testimony, but the manner of its presentation is significant for purposes of evaluating prejudice. Some 22 photographs of the victims were introduced in connection with the victim impact witnesses' testimony. The pictures were clearly chosen because they depicted the victims as members of exceptionally close and happy families. The testimony describing each photograph as it was marked for identification and shown to the jury clarified and reinforced the favorable impressions conveyed in the images. In one photo, the White family is shown giving each other a "family hug." Mrs. White stated "[w]e give each other family hugs and this is James and Jennie and myself hugging. The love's there, you can see it." (People's Exh. 120; RT 2272.) In another photo James White is shown with his grandmother. (People's Exh. 114.) Mrs White not only identified the people portrayed (James White and his grandmother), but took yet another opportunity to state how close and loving her family had been. "This is James with grandma. We tease a lot in our family and this picture shows you a lot about Jimmy and all the love and teasing that goes on. We were a very close family. That's our gift to us." (RT 2270.)

Both sets of parents described how much they enjoyed their sons' company on hiking and camping trips. (RT 2252-2253; 2270-2272.) The jury heard testimony related to numerous vacation pictures showing each of the victims with their younger siblings, parents, grandparents, and extended family including aunts, uncles, and cousins. In these photos the

families are skiing, camping, hiking, and enjoying outdoor activities together. (*See* People's Exhs. 100; 102; 113; 116; 117; 118.) In the course of identifying these exhibits, the parents told the jury stories about wonderful family vacations. They described the times when they got lost on hiking trips, and how the victims and the other children teased them during these outings. (*See*, e.g., RT 2268-2272.) Other photographs showed the families with the victims during holidays and other special occasions. Several photographs depicted the victims and their families celebrating Christmas, graduations and family birthday parties. (*See* People's Exhs. 101; 104; 105.) One photograph was of the White family during their "last Christmas together." (People's Exh. 121; RT 2272.)

There were also several graduation pictures. Mrs. Berry had a photograph of her son and James White together at their junior high school graduation, when the victims would have been around 14 years old. (People's Exh.106.) The senior high school graduation photos showed each of the victims alone, with their families, and with each other. (*See* People's Exhs.107; 108; 111.) Other pictures displayed the victims with their friends at the senior prom and on other occasions. (*See* People's Exhs. 110; 112.)

6. <u>The testimony describing the family members' deep and sustained emotional reactions was unduly prejudicial and irrelevant to the jury's determination of the penalty</u>.

As discussed in the AOB, all four of the victim impact witnesses related extreme emotional reactions which continued some three years after the victims' deaths. While these reactions may be understandable, the descriptions of utter emotional, psychological and spiritual devastation as a result of the crimes was overwhelmingly prejudicial to the defense and wholly improper in the sentencing phase of a capital trial.

The three parents, and Shannon Berry, spoke of how the victims' deaths had forever ended any and all happiness the witnesses could hope to obtain from own lives. Testifying three years after the deaths, all four witnesses convincingly described their unrelenting grief and misery. (See, RT 2253 [Mr. Berry's testimony].) Mrs. Berry testified that her grief was not helped despite years in therapy and participation in counseling groups. (RT 2265-2267.)

When asked to describe the present impact of her son's death, Mrs. White gave a long and heart wrenching narrative answer, comprising more than four pages of trial transcript. Like the Berry's, her testimony conveyed irremediable sadness and a loss of all enjoyment from life. (RT 2280-2282.) Mrs. White had even stopped going to church because she could not maintain her composure around other people. "It is hard even to go to church because everything in church reminds you when you cry in front of strangers, and I hate to cry in front of strangers, and here I am crying in front of you." (RT 2282.)

In a particularly disturbing portion of her testimony, Mrs White admitted that she would prefer to be dead so that she and her son could be re-united in heaven.

> Jackie, the 11 year old, asked me a couple of weeks ago if I ever wished that I was dead so that I could be with Jimmy. I had to tell her yes. But she had to have that thought herself to be able to ask me. This is an 11 year old girl.
>
> She believes like I do, that there is life after this one. And sometimes I long to be there because I miss my son so much.
>
> I wonder if he will look the same in heaven. I wonder if I will be able to hug him.

(RT 2283-2284.)

7. <u>The witnesses were unable to control their emotions and their obvious distress was likely to improperly influence the jury.</u>

At least two courts have recognized that the sight of a crying and emotional witness may inflame the passions of the jurors. In ***State v. Muhammad*** (N.J. 1996) 678 A.2d 164, the New Jersey Supreme Court noted that trial courts "will not allow a witness to testify if the person is unable to control his or her emotions." (*Id*. at 180.) The federal district court in ***United States v. Glover*** (D. Kansas 1999) 43 F.Supp.2d 1217, expressed the same concern with the tone of the witness' testimony. The district court held that victim impact evidence should be "factual, not emotional, and free of inflammatory comments or references." (*Id*. at 1236.) The district court further held that no victim impact witness may be permitted to testify "if the witness is unable to control his or her emotions." (*Ibid.*)

There is little doubt that the emotional atmosphere was overwhelming during the penalty phase in this case. Each of the four family members described disturbing emotions and intense sorrow. These witnesses were surely distraught as they testified in open court about such deeply personal feelings. The record reflects that Mrs. White was weeping as she spoke. At one point she remarked to the jury, "And I hate to cry in front of strangers, and here I am crying in front of you." (RT 2282.)

8. The parents' expressions of outrage concerning the way in which the victims were allegedly killed were irrelevant and unduly prejudicial.

The prosecutor carefully coordinated the victim impact testimony with the evidence in aggravation and with his closing argument. The clear purpose for this was to encourage the jury to return a death verdict by playing on the jurors' emotions and their sympathy for the witnesses. As discussed in the AOB, this deliberate effort can be seen by comparing the presentation of the prosecution's case in the mis-tried penalty phase with the prosecution's revised case in the second penalty trial. (*See,* AOB at pp. 328-335.) The success of the second trial is virtually indisputable proof that this orchestration of the victim impact witnesses' testimony with the other aspects of the case and the closing argument was highly prejudicial to James Robinson.

The victim impact testimony was almost identical in both the original and the retried penalty phases, with one notable exception. In the retried penalty phase, the victims' parents added strong statements to their narratives expressing outrage and moral indignation about the alleged manner of their sons' deaths. (*Compare,* RT 1406-1445 [testimony in first penalty phase] and RT 2247-2285 [victim impact testimony in second penalty trial].) The parents' testimony in this regard is clearly based on the prosecutor's speculative theory (the support for which was the coroner's highly questionable interpretation of the autopsies) about how the crime occurred. According to the prosecutor the terrified victims were kneeling before the killer, praying and begging for their lives. The prosecutor used this theory throughout the penalty retrial in both direct and cross-examinations, and made it the centerpiece of a highly prejudicial closing argument. (*See,* Argument III, *supra; AOB at pp.*

328-335.) This highly speculative and inflammatory theory of the crime gained enormous emotional force when joined with the victim impact witnesses' testimony. Their expressions of shock and anguish concerning the manner of their sons' deaths, combined with the other improper aspects of the penalty case, infected the entire penalty retrial with incurable prejudice.

The prosecution's "victims kneeling in prayer" scenario would have had far less emotional force without the corresponding victim impact testimony in the retried penalty phase. Consistent with the prosecution's theory, the victims' parents altered their testimony in the retrial to include their feelings about the way in which their sons supposedly died. In the second penalty trial, Mr. Berry began by describing how he felt guilty and helpless because he had not been able to protect his son. "Even though he was 18 years old and now an adult, as a father you always feel that you are there to protect your children and it is very difficult to think that at the time when he most needed somebody I couldn't be there to help him." (RT 2253-2254.) Mr. Berry then expressed his outrage about the crime.

> **How can I ever escape the image of my son's terror as he defenselessly pleaded for his life and not by accident, not in anger, not in fear, but for a few hundred dollars someone could look my son in the eye, and without feeling or mercy, in a point-blank range shoot him in the face, then put the gun against the side of his head and shot him again.**

(RT 2254 [emphasis supplied].)

Mrs. White's testimony in the second penalty phase was even more emotionally charged.

> **All of these things that you have heard about replay in our minds like videotape, the events of what happened at Subway. I can see James and what his terror must have been like in seeing his best friend shot. How afraid he must have been on his knees asking for his life. I can feel the gun to his head. To this day I don't understand how I slept so soundly and didn't know. You'd think that you would.**
>
> **I don't understand anybody being able to do that.**

I can hear him moaning as he lay on the ground and bled from his wound and there wasn't anybody there to help him.

(RT 2283 [emphasis supplied].)

This is clearly the type of victim impact testimony which will overwhelm a jury's reason and result in sentence based on emotion. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320; ***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v. Georgia***, *supra*, 428 U.S. 153, 189.)

9. The witnesses suggested that their suffering was being unduly prolonged by the trial process, thereby implying that a death verdict was appropriate because it would provide emotional closure for them.

As discussed in the AOB, the penalty phase in James Robinson's case features another example of wholly irrelevant victim impact evidence. The witnesses here described the stress inflicted on them by the justice system. Shannon Berry told of how her entire life has been interrupted, ***not only*** by the crime itself but also by the justice system. (*See*, AOB at pp. 313-314.) Ms. Berry implied that, three years later, she could not recover and move on, in part because of the justice system. "Things that used to matter to me don't. ***My life is revolving around court date after court date, trial after trial***." (RT 2260.) Mrs. White also described how the pain of her son's death was being exacerbated by the trial process. "This trial itself, the whole legal process, is very bewildering. I sit here and listen to the facts of the case and know it's my son, my little boy." (RT 2282.) According to her testimony, her daughters were also at risk of emotional harm as a result of the legal system. "Jenny is 15 now. She was with me here the other day. I am still trying to screen things from her as far as all of this." (RT 2282.)

Elsewhere in her testimony, Mrs. White expressed her need to guard the last physical reminders of her son so that they too would not be lost to her in the justice system.

You have treasured items, things that may seem silly.

* * *

A lock of Jimmy's hair that I cut off before he was cremated that

no longer looks blond; it's brown from all the blood.

I'd bring it in, but it would become People's 132 or something.

(RT 2277-2278.)

10. Mrs. White's testimony describing the death bed scene at the hospital was irrelevant and unduly prejudicial.

In the penalty retrial, James White's mother was permitted to relate all of the events from the initial police contact through the time (several hours later) immediately after her son was pronounced dead. Mrs. White's lengthy narrative was filled with poignant details creating an emotional and highly sympathetic picture of the White family.

> There was a knock at the door. It was late at night. I thought it was Jimmy, that he had forgotten his key, so I ran out in my pajamas, and there was glass in the window at the front door. I looked out, there was a police car and the lights were blinking.
>
> I opened the door and peeked through. There was two young policemen at the door, and they told me they had come to take me to the hospital, that my son had been in an accident. And I said was it a car accident and they said no, there had been an accident at the Subway. And I said was it a robbery? They said yes, that he had been shot.
>
> I asked them where and they said they didn't know.
>
> So I asked them to wait a minute, and I'd get dressed. I let them know I was a single parent and I had to get my two daughters dressed because they were too young to leave at home alone. So I went and woke up the girls.
>
> Their clothes were all laid out because we had been planning to go to Knott's Berry Farm the next day and so they got dressed and somehow I got dressed. I called my Mom and Dad to ask them to please come to the hospital too, and I called my sister, who is a surgical nurse, so that if there is any advice I needed as

far as medical, she would be there to help me.

I didn't know how bad it was. As I was gathering my girls together to go out the door, one of the policemen asked me if I had my phone book with me, and then I knew it was bad.

We drove in the police car to the hospital, my girls asking questions all the way that I didn't know how to answer.

When we got there, they brought us into the emergency room and we sat for a little while. And the police brought us back to a little tiny room all by themselves. The policemen brought my girls orange juice. A little while later a doctor came in and told me that he wanted to speak with me and my girls should wait probably out in the hallway with the policemen.
The doctor told me that – on the way in the car the policemen had told me that James had been shot in the head. I had asked them if anyone else was with him, and they said yes. I assumed it was someone that James had worked with. And I asked if that person was okay, and they told me that he had been found dead at the scene.

The doctor, when he sat me down, told me that James had been shot in the head and it wasn't a mortal wound, and that he was still alive but his heart was getting weaker. I just bowed my head and asked to see my son.

We walked out of the room and I asked the policemen to keep my daughters with them until my family arrived, and the doctor led me through the corridors to the room.

I walked in and James was laying there on the bed. There were bandages all over his head. Fluid was in the bandages on the pillow. He was on life support systems. The machine was moving and breathing up and down on his chest for him. There were tubes everywhere. And I just held him and I cried and I talked to him.

Sometime during that my family came. James' father came. I didn't let the girls come in because I didn't want them to see their brother that way.

> I wasn't even sure exactly when James died. The nurse came in and told me that they had pronounced him dead, and it seemed hard to believe because the machine was still working.
> One of the hardest things I ever had to do was to get up and walk away and leave my son there in that hospital room, but I couldn't take him with me.
>
> The policeman came in while I was there with my son and asked me if I knew a Brian Berry, and I knew then that Brian was the other one that was with Jimmy. They were together all the time. And I had the phone number and the phone book which I gave to the policeman, which is how they contacted Shannon. (RT 2273-2275.)

None of the testimony set forth above was remotely relevant to this case. The prosecution's only reason for presenting this testimony was to persuade the jury that they should sentence James Robinson to die to somehow compensate Mrs. White for the pain of having to see her son on his deathbed. As discussed in the AOB, this Court has held that victim impact evidence of this type is unduly prejudicial has no place in capital sentencing. (*See*, AOB 314-318; ***People v. Love***, *supra*, 53 Cal.2d 843.)

James Robinson also contends that Mrs. White's testimony was improper for the additional reason that ***Payne v. Tennessee***, *supra*, 501 U.S.808, permits victim impact testimony describing the crime's impact on a family member who was *personally present during the capital crime*. (*Id.*, at 816.) Mrs. White's testimony about the death bed scene at the hospital imparted no information about the crime scene or the circumstances of the crime. The mother's description of her son's last moments conveyed her fear and sadness, and her daughters' confusion and trauma. Her testimony was designed to show the jury how this happy, loving family (living a normal life which included activities such as family outings to Knott's Berry Farm) was torn apart by James' White's death. This was precisely the sort of testimony capable of inflaming the passions of the jury and causing them to act on emotion rather than reasoned judgment in the penalty phase of this capital trial. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320; ***Gardner v. Florida***, *supra*, 430 U.S. 349, 358; ***Gregg v.***

Georgia, *supra*, 428 U.S. 153, 189.) This narrative, like so much of the other victim impact evidence in this capital trial, was irrelevant and unduly prejudicial and ought to have been excluded.

F. Respondent's analysis of prejudice is incomplete as it fails to acknowledge the increased prejudicial effect of the victim impact testimony when combined with the erroneously admitted testimony of the coroner and the prosecutor's closing argument.

The victim impact evidence presented in James Robinson's case was not "a quick glimpse" of the victims' lives as respondent asserts. (Resp. Brief at p. 110.) As discussed above and in the AOB, this jury heard a substantial amount of victim impact testimony. (Compare the two brief remarks in ***Payne v. Tennessee*** to the approximately 40 pages of victim impact testimony presented here.) The testimony of these witnesses, three parents and the twin sister of two young victims, was heart-rending. Their testimony contained multiple forms of prejudice and was almost wholly irrelevant to any legitimate considerations in capital sentencing. It seems obvious as a matter of common sense that the victim impact evidence presented in this case was unduly prejudicial and that it is at least reasonably probable that its admission affected the result. There are, however, additional reasons to support this conclusion.

James Robinson's death judgment was returned in a penalty retrial, after the original jury became hopelessly deadlocked during penalty phase deliberations in the first penalty phase of the case. (RT 1663-1667; CT 518.) As discussed in the AOB and in section E, above, the second penalty phase jury heard additional victim impact evidence not presented in the first penalty trial. In the second penalty phase the parents gave powerful testimony expressing their horror regarding the way in which the victims had died. (*See*, RT 2254; 2283.) The parents described how they were tormented by the mental picture of their terrified young sons kneeling before a cruel and remorseless killer while pleading in vain for mercy. (*Id*.)

The prosecutor altered his presentation of the case in the penalty phase to give greater emphasis to this speculative scenario of what occurred at the crime scene. the coroner's testimony about the relative positions of the victims and the shooter(s) was expanded from three (3) pages in the guilt phase (RT 649-652) to thirteen (13) pages in the penalty retrial (RT 2016-2029). In the penalty retrial, Dr. Roger's allegedly expert opinion was accompanied by a dramatic crime scene re-enactment. While questioning the coroner about the parties' possible relative positions, the prosecutor himself posed as the victims to illustrate each possible scenario. To demonstrate the version of events he had advanced (i.e., the victims kneeling in front of the shooter), the prosecutor at one point got down on the floor, while holding James Robinson's gun to the back of his own head, to show the jury that the coroner's testimony concerning the angle of the entry wounds was consistent with the victims having been in that position when they were shot. (*See*, RT 2024-2025; 2026-2027; Argument III, *supra*.)

The jury in the first penalty phase split seven to five. (RT 1666.) The prosecution's revised strategy in the penalty retrial was effective, resulting in a death judgment. (RT 2865-2868; CT 680-681.) This success is a strong indication of the prejudicial effects of the new victim impact evidence. This Court has recognized that where certain evidence is not admitted in one trial, and subsequently introduced during a second trial where a different verdict results, this demonstrates the prejudicial nature of the error almost to a certainty. (*See* ***People v. Kelley*** (1967) 66 Cal.2d 232, 245; ***People v. Taylor*** (1986) 180 Cal.App.3d 622, 634.)

The significance the prosecutor assigns to the evidence provides another measure of that evidence's prejudicial impact. (*See, e.g.*, ***People v. Minifie*** (1996) 13 Cal.4th 1055, 1071-1072; ***People v. Patino*** (1984) 160 Cal.App.3d 986, 994 [no prejudice where prosecutor does not dwell upon the evidence improperly admitted].) As noted above, the prosecutor altered his presentation of the second penalty phase to emphasize this emotional scenario. The image of the frightened victims kneeling in prayer became a centerpiece of the

prosecutor's closing argument in the penalty retrial. The prosecutor called up this image again and again through references to the coroner's testimony, the family members and then through the victims themselves.

The shootings of James White and Brian Berry are referred to as "executions" nine times during the prosecutor's closing argument. (RT 2780; 2782; 2783; 2794; 2795; 2801; 2805; 2806; 2810.) The image of the victims on their knees, praying and begging for their lives is also repeated throughout the argument. The first mention occurs in the prosecutor's review of the various statutory factors under Penal Code section 190.3 and their application in this case.

> Whether or not the victim participated in the defendant's homicidal conduct or consented to the homicidal act. Well, we know that's not the case. In fact, we know that's just the opposite. We know that the victim here pleaded for his life, and we will get to that when we talk about the facts of the case, so I submit to you that this is a factor in aggravation.

(RT 2776-2777.)

The prosecutor also used the coroner's testimony to support the "praying victims" scenario.

> And let's start with the testimony of Dr. Rogers.
>
> * * *
>
> You have Dr. Rogers who basically said he performed the autopsy on Brian Berry and James White, and that James White was shot – bullet contact wound at the top of the head going, I believe, at a ten degree angle straight down.
>
> * * *
>
> Is there any one of you who reasonably does not believe that Mr. White was on his knees, head down, praying for his life when the defendant took the gun he was holding, his .380, placed it to the top of his head and fired the death shot?
>
> Is there any one of you who believes that Mr. White was not in that position? (RT 2778-2779.)

The prosecutor continued, urging the jury that the manner of the killing was established as a factor in aggravation. Yet, this fact was not actually proven beyond a reasonable doubt. (*See*, AOB at pp. 350-365; Argument VII, *infra*.)

> And I submit to you, ladies and gentlemen, that is an aggravating factor. The manner in which James White was executed on his knees, asking that the defendant just take the money, don't hurt him, don't hurt his friend Brian Berry, because we have evidence of that – remember, we will get to that in a bit – that that's what they said, just take the money, don't hurt us.
>
> What did Dr. Rogers tell us about Brian Berry?
>
> He told us that he was shot twice. He has the shot to the side of his nose from a distance of six to 18 inches. The eye was open at the time of this shot. He saw the gun in his face. He saw the face of his killer. He saw what was going to happen when the defendant pulled the trigger for that shot. And then to put in the coup de grace he takes his gun and places it to the side of his head, behind the ear, as a contact wound and shoots him again. The acts of a coward.
>
> And I submit to you, ladies and gentlemen, this is an aggravating factor.
>
> You are going to have the pictures of the wounds to Brian Berry, the wounds to James White. Look at the angles, look at the contact.
>
> Those are factors in aggravation.

(RT 2779-2780.)[58]

Toward the end of his closing argument, the prosecutor linked the alleged manner of

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[58] The scenario was revisited when the prosecutor discussed Dennis Ostrander's testimony concerning Ostrander's alleged conversation with James Robinson about the crime. (RT 2790-2791.)

the victims' deaths to the parents and connected it to their grief and loss. In order to persuade the jury to disregard the testimony by James Robinson's mother, Mrs. Vesta Robinson, the prosecutor subtly directed the jury's attention to the victims' feelings about the way their sons died. "What mother could think that your son, in cold blood, could go to a location and execute two boys, put the gun to their head as they are praying begging for their lives and shoot them?" (RT 2795.)

After discussing the other aggravating factors, the prosecutor directed the jury to sentence James Robinson to death for the harm he caused to the Berry and White families.

> What other aggravation is there in this case?
>
> Look at what he has done to the Berry and White family. You were here. You heard their testimony. You heard their sorrow. You heard their grief. You heard their suffering and it goes on and on and on. And where is the defendant's remorse? Where is his humanity? There is none.

(RT 2800.)

Later he argued that mercy for James Robinson was improper based on the way in which the victims died.

> And think of the mercy that the defendant showed Brian Berry and think of the mercy that the defendant showed James White as he was on his knees, praying, begging him not to shoot him, not to hurt him, just take the money and be gone. The defendant deserves no more mercy than what he has shown others.
>
> In determining whether the penalty of death is appropriate I ask you, look at the totality of the defendant's actions.
>
> Look at his viciousness in the manner in which he executed these two boys.
>
> Look at his cruelty as James White is begging, don't hurt us, don't hurt us, just take the money.

(RT 2805-2806.)

Finally, the prosecutor commented on how Mrs. Robinson would like to remember James as

he appeared in a photograph introduced as a defense exhibit. (Defense Exh. C; RT 2809.) He contrasted the picture of James as happy child to the mental picture the victims' families live with of their sons lying dead and dying at the crime scene.

> Mrs. White and the Berry family, they would like to remember their children like this too (indicating) the high school graduation. [People's Exh.106] It would be nice. The difference is they have to remember them like this (indicating) [toward crime scene photos]. Take that into account when you must determine what's appropriate for the defendant.
>
> The defendant's cruelty justifies your finding that the maximum penalty available, that of death, is appropriate.
>
> Look at his actions. He made his choices knowingly and without regard for anybody but himself. His actions warrant the death penalty; he has earned it based upon what he has done, based upon the devastation that he has caused.

(RT 2809.)

The victim impact testimony admitted in this case was not only excessive but also extraordinarily powerful on an emotional level. The prosecutor capitalized on the victim impact testimony, in conjunction with other erroneously admitted evidence and inflammatory argument, to convince this jury that victim impact was not merely one factor in the sentencing decision but a sufficient reason for imposing a death sentence irrespective of any other statutory considerations. Under these circumstances, it is clear that the erroneously admitted victim impact evidence contributed to the penalty verdict in this case. For all of the reasons discussed above and in the AOB, this Court should reverse James Robinson's sentence of death.

VI.

RESPONDENT FAILS TO ESTABLISH THAT THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON LINGERING DOUBT, OR THAT THE COURT'S ERRORS WERE HARMLESS UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

A. Introduction.

1. Proceedings at trial.

As discussed in the AOB, James Robinson has maintained his innocence throughout trial and on appeal. The defense in the penalty phase was centered around establishing doubt as to his responsibility for the crimes. James Robinson testified, and again denied having committed the capital crimes. Defense counsel challenged prosecution witnesses Dennis Ostrander and Tommy Aldridge, attempting to cast doubt on their testimony in an effort to undermine the certainty of the state's case for guilt. The defense proffered two alternative versions of a lingering doubt instruction before closing arguments began in the retried penalty phase. (RT 2766-2770.) [59] The trial court rejected both of the proposed defense

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[59] Defense Special Instruction 32 provided:

> Each juror may consider as a mitigating factor residual or lingering doubt as to whether the defendant intentionally killed the victims. Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubts.
>
> Thus, if any juror has a lingering or residual doubt about whether the defendant intentionally killed the victims, he or she must consider this as a mitigating factor and assign to it the weight deemed to be appropriate.

(CT 672.)

Defense Special Instruction 33 provided:

> It may be considered as a factor in mitigation if you have any lingering doubt as to the guilt of the defendant.

instructions, and refused to give the jury any instructions concerning lingering doubt. The court noted, however, that defense counsel was free to argue lingering doubt when addressing the jury. (RT 2766-2767.)

The prosecutor was first to give his closing argument. He introduced the concept of lingering doubt, knowing that the court would not instruct the jurors about how to weigh lingering doubt in the sentencing decision. The prosecutor first reviewed the testimony of the state's witnesses and compared their testimony to James Robinson's. He then argued that the state's witnesses were far more credible, and told the jury that their versions of the events had been proven in the guilt phase. (*See*, RT 2786; 2788-2790; 2804-2805.) According to the prosecutor, the discrepancies between their testimony and James Robinson's established only that James had lied in court. (*Id*.)

Several times in the course of his closing speech the prosecutor informed the jury that lingering doubts were not to be considered in choosing between death or a life sentence.

> **What happened at the Subway is not before you. That's been proven beyond a reasonable doubt.**
>
> * * *
>
> The fact that the defendant did it is not in issue.

(RT 2786-2787.)

> **I anticipate that counsel will argue something to the effect, are you sure he did it? He told you he didn't. It's not in his character to do it. And if you are not sure he did it, how can you impose the penalty of death upon him? Think about a lingering doubt that you might have.**
>
> **Remember when I told you the fact of whether he did it or not is not in issue. That's been proven. What is in issue is how and why.**
>
> And, as you recall, I told you you are not going to hear all the

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(CT 671.)

> evidence in this case; and obviously, you are aware that you did not hear everything in this case because you heard the factors presented by the defense or presented by me that deal with aggravation and mitigation because that's what this case is about, the aggravating factors and the mitigating factors and not everything was heard.
>
> And you'll be instructed that neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events or to produce all objects or documents mentioned or suggested by the evidence.
>
> You were told that the defendant is guilty, has been found guilty, and that's the state of the evidence. That's what you are to consider, that the defendant personally used a handgun when he executed James White and Brian Berry; that he is guilty of robbery; the special circumstances of multiple murder are true; the special circumstance of committing these murders during the course of a robbery are true. **So when counsel talks about this lingering doubt, I submit to you it doesn't mean anything. Ignore it.** You deal with aggravation and mitigation as the law requires.

(RT 2804-2805 [emphasis added].)

Lingering doubt about James Robinson's guilt was also featured in defense counsel's closing argument:

> He [the prosecutor] also said that I am going to talk about lingering doubt. Well, at least he listened to my opening argument because my opening statement was I told you that James Robinson was going to take the stand, he was sorry for what happened to James White and Brian Berry, but he was going to tell you that he didn't do it.
>
> Now is he lying? That's for you to consider because Mr. Barshop [the prosecutor] says lingering doubt doesn't mean anything. It does mean something, ladies and gentlemen. He has already been convicted. I told you that. We can't take that away. So you don't have to find whether he is guilty or not guilty. That's not in issue.

****

> But, if you look at the evidence, you can also consider was that other jury right or were they wrong. That's where the lingering doubt comes in. Because if you have a doubt as to whether he committed these two, and they are horrible murders, they are vicious, they are cruel, they are every adjective you can think of and use, but if he didn't do it, you don't give death. We all know that. (RT 2811-2812.)

Defense counsel then reviewed the evidence for the purpose of pointing out the weaknesses in the state's case. As respondent notes, for 12 of the 24 transcript pages of the defense closing argument counsel reviewed the evidence concerning guilt. (*See*, RT 2812; 2814; 2815-2823; 2824; 2827-2828.) The purpose was to demonstrate the weaknesses in the state's case against James Robinson, and to encourage the jury to doubt that he really had committed these crimes.

2. Claims on appeal.

James Robinson contends that the trial court violated several of his fundamental constitutional rights by refusing to instruct the jury on lingering doubt. (See, AOB at pp. 336-350.) A lingering doubt instruction was appropriate in this case because it was supported by the evidence, and was the critical factor offered in mitigation of the death penalty. Under the Eighth Amendment, the jury in the sentencing phase of a capital case may not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record or ***any of the circumstances of the offense*** that the defendant proffers as a basis for a sentence less than death." (***Lockett v. Ohio***, *supra*, 438 U.S. 586, 604 [emphasis added]; see also ***Hitchcock v. Dugger***, *supra*, 481 U.S. 393, 394; ***Eddings v. Oklahoma***, *supra*, 455 U.S. 104.) Fundamental due process and the heightened due process applicable to capital cases similarly require that the defendant be allowed to offer any mitigating evidence or testimony that might justify a sentence less than death. (***Skipper v. South Carolina***, *supra*, 476 U.S. 1, 4-5, citing ***Lankford v. Idaho*** (1991) 500 U.S.110, 126, fn. 22; ***In re Oliver*** (1948) 333 U.S. at 257, 273.) A criminal defendant in a capital case has

an Eighth Amendment right to an instruction directing the jury to consider a particular mitigating factor. (***Penry v. Lynaugh*** (1989) 492 U.S. 302, 328 [finding Eighth Amendment error where the trial court failed to instruct the jury that it could consider and give effect to mitigating evidence of the defendant's mental retardation and abused background].) This Court has held that "[w]hen any barrier, whether statutory, **instructional**, evidentiary, **or otherwise** [citation], precludes a jury from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as '***Skipper*** error.'" (***People v. Mickey*** (1991) 54 Cal.3d 612, 693 [emphasis added]; see ***Skipper v. South Carolina***, *supra*, 476 U.S. 1.)

As discussed in the AOB, an instruction on lingering doubt was especially necessary here following the prosecutor's closing argument. (See, AOB at pp. 344-348.) The prosecutor incorrectly told the jury that they could ***not*** legally consider any doubts they had about James Robinson's responsibility for the crimes. A proper instruction on the consideration of lingering doubt was needed because the prosecutor mislead the jury. Under these circumstances, the trial court ought to have instructed the jury as requested by the defense to counteract the mis-information imparted by the prosecutor. By failing to provide a correct instruction the court effectively barred the jury's consideration of this relevant defense evidence.

For all of the reasons discussed below and in the AOB, the verdict in the penalty phase should be reversed because the trial court's actions deprived James Robinson of his rights under the Fifth, Eighth and Fourteenth Amendments.

3. Respondent's contentions.

Respondent largely ignores the constitutional bases for James Robinson's claims in this area. In its brief, respondent asserts that there was no error because, although the jury may be urged to consider lingering doubt, the trial court is not required by state or federal law to instruct the jury that they may consider lingering doubt as a factor in mitigation. (Resp. Brief at p. 113, citing ***People v. Slaughter*** (2002) 27 Cal.4th 1187, 1219; ***People v.***

Staten (2000) 24 Cal.4th 434, 464; ***People v. Millwee*** (1998) 18 Cal.4th 96, 166.) According to respondent, there was no error because the trial court did not expressly instruct the jury that it could ***not*** consider lingering doubt. (Resp. Brief at p. 115.) Respondent further finds that the trial court's other instructions on the statutory factors in mitigation pursuant to Penal Code section 190.3 "were sufficiently broad to encompass any residual doubt any jurors might have entertained." (Resp. Brief at p. 115, citing ***People v. Lawley*** (2002) 7 Cal.4th 102, 166; ***People v. Sanchez,*** *supra*,12 Cal.4th 1, 77-78.) Assuming arguendo that the trial court erred, respondent finds that there was no prejudice because both counsel discussed lingering doubt in their closing arguments. Respondent is incorrect for all of the reasons set forth below and in the AOB.

B. The trial court was required to give an instruction on lingering doubt following the defense request because there was evidence supporting such an instruction.

In its brief, respondent dismisses James Robinson's entire claim by stating that "although it is proper for a jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that they may do so." (Resp. Brief at p. 113, quoting ***People v. Slaughter***, *supra*, 27 Cal.4th 1187, 1219.) Respondent here misstates the holding of ***People v. Slaughter*** and then applies it to a claim which James Robinson did not make in the AOB. James Robinson does ***not*** contend that the trial court was obligated to instruct on lingering doubt *sua sponte*. He recognizes that under California law trial courts do not have a general duty to sua sponte instruct on lingering doubt in the penalty phase of a capital trial. (See AOB at p.343, citing, ***People v. Cox*** (1991) 53 Cal.3d 618, 676.)

Respondent avoids further discussion of ***People v. Cox*** because, as discussed in the AOB, the opinion supports James Robinson's claims. This Court in ***Cox*** affirmed the capital defendant's right to present evidence and argument concerning lingering doubt as mitigation in the penalty phase. The Court further noted that ***where the defense requests*** an appropriate lingering doubt instruction the trial court must so instruct:

> As a matter of statutory mandate, the court must charge the jury

> on 'any points of law pertinent to the issue, if requested' [citations] thus, it may be required to give a properly formulated lingering doubt instruction when warranted by the evidence. (*Id.* at 676, quoting ***People v. Terry,*** *supra,* 61 Cal.2d 137, 145-147.)

It is clear that James Robinson requested that the court give an appropriate instruction. Defense counsel proposed two alternative instructions on lingering doubt. (CT 670; 671.) There was ample evidence supporting the lingering doubt instruction as this was the focus of the defense case in both phases of the trial. The trial court's refusal to grant the defense request and its unwillingness to give any instruction on lingering doubt was thus clearly erroneous under California law. Because James Robinson was entitled to have the jury consider lingering doubt in the penalty phase according to California law, the court's refusal to give a proper jury instruction denied him due process of law and equal protection under the Fourteenth Amendment to the federal constitution. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346.)

C. Respondent fails to address James Robinson's claims based on *Skipper v. South Carolina.*

As discussed in the AOB, James Robinson was entitled to have the penalty phase jury instructed on lingering doubt as a circumstance of the offense offered in mitigation under the Fifth, Eighth and Fourteenth Amendments to the federal constitution. (*See,* AOB at pp. 340-344.) Several federal constitutional doctrines affirm a capital defendant's right to present evidence and argument and to have the jury properly instructed on the defense case in mitigation of the death penalty. Under the Eighth Amendment, the jury in the sentencing phase of a capital case may not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record or ***any of the circumstances of the offense*** that the defendant proffers as a basis for a sentence less than death." (***Lockett v. Ohio***, *supra,* 438 U.S. 586, 604 [emphasis added]; see also ***Hitchcock v. Dugger***, *supra,* 481 U.S. 393, 394; ***Eddings v. Oklahoma***, *supra*, 455 U.S. 104.) Fundamental due process and the heightened due process applicable to capital cases similarly require that the defendant be

allowed to offer any mitigating evidence or testimony that might justify a sentence less than death. (***Skipper v. South Carolina***, *supra*, 476 U.S. at pp. 4-5, citing ***Lankford v. Idaho,*** *supra*, 500 U.S.110, 126, fn. 22; ***In re Oliver***, *supra*, 333 U.S. at 257, 273.)

The trial court effectively foreclosed consideration of lingering doubt on two occasions. First, the trial court erroneously refused to give an appropriate instruction at the defense's request. It is ***not*** sufficient, as respondent states, that the trial court did not expressly forbid the jury from considering lingering doubt. (Resp. Brief at p. 115.) The United States Supreme Court has ruled that a criminal defendant in a capital case has an Eighth Amendment right to an instruction directing the jury to consider a particular mitigating factor. (***Penry v. Lynaugh***, *supra*, 492 U.S. 302, 328 [finding Eighth Amendment error where the trial court failed to instruct the jury that it could consider and give effect to mitigating evidence of the defendant's mental retardation and abused background].)

The trial court prevented the jury's consideration of lingering doubt a second time when it failed to correct the prosecutor's misstatement of the law to the penalty phase jury. This Court has held that "[w]hen any barrier, whether statutory, **instructional**, evidentiary, **or otherwise** [citation], precludes a jury from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as '***Skipper*** error.'" (***People v. Mickey,*** *supra*, 54 Cal.3d 612, 693 [emphasis added]; see ***Skipper v. South Carolina***, *supra*, 476 U.S. 1.)

D. An instruction on the permissible uses of lingering doubt was clearly necessary to correct the prosecutor's misstatements of the law during closing argument.

As discussed in the AOB, the prosecutor gave the jurors an incorrect statement of the law concerning the role of lingering doubt in the penalty decision. (See, AOB at p340-341.) Several times during his closing speech the prosecutor flatly told the jury that they could not legally consider any doubts they had about James Robinson's responsibility for the crimes in mitigation of the death penalty:

> What happened at the Subway is not before you. That's been proven beyond a reasonable doubt.
>
> * * *
>
> The fact that the defendant did it is not in issue.

(RT 2786-2787.)

> I anticipate that counsel will argue something to the effect, are you sure he did it? He told you he didn't. It's not in his character to do it. And if you are not sure he did it, how can you impose the penalty of death upon him? Think about a lingering doubt that you might have.
>
> Remember when I told you the fact of whether he did it or not is not in issue. That's been proven. What is in issue is how and why.
>
> You were told that the defendant is guilty, has been found guilty, and that's the state of the evidence. That's what you are to consider, that the defendant personally used a handgun when he executed James White and Brian Berry; that he is guilty of robbery; the special circumstances of multiple murder are true; the special circumstance of committing these murders during the course of a robbery are true. So when counsel talks about this lingering doubt, I submit to you it doesn't mean anything. Ignore it. You deal with aggravation and mitigation as the law requires.

(RT 2804-2805 [emphasis added].)

The prosecutor's statements were clearly contrary to the law and the trial court was obligated to correct this misinformation. The jury was undoubtedly confused by the opposing messages received from the defense and the prosecution. The court could have easily clarified the situation by providing a correct statement of the law in its instructions to the jury, i.e., by advising the jury that lingering doubt could be considered in mitigation. Instead, by its silence the trial court communicated its approval of the prosecution's directive to the jury not to consider any residual doubts about James Robinson's guilt.

E. The defense argument and the other jury instructions concerning the

statutory sentencing factors were not sufficient to inform the jury that they could legitimately consider lingering doubt, especially in light of the prosecutor's express misstatements.

Respondent contends that any error from the trial court's failure to correctly instruct the jury on lingering doubt as a factor in mitigation was harmless. First, respondent apparently finds that defense counsel counteracted the prosecutor's statements by urging the jury to consider lingering doubt in his closing argument. Second, respondent asserts that the other instructions informing the jury about the statutory sentencing considerations under Penal Code section 190.3, which allow the jurors to consider "circumstances of the crime," informed the jurors that lingering doubt was a permissible sentencing consideration. Respondent notes "[t]hose instructions were sufficiently broad to encompass any residual doubt any jurors might have entertained." (Resp. Brief at p. 115, citing ***People v. Lawley***, *supra*, 7 Cal.4th 102, 166; ***People v. Sanchez***, *supra*,12 Cal.4th 1, 77-78.) Both of respondent's assertions are incorrect.

1. Defense counsel's argument was not sufficient without a supporting instruction.

Defense counsel correctly told the jury that, notwithstanding the first jury's verdicts in the guilt phase, they were entitled to weigh any lingering doubts about James' guilt as a mitigating factor in support of a sentence of LWOPP. However, as noted in the AOB, argument by defense counsel on a theory of law unsupported by an instruction will carry little weight with the jury. As observed by the United States Supreme Court, " . . .arguments of counsel cannot substitute for instructions by the court." (***Taylor v. Kentucky*** (1978) 436 U.S. 478, 488-489. *See also* ***People v. Clair***, *supra*, 2 Cal.4th 629, 623 [reviewing court must presume that jurors treat the court's instructions as a statement of the law and counsel's comments as words spoken by an advocate in an attempt to persuade].) Moreover, whatever persuasive value the defense argument may have had was obliterated by the prosecution's argument. Although not a correct statement of the law, the prosecutor's argument directly contradicted defense counsel. Several times during his closing speech the

prosecutor flatly told the jury that they could **not** legally consider any doubts they had about James' responsibility for the crimes in sentencing:

> What happened at the Subway is not before you. That's been proven beyond a reasonable doubt.
>
> * * *
>
> The fact that the defendant did it is not in issue.

(RT 2786-2787.)

> **I anticipate that counsel will argue something to the effect, are you sure he did it? He told you he didn't. It's not in his character to do it. And if you are not sure he did it, how can you impose the penalty of death upon him? Think about a lingering doubt that you might have.**
>
> **Remember when I told you the fact of whether he did it or not is not in issue.** That's been proven. What is in issue is how and why.
>
> You were told that the defendant is guilty, has been found guilty, and that's the state of the evidence. That's what you are to consider, that the defendant personally used a handgun when he executed James White and Brian Berry; that he is guilty of robbery; the special circumstances of multiple murder are true; the special circumstance of committing these murders during the course of a robbery are true. **So when counsel talks about this lingering doubt, I submit to you it doesn't mean anything. Ignore it.** You deal with aggravation and mitigation **as the law requires**.

(RT 2804-2805 [emphasis added].)

2. <u>The generalized instructions on the statutory sentencing factors were not adequate under these circumstances</u>.

James Robinson contends that the generalized jury instructions based on Penal Code 190.3 were not sufficient to inform the jury that lingering doubt was a proper sentencing consideration. He is aware that in other cases this Court has found those same generalized

instructions to be adequate for this purpose. (See ***People v. Lawley***, *supra,* 7 Cal.4th 102, 166; ***People v. Sanchez***, *supra*,12 Cal.4th 1, 77-78.) The circumstances here, however, are different. The juries in those cases were left with a set of generalized instructions on penalty factors which, although not specifically directing them to the concept of lingering doubt, did not foreclose consideration of residual doubt in support of a life sentence. In James Robinson's case the jurors were given the same generalized instructions on penalty factors, and then expressly told by the prosecutor that they were not to weigh lingering doubt as a factor in choosing between life and death. Under these circumstances, the trial court's failure to give a proper instruction was clearly prejudicial and tipped the scales in favor of the prosecution.

F. Conclusion.

James Robinson was clearly entitled to an instruction advising the jury that lingering doubt could be considered as a reason not to sentence him to death. After the prosecutor's misstatement of the law directing the jury not to consider lingering doubt for any reason, the trial court had a duty to correct that mis-information. By failing to instruct the jury that lingering doubt was a relevant consideration, the trial court prevented this jury from affording James Robinson the individualized consideration of the penalty the federal constitution requires. (***Lockett v. Ohio***, *supra,* 447 U.S. at 604.)

For all of the reasons discussed above and in the AOB, the death verdict resulting from these errors was arbitrary, capricious and unreliable in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. (***Gardner v. Florida***, *supra*, 430 U.S. 349.) The trial court's actions also contravened the guarantees of a fair trial, due process of law and the heightened due process in a capital case contained in the Fifth, Eighth and Fourteenth Amendments. (*See*, ***Gardner v. Florida***, *supra*, 430 U.S. at pp. 357-362; ***Chambers v. Mississippi***, *supra*, 410 U.S. at p. 294; ***Beck v. Alabama,*** *supra*, 447 U.S. at pp. 637-638, and fn.13.)

Because James Robinson was entitled to a lingering doubt instruction as a matter of California law (*See*, Penal Code § 190.3; ***People v. Cox***, *supra*, 53 Cal.3d 618, 676; ***People***

v. Terry, *supra*, 61 Cal.2d 137, 146; ***People v. Friend*** (1957) 47 Cal.2d 749, 763) the trial court's refusal to do so deprived him of a state created liberty interest without due process of law in violation of the Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Lambright v. Stewart***, *supra*, 167 F.3d 477.)

Respondent makes no attempt to show that the errors were not highly prejudicial. As discussed in the AOB, the State cannot demonstrate that these errors had no effect on the penalty verdict in this case. (*See*, AOB at pp. 348-350; ***Chapman v. California***, *supra*, 386 U.S. 18, 24.) The prosecution's case against James Robinson was not overwhelming. The state's witnesses were not especially credible. The sole eyewitness, Rebecca James, failed to identify James Robinson shortly after the crime. Both she and Dennis Ostrander had financial interests in the outcome when they testified against James Robinson. Rebecca James positively identified James Robinson only after she consulted an attorney about claiming the reward money in exchange for her assistance. (RT 300-301.) Dennis Ostrander not only failed to reveal his alleged conversation with James about the Subway crimes, but denied any knowledge of the events until after the reward had been announced. (RT 816.) As previously discussed, Tai Williams and Tommy Aldridge were critical prosecution witnesses with their own powerful motives for lying about James Robinson. (*See* Argument I, *supra*.)

The defense evidence was at least capable of raising a reasonable doubt as to James' guilt. In his testimony James' explained how his fingerprints came to be on the plastic bag found in the alley behind the Subway. A number of defense witnesses who had known James for most of his life described him as a kind and gentle person who would never hurt others. *See*, e.g., RT 2700-2704 [testimony of H.B. Barnum]; RT 2705-2710 [testimony of Mr. and Mrs. Walton]. There was absolutely no evidence of other violent or assaultive behavior by James, and he had no prior felony convictions. As discussed elsewhere, the outcome would surely have been different if the defense had been allowed to introduce the evidence of Tai's and Tommy's gun possession in Beverly Hills (see Argument I, *supra*.), and the evidence of Ralph Dudley's sighting of a grey Ford Mustang in the alley behind

Subway at the time in question. (*Id*.) However, even without these two items of evidence against Tai and Tommy, the case against James was still subject to doubt. Under these circumstances, the state cannot establish that failure to properly inform the jury that they could consider lingering doubt at sentencing had no effect on the penalty verdict. (***Chapman v. California****, supra*, 386 U.S. 18, 24.) Accordingly, for all of the reasons stated above and in the AOB, this Court should reverse James Robinson's sentence of death. (***Caldwell v. Mississippi****, supra*, 472 U.S. at p. 341; ***Hitchcock v. Dugger****, supra*, 481 U.S. at pp. 399.)

VII.

JAMES ROBINSON INVITES THIS COURT TO RECONSIDER ITS RECENT DECISIONS, AND TO DETERMINE THAT DEATH VERDICTS MUST BE BASED ON THE JURY'S UNANIMOUS FINDINGS THAT ONE OR MORE STATUTORY FACTOR IN AGGRAVATION WAS PROVEN BEYOND A REASONABLE DOUBT.

A. Introduction

California's death penalty scheme requires the penalty phase "trier of fact" to make factual determinations before it may decide whether or not to impose death. More specifically, California Penal Code Section 190.3, as a prerequisite to the imposition of the death penalty, requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[60] The United States Supreme Court's decisions in ***Apprendi v. New Jersey*** (2000) 530 U.S. 466, 490 [hereinafter ***Apprendi***] and ***Ring v. Arizona*** (2002) 536 U.S. 584, 122 S. Ct. 2428 [hereinafter ***Ring***], held that such determinations are governed by the Sixth Amendment's guarantee of the right to a jury trial, and must be made beyond a reasonable doubt by a unanimous jury.

But in ***People v. Snow*** (2003) 30 Cal.4th 43 [hereinafter ***Snow***], and ***People v. Prieto*** (2003) 30 Cal.4th 226 [hereinafter ***Prieto***], the California Supreme Court rejected the application of ***Ring*** to the penalty phase of California's death penalty scheme. It held that the finding of aggravating factors by the penalty phase jury does not increase the penalty

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[60] According to California's "principal sentencing instruction" (***People v. Farnam***, *supra*, 28 Cal.4th 107, 177), "an aggravating factor is **any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself**." (CALJIC No. 8.88; emphasis added.) This Court has recognized that fact-finding is part of a sentencing jury's responsibility, although it considered that function less important than the determination to impose or withhold a death sentence. (***People v. Brown*** (1988) 46 Cal.3d 432, 448.)

beyond the statutory maximum, and therefore is not affected by ***Ring***. (***Prieto***, 30 Cal.4th at 263.)

The California Supreme Court did not deny that the statute's requirement of the finding of at least one aggravating factor necessarily means that facts must be found in the penalty phase. However, it has created a hierarchy of facts; the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." ***Snow***, 30 Cal.4th at 126, fn. 32, quoting ***People v. Anderson,*** *supra*, 25 Cal.4th 543, 589- 590, fn.14. For these kinds of facts, this court ruled that no agreement among the jurors is necessary, no burden of proof applies, and the Sixth Amendment has no applicability. The sentencer's task in a death penalty case was analogized to the exercise of discretion by a judge sentencing someone to prison. *(**Snow**, supra; **Prieto**,* 30 Cal.4th at 275.)

The California Supreme Court thus rejected procedural protections mandated by ***Ring***. Its rationale for denying the applicability of the right to a jury trial is that the ultimate decision of whether or not to impose death is a moral and normative decision. ***Prieto***, 30 Cal. 4th at 263. This truth, however, does not justify this court's reading the Sixth Amendment out of all aspects of the penalty phase. The finding of one or more aggravating circumstances is a factual determination that is an essential prerequisite to the jury's weighing process and normative decision of whether death is the appropriate punishment.

B. In California, fact-finding is a critical part of the sentencer's task when considering whether to impose death.

1. California's death penalty process.

California utilizes a bifurcated process in which the jury first determines guilt or innocence of first-degree murder and whether or not alleged "special circumstances" are true. If a defendant is found guilty and at least one special circumstance is found to be true, a "penalty phase" proceeding is held, wherein new witnesses may be called and new evidence presented by the prosecution and defense to establish the presence or absence of specified "aggravating circumstances," and any mitigating circumstances. The jurors are

instructed that they are to weigh aggravating versus mitigating circumstances and that they may impose death only if they find that the former substantially outweigh the latter. If aggravating circumstances do not outweigh mitigating circumstances, the jury must impose life without possibility of parole ("LWOP"). Even if aggravating circumstances do outweigh mitigating circumstances, the jury has the discretion to exercise mercy and impose LWOP instead of death. (*See* Cal. Penal Code Sections 190-190.9; CALJIC 8.80-8.88; ***People v. Brown***, *supra.*)

In the penalty phase, the jurors must unanimously agree as to the ultimate question of whether to impose death or LWOP. Jurors are instructed that they must **individually** apply beyond a reasonable doubt burden of proof as to certain of the aggravating circumstances (prior criminal conduct, section 190.3 (b) and (c). But the jurors need not apply any burden of proof standard to other aggravating factors,[61] and need not unanimously find the presence of any aggravating factor.

2. Before ***Ring***, the statute was interpreted to mean that a jury finding was not constitutionally required for either the elements of a special circumstance or the aggravating circumstance(s).[62]

In ***Prieto***, this Court acknowledged that ***Ring*** overruled its holding regarding special

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[61] In addition to Penal Code section 190.3, factor (b)(other criminal activity involving force or violence) and factor (c) (prior felony convictions), there are two other categories of potential aggravating factors under California law: some factor relating to the defendant's age or some other aspect of the circumstances of the crime and special circumstance which increases the guilt or enormity of the offense, or adds to its injurious consequences, and which is above and beyond the elements of the crime itself (section 190.3, factors (a) and (I) and CALJIC No. 8.88 (7th ed. 1999).)

[62] In ***People v. Odle*** (1988) 45 Cal.3d 386, this Court held that "there is no right under the Sixth or Eighth Amendments to the United States Constitution to have a jury determine the existence of all of the elements of a special circumstance." (*Id.* at p. 411.)

circumstances,[63] but asserted that "because any finding of aggravating factors during the penalty phase does not `increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), ***Ring*** imposes no new constitutional requirements on California's penalty phase proceedings." ***Prieto***, *supra*, 30 Cal.4th at 263. This contention is less valid now than when Arizona used it to justify its sentencing scheme in ***Ring***:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by ***Apprendi***, Arizona first restates the ***Apprendi*** majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . .This argument overlooks ***Apprendi***'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.;* see 200 Ariz., at 279, 25 P.3d, at 1151.

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (***Ring***, *supra*, 122 S.Ct. at p. 2440.) California Penal Code Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as in Sections 190.1, 190.2, 190.3, 190.4 and 190.5." Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (Section 190.2), and death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances (California Penal Code Section 190.3; CALJIC 8.88 (7th Ed.,

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[63] "This holding is now erroneous after ***Ring v. Arizona*** (2002) 536 U.S. 584, 609 [122 S.Ct. 2428, 2443, 153 L.Ed.2d 556], which held that a jury--and not a judge-- must find an "aggravating circumstance necessary for imposition of the death penalty." ***Prieto***, 30 Cal.4th at 263.

1999).

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[64] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[65] There is no meaningful difference between the processes followed under each scheme. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." ***Ring***, 124 S.Ct. at pp. 2439-2440. The issue of ***Ring's*** applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

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[64]Ariz.Rev.Stat. Ann. section 13-703(E) provides:
"E. In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[65]California Penal Code Section 190.3 provides in pertinent part:
"After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."In ***People v. Brown*** (1985) 40 Cal.3d 512, 541, 545 n.19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 1999).)

The California Supreme Court does not deny in ***Prieto*** that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. However, ***Ring*** was held not to apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (***Snow***, *supra,* 30 Cal.4th at 126, fn. 32; ***Anderson,*** *supra,* 25 Cal.4th at 589- 590, fn.14.

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts, in Arizona or California, that are "necessarily determinative" of a sentence - in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. The finding of an aggravating factor is an essential step before the weighing process begins.

The ***Prieto*** Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines `whether a defendant eligible for the death penalty should in fact receive that sentence.' (***Tuilaepa v. California*** (1994) 512 U.S. 967, 972.) No single factor therefore determines which penalty-- death or life without the possibility of parole--is appropriate." (***Prieto***, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Such a factual finding is no

less critical than an element of any crime. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California, and requires the same Sixth Amendment protection.

C. Equal Protection.

In ***Prieto***,[66] as in ***Snow,***[67] this Court analogizes the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that is so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

When a California judge is considering which sentence is appropriate, the decision is governed by rules of court. California Rules of Court, Rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same Rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a California capital sentencing context, however, there is no burden of proof at all, except for the factors (b) and (c) aggravating circumstances, as to which the jurors are instructed to **individually** apply a beyond reasonable doubt standard; they are each free to find a different aggravating factor. (See ***People v. Hawthorne*** (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible

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[66] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." ***Prieto***, 30 Cal.4th at 275.

[67] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." ***Snow***, fn. 32

to a burden-of-proof quantification"].) As to other sentencing factors, different jurors can, and do, apply different burdens of proof to the contentions of each party. The California capital sentencing jury need not provide any reasons for reasons for a death sentence. (***People v. Fauber*** (1992) 2 Cal.4th 792, 859.)[68] This discrepancy violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, **second only to life itself**, as an interest protected under both the California and the United States Constitutions." (***People v. Olivas*** (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' ***Trop v. Dulles***, 356 U.S. 86, 102 (1958)." (***Commonwealth v. O'Neal*** (1975) 327 N.E. 2d 662, 668, 367 Mass 440, 449.)

A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (***People v. Olivas***, *supra*; ***Skinner v. Oklahoma*** (1942) 316 U.S. 535, 541.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. ***(Charfauros v. Board of Elections*** (9th Cir.

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[68]Ironically, the requirement that reasons be articulated is elsewhere considered by the California Supreme Court to be an element of due process so fundamental that it even applies at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the state's wrongful conduct and show prejudice flowing from that conduct. (***In re Sturm*** (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.) (See also, ***People v. Martin*** (1986) 42 Cal.3d 437, 449-450 (statement of reasons essential to meaningful appellate review).)

2001) 249 F.3d 941, 951.) Here, if the processes are truly "comparable," or "analogous," no reason at all appears for extending more protections to those who have much less at stake.[69]

D. The fact that the ultimate decision to impose death is a moral and normative decision does not mean that factual findings that are a Prerequisite to the penalty determination are outside the reach of the sixth amendment.

This Court relied heavily on the fact that "death is different," but used that irreducible fact as a basis for withholding rather than extending procedural protections to persons facing the possible imposition of a death sentence. (See ***Prieto***, *supra*, 30 Cal.4th at 275.) In ***Ring***, the state of Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of an aggravating circumstance by arguing that "death is different." The United States Supreme Court rebuffed the state's effort to turn the irrevocable nature of the death penalty to its advantage.

> "Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence." (***Ring***, *supra*, 122 S.Ct. at p. 2442, citing with approval Justice O'Connor's ***Apprendi*** dissent, 530 U.S. at p. 539.)

The fact that under the Eighth Amendment "death is different," cannot be used as a justification for permitting states to relax procedural protections provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. (***Ring***, *supra*, 122 S.Ct. at p. 2443.) No greater interest is ever at stake than in the penalty phase of a capital case. (***Monge v. California*** (1998) 524 U.S. 721, 732 ["the death penalty

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[69] When confronted with an equal protection challenge to the failure to extend to persons sentenced to death the same disparate sentencing review then afforded to non-capital defendants, the California Supreme Court rejected the claim because the two sentencing procedures were **not** comparable, but were fundamentally different. (***People v. Allen*** (1986) 42 Cal.3d 1222, 1286-1288.)

is unique in its severity and its finality"].)[70] As the United States Supreme Court stated in ***Ring***, *supra*, 122 S.Ct. at p. 2443:

> Capital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

E. Conclusion.

The California Supreme Court is surely correct in saying that the final step of California's capital sentencing procedure is a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. It errs greatly, however, in using this fact to preclude all procedural protections that would render the decision a rational and reliable one, and to allow the facts that are the very things to be weighed to be blurry, uncertain, and variable, and attended by none of the protections required by the Sixth Amendment.

That the California scheme runs afoul of ***Ring*** is evident from the following hypothetical: Imagine that California's statute and instructions were exactly as they are now, but the jury was dismissed after the conclusion of the guilt phase, and the trial judge sitting alone heard the additional witnesses, took the additional evidence, and made the determinations under section 190.3. Imagine that the trial judge was required, as the jury is

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[70]In ***Monge***, the United States Supreme Court expressly found the ***Santosky v. Kramer*** (1982) 455 U.S. 745, 755, rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "**[I]n a capital sentencing proceeding**, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [***Bullington v. Missouri***,] 451 U.S. at p. 441 (quoting ***Addington v. Texas***, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (***Monge v. California***, *supra*, 524 U.S. at p. 732 (emphasis added).)

now, to determine whether additional factors above and beyond those necessary for conviction and a finding of at least one special circumstance are present, and then to weigh any such aggravating factors against mitigation and decide whether to impose death. This is the very scheme invalidated in Arizona by the ***Ring*** decision. What cannot be done by a judge sitting alone similarly cannot be done by twelve individuals constituting a jury in name only, bound by neither unanimity nor burden of proof requirements. If the Sixth Amendment requires certain findings to be made by a jury, those findings must be made by the jury *qua* jury, unanimously and beyond a reasonable doubt.

The right to a jury trial includes the right to a determination by ordinary citizens of the existence of one or more of the aggravating circumstances which are the functional equivalent of the elements of a capital crime. ***Ring***, *supra,* 124 S.Ct. at 2442-2443. California's refusal to accept this holding violates the Sixth and Fourteenth Amendments to the United States Constitution.

VIII.

THE MULTIPLE INSTRUCTIONS CONCERNING REASONABLE DOUBT VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, MANDATING REVERSAL.

As discussed in the AOB, both juries in James Robinson's case received inappropriate and incomprehensible instructions on the concept of reasonable doubt. (See AOB at pp. 366-372, and cases and authorities cited therein; CALJIC 2.90.) The combination of this instruction with two other instructions concerning the sufficiency of circumstantial evidence to show guilt and to establish special circumstances created more confusion and lightened the prosecution's burden of proof. (See AOB at pp. 366-372; CALJIC 2.01, 8.83.) Because the discussion of this issue in the AOB is sufficiently complete, James Robinson will not address this claim further. The issue is not conceded, but is submitted for this Court's consideration based on the arguments raised in the AOB.

IX.

THIS COURT SHOULD REVERSE JAMES ROBINSON'S CONVICTIONS AND SENTENCE OF DEATH DUE TO THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE.

As discussed in the AOB, this Court should reverse James Robinson's convictions in the guilt phase and his sentence of death due to the cumulative effects of the numerous errors that occurred in both phases of his capital trial. (See, AOB at pp. 376-404, and authorities cited therein.) Because the discussion of these issues in the AOB is sufficiently complete, James Robinson will not address this group of claims further. The issues raised are not conceded, but are submitted for this Court's consideration based on the arguments raised in the AOB.

CONCLUSION

For all of the foregoing reasons, and those stated in the AOB, appellant, James Robinson, Jr., respectfully submits that this Court should reverse his convictions and/or sentence of death.

Dated: July ___, 2003

_____
SUSAN K. MARR

Attorney for Appellant
James Robinson, Jr.

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. James Robinson, Jr.***

Case Number: **Crim. S040703**
Los Angeles County Superior Court No.
PA007095

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 9462 Winston Drive, Brentwood, Tennessee 37027.

On July ____, 2002, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Brentwood, Tennessee, with postage thereon fully prepaid.

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

Executed on July _____, 2003, at Brentwood, Tennessee.

_____
SUSAN K. MARR