SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	Case No. SO83899
Plaintiff/Respondent,	
vs.	**CAPITAL CASE**
RICHARD LONNIE BOOKER,	
Defendant/Appellant.	

Automatic Appeal From the Superior Court of the State of California
County of Riverside (Case No. CR67502)

The Honorable Edward Webster, Judge

APPELLANT'S REPLY BRIEF

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Under Appointment by the California
Supreme Court

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DEATH PENALTY

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INTRODUCTION

Defendant and Appellant Richard Lonnie Booker hereby replies to certain points made by the Deputy California Attorney General in her Respondent's Brief. Defendant Booker believes that a further discussion of these points will assist the Court in deciding the issues presented.

Defendant Booker has concluded that certain issues have been adequately briefed, and that any further discussion of these issues is unnecessary. Defendant Booker's failure to reply to any particular point made by the Deputy Attorney General should not, of course, be misconstrued as a waiver or a concession. (People v. Hill (1992) 3 Cal.4th 959, 995, f.n. 3.)

ARGUMENT

GRAND JURY AND JURY SELECTION ARGUMENTS

I.

THE TRIAL COURT'S FAILURE TO ADMINISTER THE STATUTORILY REQUIRED OATH TO THE GRAND JURORS REQUIRES REVERSAL OF THE JUDGMENT

Richard Booker argues that the trial court's failure to administer the statutorily required oath to the grand jurors until **after** they had already heard substantial incriminating evidence constituted reversible per se fundamental jurisdictional and constitutional error. (AOB 12-22.)

The Deputy Attorney General, unable to deny that error was committed, nonetheless insists that reversal is not warranted since (A) Booker cannot show prejudice on appeal and (B) the error was not reversible per se. (RB 22-31.)

Neither of these arguments can withstand appellate scrutiny. It is true that this Court has previously held that generally irregularities during a preliminary hearing or grand jury proceeding which are not jurisdictional in the fundamental sense are reversible only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice. (People v. Pompa-Ortiz (1980) 27 Cal.3d 519; People v. Towler (1982) 31 Cal.3d 105, 123.) However, the rationale underlying this rule is that, by encouraging defendants to raise preliminary hearing or grand jury irregularities by pre-trial extraordinary writ petitions, the matter can be expeditiously returned to the magistrate or superior court judge for proceedings free of the

charged defects. (People v. Pompa-Ortiz, supra, 27 Cal.3d at 529.) Indeed, this Court has previously indicated that a defendant need only **seek** pre-trial writ relief in the appellate courts to be entitled to relief without an affirmative showing of actual prejudice. (Serna v. Superior Court (1985) 40 Cal.3d 239, at 263.) It follows that this rule does **not** apply when the defendant has exhausted his pre-trial remedies in both the trial and appellate courts pursuant to Penal Code sections 995 and 999 to no avail. Since Booker not only challenged the grand jury indictment in his pre-trial 995 motion in the Superior Court, but also filed a 999 petition for a writ of mandate - prohibition in the appellate court on the same grounds he now asserts on appeal, he is entitled to a reversal without an affirmative showing of actual prejudice.

The Deputy Attorney General's reliance upon People v. Stewart (2004) 33 Cal.4th 425, at 461-462 is misplaced since that case actually supports Booker's argument. In Stewart this Court held that:

> ". . . When a defendant presents, by way of a pre-trial writ petition, claims that establish irregularities in preliminary hearing procedures, the court may grant relief. . . without any showing of prejudice. . . . But when such claims **are presented for the first time on appeal,** irregularities. . . which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (People v. Stewart, 33 Cal.4th at 461-462, emphasis added.)

It follows that since Booker raised this issue by way of a pre-trial writ petition, and is **not** presenting it for the first time on appeal he need not show prejudice. Indeed, in the very next paragraph of the Stewart opinion, which the Deputy Attorney General omits, the Court notes that defendant Stewart "**presented none of his current challenges to the preliminary hearing procedures by way of a pre-trial writ petition,**" thus implying that, had he done so, no showing of prejudice on appeal would be required. (People v. Stewart, supra, 33 Cal.4th at 462, emphasis added.)

The Deputy Attorney General's reliance on People v. Jablonski (2006) 37 Cal.4th 774 is likewise misplaced. It is quite true that Jablonski moved to dismiss the indictment pursuant to Penal Code section 995 in the trial court based upon the presence of unauthorized persons in the grand jury room. However, what the Deputy Attorney General fails to note is that Jablonski, unlike Booker, did not seek pre-trial extraordinary writ relief in the appellate courts pursuant to Penal Code section 999. There is an enormous difference between giving the appellate courts the opportunity to correct error by immediately seeking extraordinary writ relief and laying in the weeds and raising the issue for the first time in a post-conviction appeal. Thus, Jablonski is anything but "dispositive."

Contrary to the Deputy Attorney General, the failure to duly swear the grand jurors until after they had already heard substantial incriminating evidence was no mere technicality, and

the cases she relies on are not on point.

Most of these cases involved a hyper-technical violation of a federal rule prohibiting unauthorized persons in the jury room. (United States v. Plesinski (9th Cir. 1990) 912 F.2d 1033, 1038-1039; Bank of Nova Scotia v. United States (1988) 487 U.S. 250, 254-257; United States v. Mechanik (1986) 475 U.S. 66.) Similarly, Jablonski involved the presence of unauthorized persons in the grand jury room in violation of Penal Code section 939.[1] While the Deputy Attorney General attempts to compare the hyper-technical violations of procedural rules in these cases to the fundamental jurisdictional error in failing to swear the grand jurors in the instant case, there simply is no meaningful comparison.

The Deputy Attorney General acknowledges that, in Vasquez v. Hillery (1986) 474 U.S. 254, the United States Supreme Court reversed a conviction, without reference to prejudice, due to a fundamental or structural error in the grand jury proceedings. However, she attempts to distinguish Vasquez on the grounds that that case - unlike Booker's case - involved racial discrimination in the composition of the grand jury that returned the indictment.

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[1] In People v. Towler, supra, the "irregularities" complained of were primarily (1) the introduction of a number of allegedly inadmissible hearsay statements and (2) the prosecutor's allegedly improper comments concerning the defendants' exercise of their Miranda rights. While the Court discusses these issues summarily in a footnote, with no attempt at analyzing whether or not the defendants' complaints were meritorious, it is clear that the errors complained of were not fundamental jurisdictional errors. (People v. Towler, supra, 31 Cal.3d at 123, f.n. 9.)

However, while Vasquez and the instant case are obviously not identical, Vasquez supports Booker's position. While Vasquez' grand jury may not have mirrored the racial composition of his community, it was at least a duly constituted grand jury. Here, the so-called "grand jurors" were merely a group of unsworn citizens with no power whatsoever to perform the functions of a grand jury. In this sense the fundamental jurisdictional error in Booker's case is - if anything - more egregious than the error found to warrant reversal in Vasquez.

Vasquez also supports Booker's position in another way. The High Court in Vasquez reversed the conviction because "the nature of the violation allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation."(See Bank of Nova Scotia v. United States, supra, 487 U.S. at 257.) Here the grand jurors returned their indictment based in part on substantial incriminating evidence which they should never have heard before they were sworn, and in part on other evidence which they heard after they became a duly sworn grand jury. Any inquiry into whether the grand jury would have returned the indictment based **only** upon the evidence which they permissibly considered after they were sworn would require similar unguided speculation. We simply have no way of telling whether or not the so-called "grand jurors'" improper consideration of incriminating evidence before they were duly sworn made a difference. Thus, this is precisely the type of fundamental jurisdictional error in the grand jury proceedings that is reversible per se.

The Deputy Attorney General, relying upon United States v. Mechanik, supra, complains about the substantial costs of a reversal and re-trial.

However, despite the serious consequence - an automatic reversal of the ensuing death penalty judgment - a reversal is unavoidable. (Cf. People v. Heard (2003) 31 Cal.4th 946, at 966-967 [automatic reversal for trial court's failure to properly select death qualified jury unavoidable despite substantial costs and "serious consequences."]) The trial court and the prosecutor were grossly negligent in failing to swear the grand jurors prior to the commencement of their duties. The prosecutor was doubly negligent in failing to spot and correct this error after the grand jurors convened in the grand jury room. The trial court could easily have avoided a reversal by simply selecting and swearing a different grand jury panel, and commencing the grand jury proceedings anew, once the court realized its mistake. The trial court also could have corrected the problem by granting Defendant Booker's 995 motion, dismissing the indictment, and allowing the prosecutor to refile. Finally, the Court of Appeal could have granted pre-trial writ relief. Had any of these things been done, this Court could have avoided the necessity of a reversal and the substantial costs of which the Deputy Attorney General now complains. However, since neither the trial court, nor the prosecutor, nor the Court of Appeal took advantage of the

many opportunities to correct this problem pre-trial, this Court must do so now.

The judgment must be reversed.

II

THE TRIAL COURT COMMITTED REVERSIBLE WITT-WITHERSPOON ERROR BY EXCUSING SEVERAL PROSPECTIVE JURORS FOR CAUSE DESPITE THEIR WILLINGNESS TO FAIRLY CONSIDER IMPOSING THE DEATH PENALTY

Richard Booker argues that his federal constitutional rights to a fair and impartial jury trial and reliable penalty determination were violated by the excusal of five prospective jurors based solely on their opinions concerning the death penalty as stated in their questionnaires, without any further inquiry. (AOB 23-32.) This Court has previously reversed penalty determinations for this precise reason in People v. Cash (2002) 28 Cal.4th 703, People v. Heard (2003) 31 Cal.4th 946, and People v. Stewart (2004) 33 Cal.4th 425. In Cash the death penalty judgment was overturned for failure to allow sufficient inquiry into jurors' attitudes about particular facts that could cause some jurors invariably to vote for the death penalty regardless of the strength of the mitigating circumstances. (Cash, supra, 28 Cal.4th 721.) In Heard, the judgment was reversed because the court erroneously excused a single prospective juror for cause based on his isolated answers on the juror questionnaire which had been lost or destroyed and ambiguous answers to questions posed during an inadequate oral examination. (Heard, supra, 31 Cal.4th at 964-966.) In Stewart, this Court reversed because the trial judge had erroneously excused five prospective jurors for cause, based solely upon their written answers to a jury questionnaire concerning their views relating to the death penalty and without any follow-up questioning by the court and

counsel which might have been able to clarify these responses and determine whether, in fact, the prospective jurors were disqualified from service. (Stewart, supra, 33 Cal.4th at 440.)

The Deputy Attorney General does **not** argue that any of the prospective jurors in the instant case were excusable for cause. Indeed, her own summary of their questionnaire responses precludes any such argument since (A) none of them stated that they would automatically vote for either the ultimate penalty or life without possibility of parole should Booker be convicted of special circumstances murder, (B) the trial judge noted that he could not determine whether one of these jurors (Mr. Ong) could follow the law based solely upon his written responses, (C) the judge also stated that another juror (Ms. Clothier) was not excusable for cause in the absence of a stipulation, and (D) still another juror (Ms. Conklin) was excused without any discussion even though she had expressly stated that she would consider all of the evidence and instructions and impose the penalty she personally felt was appropriate and was "middle of the road" concerning the death penalty. (RB 34-39.)

Furthermore, the Deputy Attorney General does **not** contend that the inquiry of the prospective jurors in Defendant Booker's case was adequate.

Instead, the Deputy Attorney General's sole argument is that defense counsel, by failing to object and actually acquiescing in the excusals, waived and invited the Witt-Witherspoon errors and cannot now complain on appeal. She relies upon the United States

Supreme Court's recent decision in Uttecht v. Brown (2007) 551 U.S. ___, 127 S.Ct. ___, and this Court's holdings in People v. Erwin (2000) 22 Cal.4th 48 and People v. Coffman and Marlow (2004) 34 Cal.4th 1. (RB 32, 39-45.)

However, the Deputy Attorney General's argument is not well taken, and the cases she relies on are inapplicable.

In Uttecht, unlike in the instant case or Witherspoon where numerous prospective jurors were excused for cause without significant examination of the individual prospective jurors, the issue was whether a single juror (Juror Z) had been improperly excused. The High Court held 5-4 that he had not been since the trial judge acted within his discretion in finding that this juror's ability to impose the ultimate penalty had been substantially impaired. Justice Kennedy emphasized, (A) the adequacy of the 11 day voir dire, (B) defense counsel's numerous objections to the excusals of other prospective jurors and challenges for cause, and (C) that the Court could not say that the state trial and appellate courts' decisions were not only erroneous, but an unreasonable application of clearly established federal law and thus grant habeas corpus relief under the Anti-Terrorism and Effective Death Penalty Act. (28 U.S.C.§2254(d).) Had the High Court been confronted with a case like Booker's on direct appeal, involving en masse excusals of prospective jurors for cause, acquiesced in by defense counsel and without any significant inquiry whatsoever, the decision would almost certainly have been in the defendant's favor.

The Deputy Attorney General's reliance on People v. Erwin, supra, in which this Court upheld a preliminary jury screening procedure and the excusals of numerous prospective jurors for cause similar to that employed in Booker's case, is misplaced. Erwin is inconsistent with this Court's later decisions in Cash, Heard and Stewart. The trial judge and counsel are not free to waive the careful probing inquiry mandated by Witt-Witherspoon to ensure that the defendant receives an impartial determination as to whether he will live or die. The bottom line here is that the inquiry in this case was totally inadequate.

People v. Coffman and Marlow is distinguishable because there, although defense counsel acquiesced in the excusals of the prospective jurors, the jurors in question were in fact excusable for cause. (Coffman and Marlow, supra, 34 Cal.4th 49.) Here, in contrast, even the Deputy Attorney General does not claim that any of the jurors in question were actually excusable for cause.

The Deputy Attorney General, seizing upon defense counsels' statement that they agreed to the excusals "for tactical reasons," invokes the doctrine of invited error. However, counsel's comments were made **after** the Witt-Witherspoon errors complained of had occurred. It is by definition impossible to "invite" an error that has already been committed.

While the Deputy Attorney General would have this Court believe that the stipulated excusals may actually have been to Booker's benefit since some of those excused may have been biased in favor of the death penalty, there is simply no evidence in

this record which supports this assertion. The stipulated excusals in this case were based solely upon the agreement between the court and counsel to expedite the jury selection process and "get these people out of here" as soon as possible in the interest of judicial efficiency regardless of whether or not they were actually excusable for cause. (5 R.T. 486-487.)

Since the improper exclusion of even one juror under the Witt-Witherspoon standard is reversible penalty phase error per se (People v. Cash, People v. Stewart and People v. Heard, all cited supra), the death sentence must be vacated and the case remanded for a new penalty trial.

III.

THE DENIAL OF MR. BOOKER'S BATSON-WHEELER MOTION - DESPITE THE PROSECUTOR'S IMPROPER USE OF PEREMPTORY CHALLENGES AGAINST FOUR AFRICAN-AMERICAN JURORS - WAS REVERSIBLE CONSTITUTIONAL ERROR

Richard Booker argues that the trial judge erred in denying his Batson-Wheeler motions challenging the prosecutor's use of his peremptory challenges to excuse several African-American jurors. (AOB 33-55.) The Deputy California Attorney General predictably disagrees. (RB 45-71.)

The Deputy Attorney General emphasizes the substantial deference to be accorded the trial court's Batson-Wheeler determinations. However, as the United States Supreme Court has recently reaffirmed, deference is not abdication, and reviewing courts have a constitutional duty to reverse the trial court's rulings, the judgment of conviction, and the death sentence, where the prosecutor has been guilty of racial discrimination in the exercise of his peremptory challenges. (Snyder v. Louisiana (March 19, 2008) ___ U.S. ___; 128 S.Ct. ___.)

The Deputy Attorney General acknowledges - as she must - that a prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias - that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds - violates a criminal defendant's right to a representative and impartial jury. (Batson v. Kentucky (1986) 476 U.S. 79, 88; People v. Avila (2006) 38 Cal.4th 491, 594.) The importance of a representative jury - including African-Americans - in a case like this in which an

African-American defendant is accused of murdering three Caucasian girls - cannot be over emphasized.

The Deputy Attorney General insists that Booker did not even make out a prima facie case of prosecutorial racial discrimination sufficient to require the prosecutor to explain himself.

However, she acknowledges that proof of a prima facie case may be made from any information in the record available to the trial court and that that proof may include a showing that the prosecutor has struck most or all of the members of the identified group from the venire, has used a disproportionate number of his peremptories against that group, and/or a showing that the defendant is a member of the excluded group whereas the victim is a member of the majority group. (People v. Bell (2007) 40 Cal.4th 582, at 597). All of these factors were shown in the instant case. The prosecutor in this case used four of his first seven, and six of his fourteen peremptory challenges to remove African-Americans from the jury, thus eliminating 75% (6 out of 8) of the prospective African-American jurors. Booker was African-American and all three of the victims were Caucasian-Americans. These facts alone established a prima facie case. (Williams v. Runnels (9th Cir. 2006) 432 F.3d 1102.) Thus, the trial court in this case committed step one Batson-Wheeler error according to the Deputy Attorney General's own reasoning.

The Deputy Attorney General argues that the prosecutor stated a number of race-neutral reasons for excusing the four

African-American jurors in question.

However, she never responds to Booker's point that this Court can have no assurance that the reasons stated by the prosecutor were in fact the **prosecutor's** reasons (as opposed to the possible race-neutral reasons discerned by the trial court). As the United States Supreme Court stated in Miller El v. Dretke (2005) 545 U.S. 231:

> ". . . when illegitimate grounds like race are an issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the [prosecutor's] stated reason does not hold up, its pretextual significance does not fade [merely] because a trial judge . . . can imagine a reason that might not have been shown up as false." (Miller El, supra at 125 S.Ct. 2332.)

Since it was the trial court which "suggested" the purported race-neutral reasons, and since the prosecutor merely parroted the trial court's remarks, we really have no idea what the prosecutor's justifications may have been. Thus, step two Batson-Wheeler error was committed.

The trial court's suggestion that the disproportionate exclusion of African Americans **as a group** was justified since they were less inclined to be strongly in favor of the death penalty than the population in general and that the exclusion of African-Americans "for death penalty reasons" somehow did not mean that they were being excluded simply because of their race

(6 R.T. 843-844) is deeply disturbing. The whole point of Batson-Wheeler is that prospective jurors cannot be excluded merely because they are members of cognizable racial groups which may hold certain attitudes regardless of the jurors' individual beliefs. The trial court's comments indicate that the court was sanctioning exclusion of African-Americans simply because of the court's **assumptions** about the attitudes of this particular minority racial group and completely undermines the idea that the court made any "sincere and reasoned effort" to evaluate the prosecutor's race-neutral reasons for excusing the African-Americans. Indeed the trial court's unproven assumptions both reflected and conveyed deeply ingrained and pernicious stereotypes. The excusal of the African-American jurors based on such prejudice and stereotypical thinking is precisely what the Equal Protection Clause of the Fourteenth Amendment forbids. (See United States v. Bishop (9th Cir. 1992) 959 F.2d 820, 859 [condemning exclusion of African-Americans about whom little was known other than that they lived in a predominately African-American neighborhood].) The Deputy Attorney General's attempt to bury the trial court's remarks in a two line footnote (see RB 52, footnote 14) does not in any way alter this conclusion. Thus, step 3 Batson-Wheeler error was committed.

The Deputy Attorney General argues that the prosecutor's overriding concern and most likely reason for the peremptory strikes as to at least three of the four African- Americans (Michelle Williams, Monique Williams, and Darrell Jackson) was

that their religious beliefs might impact their views of the death penalty, and ultimately their capacity to impose it contrary to their strongly held beliefs; Thus, the prosecutor was not guilty of racial discrimination.

However, since she also acknowledges that exclusion of a prospective juror on grounds of religious affiliation is improper (citing In re Freeman (2006) 38 Cal.4th 630, at 643), this would merely mean that the judgment would have to be reversed based upon the prosecutor's religious discrimination in the exercise of his peremptory challenges.

The Deputy Attorney General claims that Booker has waived this error since he did not object to the excusal of the jurors on this basis in the trial court. However, this Court may still consider this point in assessing whether or not the trial court's conclusion that the prosecutor had legitimate and constitutionally permissible race-neutral reasons for peremptorily excusing the jurors (step three of the required Batson-Wheeler analysis) is correct. The excusal of prospective jurors based upon their religious affiliation is constitutionally impermissible. When the prosecution's stated reasons for a peremptory challenge are improper, courts cannot effectively close their eyes to that fact. (People v. Howard (2008) 42 Cal.4th 1000, at 1034, Kennard, J., concurring and dissenting; People v. Bell (2007) 40 Cal.4th 582, 596; Holloway v. Horn (3d Cir. 2004) 355 F.3d 707, 724.)

Moreover, even assuming arguendo that this point has technically been "waived," but also assuming arguendo that this

Court concludes that the prosecutor engaged in constitutionally impermissible religious discrimination, this would merely mean that the judgement would have to be reversed anyway on grounds of prejudicial ineffective assistance of counsel. Defense counsel, having objected to the prosecutor's use of his peremptory challenges to get rid of four jurors whom the defense wanted, could not possibly have had any legitimate tactical reason for not making their challenge on **all** possible grounds. Thus, a reversal based upon counsel's deficient performance would be appropriate even on direct appeal. (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266; People v. Wilson (1992) 3 Cal.4th 926, 936; People v. Pope (1979) 23 Cal.3d 412, 426.)

The Deputy Attorney General tries to draw a distinction between impermissible exclusion based upon a juror's **religious affiliation** and exclusion based upon **religious beliefs** which may indicate a potential bias in favor of or against the death penalty. She relies upon People v. Williams (2006) 4 Cal.4th 287, at 308 and People v. Catlin (2001) 26 Cal.4th 81, at 118.

Williams is inapposite since that case merely held that the trial court did not abuse its discretion in refusing to allow defense counsel to inquire into the prospective jurors' "denominational preference" during voir dire.

Catlin is on point, but distinguishable. In that case, the prospective juror (Juror W) stated that he believed that "God is the **only** person that has the right to take someone's life," and that he believed in the Commandment "Thou shall not kill,"

(emphasis added) and seemed to feel that the State should abide by that rule. This juror was excusable for cause, and was properly excused via a prosecutorial peremptory challenge, since his views made it **impossible** for him to vote for the death penalty.

Here, in contrast to Catlin, the jurors in question expressly stated that they would set their personal religious beliefs aside and vote for the death penalty if appropriate. Juror Michelle Williams stated on her questionnaire that she would set her personal beliefs aside (8 C.T. 2069), and in answer to verbal questions stated that she was willing, despite her religious views, to follow the court's instructions and vote for the death penalty if appropriate. (8 C.T. 2069; 5 R.T. 621.) Juror Monique Williams, although she personally believed that the death penalty should only be used in instances where rehabilitation was not possible and where the defendant might pose a future danger to others, also stated that she could set aside her general feelings and follow in good faith the guidance given her by the law. (C.T. 3418; R.T. 598-599.) While she belonged to the Baptist Church and considered herself religious, she was actually slightly in favor of the death penalty (six out of ten) "because it protects the lives of others." (12 C.T. 3419.) Juror Darrell Jackson, a member of the Church of Christ, stated that he was mildly in favor of the death penalty despite the fact that "the Church of Christ is against it," and that he would consider all of the evidence and the court's instructions

and be willing to impose the ultimate penalty if appropriate. He explained that "the overriding part to being a Christian is that you follow the law of the land" regardless of your religious beliefs. (6 C.T. 1518-1520; 5 R.T. 706-707, 729-730, 739, 843-845.)

Defendant Booker submits that a prospective juror may be excluded on the basis of his religious beliefs - if at all - only when it is clear that those beliefs will make it **impossible** for him to vote for the death penalty. Speculation that religious jurors, who expressly state that they will follow the court's instructions and impose the ultimate penalty based solely on the law and the evidence if appropriate, **might** be unable to do so is not - without more - a legitimate reason for excusing them.

A number of courts have struggled with this issue and their analysis is by no means uniform. (United States v. Brown (2d Cir. 2003) 352 F.3d 654, at 668-669; United States v. Stafford (7th Cir. 1998) 136 F.3d 1109, at 1114; and see Davis v. Minnesota (1994) 511 U.S. 1115, 1117, Thomas J., dissenting from denial of certiorari.) At least one of these courts, the Stafford court, appears to be in accord with Booker's position. The Stafford court opined that, while it might be proper to strike a prospective juror on the basis of a religious belief that would prevent him or her from basing his decision on the evidence and instructions (for example a juror whose religion taught that the punishment for crimes should be left entirely to the justice of God), it did not necessarily follow that a juror whose religious

outlook **might** make him or her unusually reluctant or unusually eager to convict a defendant (or vote for the death penalty) could be similarly excused under Batson. (Stafford, supra, 136 F.3d at 1114.)[2]

In any event, if this Court were to permit peremptory challenges of prospective jurors based on their religious beliefs, despite their repeated assurances that they could set these beliefs aside, follow the law, and impose the death penalty if appropriate, based upon speculation that these beliefs **might** make it impossible for the jurors to be fair to the prosecution, then the Deputy Attorney General's distinction between impermissible excusals for religious affiliation verses permissible excusals based upon religious beliefs becomes, for all practical purposes, a distinction without a difference. Prosecutors would be permitted to excuse prospective jurors willy nilly on the basis of their religious affiliations with impunity. This simply cannot be the law, and this Court should not go there.

The Deputy Attorney General correctly points out that two African-Americans were included in the jury impaneled to try this case.

However, the fact that the prosecutor was not completely successful in removing one hundred percent of the black jurors is

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[2] The Stafford court did not actually decide this issue since, given the unsettled state of the law and the defendant's failure to cite religion as the basis for his Batson challenge, it could not be said that the trial court had committed "plain error."

not conclusive. In fact, the improper exclusion of even a single prospective juror in violation of Batson-Wheeler compels reversal. (People v. Silva (2001) 25 Cal.4th 345, at 386; Snyder v. Louisiana, supra.)

The bottom line, when all is said and done, is that the fate of Richard Lonnie Booker, a young African-American man accused of the capital murders of three young Caucasian women, was decided by a jury carefully selected to exclude members of his own race as well as anyone whose religious beliefs **might** cause them to have any doubts whatsoever about the appropriateness of the death penalty. Consequently, the judgment must be reversed, the Deputy Attorney General's contrary arguments notwithstanding.

IV.

THE FAILURE TO ADEQUATELY QUESTION PROSPECTIVE CAUCASIAN JURORS CONCERNING RACIAL BIAS AGAINST AFRICAN-AMERICANS DENIED RICHARD BOOKER A FUNDAMENTALLY FAIR TRIAL BY AN IMPARTIAL JURY

Richard Booker argues that he was denied a fair trial by an impartial jury because the court and counsel did not conduct an adequate voir dire of the prospective Caucasian jurors concerning their racial biases. (AOB 56-63.)

The Deputy Attorney General disagrees. She argues (A) that the voir dire was adequate, and (B) that Booker's defense counsel waived this issue by not propounding additional race-bias questions during voir dire. (RB 71-82.)

Neither of the Deputy Attorney General's points withstands scrutiny.

This Court has stated 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 (1997) 15 Cal.4th 619, 660-661, citing Mu'min v. Virginia (1991) 500 U.S. 415 and Turner v. Murray (1986) 476 U.S. 28.) Here, since Booker, an African-American, was charged with committing three capital crimes against three young White female victims, careful probing of the Caucasian jurors' possible racial biases and attitudes about Blacks' propensities to commit violent crimes was critical. This is especially true since, out of 132 prospective jurors, a whopping 64% were Caucasian whereas only 8% were African-Americans. (2 R.T. 233-234, 672, 841), and the prosecutor used

six of his peremptory challenges to get rid of most of the African-Americans. (5 R.T. 667, 670, 671; 6 R.T. 805.)

Contrary to the Deputy Attorney General's suggestion, neither the absence of any racial motivation for the killings nor the fact that Booker was not a civil rights activist who may have been "framed" because of his civil rights activities (see Ham v. South Carolina (1973) 409 U.S. 524) can excuse the lack of an adequate voir dire on this subject in the instant case.

While the Deputy Attorney General argues that the voir dire was adequate, it is difficult to believe that this position is genuinely held. The **only** question on the written questionnaire which addressed this subject was Question 44. The jurors were simply asked, "Is there anything about the appearance of the defendant that might bias you for or against either side?" (3 C.T. 747.) The **only** question asked the prospective jurors during the oral voir dire was posed by defense counsel as follows: "You can all see that my client is an African-American male. I believe that you will hear, should you sit as a juror in this case, that the victims are not African-American. Now is there anybody in this group of twenty [prospective jurors] that has a reaction to the fact that the victims are a different race than my client?" Only two of these twenty jurors (Mr. Amato and Michelle Williams) responded to this question, and one of these (Ms. Williams) was herself African-American.) (5 R.T. 629.) Furthermore, this question was not posed to the remaining 112 jurors who were originally called up and questioned or to any of

the prospects who replaced some of them after they were excused.

The Deputy Attorney General correctly notes that there are many ways to conduct voir dire, that generally the scope of voir dire on any particular subject lies within the discretion of the trial court, and that there is no one "perfect" question which will necessarily ferret out hidden racial biases. All of this is true. However, it is also true that the racial bias voir dire in the instant case was so inadequate that this Court can have no assurance that Richard Booker received a fair and impartial trial by the jury ultimately impaneled which included only two African-Americans. (6 R.T. 842.)

The Deputy Attorney General's argument that this issue has been waived due to defense counsel's failure to propound or request additional inquiries concerning the jurors' racial prejudices is inconsistent with People v. Taylor (1992) 5 Cal.App.4th 1299, a case cited by both parties. In Taylor the defendant, an African-American, was charged with the murder of an Hispanic victim. The trial judge's racial bias inquiry was far more extensive than in the instant case. The judge, addressing the prospective jurors, stated:

> "Now, in this case, it's apparent that Mr. Taylor is black, an Afro-American, African-American. The alleged victim in this case, I think it will become apparent, is Hispanic. One of our guiding principles in this courtroom, indeed in every courtroom, is that race, creed, color, religion, national origin, none of things counts for or against anybody. These are neutral factors except as they might play a part in identifying somebody, as a point of identification.

> People don't get found guilty, they don't get found not guilty because of race, creed, color, religion, national origin and so forth. Do any of you have any quarrel with that principle, any quarrel with that at all?"

While each of the twelve persons in the jury box answered in the negative, the court pursued the inquiry further:

> "I'm going to assume, because I am human and I have my own biases and prejudices, that some of you may have some biases and prejudices. But as a judge, I am required to put aside whatever feelings I might have and to be neutral in making decisions. I have to require you folks to do the same thing. Do any of you have any quarrel with that principle?"

Moreover, unlike in the instant case, this question was repeated to each and every prospective juror called to the jury box.

Whenever a prospective juror answered a question which in any manner indicated that further inquiry was needed, follow-up questions were posed. The inquiry succeeded in revealing the potential biases of two jurors and they were excused by stipulation. (Taylor, supra, 5 Cal.App.4th at 1310-1311.)

In Taylor, as in the instant case, defense counsel did not request any further racial bias inquiry, and the Attorney General argued on appeal that counsel's failure to do so constituted a waiver of any complaint about the adequacy of voir dire. Yet, despite this, Justice Epstein, writing for a unanimous court, concluded that the issue should be addressed on its merits on

appeal and that the trial judge should have made further inquiry into the area of possible racial bias against the African-American defendant. The trial court in Taylor had asked no questions designed to elicit whether any juror actually held such bias and, since there was a potential of racial or other invidious prejudice against the defendant, a further inquiry should have been made. (People v. Taylor, supra, at 1312-1316.)

It necessarily follows that, in the instant case where the race-bias voir dire was not nearly as extensive as in Taylor, the issue should be addressed on appeal, and this Court should similarly hold that a further inquiry should have been made.

The Deputy Attorney General argues that, even if the inquiry to probe the prospective jurors' racial biases is deemed inadequate, it is nonetheless not reversible error since Booker cannot demonstrate that this rendered his trial fundamentally unfair.

However, this federal constitutional error is reversible per se (Ham v. South Carolina and Turner v. Murray, both cited supra.)

Alternatively, even assuming that the federal constitutional error test of "harmless beyond a reasonable doubt" (Chapman v. California (1967) 386 U.S. 18) applies, the convictions must still be reversed. This Court cannot say beyond a reasonable doubt that a jury more carefully screened to weed out potential racial prejudices might have been unable to convict Booker or impose the death penalty.

Accordingly, the Deputy Attorney General's arguments should be rejected, and the judgment should be reversed.

GUILT PHASE ARGUMENTS

V.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTIONS AND SPECIAL CIRCUMSTANCES FINDINGS

Richard Booker argues that the evidence is legally insufficient to support his first degree murder, attempted murder and arson convictions or the felony murder special circumstances findings. (AOB 64-83.)

The Deputy Attorney General counters that the evidence is not only legally sufficient, but "overwhelming." (RB 82-98.)

However, as Appellant will now explain, the supposed overwhelming evidence - like the emperor's new clothes in the fairy tale - does not in fact exist. The Deputy Attorney General, like the prosecutor in the trial court, is relying upon pure speculation rather than credible evidence of solid value or reasonable inferences which the jury was entitled to draw therefrom. Moreover, the Deputy Attorney General bases many of her arguments on isolated facts in the record taken out of context, and the cases she relies upon are distinguishable.

A. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH PREMEDITATION

In People v. Anderson (1968) 70 Cal.2d 15, and again in People v. Stitely (2005) 35 Cal.4th 514, at 543, this Court identified three categories of evidence relevant to determining the sufficiency of the evidence of premeditation and deliberation: prior planning activity, motive, and manner of killing. The Deputy Attorney General argues that evidence of all three types supports the jury's finding of premeditation in the instant case.

This is simply untrue.

There is no evidence that Richard Booker planned to kill Tricia Powalka, Amanda Elliott, or Corina Gandara in advance. Richard did not even know these young women prior to the evening of August 9, 1995 which ended in their tragic deaths. The only reason Richard went to Tricia Powalka's apartment that night was that Amanda Elliott invited him to come over and "party." Amanda suggested to Deverick Mattox (who was visiting at the time) that he invite a friend to come over, Deverick telephoned Richard, and Richard accepted the invitation. Furthermore, according to Deverick, the two young men and three young women spent the evening drinking, listening to music, and watching movies (8 R.T. 1120-1132) and several of Tricia's neighbors heard music and laughter, and had no reason to believe that anything was amiss as late as 3:00 a.m. (8 R.T. 979 et seq., 996, 1001-1007, 1018-1023, 1038-1041.) There is not a scintilla of evidence in this record that even remotely suggests that either prior to, or during, the evening Richard Booker had any animosity toward any of his hostesses, let alone that he was plotting to kill them.

The Deputy Attorney General's argument that a pre-existing plan to murder the young women can be reasonably inferred merely because Richard "came armed [to the apartment] with a knife which he [later] put to lethal use" (R.B. 86) borders on the absurd, and the cases she relies on do not support her position.

As this Court said in People v. Alcala (1984) 36 Cal.3d 604, at 626 "use of a deadly weapon is not always evidence of a plan

to kill" and "not all 'planned' conduct with the victim is actively directed toward, and explicable as intended to result in a killing. . . ." In Alcala, the defendant met and photographed his female victim, devised and executed a scheme to abduct her, kept her in his car by force or fear, drove her a considerable distance from urban surroundings to a rural area, then took her on foot away from the road to an even more secluded spot where others were unlikely to intrude before sexually assaulting her and murdering her. This Court concluded that, under these circumstances, it was reasonable to infer that, since the defendant had brought a deadly weapon with him and subsequently employed it, he had considered the possibility of homicide from the outset. (People v. Alcala, supra, 36 Cal.3d at 626.)

In People v. Marks (2003) 31 Cal.4th 197, the defendant robbed and murdered a taxi cab driver and a convenience store owner. Moreover, he brought a gun rather than money with which to pay for the taxi ride. He also, in a separate incident, brought a gun into a store and used it shortly thereafter to kill an unarmed robbery victim after robbing and shooting employees of a Taco Bell. All of this, considered collectively, strongly supported a reasonable inference that he planned violent encounters with his victims and had murder on his mind. (People v. Marks, supra, 31 Cal.4th at 230-232.)

In People v. Steele (2002) 27 Cal.4th 1230, there was evidence that the defendant hated women and had planned to kill one of his female victims "because she was a whore." He then

stabbed one woman to death and led another woman into her apartment with a knife in his pocket, from which the jury could readily infer that he intended to use his knife a second time for the same purpose. Additionally, there was testimony that the defendant had told one of his victims, before killing her, "put the phone down or I'll kill you." This evidence, taken all together, suggested a planned killing, and this Court so concluded. (People v. Steele, supra, 27 Cal.4th at 1239-40, 1249-1250.)

In People v. Perez (1992) 2 Cal.4th 1117, the defendant, who was previously acquainted with the victim, surreptitiously entered her home, immediately seized a kitchen knife, confronted her, beat her, and then fatally stabbed her. When that knife broke, cutting him, defendant went in search of another knife. It was under these circumstances that this Court concluded that the evidence, while by no means "overwhelming," was sufficient to sustain the jury's finding of premeditation. (Perez, supra, 2 Cal.4th at 1126-1129.)

Our case, however, is distinguishable from those relied upon by the Deputy Attorney General and discussed above. Richard Booker did not even know the victims prior to the fatal encounter, entered their home by invitation rather than surreptitiously, and had no pre-existing plan to harm them. In fact, he spent hours listening to music, watching movies, and partying with the three young women. The only evidence as to how the three young women ended up dead, since they obviously did not

survive and the only other person present (Deverick Mattox) testified that he was asleep on the couch, was Richard's uncontradicted post-arrest statement that the killings were triggered by an **accidental** stabbing. Richard had been absent-mindedly playing with his knife. Corina accidentally bumped into it. She asked Richard why he was trying to stab her and tried to grab the knife. He hit her, and she ran into the bedroom. Tricia threatened to shoot Richard even though he told her that the "stabbing of Corina had been an accident." Tricia nonetheless ran for the gun. Richard grabbed the gun away from her. Amanda charged him, he stabbed her several times, and also shot Amanda. (3 C.T. 672-713; 7 R.T. 952-964; 9 R.T. 1264-1267, 1274, 1279-1292.) One need not accept Richard's post-arrest statements as the gospel truth to conclude that these killings were anything but planned.

The Deputy Attorney General's contention that a plan to murder the victims can be reasonably inferred from the mere fact that Richard Booker brought along his knife to their apartment is also undermined by the testimony of Kali Franco, Richard's long time friend, that he habitually carried the knife. (10 R.T. 1359 et seq.) This suggests that there was nothing unusual about his having the knife, and that he did not "arm" himself with a deadly weapon for the purpose of doing the victims harm.

As this Court observed in Alcala, use of a deadly weapon is not always evidence of a plan to kill. It is certainly not evidence of a plan to kill in this case.

The Deputy Attorney General also argues that "as to motive, regardless of what inspired the initial entry and attack, it is reasonable to infer that defendant determined it was necessary to kill Corina to prevent her from identifying him, or telling the others what he did. When her screams caused Tricia Powalka to try to intervene, Booker had to kill Tricia too, and incidentally obtained her gun. Once Amanda Elliott woke up, she also had to be eliminated as a witness, so Booker stabbed her, then shot her with Tricia's gun." (R.B. 89.) She makes a great deal of Richard's statement to Deverick Mattox that he "had to" kill the young women, interpreting this statement as a motive to eliminate the witnesses so that he would not have to "go to jail for his crimes." (RB 86-88.) She relies on People v. Alcala, supra, People v. Bonillas (1989) 48 Cal.3d 757, at 792, and People v. Haskett (1982) 30 Cal.3d 841, 849-850.

However, the cases relied upon by the Deputy Attorney General are distinguishable, and her argument fails to take into account the entire record in the instant case.

In the cases relied upon by the Deputy Attorney General the "witness elimination" motive was established by evidence that the defendant was concerned with apprehension and punishment, and that the victims - who **knew** the defendant - could identify him.

In Haskett, the defendant killed two boys after murdering their mother. At least one of the boys knew the defendant by name and could easily identify him. Moreover, Defendant Haskett demonstrated his concern that the boys might jeopardize his

escape or assist in his apprehension by alarming others of his presence by repeatedly telling the mother to keep her sons quiet because they made him nervous and because he feared the neighbors might hear them. (People v. Haskett, supra, 30 Cal.3d at 850.)

In Bonillas the defendant had a strong motive to eliminate the victim since she was his neighbor and would easily have been able to recognize and identify him as the perpetrator of a burglary. (People v.Bonillas, supra, 48 Cal.3d at 792.)

In Alcala the defendant had previously met and photographed the victim, and the evidence thus suggested that he believed that she was the only person who could implicate him in a serious felony kidnapping. In fact, according to one witness, the defendant stated that he felt safe even after his arrest because "nobody seen me take her" (i.e. nobody left alive). (People v. Alcala, supra, 36 Cal.3d at 627.)

In this case, Richard Booker was so unconcerned about apprehension and punishment that he repeatedly told both Deverick Mattox and the police that he wanted to die and invited Deverick to shoot him. (8 R.T. 1200.)

Moreover, none of the three young women had ever met Richard Booker before, did not know him from Adam, did not know where he lived, and could not have told the police where to find him.

Moreover, the failure of Richard Booker to "eliminate" Deverick Mattox, the one and only witness who knew him and could have reported him to the police, completely undermines the prosecution's witness elimination theory. While the Deputy

Attorney General argues that this merely means that Richard Booker put his trust in the wrong person, this does not explain why, if Richard wanted to eliminate the eye witnesses against him, he did not eliminate **all** of them.

While the Deputy Attorney General emphasizes Richard's statement to Deverick that he "had to" kill the young women, the record is ambiguous as to what he meant by this remark. Certainly the most reasonable inference, in light of Richard's subsequent post-arrest statements that Tricia was about to shoot him, is that Richard was trying to explain that he "had to" kill the young women in order to avoid being killed himself.

In sum, these were simply not witness elimination killings. The prosecution knew this full well from the commencement of this case, and the prosecution's failure to charge witness elimination special circumstances (Penal Code §190.2, subdivision (a)(5),(10)) speaks volumes.

The Deputy Attorney General, perhaps realizing the weakness of the planning and motive evidence in this case, nonetheless argues that the manner of killing - multiple shootings and stabbings - "is itself sufficient to support the jury's verdict of premeditated murder." (RB 85). According to her, it can be reasonably inferred that "Booker used his knife to repeatedly stab each victim to make sure she would bleed to death, and when he got his hands on a gun, he used that to execute Amanda Elliott, who was already incapacitated from having her throat slashed." (RB 89.)

However, this Court has repeatedly stated that multiple stab wounds randomly inflicted is "a method of killing that does not in itself establish premeditation and deliberation" in the absence of strong additional evidence of both planning and motive. (People v. Haskett, supra, 30 Cal.3d at 850; People v. Anderson, supra, 70 Cal.2d at 31; People v. Granados (1957) 49 Cal.2d 490, 497; People v. Craig (1957) 49 Cal.2d 313, 319.) That is certainly the case here in view of the total absence of evidence of planning activity or motive as discussed above.

Moreover, it should be noted once again that, despite fanciful prosecutorial speculation, we do not really know the sequence of events since the three victims obviously did not survive, Deverick Mattox claimed to be asleep on the couch, and there were no other eye witnesses except for Richard Booker himself. While Richard's post-arrest statements were rambling and inconsistent, the multiple stab wounds and shootings support his claim that these were rash and impulsive killings, and that the victims died during a wild melee triggered by an accidental stabbing.

Thus, while the Deputy Attorney General would have this Court believe that the evidence of intentional premeditated killings is not only sufficient but overwhelming, the truth is that such evidence really does not exist.

B. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH ATTEMPTED RAPE AND FORCIBLE MOLESTATION

Richard Booker argues that the evidence is legally insufficient to establish that Corina Gandara was murdered during the commission of rape or attempted rape, or attempted or actual forcible lewd conduct with a child under fourteen, and therefore insufficient to support either first degree felony murder or the felony murder special circumstances finding. (AOB 71-75.)

The Deputy Attorney General concedes that the coroner did not find evidence of a completed rape such as semen or any physiological evidence of intercourse. However, she argues nonetheless that, since Corina was found with her pants pulled down, her legs apart, and bloody hand-prints on her thighs, the jury reasonably could have found that Corina was killed during an attempted rape or child molestation. (RB 90-92.)

However, as Richard Booker has pointed out in his opening brief, this Court has previously found that such evidence is legally insufficient to establish attempted rape. (AOB 71 et seq.; People v. Granados; People v. Craig; and People v. Anderson, all cited supra; People v. Johnson (1993) 6 Cal.4th 1.) The Deputy Attorney General neither attempts to distinguish these cases nor cites any cases holding to the contrary.[3]

The instant case is distinguishable from People v. Rundle

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[3] The similar evidence concerning Tricia Powalka is irrelevant in this context. The jury clearly did not base its first degree murder verdict as to Ms. Powalka on this theory since they found the related rape-murder special circumstances allegations not true.

(April 3, 2008) ___ Cal.4th ___, 2008 DJDAR 4708. In Rundle this Court held that the evidence was sufficient to support an attempted rape conviction where the victim was found nude with her arms bound very tightly behind her back, and the evidence did not eliminate a sexual assault. Moreover, and perhaps most importantly, the defendant admitted that he had sex with the victim.

Here, in contrast, Corina Gandara was not bound or restrained, the coroner found no semen, vaginal trauma, or other evidence of a sexual assault, and Booker denied that he had ever assaulted Corina.

Moreover, there is no evidence that Corina Gandara was still alive at the time that any attempted rape or molestation may have occurred. While the Deputy Attorney General correctly notes that an individual who attempts to rape or molest a victim in the mistaken belief that she is still alive may be found guilty of sexual assault (People v. Thompson (1993) 12 Cal.App.4th 195, 203, People v. Kelly (1992) 1 Cal.4th 495, 525), the evidence does not establish that this is what occurred in our case. The Deputy Attorney General bases her argument on Richard Booker's statement that Corina was not that badly hurt when he left her in the bathroom, and then returned to "help her" undress, and ultimately kill her. However, this is misleading since a considerable period of time may have elapsed between when Richard left the bathroom and when he returned to find Corina lying on the floor neither speaking nor moving. There is literally **no**

evidence that Corina was still alive, or even that Richard believed that she was still alive, at the time she was touched.

Thus, the Deputy Attorney General's arguments are unavailing and the evidence is legally insufficient to support the jury's felony murder findings.

C. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH ARSON

Richard Booker argues that the evidence is legally insufficient to support his arson conviction. (AOB 76-77.)

The Deputy Attorney General of course disagrees. Her position is that, since arson is a general intent crime, the only mental element required is an intent to start the fire intending to burn an inhabited structure. (People v. Atkins (2001) 25 Cal.4th 76, 88; RB 94.)

However, the evidence in this case shows merely that Richard Booker may have placed a bag of dirty laundry on top of the kitchen stove before leaving Tricia Powalka's apartment. There is literally **no** evidence that he did so with the intention of starting a fire in the apartment in order to destroy the "crime scene" as the prosecutor opined. None of the usual indica of arson (such as other sources of ignition or kerosene soaked rags) were found, and the Deputy Attorney General has taken Booker's post-arrest statement that he may have intended to start a fire completely out of context. In summary, the evidence establishes nothing more than an accidental or unintentional ignition.

People v. Lewis (2001) 26 Cal.4th 334 and People v. Stanley (1995) 10 Cal.4th 764, cited by the Deputy Attorney General (see RB 94, footnote 20) are not on point. In Lewis this Court held that the jury could consider the defendant's express threat to cause a fire and his follow-up act of throwing a burning sheet into a trash can outside his cell as an aggravating Penal Code section 190.3, subdivision (b) factor. (Lewis, supra, 26 Cal.4th

at 392.) In Stanley, this Court similarly held that evidence that the defendant had threatened the victim in order to frighten and control her, coupled with follow-up acts of burning her house and her car on two separate occasions, was admissible as an aggravating factor during the penalty trial pursuant to section 190.3, subdivision (b). (Stanley, supra, 10 Cal.4th at 824.)

In our case, Richard Booker never threatened to harm the victims or burn their property before placing a bag of dirty laundry on top of their kitchen stove.

Furthermore, this case is distinguishable from cases like Lewis and Stanley inasmuch as it is by no means clear that Richard Booker actually lit the fire. Richard told the investigating officers merely that he seemed to remember that he may have put something on the stove before leaving Tricia Powalka's apartment. There is no evidence that the stove burners were lit by Booker at that time. It is entirely possible that they were lit either (1) by Tricia, Amanda, or Corina earlier or (2) by Deverick Mattox who was apparently still in the apartment after Richard left.

In any event, even assuming that the evidence is sufficient to establish that Richard Booker started the fire on the stove, it is legally insufficient to establish that he did so with the intent to burn Tricia Powalka's apartment.

D. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH ATTEMPTED MURDER

Richard Booker argues that the evidence was legally insufficient to establish that he attempted to murder baby Eric Stringer. Attempted murder requires the specific intent to kill the victim. (People v. Lee (2003) 31 Cal.4th 613, 623), and there is no evidence that Richard intended to kill Eric. (AOB 78-80.)

The Deputy Attorney General, faced with the absence of any direct evidence that Richard Booker intended to murder Eric, relies upon the so-called "kill zone" cases. She argues that the very act of setting a fire in an occupied apartment which could kill all the occupants and others nearby is sufficient to support an inference of intent to kill. She cites People v. Smith (2005) 37 Cal.4th 733 and People v. Chinchilla (1997) 52 Cal.App.4th 683. (RB 95-98.) However, cases like Smith and Chinchilla are distinguishable and the Deputy Attorney General's reliance on those cases is misplaced.

The attempted murder convictions in those cases were upheld, not merely because the victims were within the kill zone, but because of evidence that the defendant had a motivation to kill them. Thus, in Smith, this Court held that the defendant could be convicted of the shooting murder of an infant whom the targeted mother was holding since the mother was his ex-girlfriend, and had just arrived on the scene with a new boyfriend and their baby, and the defendant may have felt animus towards **both** the mother and her baby when he opened fire. (Smith, supra, 37 Cal.4th at 744.) Similarly, in Chinchilla, there was evidence that the defendant

was hell-bent on murdering **all** of the police officers who were attempting to apprehend him for an attempted robbery when he fired a single shot in their direction. (Chinchilla, supra, 52 Cal.App.4th at 687.)

Here, in contrast, there is no evidence that Richard Booker intended to kill Eric. Certainly, since Eric could not have identified him or testified for the prosecution, Richard had no reason to eliminate him as a potential witness.

Moreover, it is not clear that Richard Booker even knew that Eric was in the apartment. The Deputy Attorney General correctly points out that Richard told the detectives that he heard a baby crying. (3 C.T. 696; RB 96.) However, Tricia Powalka lived in an apartment complex where the tenants and their guests could easily overhear what occurred in their neighbors' apartments. For example Tricia's neighbors heard music and laughter during the evening in question (8 R.T. 976, 996, 1001-1007, 1018-1023, 1038-1041.) There is nothing to indicate that Richard thought the baby he heard crying was in Tricia's apartment.

In summary, there was insufficient evidence for any reasonable juror to conclude that the prosecution had proved beyond a reasonable doubt that Richard Booker attempted to kill Eric Stringer. Consequently, the attempted murder conviction must be reversed.

E. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S FINDING OF MULTIPLE MURDER SPECIAL CIRCUMSTANCES

Richard Booker argues that, since none of the three murders was of the first degree, the multiple murder special circumstances must be stricken. Alternatively, since only one multiple murder special circumstance is permissible, two of the three findings must be set aside. (AOB 81-82.)

Contrary to the Deputy Attorney General, the evidence that any of these killings were premeditated, and/or that the murder of Corina Gandara was a first degree felony murder is, not only not "overwhelming," but legally insufficient for the reasons set forth ante.

The Deputy Attorney General argues that the judgment "recited" only one special circumstance of multiple murder. However, she refers to the Reporters' Transcript (15 R.T. 2052) rather than to the judgment as reflected in the Clerk's Transcript (14 C.T. 3819 et seq., 3939 et seq.) Since the Deputy Attorney General does not disagree with Richard Booker's argument that only one multiple murder special circumstance is permissible under this Court's precedents, the judgment must, at the very least, be corrected accordingly.

VI.

THE TRIAL COURT DEPRIVED RICHARD BOOKER OF A FUNDAMENTALLY FAIR TRIAL BY ADMITTING GRUESOME PHOTOGRAPHS OF THE VICTIMS' BODIES AND THE SURROUNDING "CRIME SCENE"

Appellant Booker believes that this issue has been adequately briefed (see AOB 84-93; RB 99-113), that the Deputy Attorney General's arguments were anticipated and replied to in the opening brief, and that no purpose would be served by simply repeating these same points here. Suffice it to say that, while the Deputy Attorney General argues at length that the photographs in question were relevant to illustrate the method and ferocity of the murders, their real purpose was simply to inflame the passions of the jury and ensure multiple first degree murder convictions which a dispassionate consideration of the evidence did not justify.

VII.

THE FAILURE TO INSTRUCT THE JURY THAT NEITHER RAPE NOR FORCIBLE SEXUAL MOLESTATION ARE POSSIBLE WHEN THE VICTIM IS DEAD REQUIRES REVERSAL OF THE CORINA GANDARA MURDER CONVICTION AND FELONY MURDER SPECIAL CIRCUMSTANCES FINDING

Richard Booker contends that the trial court reversibly erred in failing to instruct the jury that he could not have raped or molested Corina Gandara if she was no longer alive when the purported sexual assault occurred. (AOB 94-107.)

The Deputy Attorney General argues that the trial court was not obligated to give this pinpoint instruction on after-formed intent in the absence of a request, and that any such instruction would have been unsupported by the evidence. (RB 114-125.)

The Attorney General's argument that the trial court was not obligated to instruct on this point in the absence of a request is clearly without merit. The Deputy Attorney General concedes that the trial court is obligated to instruct the jury on the general principles of law relevant to the case being tried whether or not the defendant makes a formal request (RB 117; People v. Rogers (2006) 39 Cal.4th 826, 867), and that a trial court is obligated to instruct sua sponte that there can be no rape of a dead body when there is substantial evidence to support the theory that the victim may have been dead at the time of the alleged sexual assault. (RB 122; People v. Stanworth (1974) 11

Cal.3d 588; People v. Sellers (1988) 203 Cal.App.3d 1042.)[4]

The critical question is thus whether or not there is substantial evidence that the victim may have already been dead at the time the alleged assault occurred.

People v. Kelly (1992) 1 Cal.4th 495, cited and relied upon by the Deputy Attorney General, is actually similar to the instant case in many respects, and supports Richard Booker's position. In Kelly, this Court held that the trial court reversibly erred in misinstructing the jury that it was legally possible to rape a dead body, and reversed a rape conviction as to a victim Houser since the evidence, although far from conclusive, suggested the possibility that the victim was dead before she was assaulted. (People v. Kelly, supra, 1 Cal.4th at 526-528.)

In our case, as in Kelly, the evidence, although not conclusive, suggests the possibility that Corina Gandara was dead at the time any assault may have occurred. Richard Booker told the interrogating detective that, at the time he "kind of helped" Corina take her pants off, she was lying on the bathroom floor neither speaking nor moving. Furthermore, he told the detective that the reason why he decided to remove Corina's pants was that he knew that he "was going to go down [i.e. going to prison]," and

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[4] In view of the Deputy Attorney General's concessions, it is unnecessary to address whether the failure to instruct on this issue is more appropriately viewed as a failure to instruct on an element of the offenses (as Richard Booker argues) or as a failure to instruct on a particular defense (as the Deputy Attorney General contends).

figured that since he was already "fucked" [i.e. he had already killed Corina], he might as well satisfy his sexual curiosity. (3 C.T. 696-700, 709-710.) Thus, in our case, just as in Kelly, the failure to properly instruct the jury that the defendant could not be found guilty of rape or molestation if they concluded that the victim was already dead was clear error.

The Deputy Attorney General suggests that the instructional error was harmless beyond a reasonable doubt as to the jury's special circumstances finding that Corina was murdered while Richard was attempting to rape and/or forcibly molest her. She relies on Kelly, supra, 1 Cal.4th at 525, People v. San Nicholas (2004) 34 Cal.4th 614, and People v. Hart (1999) 20 Cal.4th 546. The rationale of these cases is that, where the defendant forms the intent to rape while the victim is alive he is guilty of having attempted the underlying felony, and the felony murder doctrine is applicable regardless of whether actual penetration occurred before or after death. (RB 118.)

However, this argument is unavailing since in our case, unlike in Kelly and the other cases cited by the Deputy Attorney General, there was never any actual penetration either before or after death. To quote the Deputy Attorney General: "Admittedly here, the coroner did not find evidence of a completed rape, no semen, no physiological evidence of intercourse. . . " (RB 91), and indeed "the coroner did not find genital trauma on Corina Gandara." (RB 115.)

People v. Jones (2003) 29 Cal.4th 1229, at 1258-1259, also

cited by the Deputy Attorney General, is inapposite. There, unlike in our case, the criminalist found a great abundance of intact spermatozoa on a vaginal swab, leading him to conclude that ejaculation had occurred within five to ten hours **before** the victim's death, and DNA analysis established to a statistical near-certainty that the defendant had raped her. (People v. Jones, supra, 29 Cal.4th, at 1239-1240.) It is hardly surprising that, under these circumstances, this Court concluded that the trial court did not err in failing to instruct the jury on after-formed intent, and that no reasonable juror could have failed to understand from the standard instructions that the defendant was guilty of rape felony murder only if his intent to rape was formed before the murder occurred. The facts in our case, as discussed above, are as different from those in Jones as night from day.

The bottom line is that reasonable jurors, properly instructed, could have easily concluded that Richard Booker neither raped nor molested, nor even attempted to rape or molest, Corina Gandara while she was still alive, that at worst he touched her out of sexual curiosity knowing that she was already dead, and that he was therefore not guilty of special circumstances felony murder. While the Deputy Attorney General struggles mightily to avoid this result, her arguments are unavailing. Therefore, both the first degree felony murder conviction and special circumstances finding regarding Corina Gandara must be reversed.

Furthermore, since in the absence of the Corina Gandara murder conviction and special circumstances finding the jury could have come to a different conclusion regarding the appropriate penalty, the death sentence cannot stand.

VIII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT ON IMPERFECT SELF-DEFENSE AND HEAT OF PASSION VOLUNTARY MANSLAUGHTER

Richard Booker argues that the trial court reversibly erred in refusing to instruct on imperfect self-defense and heat of passion voluntary manslaughter. According to Richard's uncontradicted post-arrest statements, he had been drinking, listening to music, and watching movies with Tricia Powalka, Amanda Elliott, and Corina Gandara. He had been absent-mindedly playing with his knife when Corina accidently bumped into it. Corina, misperceiving the situation, asked Richard why he was trying to stab her and tried to grab the knife. She ran into Tricia's bedroom. Tricia threatened to shoot him even though he told her that the "stabbing" of Corina had been an accident and ran for her gun. He hit her, and grabbed the gun away from her. Amanda, refusing to heed Richard's warning that he was not "playing," charged him. During the melee Richard fatally stabbed and shot both Tricia and Amanda. Richard repeatedly told Deverick Matox and the interrogating officers that he "had to" kill the young women because otherwise Tricia was going to shoot him. (3 C.T. 687, 693, 694, 705, 706, 707; 9 R.T. 1284, 1286-1287, 1291.) This constituted substantial evidence from which the jurors were entitled to conclude that Richard was guilty of manslaughter rather than murder - as to Tricia and Amanda - and instructions on the lesser included manslaughter offenses were thus required. (People v. Breverman (1988) 19 Cal.4th 142; People

v. Lewis (2001) 25 Cal.4th 610 at 645.)(AOB 108-122.)[5]

The Deputy Attorney General makes a number of counter arguments (at RB 125-137), none of which is persuasive. The Deputy Attorney General asks this Court to reject "Booker's 'kill or be killed' scenario. . . [as] a sad fabrication, contrived after the fact to explain the inexplicable." (RB 137.) However, whatever the Deputy Attorney General or this Court may think of Richard Booker's version of the way in which these tragic events unfolded, this was a matter of credibility for the **jury** to determine. The trial court's refusal to allow the jury to make that determination, and conclude - if they believed Richard Booker - that he was guilty of manslaughter rather than murder, cannot be condoned.

The Deputy Attorney General argues that the above - described evidence was somehow not sufficiently substantial to require instructing the jury on the lesser included manslaughter offenses. She relies on People v. Rogers (2006) 39 Cal.4th 826, at 883-884.)

However, this argument fails. According to Richard Booker's post-arrest statements, this was a classic manslaughter case in which three young woman over-reacted to an accidental stabbing, put Richard in a "kill or be killed" position, and ended up dead. To compare this case - in which one of the young woman threatened to shoot Richard Booker and ran for her gun and another charged

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[5] Richard Booker does not argue that the trial court was required to instruct on the lesser included manslaughter offenses as to victim Corina Gandara.

him apparently intent on wresting the gun away and shooting him - with Rogers - in which an unarmed 15 year old girl did nothing more than point her finger at the defendant - is absurd.

The Deputy Attorney General, relying upon CALJIC No. 5.17, insists that Richard Booker was not entitled to imperfect self-defense manslaughter instructions because "this principle is not available. . . if the defendant by his. . . unlawful or wrongful conduct created the circumstances which legally justified his... adversary's use of force, [or] attack. . . ." She reasons that, "since Booker's own version of events showed him to be the initial aggressor and the victims' responses to be legally justified, Booker was not entitled to rely on unreasonable self-defense to reduce murder to manslaughter." (RB 134.)

However, the mere fact that the defendant may have been the initial "aggressor" does not necessarily mean that he is not entitled to imperfect self-defense manslaughter instructions. Whether or not such instructions must be given depends upon the circumstances.

For example, in People v. Randle (2005) 35 Cal.4th 987, cited by the Deputy Attorney General only in passing (at RB 136), the homicide victim had confronted the defendant, who was stealing a stereo speaker from the car of the victim's relative. The defendant pulled a .25-caliber pistol from his pocket and fired several times. The defendant and his cousin fled, and the victim and his relative pursued them. The victim beat the defendant's cousin with his fists and recovered the stolen stereo

equipment, but returned to continue the beating. The defendant testified that he fired his gun to make the victim stop beating his cousin. This Court held that the trial court prejudicially erred in refusing to instruct the jury on the doctrine of imperfect self-defense. If Mr. Randle killed in the actual but unreasonable belief that he had to defend his cousin from imminent danger of death or great bodily injury, he was guilty of imperfect self-defense manslaughter rather than murder. Defendant Randle could invoke the doctrine, **even though his criminal conduct set in motion the series of events that led to the fatal shooting**, because the retreat of the defendant and his cousin and the subsequent recovery of the stolen equipment from the defendant's cousin extinguished the legal justification for the victim's attack.

Similarly, in People v. Vasquez (2006) 136 Cal.App.4th 1176, cited and discussed by both parties, the appellate court held that the defendant was entitled to imperfect self-defense manslaughter instructions, **even though he was the initial aggressor**, because, after he confronted the victim with an accusation, the victim reacted by choking him, before he pulled out his gun and shot the victim to death.

Here, although the Deputy Attorney General labors long and hard to convince this Court otherwise, Richard Booker was entitled to imperfect self-defense manslaughter instructions because, according to his version of the events, the initial "stabbing" of Corina Gandara was **accidental.** Richard was absent-mindedly playing with his knife when Corina suddenly got up and

bumped into it. Since persons who commit otherwise criminal acts by **accident** may not be held criminally liable (Penal Code §26, paragraph 5), it cannot be said that Richard's conduct in accidentally "stabbing" Corina was the type of **unlawful** or **wrongful** conduct which would legally justify Tricia's and Amanda's use of lethal force or attack under CALJIC No. 5.17. Therefore, since under Richard's version of events he was not a deliberate aggressor, and the victims' responses were not legally justified, he was entitled to rely on unreasonable self-defense to reduce murder to manslaughter.

The Deputy Attorney General's final argument is that the instructional error was harmless. She reasons that the jury necessarily rejected Richard Booker's version of events by finding him guilty of premeditated murder. Thus, according to her, the jury surely would have returned the same verdicts if given additional instructions on imperfect self-defense or heat of passion manslaughter. (RB 133.)

However, this particular argument was anticipated and answered in the Appellant's Opening Brief. The jury's implied finding that this was a case of premeditated murder, as to victims Tricia Powalka and Amanda Elliott, was **not** necessarily inconsistent with the finding of imperfect self-defense manslaughter in view of this Court's decisions holding that "premeditation" does not require an extended period of time so long as the defendant has an opportunity to meaningfully reflect on what he is doing. (See People v. Manriquez (2005) 37 Cal.4th

547 at 577.) A jury, properly instructed on the lesser included offense of imperfect self-defense manslaughter, could have easily concluded that Richard Booker "meaningfully reflected" on the situation confronting him after Tricia threatened to shoot him and Amanda charged him, and concluded that this was a case of "kill or be killed."

The instructional errors in this case were anything but harmless, and the Tricia Powalka and Amanda Elliott murder convictions must be reversed.

IX.

THE PROSECUTOR'S ARGUMENT THAT THE PRESUMPTION OF INNOCENCE HAD VANISHED BEFORE THE JURY HAD HEARD ALL OF THE EVIDENCE AND COMMENCED DELIBERATIONS IMPROPERLY SHIFTED THE BURDEN OF PROOF AND COMPELS REVERSAL

Richard Booker argues that the prosecutor committed misconduct, during his closing argument, when he repeatedly claimed that the presumption of innocence had vanished before the jurors had even begun their deliberations. The prosecutor's remarks, which were not only not cured by but were exacerbated by the trial court's instructions, improperly shifted the burden of proof, and constituted reversible constitutional error. Booker's position is supported by the remarkably similar case of United States v. Perlaza (9th Cir. 2006) 439 F.3d 1149. (AOB 123-135.)

The Deputy Attorney General attempts to distinguish Perlaza by arguing that the reversal in that case was due to a combination of a lack of the trial court's jurisdiction and the prosecutor's improper argument. Thus, she implies, the prosecutor's improper remarks alone would not have resulted in reversal. (RB 147.)

Not so. The Perlaza opinion expressly states that "even if the District Court had jurisdiction over these Defendants, we would still reverse their convictions because of the prosecutor's improper closing argument and the District Court's failure to adequately cure it." (Perlaza, supra, 439 F.3d at 1178, emphasis added.)

The Deputy Attorney General also tries to distinguish Perlaza on the grounds that the prosecutor in our case, unlike the federal prosecutor in that case, never argued that there was

a presumption of guilt. (RB 147.)

However, the prosecutor's comments in our case were - if anything - worse than those uttered by the federal prosecutor in Perlaza. The federal prosecutor stated that, once the jury retired and commenced deliberations, the presumption of innocence would vanish since the jurors would necessarily conclude that the defendants were guilty. In our case, in contrast, the prosecutor told the jurors that the presumption of innocence had vanished many days ago, long before their deliberations had even begun.

The Deputy California Attorney General argues that the trial court's general instructions on proof beyond a reasonable doubt, and the prosecutor's acknowledgment that he had the burden of proof, rendered the prosecutor's misconduct harmless. (RB 149-150.)

However, these are the very same arguments that the Perlaza court rejected. Indeed, the trial court in our case made the problem worse by agreeing with the prosecutor and telling the jurors that "at some point you come to the conclusion the person is guilty, the presumption is gone." (12 R.T. 1586-1587.)

The Deputy Attorney General, unable to locate anything in the precedents of this Court which might conceivably support her position, relies instead on People v. Goldberg 161 Cal.App.3d, 170, decided by the California Court of Appeal in 1984. In Goldberg the intermediate appellate court found that a prosecutor's remarks, which were similar to those expressed by the prosecutor in our case, were not improper. The Court

reasoned that, once an otherwise properly instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless they, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt during deliberations. (Goldberg, supra, 161 Cal.App.3d 189-190.)

However, in People v. T. Wah Hing (1911) 15 Cal.App. 195, at 199-200, the Court of Appeal concluded otherwise, and reversed, because the trial judge had told the jurors essentially that they could conclude that the presumption of innocence had been overcome, and that the defendant was guilty, prior to the commencement of their deliberations.

Richard Booker submits that Perlaza and Wah Hing were correctly decided, and that the Goldberg court and the Deputy Attorney General, as well as the trial judge and the prosecutor in our case, are wrong. The presumption of innocence goes with the defendant into the jury deliberation room and does not "vanish" whenever individual jurors conclude that they have heard enough and that the defendant must be guilty. This is why juries are routinely admonished that they have a duty not to form or express any opinion on the defendant's guilt or innocence **until the cause is finally submitted to them.** (Penal Code §1122, subdivision (b).)

The prosecutor's egregious misconduct in attempting to shift the burden of proof, aided and abetted by the trial court's erroneous instruction, constituted reversible federal

constitutional error. Consequently, the judgments of conviction cannot stand.

X.

THE TRIAL COURT'S MULTIPLE EVIDENTIARY AND INSTRUCTIONAL ERRORS DURING THE GUILT PHASE WERE CUMULATIVELY PREJUDICIAL

Richard Booker argues that the cumulative impact of the admission of inflammatory and gruesome photographs, omitted instructions on "after-informed intent" and the lesser included offense of manslaughter, coupled with the prosecutor's misconduct during his closing argument, collectively mandate reversal. (AOB 136-137.)

The Deputy Attorney General predictably counters that any errors were harmless, that Booker had a fundamentally fair (although not a perfect) trial, and that the convictions must be affirmed. (RB 150-151.)

Booker has already demonstrated in considerable detail that both the trial court and the prosecutor violated his constitutional rights in numerous ways and deprived him of anything resembling a fundamentally fair trial, and that the Deputy Attorney General's counter arguments are unavailing. This being so, the guilt phase judgment must be reversed.

PENALTY PHASE ARGUMENTS

XI.

THE TRIAL COURT DEPRIVED RICHARD BOOKER OF A RELIABLE PENALTY DETERMINATION BY RE-ADMITTING GRUESOME PHOTOGRAPHS DURING THE PENALTY PHASE

Richard Booker argues that the trial court again abused its discretion by allowing the re-introduction of the overly gruesome autopsy and crime scene photographs in the penalty phase trial. (AOB 138-140.)

The Deputy Attorney General predictably argues once again that these photographs were relevant and admissible. (RB 151-153.)

Richard Booker is confident that this issue has been - for the most part - adequately briefed.

However, there is one point which warrants further comment. While the Deputy Attorney General quarrels about whether or not the photographs were technically re-introduced in the penalty phase, she acknowledges that the jury was permitted to consider the photographs in deciding the appropriate penalty. (RB 151-153.) Thus, the Deputy Attorney General's "distinction" is a distinction without a difference. The real issue is whether these photographs inflamed the passions of the jury and precluded them from weighing the appropriate penalty based upon a dispassionate consideration of the evidence. Booker asserts that this is precisely what occurred in this case, and that therefore the death penalty must be reversed.

XII.

THE TRIAL COURT DEPRIVED RICHARD BOOKER OF A RELIABLE PENALTY DETERMINATION, DUE PROCESS, AND A FUNDAMENTALLY FAIR TRIAL, BY ALLOWING THE JURY TO CONSIDER UNDULY PREJUDICIAL OTHER UNCHARGED CRIMES EVIDENCE

Richard Booker argues that allowing the jury to consider unduly prejudicial unadjudicated other crimes evidence undermined the reliability of the penalty determination in his case, and unfairly persuaded the jury to impose the death penalty. (AOB 141-153.)

Appellant Booker recognizes that this Court has previously upheld the constitutionality of Penal Code section 190.3, subdivision (b) authorizing the admission of this evidence during the penalty phase of a capital trial. (People v. Balderas (1985) 41 Cal.3d 144, 204.) However, he has urged this Court to reconsider this issue in light of (A) the decisions of courts in other states which have reached a contrary conclusion, (B) the inherent unreliability of this evidence, (C) the danger that the jury will impose the ultimate penalty based upon the defendant's purported violent propensities as opposed to what he actually did in the case being tried, and (D) the likelihood that a jury which has convicted the defendant of special circumstances murders and heard about his other alleged but unproven crimes will be unable to follow the court's limiting instructions and use their reason rather than their emotions in determining the appropriate penalty. (AOB 145-150.)

The Deputy Attorney General, while correctly noting that this Court has declined previous invitations to reverse Balderas,

this Court has declined previous invitations to reverse Balderas, does not answer Booker's arguments or even attempt to demonstrate why his concerns are unfounded. (RB 164-165.)

However, even assuming that prior unadjudicated crimes evidence is not per se inadmissible during the penalty phase trial, it nonetheless should not have been allowed in this case.

This Court has held that, although a trial court may not categorically exclude evidence of other violent criminal activity on the ground of undue prejudice, inasmuch as such evidence is expressly made admissible by statute, it may nonetheless exclude specific other-crimes evidence that may unfairly persuade the jury to find that the defendant engaged in the other violent criminal activity in question. (People v. Griffin (2004) 33 Cal.4th 536 at 587-588.)

Griffin is, of course, in accord with Evidence Code section 352, as well as numerous other decisions by this Court and the federal courts condemning the introduction of unduly prejudicial other crimes evidence which has little probative value. (People v. Balcom (1994) 7 Cal.4th 414, 425 [unduly prejudicial but relevant other crimes evidence excludable under Evidence Code §§1101, subdivision (b) and 352]; People v. Ewoldt (1994) 7 Cal.4th 380, 403 [same]; People v. Castro (1985) 38 Cal.3d 301 [unduly prejudicial prior crimes impeachment evidence inadmissible]; People v. Falsetta (1999) 21 Cal.4th 903 [unduly prejudicial prior crimes propensity evidence excludable under Evidence Code §352 even though relevant and admissible under

Evidence Code §1108]; People v. Partida (2005) 37 Cal.4th 428 [appellate court may determine whether the admission of unduly prejudicial gang evidence denied the defendant due process and a fundamentally fair trial even if he failed to object on due process grounds in the trial court]; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 [admission of unduly prejudicial prior crimes evidence inadmissible since it deprives the defendant of a fundamentally fair trial even if relevant]; United States v. LeMay (9th Cir. 2001) 260 F.3d 1018, at 1026 [same].)

While the Deputy Attorney General quarrels with Booker's interpretation of the scope of some of the federal cases cited in the Opening Brief (RB 161-164), she does **not** argue that unduly prejudicial prior crimes propensity evidence is admissible during the penalty phase trial under Griffin.

The critical question in this case thus boils down to whether the particular evidence of other uncharged crimes introduced during Richard Booker's penalty trial unfairly persuaded the jury to conclude that he was an habitually violent criminal who deserved to die. Booker argues that it did. (AOB 149-153.) The Deputy Attorney General argues that it did not. (RB 165-168.) The Deputy Attorney General is wrong.

The evidence in question had little - if any - probative value concerning Richard's alleged violent propensities. Indeed even the Deputy Attorney General admits that two of the four incidents here (the broomstick wielding and knife display incidents) were trivial in nature. (RB 167).

Moreover, while the Deputy Attorney General argues that the stabbing incident involving Richard Booker's uncle Robin Stewart demonstrated Richard's violent propensities and was relevant to the jury's determination of whether Richard was to live or die, the truth is that uncle Robin's testimony established that this was a case of self-defense **as a matter of law**. While the Deputy Attorney General would have this Court believe that uncle Robin must have been lying in an attempt to minimize nephew Richard's responsibility, the prosecution never presented any evidence which would support this assertion.

We simply do not have in this case **substantial** evidence from which a **rational** jury could possibly conclude **beyond a reasonable doubt** that Richard Booker was going around willy-nilly committing violent crimes, much less that he had an incurable propensity for violence, prior to the tragic events in Tricia Powalka's apartment.

The transparent purpose of introducing this evidence was to unfairly persuade the jury that Richard was an habitual knife-wielding assassin who must be put to death. This evidence ensured an emotionally driven and skewed penalty determination, and deprived Richard Booker of any possibly of a fair penalty trial, the Deputy Attorney General's arguments notwithstanding.

The Deputy Attorney General asserts that the erroneous admission of the prior crimes evidence was harmless because (A) the factor (a) evidence was overwhelming and (B) there was no compelling mitigating evidence which might have persuaded the

jury to spare Richard Booker's life even if they had never heard about these other incidents.

However, the Deputy Attorney General's harmless error argument grossly exagerates the strength of the factor (a) evidence and unduly minimizes the substantial mitigating evidence presented. The **only** evidence as to the manner in which the victims met their deaths consists of (A) Richard's post-arrest statements and (B) the pathologist's testimony that the three young women were stabbed and shot multiple times. This evidence suggests that (as argued ante) this was a case where the victims simply over- reacted to an accidental "stabbing," that they were hell-bent on shooting or otherwise disposing of Richard Booker, and that Richard killed them only because he "had to." Moreover, (as also argued ante) there is no substantial evidence that Richard deliberately set fire to Tricia Powalka's apartment or that he even knew that baby Eric was asleep in the bedroom.

Moreover, the Deputy Attorney General, in her flight of hyperbole, fails to mention Richard's repeated expressions of anguish and remorse, and his wish to die to Deverick Mattox and the police. Contrary to the Deputy Attorney General's assertion, the fact that Richard, exhausted by the traumatic events of that night, went home and fell asleep, and then sought solace in the arms of his girlfriend, does not indicate a lack of compassion or remorse.

Finally, the fact that Richard was just barely 18-years-old at the time these tragic events unfolded is - in and of itself -

a compelling mitigating factor.

Thus, this Court cannot say that the jury would necessarily have imposed the death penalty in the absence of the prior crimes evidence.

The death sentence cannot stand.

XIII.

THE JURY'S CONSIDERATION OF HIGHLY EMOTIONAL AND UNDULY PREJUDICIAL VICTIM IMPACT EVIDENCE DEPRIVED RICHARD BOOKER OF A FUNDAMENTALLY FAIR PENALTY TRIAL

Richard Booker argues that the admission of highly emotional and inflammatory victim impact evidence, over his repeated objections, violated his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments. (AOB 154-171.)

The Deputy California Attorney General predictably disagrees. (RB 168-184,)

The parties agree that, while victim impact evidence is not per se inadmissible (Payne v. Tennessee (1991) 501 U.S. 808), irrelevant or inflammatory emotional evidence must be curtailed in order to ensure a fundamentally fair - rather than an emotionally driven - penalty determination. (People v. Sanders (1995) 11 Cal.4th 475 at 549-550.)

The question in this case is whether the victim impact evidence presented, considered **collectively**, was so "over the top" as to exceed constitutional limits. Booker submits that, despite the Deputy Attorney General's attempt to justify each of the individual items of evidence, the prosecutor's victim impact presentation - considered in its entirety - made a fair and reliable penalty determination impossible. Here, the prosecution presented (A) three video tapes containing numerous photographs of Tricia Powalka, Amanda Elliott, and Corina Gandara when alive which (even with the "hearts and flowers" music removed) were

designed to transform the penalty phase trial into a "video montage" tribute to the victims, (B) "open casket" testimony by Tricia's mother very similar to that previously condemned by this Court, (C) rank speculation that Tricia's death **may** have contributed to her grandmother's heart attack and death, (D) clearly improper testimony about the victims' frustration and anguish over the lengthy delays in bringing this case to trial (which as the trial judge remarked could not be fairly attributed to Richard Booker), and (E) the testimony of Corina Gandara's mother - whom the prosecutor cruelly insisted on placing on the witness stand despite her clearly distraught and mentally unstable condition - concerning her attempted suicides and commitments to a mental hospital, which culminated in her nearly fainting in front of the jury. This last mentioned victim impact testimony was particularly inflammatory, as well as completely unnecessary, since these same facts had been testified to by Corina's father.

The impact of this testimony is all too clearly shown by (A) the trial court's references to the "teary eyed" audience, and (B) the courtroom spectator's attempt to bribe the bailiff and the juror in the elevator to leave him alone with Richard Booker so that he could "take care of" him.

The Deputy Attorney General cites a number of cases in which this Court has held that victim impact evidence was properly admissible. However, the evidence in those cases did not even come close to the prosecutor's emotional over the top presentation in the instant case.

In People v. Taylor (2001) 26 Cal.4th 1155, the victim impact evidence, carefully limited by the trial court, was presented by only two of the victims' family members, and consisted of (A) the impact of the victims' death on them and (B) the extent of the injuries, physical and psychological, that one of them (Kazumi), who was himself badly injured and almost killed during the underlying incident, suffered. Most of this same evidence had previously been presented during the guilt phase trial. (People v. Taylor, supra, 26 Cal.4th, at 1170 - 1172.)

In People v. Marks (2003) 31 Cal.4th 197, at 235, a single witness (Carter) testified that he had been impacted by the victim's death because the victim was the only one who would give the disabled Carter a job, help him financially, and treat him like a human being. Both Carter's physical and financial condition had deteriorated since the victim's death. The only objection raised by Defendant Marks was that Carter should not have been allowed to testify since he was not a relative of the deceased victim.

In People v. Boyette (2002) 29 Cal.4th 381, at 440-483 a number of the victim's family members testified concerning how "devastating" her loss had been, how they would have nightmares and wake up in the middle of the night crying, how depressed some of them were, and how difficult it was for them to carry on their lives in the victim's absence.

In People v. Huggins (2006) 38 Cal.4th 175, at 238, this Court upheld the admission of victim impact evidence, carefully

limited by the trial court, including testimony that the victim had made charitable contributions. The trial court in Huggins had excluded seventy-five percent of the prosecution's victim impact witnesses, and also instructed the prosecutor to make certain that none of the testifying witnesses offered any opinion about the crimes, the defendant, or the proper penalty. The jury heard testimony about the victim's compassion and loyalty, and the psychological effect of her death on other individuals and the community. Most of this testimony was admitted with nary an objection by the defense.

One wonders how the Deputy Attorney General can compare cases like Taylor, Marks, Boyette, and Huggins with the prosecutor's theatrical presentation transparently designed to inflame the jury's passions in favor of the death penalty in the instant case.

One also wonders how the Deputy Attorney General can argue that this highly inflammatory testimony, which went on for hours, is somehow justifiable because it covered **only 68** pages of testimony!

Two recent decisions by this Court suggest an increasing uneasiness over the admission of videotapes of the victim while alive, and by implication that showing the jury videotape eulogies, at least when combined with other "over the top" victim impact evidence, may be sufficient in an appropriate case to reverse the penalty determination.

In People v. Prince (2007) 40 Cal.4th 1179, at 1286-1291,

this Court, while cautioning against the admission of lengthy video tapes which are tantamount to an emotional tribute to the victims, nonetheless found no prejudicial error in the jury viewing a 25-minute video taped interview of a victim made a few months prior to death. The tape was **not** an emotional tribute, did **not** display the victim at home or with family, and did **not** include images of the victim as an infant or young child, and the setting was a neutral television studio, where an interviewer politely asked questions concerning the victim's accomplishments on the stage and as a musician. In other words, the video tape in Prince was the opposite of the video montages displayed in our case.

In People v. Kelly (2007) 42 Cal.4th 763, at 793, the majority, while reiterating that trial courts must be very cautious about admitting such videotape evidence, and acknowledging that in some respects the video tape played in that case contained irrelevant "aspects that were themselves emotional without being factual," concluded that any error was harmless since the video tape was "mostly factual and relevant," and there was no reasonable possibility that the objectionable portions of the video tape affected the penalty determination. However, Justices Werdegar and Moreno authored separate concurring opinions concluding that it was an abuse of discretion to admit a video tape that they regarded as unduly lengthy, containing elements of theatricality, and going beyond a factual presentation of the victim as she was in life. They concurred in

the judgment **only** because the error in allowing the jury to view the video tape was harmless and did not so inflame the passions and sympathy of the jury that the penalty phase was rendered unfair by this single item of evidence. (Kelly, supra at 42 Cal.4th 801-806.)

However, in our case, we have precisely the type of video tributes condemned by this Court in Prince and Kelly, **and** open casket evidence, **and** lay speculation about how one of the victims' death **may** have contributed to her grandmother's heart attack and death, **and** the mentally unstable and distraught mother of one of the victims swooning on the witness stand.

Moreover, in our case we **know** that the victim impact evidence had a strong emotional effect, as indicated by the trial court's comments about the "teary eyed" audience, and the courtroom spectator's attempt to bribe the juror and the bailiff to leave him alone in the courtroom with Appellant Booker so he could "take care of" him.

The victim impact evidence in this case was, contrary to the Deputy Attorney General (at RB 183), anything but "permissible" or "traditional," and anything but harmless.

Even assuming arguendo that the imposition of the death penalty might conceivably have been "warranted" in view of the factor (a) evidence and "the circumstances of the three inexplicable and violent murders themselves," (RB 183), it is equally true that a sentence of life without possibility of parole would have been "warranted" based upon such mitigating

factors as Booker's age and his obviously genuine remorse. It simply cannot be said that, in the absence of the highly emotional and unduly prejudicial victim impact evidence, the jury could not have concluded that Richard Booker's life should be spared.

The prejudicial error in admitting the victim impact evidence constitutes yet another reason for reversing the death sentence.

XIV.

THE TRIAL COURT DEPRIVED RICHARD BOOKER OF A FUNDAMENTALLY FAIR PENALTY TRIAL BY FAILING TO INSTRUCT THE JURY THAT HIS AGE WAS A MITIGATING FACTOR

Richard Booker argues that the trial court deprived him of a fundamentally fair trial and a reliable penalty determination, in violation of the Eight and Fourteenth Amendments, by refusing to instruct the penalty phase jury that his being slightly over eighteen years old at the time of the victims' deaths could only be considered as a mitigating factor. He relies inter alia on the United States Supreme Court's decision in Roper v. Simmons (2005) 543 U.S. 551.) (AOB 172-174.)

The Deputy Attorney General, relying on this Court's rejection of a supposedly "similar" instruction in People v. Brown (2003) 31 Cal.4th 518, disagrees. (RB 184-187.)

While this issue has been - for the most part - adequately briefed, the Deputy Attorney General does make one point that perhaps warrants some further comment. She argues that, since Booker "withdrew" his request to modify CALJIC No. 8.85 (i), he has waived this issue.

This argument is unavailing. The record does not unambiguously replace that Booker intended to abandon his argument that the jury be instructed to consider his age as a mitigating factor. However, even assuming that the record may be so construed, this makes no difference. The trial court had a sua sponte duty to instruct the jury as to the general principles

of law relating to their penalty determination. If, as Booker argues, his being eighteen at the time could only be a mitigating factor as a matter of law, then the trial court had a duty to so instruct the jurors.

XV.

THE EVIDENTIARY AND JURY INSTRUCTIONAL ERRORS COMMITTED DURING THE PENALTY PHASE WERE CUMULATIVELY PREJUDICIAL

Richard Booker has argued that the admission of the gruesome photographs, emotion-laden victim impact testimony, evidence of prior acts portraying Booker has an habitually violent knife-wielding assassin, as well as the refusal to instruct on age as a mitigating factor, considered cumulatively, resulted in the unconstitutional deprivation of a fair and reliable penalty determination. (AOB 175-176.)

The Deputy Attorney General of course argues that no errors were committed, and in the alternative that any errors were harmless. (RB 187.)

While this issue has been adequately briefed, Booker would note that this is a case where the whole was greater than the sum of its parts. The prosecutor's over the top presentation of his penalty phase case was transparently designed to overcome the jurors' reason and ensure an emotionally driven death penalty verdict. A death penalty returned under these circumstances can not stand.

XVI.

CALIFORNIA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Richard Booker argues at length that California's death penalty law, as applied and interpreted by this Court, is unconstitutional. (AOB 177 et seq. and SAOB 2 et seq.)

The Deputy Attorney General of course disagrees. (RB 188 et seq.)

Booker believes that this issue has been adequately briefed, especially in light of People v. Schmeck (2005) 37 Cal.4th 240, at 304), and that no further discussion is warranted.

CONCLUSION

For each and all of the above reasons, as well as for all of the reasons stated in the Opening Brief, the judgments of conviction, the jury's special circumstances findings, and the death sentence must be reversed.

Dated: April 16, 2008

Respectfully submitted,

By _____
JONATHAN P. MILBERG

Attorney for Defendant and Appellant RICHARD LONNIE BOOKER

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.630, subdivision (b)(2), of the California Rules of Court, I certify that the text of this Appellant's Reply Brief contains 17534 words, as counted by the Corel WordPerfect version 8 program, and does not exceed 140 pages.

Dated: April 16, 2008

Respectfully submitted,

JONATHAN P. MILBERG

PROOF OF SERVICE BY MAIL

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of Los Angeles, that I am over the age of 18 years and not a party to the within cause; that my business address is 300 N. Lake Ave., Suite 320, Pasadena, CA 91101.

On April 16, 2008, I served the attached

APPELLANT'S REPLY BRIEF

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California, addressed as follows:

PLEASE SEE ATTACHED MAILING LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at Pasadena, California, on April 16, 2008.

Bonnie L. Lingan
(Typed Name)

Bonnie L. Lingan
(Signature)

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