No. _____

IN THE

Supreme Court of the United States

JAMELLE EDWARD ARMSTRONG,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
JAMELLE EDWARD ARMSTRONG,
Defendant and Appellant.

S126560

Los Angeles County Superior Court
NA051938-01

February 4, 2019

Justice Corrigan authored the opinion of the court, in which Chief Justice Cantil-Sakauye and Justices Chin and Kruger concurred.

Justice Liu filed a dissenting opinion in which Justices Cuéllar and Perluss* concurred.

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PEOPLE v. ARMSTRONG

S126560

Opinion of the Court by Corrigan, J.

After a jury convicted defendant Jamelle Edward Armstrong of kidnapping, robbing, raping, torturing, and murdering Penny Sigler, it returned a death verdict. On automatic appeal, we affirm Armstrong's convictions but reverse his death sentence because, under the standards of *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, multiple prospective jurors were improperly excused for cause.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Guilt Phase Trial*

On the night of December 29, 1998, Penny Sigler, a 45-year-old Long Beach woman, was attacked and killed by three strangers: Kevin Pearson, Armstrong, and Armstrong's older half-brother, Warren Hardy. Each of them was tried separately, convicted, and sentenced to death. We have previously resolved the Hardy and Pearson appeals. (See *People v. Hardy* (2018) 5 Cal.5th 56; *People v. Pearson* (2012) 53 Cal.4th 306.)

1. *Prosecution Evidence*

Sigler lived with her husband and Joseph O'Brien in Long Beach. On the evening of December 29, 1998, O'Brien asked Sigler to buy him cereal and milk. She took the food stamps he offered and left on foot between 10:00 p.m. and 10:30 p.m. She never returned.

The following morning, a Caltrans worker found Sigler's body on an embankment near the 405 Freeway. The body was in an area surrounded by a chain link fence and concrete retaining wall. The body would have been difficult to see from the road. There were blood spatters and drag marks near the corpse. Shoe impressions were later identified as similar to the treads on Hardy's and Pearson's shoes. Police noted a broken wooden stake at the base of a nearby fence and recovered a food stamp book cover matching the serial number of the stamps O'Brien had given Sigler.

Sigler died from asphyxiation and multiple other injuries. Before she died, she suffered 11 broken bones, 20 distinct internal injuries, and 94 separate external injuries. Her right ear was partially torn. Lacerations and bruising of the genitalia were consistent with forcible penetration. A large wooden splinter was embedded in her vaginal tissue.

Pearson, Hardy, and Armstrong were arrested the following week, and Armstrong confessed. Detective Steven Lasiter related remarks Armstrong made before the taping of his statement began. The taped confession was played for the jury.

Armstrong told investigators that he, Pearson, and Hardy were drinking with others at the house of a friend, Monte Gmur, on the night of December 29. Sometime after 10:00 p.m., Pearson, Hardy, and Armstrong left. After failing to find someone to buy alcohol for them, the three decided to go to the home of Hardy's girlfriend in Los Angeles. They rode a metro train to its last stop, then proceeded toward a bus stop. Walking under the 405 Freeway, Armstrong called out, "I can't wait 'til '99." A female voice responded. The three men approached the

woman, Sigler, who said something like, "I hate you." Hardy offered Sigler money for oral sex. Sigler said no, pushed past Pearson and Hardy, and slapped Armstrong as she went by.

Sigler reached a leafy area near the street, turned, and stuck out the middle fingers of both hands. Using racial slurs, she said, "I hope they kill you all." Pearson ran toward her, saying, "I'm fixing to BKC this bitch." Armstrong explained that "BKC" was a Long Beach term, "bitch killer connect," for someone the speaker did not like who might get beaten up. Pearson punched Sigler and knocked her down. Armstrong and Hardy walked toward them. Armstrong heard Pearson say, "Give me your money." Pearson went through Sigler's pockets, found food stamps, then started to remove her pants. When she struggled, he asked Hardy and Armstrong to hold her arms and legs. They did so. Pearson removed Sigler's pants and asked where her money was. He tore open her shirt and underwear, then unzipped his pants and asked for a condom. Hardy stood off to the side. Armstrong was still holding Sigler's arms and said it appeared Pearson was engaging in intercourse.

After he finished, Pearson said, "This ain't over yet bitch. Let's kill this bitch." He kicked and stomped her in the chest and face. Armstrong also kicked her several times. She made gurgling, moaning noises. Armstrong recognized Sigler was in considerable pain.

Pearson asked what to do with Sigler, then told Armstrong to jump over a chain link fence and hold it down so they could move her behind it. When Pearson and Hardy hoisted Sigler over the fence, she landed head first in a concrete ditch. Pearson dragged her 20 feet to a dark spot. He tripped over and broke off a three-foot long wooden stake. Using the stake, he hit Sigler

five to 15 times with a two-handed grip, swinging as hard as he could. Sigler blinked and moaned in response to the blows. Pearson then inserted the stake in Sigler's vagina, pulling it in and out. Hardy took the stake and did the same. When Sigler finally made no more noise, Armstrong held a lighter to her face and saw her eyes close.

Pearson and Armstrong moved the body further up the embankment toward the freeway. Armstrong threw away the stake and a trash bag filled with Sigler's clothes. The three men caught a bus and spent the night at the residence of Hardy's girlfriend.

Blood on a pair of Armstrong's overalls matched Sigler's DNA. A stain on his shirt contained his own semen and blood from an indeterminate source.

Armstrong's girlfriend, Jeanette Carter, testified that a week after the murder Armstrong told her he had done something very bad. He said Pearson had beaten and raped a woman and put a stick in her vagina while Armstrong held her down. A tape of an earlier police interview of Carter was also played during which she related similar admissions by Armstrong.

Keith Kendrick, a friend of Pearson's and Armstrong's, testified he was with them when they saw a news report of the murder. Kendrick, to whom Pearson had already confessed, said, "I know who did that. [¶] . . . [¶] Killer Kev did it." Armstrong whispered to Pearson, "How did he know?" and then sat silently as Pearson recounted the details.

2. *Defense Evidence*

Armstrong was the sole defense witness. He conceded he had been with Pearson and Hardy during the crimes but minimized his role.

The three men were out walking the night of December 29, 1998. Armstrong was in a good mood and yelled out, "We are going to have a Happy New Year for '99." He then heard Sigler yell from across the street, "Fuck you niggers." Hardy walked across the street toward Sigler. Pearson and Armstrong followed. Sigler and the three men were the only ones on the street. Armstrong thought Sigler was on drugs.

Hardy offered Sigler $50 to perform fellatio on all three men, but Armstrong knew he was joking because Hardy did not have that much money. Sigler ran past him, turned, displayed the middle fingers of each hand, and said, "Fuck you niggers. You niggers should die." Pearson ran up to Sigler and struck her in the face. Armstrong held her down because Pearson demanded he do so. He saw Pearson go through her clothes, but Armstrong did not intend to steal from her. He saw Pearson take food stamps from Sigler's pocket and place them in his own. When Pearson stopped going through Sigler's clothes, Armstrong let her go.

When Pearson renewed the assault, kicking and stomping Sigler, Armstrong said they should leave. He did not leave by himself because he had no money for bus fare. Armstrong held Sigler down again at Pearson's direction. Armstrong never kicked Sigler himself, but at one point while restraining her he had his foot on her chest and pushed her with his foot. Armstrong did not try to stop Pearson because he feared Pearson would turn on him. When Pearson raped Sigler,

Armstrong was standing behind him, not holding Sigler down. Pearson and Hardy threw Sigler over the chain link fence. Armstrong thought the attack was scandalous and animal-like, but helped Pearson move Sigler up the embankment. He threw away both the stake and Sigler's clothes because Pearson told him to, and because he was afraid of Pearson. The encounter lasted around 30 minutes.

3. *Charges and Guilt Phase Verdict*

Pearson, Hardy, and Armstrong were tried separately. (See *People v. Pearson*, *supra*, 53 Cal.4th 306; *People v. Hardy*, *supra*, 5 Cal.5th 56.)

Armstrong was charged with various counts of murder, kidnapping, robbery, rape, and torture, with six attendant special circumstances.[1] Armstrong was also charged with kidnapping and torture as sentence enhancements. (§ 667.61, subds. (a), (d).) The jury convicted Armstrong on every count and found every special allegation true, except for the special circumstance that Armstrong committed murder during a kidnapping.

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[1] The charged offenses included first degree murder, second degree robbery, kidnapping for purposes of rape, rape, rape while acting in concert, sexual penetration with a foreign object, sexual penetration with a foreign object while acting in concert, and torture. (Pen. Code, §§ 187, subd. (a), 189, 206, 209, subd. (b)(1), 211, 261, subd. (a)(2), 264.1, subd. (a), 289, subd. (a)(1)(A).) The special circumstances included robbery, kidnapping, kidnapping for purposes of rape, rape, rape by instrument, and torture murder. (§ 190.2, subd. (a)(17)(A), (B), (C), (K), (a)(18).) All further unlabeled statutory references are to the Penal Code.

B. *Penalty Phase Trial*

1. *Prosecution Evidence*

Monte Gmur testified that on the evening of the murder, Pearson asked him if Pearson, Hardy, and Armstrong could use a bedroom to initiate a man named Chris into their gang. Gmur refused because he did not want a violent initiation ritual in his house. The three men left for 15 to 20 minutes. When they returned, Hardy borrowed Gmur's phone to call a man named Capone and tell him Chris was "cool" and would be called "Playboy."

Janisha Williams, a childhood friend of Armstrong's, testified he was a member of the Capone Thug Soldiers gang. The gang required "jumping in," i.e., fighting a gang member to join. On occasion Williams had seen Armstrong kick people, hit them with sticks, or stomp on them during fights.

Sheriff's Deputy Hugo Baraja testified that Armstrong and three other African-American prisoners attacked a Hispanic inmate.

Sigler's son testified he was unable to finish high school after the murder because of the pain of her loss.

2. *Defense Evidence*

Detective Steven Lasiter testified that during his police interview Armstrong appeared to feel badly about what he had done.

Reverend Larry Clark testified that he knew Armstrong and his family, although he had not seen them since the defendant was 14 or 15. The Armstrong family lived in a high-crime neighborhood and had financial problems. Armstrong's father, James, was sometimes absent. Armstrong had potential

as an artist and would sometimes help with church cleanup or charity work.

James Armstrong admitted he had been a poor parent. He earned a living selling drugs and pimping, was frequently absent, and never taught Jamelle right from wrong. He supplied Jamelle with drugs and alcohol. Jamelle's mother, Pamela, was an alcoholic who drank and used drugs. James beat his wife in their son's presence.

3. *Rebuttal Evidence*

The People called Jamelle's mother, Pamela, who described a different family dynamic. Various police officers testified to Jamelle's gang membership.

4. *Penalty Phase Verdict and Sentence*

The jury returned a death verdict, which the court imposed. It added consecutive terms of 30 years, 25 years to life, and life with the possibility of parole.[2]

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[2] The abstract of judgment indicates, incorrectly, that Armstrong's conviction on four counts was pursuant to a plea rather than a jury verdict. The abstract of judgment also incorrectly indicates Armstrong received nine years on the rape count, not eight, and incorrectly lists a determinate term of 56 years, not 30 years. Finally, the abstract of judgment fails to indicate that in addition to the determinate term for rape in concert, sexual penetration with a foreign object, and sexual penetration with a foreign object while acting in concert, Armstrong received a 25-year-to-life term under section 667.61, subdivisions (a) and (d), which was then stayed under section 667.61, subdivision (g). The People ask, without opposition, that we order the abstract of judgment corrected. We will do so. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

II. DISCUSSION

A. *Juror Selection Issues*

1. *Excusal of Prospective Jurors for Cause*

Prospective jurors initially completed a questionnaire. The court then conducted *Hovey* voir dire, during which potential jurors were asked outside the presence of others about their death penalty views. (See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80–81.) Armstrong contends the court erred by excusing multiple jury candidates on the ground they could not fairly and impartially consider whether death was the appropriate punishment. We agree. During our discussion, we refer to both written and oral responses.

a. *Legal Principles*

"[T]he Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not 'uncommonly willing to condemn a man to die.' " (*White v. Wheeler* (2015) 577 U.S. ___, ___ [136 S.Ct. 456, 460], quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) To accommodate this right, " '[p]ast decisions of the United States Supreme Court and this court establish that "[a] prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would ' "prevent or substantially impair" ' the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt*[, *supra*,] 469 U.S. [at p.] 424; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) ' " 'A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where

appropriate.' " ' " ' " (*People v. Pearson*, *supra*, 53 Cal.4th at p. 327.) The party seeking excusal bears the burden of developing evidence for dismissal. (*Wainwright*, at p. 423; *People v. Stewart* (2004) 33 Cal.4th 425, 445.)

A person's particular views on the death penalty, the strength with which those views are held, and their effect, if any, on the person's ability to perform a juror's duties are often nuanced questions. " '[N]ot all who oppose the death penalty are subject to removal . . . ; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) 'The critical issue is whether a life-leaning prospective juror — that is, one generally (but not invariably) favoring life in prison instead of the death penalty as an appropriate punishment — can set aside his or her personal views about capital punishment and follow the law as the trial judge instructs.' " (*People v. Jones* (2017) 3 Cal.5th 583, 614.) Jurors are not required to like the law, but they are required to follow it. A jury candidate who will not, or cannot, follow a statutory framework, is not qualified to serve. Yet so long as prospective jurors can obey the court's instructions and determine whether death is appropriate based on a sincere consideration of aggravating and mitigating circumstances, they are not ineligible to serve. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447; *People v. Lewis* (2001) 25 Cal.4th 610, 633.)

Whether a candidate is substantially impaired is an issue for the trial court's determination, and its ruling is entitled to deference. (*People v. Souza* (2012) 54 Cal.4th 90, 122.) Impairment need not be proven with " 'unmistakable clarity.' "

(*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Excusal is permitted when the trial judge has been "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Id.* at p. 426; accord, *People v. Thompson* (2016) 1 Cal.5th 1043, 1066.) We review the ruling for abuse of discretion. (*People v. Scott* (2015) 61 Cal.4th 363, 378; *People v. Jones* (2012) 54 Cal.4th 1, 41.)

Here, the court improperly excused at least four candidates. In doing so, it committed two kinds of errors: (1) it applied an erroneous standard to the question of qualification; and (2) it relied on factual bases not supported by the record. As a result, the death verdict must be reversed. (*People v. Heard* (2003) 31 Cal.4th 946, 966.)

b. Prospective Juror S.R.

S.R. wrote in his questionnaire that he supported the death penalty and believed it was "a big deterrent to many others who may wish to kill." The death penalty should not be mandatory, but should be available in "special circumstances." S.R. saw death as an appropriate punishment "if the crime was horrendous enough," as in cases of "mutilations [or] torture." He could vote for either life or death, but would not automatically vote for either. He considered his "duty as a juror to be fair and un-biased." He was willing to serve because he was "a fair person. I have always been one to listen to both sides of an argument. I also know people [who] have done good things, and people who have done bad things. A defendant/prosecution deserves jurors that are not one-sided and biased."

During voir dire, S.R. confirmed he could vote for either death or life, and would choose neither automatically. He could keep an open mind, and would consider whatever factors the

court instructed were relevant. S.R. could vote for death if the aggravating circumstances substantially outweighed those in mitigation, and for life if they were equal. S.R. saw death as a "far worse" punishment than life in prison without possibility of parole, and would reserve it for "a truly horrible crime." Nevertheless, "if it does fit the crime," S.R. could choose death.

The prosecutor focused S.R.'s questioning on three hypotheticals involving a liquor store robbery, a beating death, and a bank robbery. In the liquor store hypothetical, a defendant walking by noticed the cash register was open, entered the store on the spur of the moment, killed the cashier, and stole the money. S.R. was unsure which penalty he would select without having more facts, which the prosecutor declined to supply. Based only on the information provided, S.R. said he would probably not vote for death. Asked to assume that unspecified aggravating circumstances substantially outweighed any mitigating circumstances, S.R. said he could vote for death. The prosecutor stressed S.R. would be instructed that life remained an option even if the aggravating circumstances outweighed the mitigating circumstances and asked again if S.R. could choose death. S.R. replied, "I'm sure I probably could," but voting for life or death was "not something I would take lightly."

In the deadly beating hypothetical, one person held a victim's arms while a second person inflicted the beating. S.R. thought the one restraining the victim to be nearly as guilty as the beater, but not equally so. If the aggravating circumstances substantially outweighed any in mitigation, S.R. affirmed he could vote for death for the restraining participant. The prosecutor challenged the plausibility of this answer in light of S.R.'s belief that the restrainer was slightly less culpable and

the court's instruction that death was not mandatory even if the aggravating circumstances were substantially greater. S.R. replied: "[Y]ou asked if I could [vote for death], if it was possible, if [the aggravating circumstances were more than the mitigating circumstances]. I could. I'm not saying I would, you know, you're [asking] could I?" The prosecutor challenged his answer: "If you don't think that the two people are equally guilty, wouldn't you give them different punishments, because they weren't equally guilty?"[3] To explain why he could vote for death, S.R. relied on the additional factor supplied by the prosecutor, that the aggravating circumstances outweighed the mitigating circumstances. The prosecutor asked a third time: "So in your mind, because the person holding the arms is not as guilty as the person actually doing the punching, wouldn't you impose life without the possibility of parole on him and give the other guy, the one actually doing the punching, the death penalty?" S.R. adhered to his answer: "I could do both in that [circumstance]. Like I said, you asked, could I do either [life or death]?"

The prosecutor then turned to a scenario involving three bank robbers: a getaway driver, a lookout, and the actual killer who went inside and shot someone. Asked whether he would consider the getaway driver equally or less culpable than the

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[3] It appears the court and prosecutor used the term "guilty" with some imprecision. As a matter of law, an aider and abettor can be as "guilty" of an offense as a direct perpetrator, in the sense that both may be convicted of the same crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116–1117.) The term as used here seemed to involve not legal guilt but respective degrees of blameworthiness or culpability as that concept relates to sentencing.

actual killer, S.R. asked whether the driver knew the shooter was going to kill someone. When told the driver did not, S.R. concluded the driver was less culpable and he would probably not impose death. Likewise with the lookout: If neither aider and abettor knew a shooting was intended, S.R. would reserve death for the actual killer.

The prosecutor moved to excuse S.R. During argument over the motion, defense counsel reasserted a continuing objection to the prosecutor's questioning using aiding and abetting hypotheticals without any instruction on when, as a matter of law, a person who was not the actual killer could be eligible for death. The prosecutor argued against instruction: "If a juror knew the law, the juror would then frame his [answer] in accordance with the law. A true test of the juror's state of mind with regard to aiding and abetting, and accomplices, is to find that out without pre-instructing them, because then we know what their true views are. If they know what the law is, in advance, we cannot find out what their true views are, *because they want to follow the law*." (Italics added.)

The court embraced the prosecutor's position against pre-instruction because it would color the jurors' responses. It reasoned that those who wished to follow the law would shape their answers to conform with legal requirements, and asking uninstructed jurors would give better insight into their true feelings: "By not giving the [aiding and abetting] instruction, . . . wouldn't that be a better way to test their mind, a true test of their mind, as to whether or not they would be able to impose the penalty of death, whether they could on an aider and abettor?" The court further explained: "[N]ormal people . . . understand that [there] should be different liabilities for an aider and abettor [than] for the perpetrator. [¶] And given that

is the case, if that is, in fact, the true state of mind of a particular prospective juror, that is a worthy test of whether or not, given that they see a difference in liability in their state of mind, would that create a variance as to their ability to be able to impose punishment? Because that, effectively, would be a fair way to determine whether the person would automatically, in fact, not impose the penalty of death and would automatically impose life without parole, because of their varying views on the liability of an accomplice.[4] [¶] And that's the reason why this

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[4] In referring to what a candidate would "automatically" do, the court overlooked how the United States Supreme Court's thinking on disqualification had developed, an evolution that has shifted the focus to subtler considerations: "In *Wainwright v. Witt*[, *supra*,] 469 U.S. 412 . . . , the United States Supreme Court reconsidered language in *Witherspoon v. Illinois*[, *supra*,] 391 U.S. 510 . . . , to the effect that prospective jurors may be excused for cause if they make it 'unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.' (*Id.* at p. 522, fn. 21.) This standard had tended to be applied in formulaic terms, with 'lower courts stat[ing] that a veniremember may be excluded only if he or she would "automatically" vote against the death penalty, and even then this state of mind must be "unambiguous," or "unmistakably clear." [Citation.]' (*Witt,* at p. 419.) [¶] In *Witt,* the high court rejected such a narrow and formalistic approach and discarded the *Witherspoon* formulation. It held instead that a trial court may excuse a prospective juror for cause whenever 'the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' (*Witt*, *supra*, 469 U.S. at p. 424, fn. omitted.)" (*People v. Heard*, *supra*, 31 Cal.4th at p. 983 (conc. & dis. opn. of Brown, J.).)

court is not going to give a pre-instruction on aiding and abetting. I believe that that is a fair way to test the true state of mind of lay people, because that's exactly what we are trying to do. [¶] We don't want to pre-instruct them just so that they can fit their answer with the law."

The court excused S.R. for cause, concluding his fitness to serve should be determined by his uninstructed views on the relative culpabilities of hypothetical aiders and abettors: "[I]n terms of an accomplice, or an aider or abettor, it is [S.R.'s] true state of mind that they're not equally guilty, and even if they are guilty, they're not equally guilty. In other words, in these folks' eyes, the person is guilty, but there's a degree of guilt. And that is really the true test of whether or not they would be able to consider the penalty of death or automatically vote for life without parole."

We note several things here. First, the prosecutor's argument and the court's ruling appear to presume that jury candidates would violate their oath and commit misconduct by shading their answers to secure a place on the jury. They also misapprehend the appropriate test for qualification, which turns on a willingness and ability to follow the law. It seems counterintuitive to conclude that the "true test" of this ability involves keeping candidates in the dark as to the law's requirements. Advocates may certainly inquire about a candidate's broader death penalty views and take them into account when exercising *peremptory* challenges. But those broader views, even if leaning significantly toward one side or the other, will not support a challenge for *cause* unless they would substantially impair the ability to serve.

Second, the death penalty statutes reflect, as a matter of policy and constitutional mandate, that a decision as to capital punishment is to be made on an individualized basis. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) Jurors are to consider the nature of the crime, the circumstances of its commission, and a variety of factors relating to the particular defendant. These latter factors may include his past criminal conduct and a variety of developmental and historical experiences. This weighing can result in different degrees of blameworthiness being assigned from case to case and among co-participants. A juror willing to act in conformance with statutory mandates, able to openly and honestly consider both sentencing alternatives, may well identify different levels of culpability for different participants in the same events. That a juror can do so is not grounds for disqualification.

In determining otherwise, the court applied a test for ineligibility that was erroneous as a matter of law. Under *Witherspoon* and *Witt*, the state is permitted to cull from the jury pool only those who would be unable to set aside their personal views and follow the law and the court's instructions. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176; *People v. Jones*, *supra*, 3 Cal.5th at p. 614; *People v. Stewart*, *supra*, 33 Cal.4th at pp. 446–447.) An unimpaired juror who perceives differences in culpability might well be open to a variety of determinations: (1) though an aider and abettor was comparatively less blameworthy, the crime was sufficiently egregious, and his participation and knowledge sufficient, that both he and the actual killer merit death; (2) only the actual killer merits death; or (3) neither defendant does. That S.R. ascribed different degrees of culpability to some aiders and abettors in some hypotheticals offered no basis for determining he would be

unable to follow the court's instructions and choose between a life or death sentence in accordance with the law. Indeed, his answers indicated the contrary.[5] By framing the test of eligibility to serve as it did, the court risked excluding jurors who could follow the court's instructions and appropriately use evidence in aggravation and mitigation to differentiate between those who merited the death penalty and those who did not.

Third, when assessing a candidate's ability to serve, fact-based hypotheticals should be used with caution. " '[T]he *Witherspoon-Witt* . . . voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract. . . . The inquiry is directed to whether, without knowing the specifics of the case, the juror has an "open mind" on the penalty determination.' " (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120, quoting *People v. Clark* (1990) 50 Cal.3d 583, 597.) Hypotheticals that too closely mirror the expected facts of the case at hand may result in jurors prejudging a case on a brief summary of the evidence. (*Zambrano*, at p. 1120; *People v. Pinholster* (1992) 1 Cal.4th 865, 915.) Further, questions focusing only on specific factual circumstances can yield answers that might be used to erroneously cull competent jurors. The way a question is posed may skew the answer. For example, a hypothetical that emphasizes aggravating factors might elicit an answer that leans heavily in favor of execution.

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[5] When asked whether he could comply with the court's instructions, even if he did not agree with them, S.R. checked "yes" and wrote: "It's the court's instructions, we must follow them." He affirmed that he could "consider all of the relevant factors that the court will give you." He explained that his ability to vote for death would depend in part on "what the judge says" about the law.

(See *People v. Mason* (1991) 52 Cal.3d 909, 940.) Trial courts may prohibit such hypotheticals. (*People v. Sanders* (1995) 11 Cal.4th 475, 538–539.)

This case presents an obverse situation, with hypotheticals describing defendants at, or beyond, the outer reaches of death eligibility. The United States Constitution and California's sentencing scheme make lookouts, getaway drivers, and others involved in, but absent from, a robbery or homicide scene categorically ineligible for death without additional showings as to the degree of their participation and the extent of their awareness or intent that a fatality might result. (§ 190.2, subd. (d); *Enmund v. Florida* (1982) 458 U.S. 782, 795–798; *People v. Banks* (2015) 61 Cal.4th 788, 798–804.) As for the prosecutor's beating hypothetical, assault alone is not a basis for special circumstance felony murder. (See § 190.2, subd. (a)(17).) By definition, a competent juror who can consider both life and death as options would be willing to vote for death in some cases and for life in others. Given sufficiently mild hypothetical scenarios, many competent jurors might say they would be quite likely to vote for life without the possibility of parole. Such responses do not necessarily reveal that the same juror would not vote for death under more aggravating circumstances. (See *People v. Mason*, *supra*, 52 Cal.3d at p. 940.)

Here, the prosecutor supplied no additional facts that would make the hypothetical robbery and beating aider and abettors legally eligible for death or clearly deserving of that punishment. Instead, S.R. was required to assume an unspecified special circumstance had been proven and unspecified aggravating circumstances were present. Even so, S.R., a death penalty supporter, consistently maintained that he could vote for death under the appropriate circumstances, both

in general and as applied to an aider and abettor. S.R.'s answers give no indication he was unfit to serve.

The court also relied on S.R. being unable to consider death as an option for some charged special circumstances. It asserted that S.R. "picks and chooses the special circumstances that he believes he would be able to consider the penalty of death on." The record does not support this assertion. S.R. never indicated he could not consider death as an option for the charged special circumstances. He simply expressed uncertainty as to how he would vote if each of several of the charged special circumstances was the only one found true. A juror who indicates he could vote for death, but is unwilling to guarantee he would do so, is not subject to excusal for cause. (*People v. Pearson*, *supra*, 53 Cal.4th at p. 332.)

A court can abuse its discretion by applying an erroneous legal standard or by making a ruling unsupported by substantial evidence. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712.) Both problems are present here. The court's remarks, and a comparison of its ruling with the record, reflect that it was overlooking the crucial question of whether S.R. could set aside his personal views and follow the court's instructions. Instead, the court concluded S.R.'s views might lead him to vote against death under particular unrelated facts. Standing alone, views of that nature do not support a challenge for cause. Additionally, the record reveals no substantial evidence that S.R. would have had any difficulty following the court's instructions in determining the appropriate sentence.

The erroneous exclusion of S.R. was not an isolated occurrence. The record reflects that the court applied the same "true test" to other candidates, focusing on whether they would

be equally willing to impose death on an aider and abettor as on an actual killer, rather than on whether they could follow the law and consider death as an option. Application of this test excluded several essentially neutral candidates who professed their ability to follow the court's instructions and impose death in an appropriate case.

We discuss the others in turn.

c. Prospective Juror M.M.

In her questionnaire, M.M. agreed that California should have a death penalty and should not abolish it because "it serves as a deterrent for some offenders." Death would be an appropriate punishment for "repeat murderers," among others, and serves to "provide justice in the cases that warrant it." M.M. repeatedly stated she could vote for death, but would not automatically do so. Whether death was appropriate should be decided "on a case-by-case" basis. M.M. had no religious or moral views that would make it difficult for her to vote for execution.

In voir dire, M.M. said that she was neutral as to sentence and could vote for either. On six occasions, she affirmed her ability to vote for death. When asked whether she could look at the defendant and say, "I kill you," M.M. replied: "I think that's a very hard position to be put in, but I think the approach I would take is that I need to do the right thing, either not guilty or guilty and where ever that falls, given the information, then I would have to feel comfortable with that."

Given that M.M. was neither for nor against the death penalty, the prosecutor asked how she could determine whether M.M. would vote for death. M.M. said her decision would depend on the evidence, not prior leanings: "I don't know that

you can determine that [I would vote for death] at this point. I think that determination or decision would be made after the information was given to me or any other juror. [¶] At this point, I don't have a say one way or the other, because I haven't heard anything." She went on: "I certainly would want to do the right thing by the defendant or by the other side. [¶] I would want to do whatever the evidence or the information warranted. . . . [¶] It would be a very difficult decision if I had to decide that it was a death penalty. I don't think anybody would walk away feeling great about doing that, but I feel I have to do what was warranted by the case." When asked again how she could "impose the death penalty if you don't even know what your feelings are regarding it?," M.M. said, "I really don't have a set decision like some people [where] I'm all for the death penalty or totally opposed. [¶ Q.] You don't have a feeling one way or the other. [¶ A.] I don't have a feeling one way or the other. I'm neutral. My feeling would be each case would be individual and unique in itself, and I think you need to go into [it] looking at it like [that]. . . . Every case is different and unique."

M.M. affirmed that she could vote for death if the aggravating circumstances outweighed the mitigating circumstances and could impose death on an aider and abettor such as a defendant who held a victim's arms while a second defendant beat the victim to death. She repeated that she could tell the defendant he was going to die.

The prosecutor then turned to the bank robbery hypothetical with a getaway driver, a lookout, and the actual killer. M.M. described the nonkillers as less culpable, but when asked if she could impose death on the getaway driver if the aggravating circumstances outweighed the mitigating circumstances, she said she could. The prosecutor suggested

those answers were inconsistent: "How can you impose the death penalty on the person who is waiting out in the car, when you believe he is not as guilty as the person who pulled the trigger?" M.M. explained, "Because you said that . . . the bad issues about him were more than the ones that weren't bad." The prosecutor explained that under the law, a juror could, but did not have to, impose death when aggravating circumstances outweighed mitigating ones. She then asked, "[K]nowing that, *would* you impose the death penalty on the person waiting in the car?" (Italics added.) This time, M.M. said, "No."

The prosecutor challenged M.M. on the ground that M.M. did not know whether she was for or against the death penalty and would be unable to impose death on an aider and abettor. The court granted the motion on the basis that M.M. would not impose the death penalty in the getaway driver scenario, and the People defend the excusal on that basis alone.

The record offers no support for the prosecutor's assertions. M.M. consistently indicated, in her questionnaire and in response to questions from the bench, defense attorney, and prosecutor, that she could impose the death penalty in an appropriate case based on the evidence submitted. She believed California should have the death penalty and that it serves as a deterrent. Being "neutral" on the death penalty before hearing any evidence is not disqualifying. (*People v. Pearson*, *supra*, 53 Cal.4th at p. 332.) Indeed, M.M.'s answers show she was unwilling to prejudge the matter. She confirmed that she could impose the death penalty on a nonkilling aider and abettor, in both the beating and bank robbery hypotheticals.

M.M. did indicate that, given the option, she would not choose death for the getaway driver. That answer did not

demonstrate substantial impairment or views that would prevent her from serving. Recognizing different degrees of culpability, M.M. acknowledged that hypothetically she could, but would choose not to, impose death on a less culpable defendant. This response does not indicate an inability to follow the court's instructions. Her answers reflect an ability to listen to and follow the law. She properly declined to guarantee how she would vote based on the facts proven at trial. Her excusal was error.

d. Prospective Juror L.B.

Prospective juror L.B. described himself as "for" the death penalty and thought it was used too seldom. He approved of California having the penalty because "[i]f [a] very violent crime is committed, [the] death penalty is justified." Death was appropriate for "premeditated, and brutal" crimes; life in prison without possibility of parole gave him pause because he was "afraid that the law can be changed" so that the defendant could get out on parole. L.B. held no religious or moral objections to the death penalty and could vote for it. Death should not be automatic for intentional murders, but should "depend[] on [the] person's state of mind before and during committing the act." To L.B., a death sentence meant "that society will be somewhat safer."

Under questioning from the court and counsel, L.B. indicated that before hearing the evidence, he was not leaning toward life or death, would keep an open mind, could follow the court's instructions, and could vote for either sentence. He indicated he could vote for death in the case of someone who, seeing a cash register open, opportunistically killed the cashier to steal the contents.

As she had with other jurors, the prosecutor asked L.B. hypothetically about the three participants in a bank robbery and the two participants in a beating death. In the bank robbery scenario, L.B. agreed the getaway driver, lookout, and actual killer were equally responsible. He could impose death on the getaway driver or lookout, depending on the balance of aggravating and mitigating factors, provided the person knew the actual killer was armed. In the beating hypothetical, L.B. considered the person holding the victim down equally culpable. He hesitated to say that he could impose death on him, however, because he "still assume[d] that the guy who is holding him didn't probably know that he is going to be severely beaten." Asked to reconcile that hesitation with his willingness to impose death in the armed robbery scenario, L.B. explained: "[W]hen you start beating on somebody, I don't think . . . you [are] doing it with the intention that you are killing, but when you have [a] weapon then it's a different story. You have a weapon for one reason[,] to hurt somebody, in my opinion." Based on that distinction, he did not feel the person holding another's arms should be executed if the beating victim ultimately died.

The prosecutor challenged L.B. for cause on the sole basis that he could not apply the law with regard to aiding and abetting. The court granted the motion on that basis, and the People defend the excusal on the same ground.

The excusal of L.B. was flawed for the same reasons discussed in connection with S.R. and M.M. L.B. consistently indicated that he could follow the law and the court's instructions and could impose death in a number of factual situations. That the prosecutor could construct a murder hypothetical for which L.B. thought one perpetrator should be spared execution does not mean he was substantially impaired

within the meaning of *Witt*. The prosecutor offered no additional facts that might actually support a special circumstance finding, nor sufficient aggravating factors to justify a vote for death. Many competent jurors might react to such a hypothetical by indicating they would vote for life, not death.

No other evidence supports the court's ruling. The record shows L.B. actively supported the death penalty, thought it was used too infrequently, and would be able to consider either life or death in a range of circumstances. Even the prosecutor described L.B. as "good up until the last hypothetical." The excusal of L.B. was error.

e. Prospective Juror G.P.

Prospective juror G.P. had a slight proprosecution leaning, but said he would try to avoid any prejudice and could follow the court's instructions. He felt the death penalty "is an appropriate punishment in certain cases" and favored California having the penalty because "in some cases it is called for," such as cases involving "plan[ned], premeditated" murder. In addition to supporting the death penalty, G.P. could vote for it, though he would not automatically do so. Neither death nor life should be mandatory in all murder cases; instead punishment should "depend[] on the circumstances." G.P. had no philosophical or religious convictions that would affect his ability to impose death, but sitting on a capital jury would be difficult because "[i]t is a very serious thing to have someone's life in my hands." Still, G.P. could vote for death "[i]f the facts meet the criteria," such as when a defendant had "without any thought taken another's life to gain money [or] property, or hunted down another to kill them." Both death and life without possibility of

parole were severe sentences to G.P. He stated in one part of his questionnaire that life without parole was worse, but reported in another that he was "torn" as to which was worse.

When asked by the court whether, based on personal views, he would refuse to vote for the death penalty without considering aggravating and mitigating factors, G.P. replied, "No, I don't think so." G.P. would not begin by immediately favoring life or death; rather, "either defense or prosecution would [have to] convince me that [the case] called for the death penalty, I'd have to listen to the different circumstances. And hopefully keep an open mind . . . ."

When asked by the prosecutor how he could impose death even though he was not sure it was a more severe sentence than life in prison, G.P. explained: "I go back to what takes place during the trial, during the penalty phase. I would listen to all the evidence . . . [¶] [I]f the circumstances surrounding the crime and all the factors leading up to it called for the death penalty, then I think[] I could do that too." The prosecutor asked again, "[H]ow will we know you are able to impose the appropriate punishment?" G.P. replied, "Well, I don't know how you would know. I really don't. Again, you have to take my word that I would listen to all the evidence and make the decision that I think is right. And since you are the prosecution side, you would have to convince me — not maybe convince me like I'm resisting it, but show me that this man deserves the death penalty in this case." Pressed on what the prosecutor would have to show him to get a death verdict, G.P. would not agree that any single factor would be necessary or sufficient: "[U]ntil I hear the evidence, I don't know [what you would have to show me]." The prosecutor then went through each special circumstance one by one and asked whether, if she proved only

first degree murder and that one special circumstance, G.P. could vote for death. G.P. replied in each case some variation of "probably" or "I'm not sure, I think I could," but "might be reluctant" if the only special circumstance was murder in the course of a kidnapping.

G.P. had written on his questionnaire that he thought life without possibility of parole might serve as a replacement for the death penalty. He explained that "a lot of so-called industrial countries feel that life [in prison] is good enough punishment for somebody," but he still believed in execution when "the circumstances surrounding the crime call for the death penalty." When asked for circumstances that might call for death, he offered, "[M]aybe in [a] case like this case, possibly, . . . the way the charges were read with torture and things like that[,] rape with using the foreign object, the cruelty of this crime, possibly, assuming that this all took place, and the defendant committed these crimes, then it could call for the death penalty."

After G.P. agreed he wasn't sure how he felt about the death penalty, the prosecutor asked, "And since you don't know how you feel about the death penalty, how am I able to determine whether or not you could impose the death penalty, if the circumstances warrant it?" G.P. replied, "If the circumstances warrant it, I would be able to impose it." The prosecutor described G.P.'s frame of mind as being "torn between life without the possibility of parole and between the death penalty"; G.P. disagreed, saying, "No, I think my frame of mind [is], I'm willing to listen to all the circumstances from both sides and make up my mind then about whether to impose the death penalty on someone or life in prison." If the aggravating circumstances outweighed any mitigating circumstances, G.P.

could impose death. When asked to consider the beating hypothetical and assume the aggravating circumstances substantially outweighed the mitigating, G.P. affirmed that he had "[n]o doubt" he could impose death on the aider and abettor.

G.P. acknowledged that, as he had written in his questionnaire, he did not think the death penalty was an effective deterrent. He rejected the prosecutor's suggestion that he therefore would be incapable of imposing death: "Well, I don't think that just because my idea is that [the] death penalty is not a deterrent doesn't keep me from imposing the death penalty [¶] . . . [¶] [I]f the circumstances surrounding the crime call for the death penalty, then I can make that decision."

The prosecutor turned to the bank robbery hypothetical. G.P. thought all three "equally guilty of murder," but "probably wouldn't impose the death penalty" on the getaway driver who, as the prosecutor described it, "didn't go inside[,] he didn't shoot[,] he wasn't the actual killer."

The prosecutor moved to excuse G.P. for cause, and the court granted the challenge. The court highlighted two aspects of G.P.'s views it was troubled by: G.P.'s belief that life in prison without possibility of parole might substitute for the death penalty, given that other industrial countries got by without capital punishment, and his belief that the death penalty was not a deterrent. The first view the court saw as a way many "smart" prospective jurors discussed the death penalty, discussions the court characterized as "some kind of intellectual sophistry." The second view, that the death penalty was not a deterrent, the court saw as a basis for "infer[ring] that he could not impose [the death penalty, and] that's the inference that has to be drawn based on the state of mind."

The inference that, simply because one has doubts about the efficacy of the death penalty, one would refuse ever to impose it and may be excused for cause has long been forbidden. That a prospective juror may "voice[] general objections to the death penalty or express[] conscientious or religious scruples against its infliction" is an insufficient basis for excusal. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522.) The high court has clarified that the prosecution "must demonstrate, through questioning, that the potential juror lacks impartiality," i.e., that the candidate's views would substantially impair his or her ability to follow the court's instructions and vote for death in appropriate cases. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) A trial court cannot simply assume that, because a candidate doubts the death penalty is a deterrent, he or she could never impose it. Here, G.P. directly rejected the assumption: "Well, I don't think that just because my idea is that [the] death penalty is not a deterrent, [it] doesn't keep me from imposing the death penalty [¶] . . . [¶] [I]f the circumstances surrounding the crime call for the death penalty, then I can make that decision."

The court also referenced several of G.P.'s specific responses to questioning about whether he could impose the death penalty. The court noted that when asked whether he could give the death penalty based on each of the special circumstances charged in the case, G.P. wavered before saying he thought he could, or probably could. The court further noted that G.P. "flat out said he could not [impose death on a getaway driver]. And, if the theory of the People in this case is an aider and abettor theory[,] that would preclude consideration of a potential penalty."

On the second point, the record is to the contrary. When asked, "What penalty would you impose on the person in the car, who didn't go inside? He didn't shoot. He wasn't the actual killer," G.P. responded, "I probably wouldn't impose the death penalty." That a juror "probably wouldn't impose the death penalty" on a hypothetical getaway driver is not evidence the same juror could not impose the death penalty in an appropriate case. Some getaway drivers, although guilty of first degree felony murder, may not even be death eligible. (See *People v. Banks*, *supra*, 61 Cal.4th 788.) Even those legally eligible might rationally be seen by competent jurors as less deserving of death than another who pulls the trigger. In contrast, G.P. affirmed that he could cast a vote for death in other aiding and abetting scenarios and pointed to the facts of this case as circumstances that might justify a death sentence.

The People agree that G.P.'s answers show he could vote for death in a range of circumstances, but contend that because he "probably wouldn't" in others, he was impaired. The law does not entitle the People to a jury composed only of those who would impose death in every factual scenario, but instead to a jury that can follow the court's instructions and conscientiously consider the appropriate penalty based on the proven aggravating and mitigating circumstances. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 447.)

The court's remaining point, that G.P. hesitated before affirming he probably could vote for death in various single special circumstance hypotheticals, presents a closer question. Only the trial court could observe G.P.'s demeanor and "the way he answers the questions." However, even accepting the court's view of G.P.'s demeanor, as we must, the record does not contain substantial evidence that G.P. held views that would

"substantially impair" his ability to follow the law and the court's instructions. G.P.'s responses uniformly indicate he could maintain an open mind as to either life or death. Indeed, G.P. offered the facts of this case as precisely the sort of case in which he might be able to consider a death sentence.

"[U]nder applicable law, even a juror who 'might find it very difficult to vote to impose the death penalty' is not necessarily substantially impaired unless he or she was unwilling or unable to follow the court's instructions in determining the appropriate penalty." (*People v. Merriman* (2014) 60 Cal.4th 1, 53.) The prosecution, as the party seeking G.P.'s removal, had the burden of establishing he lacked impartiality and could not follow the court's instructions. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) Here, nothing in the record suggests G.P. held inalterable anti-death penalty views or would find it difficult to vote for death when appropriate, nor does anything in the record give reason to doubt G.P. could act in accordance with the law and the court's instructions, as he repeatedly and without reservation indicated he would do. The court erred in excusing G.P. for cause.

f. Harmless Error

In a capital case, the erroneous excusal of even one prospective juror for cause requires automatic reversal of the death sentence, although not the preceding guilt determinations. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 516–518, 521–523; *People v. Riccardi* (2012) 54 Cal.4th 758, 783; *People v. Pearson*, *supra*, 53 Cal.4th at p. 333; *People v. Heard*, *supra*, 31 Cal.4th at p. 966.)

The People ask us to revisit this rule and hold any error harmless. The rule is not ours to revisit. It has been established in United States Supreme Court case law. (*Gray v. Mississippi* (1987) 481 U.S. 648, 659–668 (plur. opn. of Blackmun, J.); *id.* at p. 672 (conc. opn. of Powell, J.); see *People v. Riccardi*, *supra*, 54 Cal.4th at p. 783.) Even if a harmless error standard were to apply, the People fail to explain how the erroneous exclusion of at least four jurors could be deemed harmless. (See *Riccardi*, at p. 845 & fn. 6 (conc. opn. of Cantil-Sakauye, C. J.) [whatever doubt there might be about the impact of a single erroneous excusal for cause, the erroneous exclusion of numerous jurors inevitably will have an "appreciable impact on the final composition of the jury"].)

2. Wheeler/Batson *Motions*

We turn now to a different aspect of jury selection. The foregoing *Witherspoon/Witt* analysis involved *the court's* excusal of prospective jurors *for cause*. In this section we consider the *prosecution's* exercise of *peremptory challenges* against jurors not excused for cause. As we explain, the questions involve different principles.

Penny Sigler was a White woman. Armstrong, like Pearson and Hardy, is an African-American man. During jury selection, the prosecution exercised four peremptory challenges against African-American male prospective jurors. Armstrong objected to the first two peremptories as racially discriminatory. The court denied these motions, ruling no prima facie case of discrimination had yet been established. After the third peremptory, the court found a prima facie case, but after considering the prosecutor's proffered explanation, concluded the peremptory was being exercised for racially neutral reasons.

The court also revisited the two earlier challenges and asked the prosecutor to justify these peremptories. In light of the reasons given, the court ruled these excusals likewise were not based on race.

The court initially granted a fourth motion, but after a recess reversed itself and denied the motion. With the last African-American male eliminated from the pool, Armstrong moved for a mistrial. The court denied the motion, noting that both African-Americans and males were represented on the jury. The jury as seated included one African-American woman and five Caucasian men, but no African-American men.

Armstrong renews his objections on appeal, arguing that he was deprived of the right to equal protection and trial by a representative jury. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 16.) We conclude there was no error.

a. Legal Principles

Peremptory challenges are "designed to be used 'for any reason, or no reason at all.' " (*People v. Scott*, *supra*, 61 Cal.4th at p. 387, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 374 (conc. opn. of O'Connor, J.).) But there are limits: Peremptory challenges may not be used to exclude prospective jurors based on group membership such as race or gender. (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 129; *Batson v. Kentucky* (1986) 476 U.S. 79, 97; *People v. Wheeler* (1978) 22 Cal.3d 258, 276; Code Civ. Proc., § 231.5.) Such use of peremptory challenges violates both a defendant's right to a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution, and his right to equal protection under the Fourteenth Amendment to

the United States Constitution. (*People v. Parker* (2017) 2 Cal.5th 1184, 1211.)

"[T]here 'is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.' " (*People v. Hensley* (2014) 59 Cal.4th 788, 802; see *Purkett v. Elem* (1995) 514 U.S. 765, 768.) Under a now familiar three-step process, a defendant must first "make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' " (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted; see *People v. Scott*, *supra*, 61 Cal.4th at p. 383.) The defendant's ultimate burden is to demonstrate that "it was more likely than not that the challenge was improperly motivated." (*Johnson*, at p. 170.) The same rules apply to state constitutional claims. (*People v. Chism* (2014) 58 Cal.4th 1266, 1313.)

Different standards apply to the review of first-stage and third-stage rulings. (Compare *People v. Sánchez* (2016) 63 Cal.4th 411, 434–435 [first-stage standard] with *People v. Winbush* (2017) 2 Cal.5th 402, 434–435 [third-stage standard].) Armstrong and the People agree that the third-stage standard applies to Armstrong's final two motions, but disagree as to the standard applicable to Armstrong's first two motions. Armstrong is correct that the third-stage standard applies to all four rulings.

In response to Armstrong's first two motions, following challenges to prospective jurors S.L. and R.C., the court originally found no prima facie case. However, after finding a prima facie case in connection with Armstrong's third motion, the court chose to revisit its earlier rulings and asked the prosecutor for a statement of reasons as to each. Upon reconsideration, the court reaffirmed its determination that these peremptories rested on race-neutral grounds. The court's actions were consistent with the law as it stood at the time of trial, which required courts finding a prima facie case to solicit and consider the prosecution's reasons for every other challenge against a member of the same group. (*People v. McGee* (2002) 104 Cal.App.4th 559, 570, disapproved by *People v. Avila* (2006) 38 Cal.4th 491, 549–550.)

Trial courts are no longer obligated to revisit their rulings on earlier *Wheeler*/*Batson* motions when they conclude the defendant has made out a prima facie case in connection with a later motion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 899, fn. 10; *People v. Williams* (2006) 40 Cal.4th 287, 311; *People v. Avila*, *supra*, 38 Cal.4th at p. 549.) However, they have the power to do so in cases when a subsequent challenge places an earlier challenge in a new light. (*Avila*, at p. 552.) When a trial court revisits an earlier ruling, determines a prima facie case has been made, solicits reasons from the prosecutor, and rules on those reasons, its ruling is reviewed in the same fashion as any other third-stage ruling.

The court's reconsidered rulings on prospective jurors S.L. and R.C. based on reasons solicited from the prosecutor must be reviewed under the standards applicable to third-stage rulings. The record does not reveal whether the court reconsidered its earlier determination that no prima facie case had been made,

but when a trial court solicits reasons for earlier strikes it had previously found did not support a prima facie case, we will assume the court has reversed its earlier determination unless the record affirmatively demonstrates otherwise. Moreover, when the sincerity of the reasons given for excusing one juror bears on the sincerity of the reasons given for excusing a later juror, those reasons may be considered in evaluating the peremptory strike against the original juror. (*People v. Scott*, *supra*, 61 Cal.4th at p. 392; *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 786–787.) There is some overlap in the reasons given for striking S.L. and R.C., and for later striking E.W. and R.P. Accordingly, we will review all four strikes as third-stage rulings.

At the third stage, the genuineness of the justification offered, not its objective reasonableness, is decisive. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 769; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158.) "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339; accord, *People v. Winbush*, *supra*, 2 Cal.5th at p. 434.) Because the trial court's credibility determination may rest in part on contemporaneous observations unavailable to the appellate court, we review that determination " ' "with great restraint" ' " and will accord it deference "[s]o long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered," affirming when substantial evidence supports the

ruling. (*People v. Burgener* (2003) 29 Cal.4th 833, 864; accord, *People v. Lenix* (2008) 44 Cal.4th 602, 613–614.)

Armstrong contends no deference is due the trial court's determinations. We cannot cast aside these findings so lightly. The record shows that over the course of Armstrong's four motions, the prosecutor made a comprehensive record of her reasons for every strike, whether challenged or not. The trial judge took the opportunity to debate at length with counsel and consider thoughtfully the genuineness of the proffered reasons in light of his own observations. Discussion of the final *Wheeler*/*Batson* challenge alone consumed more than 80 pages of transcript. In the trial court, Armstrong bore the burden only of showing by a preponderance of the evidence that purposeful discrimination was behind the prosecutor's use of strikes. (See *Johnson v. California*, *supra*, 545 U.S. at p. 170; *People v. Woodruff* (2018) 5 Cal.5th 697, 753.) Once the trial court engaged in a reasoned examination of Armstrong's showing in light of the record and determined he had not proven discrimination, its findings became entitled to "'"great deference on appeal" and will not be overturned unless clearly erroneous.'" (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 787, quoting *Miller-El v. Cockrell, supra*, 537 U.S. at p. 340.)

b. African-American Men Are a Cognizable Class

In the trial court, Armstrong argued the use of peremptories on S.L., R.C., E.W., and R.P. was motivated by race. Once all four had been excused and his motions denied, Armstrong sought a mistrial on the ground that all African-American men had been removed from the jury panel. The court denied the motion. In this court, Armstrong contends the prosecutor's peremptories were exercised to discriminate

against African-American men specifically, rather than all African Americans.

Motions under *Wheeler* and *Batson* protect against the systematic exclusion of distinctive and protected groups from the jury pool. Armstrong, as the moving party, has the burden of establishing the challenged jurors are members of a cognizable class. (*People v. Jones* (2013) 57 Cal.4th 899, 916.) The record confirms that the four excluded jurors were African-American men, and this court's precedent establishes that, in addition to groups defined by either race *or* gender, groups lying at the intersection of race *and* gender are cognizable under *Wheeler*. (*People v. Cleveland* (2004) 32 Cal.4th 704, 734; *People v. Boyette* (2002) 29 Cal.4th 381, 422; *People v. Clair* (1992) 2 Cal.4th 629, 652; *People v. Motton* (1985) 39 Cal.3d 596, 605.) In line with that precedent, the Court of Appeal has held African-American men a cognizable class for *Wheeler* purposes. (*People v. Gray* (2001) 87 Cal.App.4th 781, 788–790.) The People contend that African-American men should not be considered a cognizable group, pointing to federal cases and to a concurring opinion disagreeing with the approach this court has taken. (*People v. Young* (2005) 34 Cal.4th 1149, 1235–1238 (conc. opn. of Brown, J.).) Settled law dictates otherwise.

c. Prospective Juror S.L.

After *Hovey* voir dire, the prosecutor moved to excuse S.L. for cause. She expressed concern that S.L. "hesitated on quite a few of his decisions, especially those asking whether or not he could impose the death penalty." S.L favored rehabilitation, and the prosecutor was unsure whether S.L. was for or against the death penalty. Based on these and other views, the prosecutor

was of the "opinion that [S.L.] would be unable to impose the death penalty." The court denied the motion.

Following regular voir dire, the prosecutor used a peremptory on S.L. When initially denying Armstrong's *Wheeler*/*Batson* motion, the court referenced its earlier denial of excusal for cause, which it described as "a very close challenge," and concluded based on courtroom observations that the strike rested on S.L.'s reluctance to impose death: "I can understand why [the prosecutor] would want to excuse this juror, because at the *Hovey* challenge, even though this court did not grant the challenge for cause, this juror had some reservations about imposing the penalty of death, based on his demeanor, [and] my belief is based upon the earlier challenge for cause during the *Hovey* process, that the motive to excuse this juror is not based on race, but because of [the prosecutor's] perceived perception of this juror's inability to be able to impose death at the penalty phase." When denying the challenge for cause, the court had anticipated the juror later would be the subject of a peremptory: "In making that ruling at that time I realized that there is an issue that this juror may, as the prosecutor [had] perceived at the time, may not be suitable, because that person waffled on whether they could impose death or not, believing in a rehabilitation system, and [that the defendant] has to commit a hateful crime."

As noted, the parties and court returned to the strike of S.L. when the court found a prima facie case in response to a subsequent *Wheeler*/*Batson* motion in connection with a different juror. Defending the strike, the prosecutor highlighted numerous answers S.L. had given that might suggest reluctance to impose the death penalty. The court credited this reason,

again noting that in its view S.L. nearly could have been excused for cause based on his death penalty views.

Initially, we note rulings made in response to assertions that "the juror did hesitate for [a] very long time before finally indicating that he could impose the death penalty" and based in part on observations of a juror's "demeanor" are particularly difficult to second guess. Only the trial court is in a position to observe these matters. The court can hear the juror's tone and inflection and see whether a juror hesitates or struggles with particular answers in a way the record may never reveal. (See *People v. Lenix*, *supra*, 44 Cal.4th at pp. 626–627.) Because the "trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes[,] . . . 'these determinations of credibility and demeanor lie peculiarly within a trial judge's province,' and 'in the absence of exceptional circumstances, we [will] defer to the trial court.' " (*Davis v. Ayala* (2015) 576 U.S. ___, ___ [135 S.Ct. 2187, 2201].)

What can be discerned from the record supports the prosecutor's and trial court's assessments of S.L. As the prosecutor recited, S.L. thought rehabilitation "important" and said, "[I]f there is anything about [a defendant's] background that I would feel maybe he could be rehabilitated, then I would vote for life imprisonment." For a first time offender without a prior history of "hateful decisions," S.L. thought "maybe life in prison would be better" and thus would lean toward voting for life. He gave conflicting answers as to whether he would require the People to prove just one, multiple, or all special circumstances before voting for death. S.L. would require proof of an intent to kill. S.L. "probably would" vote for life without the possibility of parole absent evidence the defendant would

reoffend in prison. S.L. thought life in prison was a more severe punishment than death because "the person would have the rest of their lives to think about what they had done."[6] S.L. was unsure whether California should abolish the death penalty.

A juror's reservations about imposing the death penalty are an acceptable race-neutral basis for exercising a peremptory. (E.g., *People v. Winbush*, *supra*, 2 Cal.5th at p. 436; *People v. Lomax* (2010) 49 Cal.4th 530, 572; *People v. Taylor* (2010) 48 Cal.4th 574, 603; *People v. Burgener*, *supra*, 29 Cal.4th at 864.) The view that life without possibility of parole is a more severe punishment than death is also an "obvious race-neutral ground[]" for challenging a prospective juror. (*People v. Davis* (2009) 46 Cal.4th 539, 584.)

Armstrong models his claim after *Miller-El v. Dretke* (2005) 545 U.S. 231. Two factors the Supreme Court weighed heavily there, the apparently discriminatory use of a Texas procedure called "jury shuffling" and direct evidence of a systemic, historical policy of excluding African-Americans from juries in the county, are absent here. (*Miller-El*, at pp. 253–255, 263–265.) Armstrong points to two other factors: the argument that similar White jurors were not challenged, and that the prosecutor engaged in disparate questioning. Neither of these factors is demonstrated in the record.

Armstrong identifies four jurors and an alternate who, in response to one of the two questions on the juror questionnaire

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[6] In his questionnaire, S.L. also said life without possibility of parole meant a defendant would "have to live with [his crime] for the rest of [his] life" and "you have the rest of your life to be punished."

comparing death and life without possibility of parole, indicated life was, or were unsure whether it might be, a worse punishment for a defendant.[7] That these jurors were allowed to serve does not refute the trial court's determination that the prosecutor's concern was sincere. Examining the voir dire as a whole, the prosecutor showed by word and deed that she afforded significance to whether prospective jurors thought life in prison without parole a more severe penalty than death. She routinely questioned White jurors of both genders about the respective severity of death and life without parole. She challenged for cause or used peremptories against many White jurors who did not clearly view death as more severe. The prosecutor's concern extended even to jurors who considered the question in terms of how they themselves would compare the punishments if each were imposed on them.

In response to Armstrong's *Wheeler*/*Batson* motions, the prosecutor articulated her thinking about this consideration: "I don't believe that somebody . . . who believe[s] that life without the possibility of parole is a more severe punishment than death can actually impose the death penalty, because they believe that spending the rest of their life in prison would be the more severe punishment that could be imposed. [¶] I have exercised my peremptory challenges with respect to those jurors who have indicated" they hold that belief. Whether the prosecutor was

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[7] The jury questionnaire asked: "Overall, in considering general issues of punishment, which do you think is **worse** for a defendant," death or life in prison without the possibility of parole? A second question asked, "Which do you believe is a more severe punishment," death or life without parole? In response to the second question, these jurors and the alternate, unlike S.L., indicated death was the more severe punishment.

right in her thinking, or whether we would share her concerns, is irrelevant. What matters is the genuineness of this view and its use as a criterion to distinguish among jurors. Exercising a peremptory to strike a juror who thinks death is a less severe punishment than life in prison without possibility of parole can be a "reasonable," race-neutral basis (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 248) if not used in a racially discriminatory way. This is not a case like *Miller-El* where the prosecutor displayed only selective concern. Instead, the issue was a frequent part of the prosecutor's questioning of both White and African-American jurors throughout the *Hovey* voir dire.[8]

That the prosecutor did not eliminate every juror who had even some doubt as to the relative severity of the penalties does not demonstrate that the trial court committed clear error in finding the concern genuine. The jury questionnaire asked both generally whether a death or life sentence was more severe and specifically which penalty was worse for the defendant. (See *ante*, fn. 7.) More than 30 percent of the jury pool indicated that life was the harsher penalty in response to both questions, and nearly half indicated as much on at least one of the two questions.[9] Based on this representation in the jury pool, one would have expected six of the 18 jurors and alternates to think

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[8] In addition to her use of peremptories, the prosecutor successfully moved to excuse for cause a juror who believed life without possibility of parole was the more severe penalty and for that reason would vote for life when the aggravating circumstances outweighed the mitigating circumstances.

[9] By our count, of the 406 prospective jurors who answered, fully 190 indicated life was a harsher penalty than death in response to one question or the other, and 133 so indicated in response to both.

a life sentence was harsher both in general and specifically, and eight to have answered that way on at least one of the two questions. The prosecutor's focus on the issue produced a jury that contained *no one* in the first category, and only four jurors in the second.

The prosecutor focused on these questions because she believed they indicated a reluctance to impose death, but they were not the only ones that might reveal reluctance. The prosecutor was entitled to consider the full set of each juror's responses in deciding whether they could be persuaded to vote for death if appropriate. Each of the jurors who sat had other answers that might temper concern. For example, in contrast to S.L., each rejected the idea that the death penalty should be abolished.

Armstrong also identifies two jurors and an alternate who indicated rehabilitation or redemption might play a role in their thinking. Juror No. 4 believed that life might be appropriate for a remorseful first time offender who still had something to contribute to society, but did not think she could identify whether someone was remorseful, and was unequivocal about her ability to vote for death for a first time offender; S.L. would lean toward life for all first offenders. Juror No. 11 thought of death as an acceptable way to punish the unredeemable and would consider whether there was "hope for [the defendant] in our society" when weighing life and death. But unlike S.L., Juror No. 11 believed death was a more severe punishment. Unlike S.L., Juror No. 11 was clear that the death penalty should not be abolished. Her collective answers suggest openness to the death penalty in a wider range of

circumstances.[10] Finally, Alternate Juror No. 6 endorsed life in prison for those who are "truly sorry and can be rehabilitated to some usefulness and good." But nothing else in her questionnaire or voir dire suggested hesitation about imposing the death penalty.

Armstrong objects that the prosecutor used differential questioning for S.L. and other prospective jurors, who were not asked whether they could impose the death penalty under specific special circumstances and whether they would require that more than one special circumstance be proven. The record refutes this contention. The prosecutor employed the same general line of questioning with numerous prospective jurors who were not African-American men.

Finally, Armstrong argues that S.L.'s answers in his questionnaire and on voir dire gave no suggestion he could not follow the law. While this may be true, the argument misses the point. Unlike a for-cause challenge under *Witherspoon* and *Witt*, the issue here is not whether a juror held views that would impair his or her ability to follow the law. Unimpaired jurors may still be the subject of valid peremptory strikes. The issue instead is whether the prosecutor held a genuine race-neutral reason for exercising a strike.

"In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make

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[10] S.L. described the death penalty's only purpose as a tool to punish "people [who] murder and can't or won't stop even if they were in prison for life."

fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor." (*Davis v. Ayala*, *supra*, 576 U.S. at p. ___ [135 S.Ct. at p. 2201].) The trial court determined the use of a peremptory to excuse S.L. was the product of just such a judgment call. Its determination was supported by substantial evidence and thus not clear error.[11]

d. Prospective Juror R.C.

Armstrong challenged the prosecution's use of its eleventh peremptory on R.C. The court initially found no prima facie case. It noted both R.C.'s failure to give direct answers and a developing friction between R.C. and the prosecutor as providing neutral reasons for the peremptory. When the court retroactively solicited a statement of reasons following use of a peremptory to strike a third African-American male, the prosecutor explained she struck R.C. because he had memory issues, expressed an unwillingness to set aside his belief system, repeatedly gave nonanswers or revealed no opinions about the death penalty, and clashed with the prosecutor during voir dire.

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[11] Armstrong relies on *People v. Silva* (2001) 25 Cal.4th 345, 385 to argue that no deference is due the trial court's determinations and we should consider de novo the validity of this strike. In *Silva*, we carved out an exception to the usual rule of deference because the record contained no support for the prosecutor's stated reasons and the trial court did not inquire into those reasons. (*Id.* at pp. 376–377, 385–386.) No similar justification for applying the exception appears here where, as discussed, the record supports the prosecutor's reasons and the trial court correctly recalled and considered the *Hovey* voir dire that bore on those reasons.

After hearing the prosecutor's explanations, which aligned with the reasons identified in the earlier ruling, the court accepted them.

The record supports the court's determination. R.C.'s questionnaire revealed little to nothing about his death penalty views. In voir dire, the prosecutor had an equally difficult time discovering his feelings on the subject. R.C. acknowledged he had memory difficulties. He also wrote on his questionnaire that he would not set aside his religious, social, and philosophical beliefs, although he later indicated he had misunderstood the question. Finally, review of the voir dire transcript confirms that exchanges between the prosecutor and R.C. became so combative that counsel and the court needed a sidebar to discuss whether the prosecutor could ask ancillary questions about why R.C. was resisting her inquiries.[12] The

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[12] Sample exchanges:

Q: . . . what subjects did you teach?

A: You're amazing. You're amazing. . . .

Q: You said I was amazing. Did you mean that sarcastically?

A: I don't think I was laughing.

Q: Okay. So why did you say I'm amazing?

A: I think you are. It's simple to me.

Q: . . . would you say that you are for or against the death penalty?

A: Lady, I keep telling you the same thing. I don't understand why you keep asking me the same thing.

Q: Can you —

A: I do not know your name, that's why I called you lady.

Q: That's nice. At least you didn't call me something else.

A: I don't have any of that other in my heart or in my mind. I just want some clear questions, so I can get some clear answers and get out of here.

Q: Okay. The question I have in my mind is based on your answers. Are you for or against the death penalty?

A: My opinion is the same as it was when we started this.

Q: So you have no opinion one way or the other?

A: No.

Q: Based on what you just said, it sounds like, to me, that you believe in the death penalty. Is that an accurate statement?

A: Whatever you want to believe is fine with me.

Q: But I've asked you what your opinion is about the death penalty, and you say you have no opinion. So that doesn't make sense to me that you can impose it, but you don't have an opinion about it.

A: I'm pretty clear, and it's okay with me. . . . Where I'm coming from is that I'm very clear about what I'm saying to you. And what you believe is personal, you know, I don't — I don't even — I'm not even willing to help you, but that's personal, I think.

Q: Can you come out here, look him in the eye and say "Death"?

A: Why are you asking me that?

Q: Because that's what you have to do at the end, if you come back with a death verdict. The court is going to poll you, he's going to ask what your verdict is, and the defendant is going to be sitting right there looking you in the eye. Can you look him back in the eye and say "Death"?

A: If you were the defendant, I could look you in your eye and say "Death."

prosecutor "felt that my client would not be best served by a juror who has a personality conflict with me as the lawyer, because I think that would get in the way of being able to evaluate the evidence . . . and would cause him to sway towards the defense." She was entitled to exercise a peremptory on these bases, and the court had ample basis for viewing the reason as genuine.

Armstrong concedes a conflict developed between the prosecutor and R.C., but lays blame for that conflict solely on the prosecutor for allegedly provocative, confrontational, and insulting questions. Our review of the voir dire does not support this interpretation. More fundamentally, the trial judge observed the questioning and concluded the personality conflict was genuine rather than manufactured by the prosecutor. In later explaining its ruling, the court said: "This juror . . . was, in this court's observation, a belligerent and hostile juror toward the prosecutor during her questioning. He refused to answer many of the same reasonable questions posed to the other jurors, specifically whether he could impose death . . . . The sum and substance of his answers were that You'll have to find out later." Armstrong dismisses that determination, but it appears to be a legitimate conclusion based explicitly on the court's observations.

Armstrong also contends that comparative juror analysis shows the reasons for R.C.'s excusal were pretextual, identifying a handful of other jurors who he asserts had similarly ill-formed views of the death penalty. That other prospective jurors may have been similar in one or two regards is not decisive. (*People v. Winbush*, *supra*, 2 Cal.5th at p. 443.) No other juror engaged the prosecutor in pointed verbal sparring in the way R.C. did. What occurred here was unique. Consequently, no other juror's

combination of questionnaire and voir dire responses is comparable to R.C.'s. The court did not abuse its discretion in determining that the prosecutor's race-neutral reasons for excusing R.C., including his nonresponsiveness and the tenor of the exchanges during voir dire, were genuine.

e. Prospective Juror E.W.

When Armstrong challenged the use of a peremptory on prospective juror E.W., the court found a prima facie case and solicited the prosecution's reasons. After discussing a number of responses from E.W. that gave her pause, the prosecutor identified two as dispositive: "The two things that really bother me [are] that he believes that life without the possibility of parole is the most severe sentence and he also believes that since if the death penalty is imposed it cause[s] so much additional litigation, he doesn't believe it should be, just let it go, is what he says. To me that is indicative of what his verdict is going to be." Later, she reiterated that E.W.'s view of life without possibility of parole as the more severe sentence was her "primary motivation for exercising the peremptory challenge," and she had exercised peremptories against Whites who held the same view. The trial court evaluated these concerns and concluded they were genuine. Because the prosecutor's "concern has nothing to do with race[,] it has to do with whether or not [E.W.] could impose the death penalty," the court denied the motion.

The record substantiates that E.W. held the views the prosecutor ascribed to him. He wrote that the death penalty in its "current form is so slow that it's really useless. Justice delayed." He was "OK [with the death penalty] in principle, but if it creates so much additional litigation, maybe [the state]

should just let it go." He circled that life in prison without possibility of parole was a more severe punishment than death and added, "To me, I'd rather die." E.W. confirmed this view in voir dire. E.W. also thought "the appeals process so long that it tends to be life in prison."

Armstrong stresses that in E.W.'s questionnaire and voir dire, E.W. said his views would not affect his verdict. So does the dissenting opinion. (Dis. opn., *post*, at pp. 18–20.) They are correct about the record, but incorrect about its significance. E.W. was not excused for cause. Instead, the prosecution was entitled to use a peremptory if, as an advocate, she was concerned he would resist her view of the case. The ultimate issue in a *Wheeler*/*Batson* motion is not whether E.W.'s views would substantially impair his ability to vote for execution. The question instead is whether the prosecutor genuinely believed those views would incline E.W. to vote for life, and whether that belief was the true basis for the exercise of a peremptory. The trial court accepted this reason after voir dire. Armstrong and the dissent must do more than argue that the prosecutor's concerns might have been unfounded. The "inquiry is focused on whether the proffered neutral reasons are subjectively *genuine*, not on how objectively reasonable they are." (*People v. Melendez* (2016) 2 Cal.5th 1, 15.) The reasons must be sincere and nondiscriminatory, but they need not be universally shared.

The dissenting opinion accepts that " 'we exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson/Wheeler* rulings.' " (Dis. opn., *post*, at p. 23, quoting *People v. Gutierrez*, *supra*, 2 Cal.5th at p. 1172; see *People v. Melendez*, *supra*, 2 Cal.5th at p. 15 ["We review the trial court's determination with restraint, presume the prosecutor has exercised the challenges in a

constitutional manner, and defer to the trial court's ability to distinguish genuine reasons from sham excuses."].) We departed from that stance of deference in *Gutierrez*, but only because the proffered reasons lacked inherent plausibility or were contradicted by the record, and the trial court did not ask the prosecutor to elaborate. (*Gutierrez,* at pp. 1169–1172; see *People v. Silva*, *supra*, 25 Cal.4th at p. 386.) Here, in contrast, the reasons the prosecutor relied upon could well make a juror less desirable for a prosecution seeking the death penalty and were borne out by the record.

The dissenting opinion nevertheless offers two reasons for according the trial court's finding no deference. First, it suggests the court failed to challenge the prosecutor's assertion that she was striking all prospective jurors who believed life without parole was a more severe sentence than death. The dissenting opinion accepts that E.W. indicated he thought life without parole a more severe penalty than death, and that the prosecutor was correct in stating every seated juror had answered differently. But, according to the dissent, the trial court should have noticed that four other jurors or alternates indicated in response to a different question that life without possibility of parole was worse for defendants, and these answers should have spurred further inquiry from the court. (Dis. opn., *post*, at p. 16.)

However, when the prosecutor struck E.W. and the trial court considered the *Wheeler*/*Batson* challenge, only *one* of the four supposedly comparable jurors (Juror No. 5) was in the

box.[13] That is, no juror in the box save E.W. had indicated life was the more severe punishment, and only one other thought life worse for a defendant. That the trial court failed to observe *one* juror had answered *one* of the two questions on the questionnaire asking about the two penalties' relative harshness (see *ante*, fn. 7) in a manner that could have concerned the prosecutor does not show that the court's inquiry was insufficiently " 'sincere and reasoned.' " (*People v. Lenix*, *supra*, 44 Cal.4th at p. 614.)

The meager representation of these views on the panel, notwithstanding that nearly half the prospective jurors held such views, was the product of weeks the prosecutor spent pressing, challenging for cause, and striking jurors who did not consider death more severe than life in prison without parole. (See *ante*, pp. 42–45.)[14] The trial court, unlike this one, observed

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[13] The prospective jurors who ultimately served as Jurors No. 4 and No. 9 were drawn randomly late in the process, after E.W. had been struck, when both sides were low on strikes and had to weigh carefully the pros and cons of the provisional panel against the characteristics of the dwindling pool of potential replacements. Alternate Juror No. 5 was chosen much later as part of a separate process.

[14] Two examples illustrate the prosecutor's approach. Prospective Juror No. 255, a White female, indicated in her questionnaire that life and death were equally severe penalties. The prosecutor questioned her about this and got her to agree that death was actually more severe. Unsatisfied, the prosecutor later exercised a peremptory against the woman, and explained on the record that her sole reason was because she thought the juror still felt life was as severe a punishment as death.

Prospective Juror No. 9803, a White male, indicated on his questionnaire that life was more severe than death. The

those weeks of questioning directed at jurors of all races and genders. Its observations informed its judgments about whether the prosecutor's stated concern was genuine. If the deference we are required to accord the trial court's finding (*Davis v. Ayala*, *supra*, 576 U.S. at p. ___ [135 S.Ct. at p. 2199]) means anything, it means that first-hand experience merits some weight. Given a justification that (1) was inherently plausible, (2) was largely supported by the record of the prosecutor's behavior, and (3) appeared to the trial court to be subjectively genuine, the trial court was not legally obligated to inquire further.

The record offers factual and statistical support for the genuineness of the prosecutor's concern about jurors who, like E.W., thought life without parole a more severe penalty. Unable to contest that the prosecutor winnowed out all jurors who thought life the more severe penalty, and nearly all who thought it a fate worse than death for the defendant, the dissent would shift the focus from whether the prosecutor's concern was genuine to whether specific statements she made in illustrating that concern were not just substantially accurate but universally true. This misstates the nature of the trial court's inquiry, and ours. That the prosecutor may have succeeded in eliminating only nearly all, rather than all, the jurors the

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prosecutor asked him whether this answer meant he would vote for life. The juror said it did not. Again unsatisfied, the prosecutor struck him and gave as her sole reason that the juror felt life a more severe punishment than death.

These and other instances also reflect the prosecutor's consistent reluctance, for prospective jurors of all races and genders, to put faith in voir dire answers that hedged on views expressed in the jurors' questionnaires.

dissent deems comparable does not call into question the sincerity of her concern.

Second, the dissenting opinion concludes that, on its view of the cold record, the prosecutor should have been no more concerned by E.W.'s death penalty views than those of several jurors the prosecutor did not strike. (Dis. opn., *post*, at pp. 18–20.) The conclusion fails because the jurors are not comparable. E.W. thought life without possibility of parole the more severe penalty; Juror No. 5, the only one of the comparison jurors on the panel when E.W. was struck, did not, explaining that "[d]eath is the end forever — prison for life is still life." Where E.W. described the death penalty as "useless" and a candidate for abandonment, Juror No. 5 saw the death penalty as a "needed though sad way to punish someone." The same is true of other jurors later added to the panel and now compared to E.W. with the benefit of hindsight. Juror No. 4 thought death more severe ("Death is final") and wrote: "The punishment has to fit the crime and I think that some[]times [the death penalty] is warranted." Juror No. 9 believed death the more severe penalty and wrote "I have no problem with this law" and "In some cases[,] it is justice." Finally, Alternate Juror No. 5 thought the death penalty more severe and wrote of the penalty, "There may be times when it is necessary." A prosecutor could rationally distinguish between prospective jurors who thought death a more severe and necessary penalty and one who thought it less severe and useless. The record supports the prosecutor's assertion that she had more reason to be concerned about E.W.'s potential verdict than a verdict from jurors the dissent and Armstrong posit as comparable.

Armstrong also identifies jurors who indicated they had not thought about their support or opposition for the death

penalty before. But the proffered explanation was not that E.W. had never thought about the death penalty. The prosecutor was concerned instead about the views he had actually developed: E.W. could not say he was affirmatively in favor of the death penalty, and he thought perhaps it should be abandoned. Finally, Armstrong points out other jurors who, like E.W., indicated that they thought the death penalty was imposed too seldom or too randomly. But the prosecutor never identified this as a basis for striking E.W. Her concern was that E.W. thought a life sentence more severe than the death penalty, which should perhaps be discontinued. Seated jurors and alternates did not share these views.

Armstrong and the dissenting opinion also highlight that the prosecutor mentioned E.W.'s profession, engineering, as an area of concern, explaining she feared he might put her to a higher standard of proof. (Dis. opn., *post*, at p. 8.) The prosecutor did not identify this as one of the "two things that really bother me" about E.W., and the trial court did not originally consider the prosecutor to have proffered it as a justification. We may infer that in the prosecutor's eyes the juror's profession alone was an insufficient reason to exercise a strike.[15]

The fact another engineer, Juror No. 11, remained on the jury does not demonstrate the expressed doubt about engineers, as part of the overall calculus, was insincere. The seated juror

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[15] Later in voir dire, the prosecutor described her general approach to strikes and listed five areas of principal concern, none of which focused on a juror's profession: (1) belief that life in prison was as or more severe a punishment than death; (2) belief in rehabilitation; (3) bad experiences with the police; (4) reluctance to judge others; and (5) prior service on a hung jury.

differed from E.W. on each of the two grounds the prosecutor gave as her principal reasons for exercising a strike. Unlike E.W., Juror No. 11 indicated death was a more severe punishment than life in prison. Unlike E.W., Juror No. 11 did not think the state should consider abandoning the death penalty. An engineer with these views might be acceptable, even if not ideal, while an engineer with views like E.W.'s was deemed too big a risk to take in selecting the jury. Comparative juror analysis has force "when the compared jurors have expressed 'a substantially similar *combination* of responses,' in all material respects, to the jurors excused." (*People v. Winbush*, *supra*, 2 Cal.5th at p. 443.) No such combination appears here.

The dissenting opinion is unclear how other considerations, such as more prosecution-friendly views at the penalty phase, might outweigh concerns that a prospective juror would be harder to persuade at the guilt phase. (Dis. opn., *post*, at p. 9.) This is not a conundrum. A prosecutor with an exceptionally strong guilt phase case but a weaker penalty phase case might be willing to trade some small risk of an unfavorable guilt phase verdict for better odds of a desired penalty phase verdict. A prosecutor need not strike every single juror with a particular trait, even those with other redeeming qualities, to demonstrate that concerns about the trait are genuine.[16]

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[16] Alternatively, it is possible that in the course of reviewing 50-page questionnaires, each containing responses to 237 questions, from more than 400 jurors — more than 20,000 pages in all — the prosecutor, defense counsel, and trial court all overlooked Juror No. 11's profession. Neither at the time nor in a later new trial motion rearguing the *Wheeler*/*Batson* motions

This court and the United States Supreme Court have previously recognized that comparative juror analysis can be a useful tool, but also one that has some "inherent limitations." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622; see *Snyder v. Louisiana* (2008) 552 U.S. 472, 483.) "Moreover, the selection of a jury is a fluid process, with challenges for cause and peremptory strikes continually changing the composition of the jury before it is finally empanelled. As we noted in *People v. Johnson* (1989) 47 Cal.3d 1194: '[T]he particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors.' (*Id.* at p. 1220.)" (*Lenix*, at p. 623.)

"Each juror becomes, to a certain degree, a risk taken. Voir dire is a process of risk assessment. As the Supreme Court

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did defense counsel argue the challenge to E.W. and the failure to strike Juror No. 11 were inconsistent.

observed, 'potential jurors are not products of a set of cookie cutters.' (*Miller-El* [*v. Dretke*], *supra*, 545 U.S. at p. 247, fn. 6.) Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624.)

Four months later, when denying Armstrong's motion for a new trial, the court determined E.W.'s profession was an additional genuine race-neutral basis for the strike. In opposing the new trial motion, the People did not identify E.W.'s profession as the principal reason for the strike. The court compared E.W. to Prospective Juror No. 5128, a White male engineer. As with E.W., the prosecutor questioned No. 5128 about whether his training would lead him to speculate about every conceivable possibility. Like E.W. and unlike seated Juror No. 11, this prospective juror also gave other answers reflecting views on the criminal justice system that concerned the prosecutor. She unsuccessfully moved to excuse him for cause, and then was able to excuse him by stipulation.[17] The prosecutor's approach to No. 5128 is consistent with the subjective view that while an engineering background alone

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[17] The prosecution and defense settled on the final set of alternate jurors by mutual agreement, rather than by exercising alternating peremptory challenges. Prospective Juror No. 5128 was not on the agreed-upon list.

may not warrant a peremptory, in combination with other factors it may make the juror less desirable.[18]

The prosecutor also mentioned a handful of reasons she deemed less significant, which the trial court did not rule on. We have cautioned against a trial court "tak[ing] a shortcut in its determination of the prosecutor's credibility, picking one plausible item from [a] list and summarily accepting it without considering whether the prosecutor's explanation as a whole" suggests pretext. (*People v. Smith* (2018) 4 Cal.5th 1134, 1157.) No cherry-picking was involved here. The prosecutor herself highlighted the considerations that concerned her most. The trial court took her at her word and evaluated those reasons for their genuineness and neutrality. Once they passed muster, it was not error to omit express consideration of secondary factors.

Nor, in any event, do these lesser factors undermine the trial court's credibility finding. The voir dire transcript and E.W.'s questionnaire show that E.W. indicated prosecutors "tend to be overzealous to convict," and had had negative experiences with the police. He believed misconduct by police and lawyers was inadequately punished and that failure was one of the most important problems with the criminal justice system. In addition, E.W. was neither firmly for nor against the

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[18] The trial court specifically relied on the prosecution's approach to No. 5128 in finding the prosecution's concerns about E.W.'s profession genuine. The dissenting opinion would consider the prosecution's questioning of that prospective juror de novo and conclude it demonstrates the prosecution actually sought to rehabilitate other engineers. (Dis. opn., *post*, at pp. 12–14.) We do not read the cold record as revealing any significant disparity. We should be most hesitant to substitute our judgment, long after the fact, for the trial court's comparison of the examinations it observed.

death penalty, thought the system needed reform, and was familiar with legal terminology. These are factors that, considered with all other circumstances, could fairly give an advocate pause. They provide no basis for us to substitute our judgment for that of the trial court's and conclude the prosecutor acted with racial bias. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 613.)

An advocate who chooses jurors based on racial bias commits grievous misconduct, for "the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' [citation], and undermines public confidence in adjudication." (*Miller-El v. Dretke, supra*, 545 U.S. at p. 238.) In guarding against such corrosive impropriety, judges on the trial court, and on appellate panels, must be vigilant. The first line of vigilance rests with those in the trial court, who see and hear the questions, responses and nuances of the interaction.

The rules of review also require vigilance, and humility. Appellate courts must surely call out misconduct. But we are aided in this endeavor by the trial judge who ruled in the first instance. In the face of a trial court's supported factual findings regarding the genuineness of the prosecutor's racially neutral reasons for exercising a strike, we should be hesitant to draw a contrary conclusion unless well-founded on fair inference, rather than surmise.

The trial court in this case determined that the strike of E.W. was made on genuine, race-neutral bases. Reviewing that ruling with the deference precedent requires, the record supports the trial court's conclusion.

f. Prospective Juror R.P.

R.P. was the last African-American man in the jury pool. Before seeking to excuse him, the prosecutor requested a sidebar and offered the reasoning behind every peremptory she had exercised. The prosecutor then gave detailed reasons for striking R.P. As with S.L. and E.W., she struck him in part because he thought life in prison a more severe sentence than death. He also believed that the death penalty was overused, especially against African-Americans, and that African-Americans in general were overincarcerated. Third, R.P. had sat on two prior murder cases, and his service had troubled him. Finally, one of R.P.'s sons had had a negative experience with the Long Beach Police Department. A second son had recently been robbed at gunpoint in Long Beach, and the investigation was ongoing. The prosecutor feared any future negative interactions with the Long Beach police could impair R.P.'s impartiality.

The court concluded that the prosecutor's peremptory was based on her belief R.P. would not impose the death penalty, and that reason was race-neutral. Nonetheless, it initially granted the *Wheeler*/*Batson* motion because it believed R.P. could impose a death verdict. Because the prosecutor's race-neutral reason was "mistaken," the court rejected the prosecutor's exercise of a peremptory.

The prosecutor pointed out that the court was applying the wrong standard. Whether R.P. was unable to vote for death was a consideration in a for-cause challenge. A *Wheeler*/*Batson* motion, by contrast, examines whether the prosecutor genuinely believes a juror will be resistant to her side of the case and is striking him for that race-neutral reason. After asking the prosecutor to restate her reasons, the court reversed itself and

denied the *Wheeler*/*Batson* motion. The court specifically concluded that three of the prosecutor's reasons were genuine and race-neutral: R.P. found judging others disturbing; thought the death penalty was overused, especially against African-Americans; and was concerned about the overincarceration of African-Americans in general.

The record supports the court's determination. R.P. had served as a juror in two noncapital murder trials. He wrote that "the aftermath is always disturbing." Asked about this answer, R.P. explained: "I carry it with me. I go back over it, I guess — I don't want to say second guess, but it's disturbing. It's disturbing to a certain degree when you do judge your fellow man — for me it is." Twice more in follow-up questioning he described the process of jury service as disturbing. In later questioning, R.P. described his jury experience as "unsettling."

R.P. thought the death penalty was "[s]ometimes overused," especially on "certain segments of our society." His views were informed by other states that imposed moratoriums on executions and reports of prisoners released based on DNA evidence. In light of this, R.P. believed the death penalty was "a serious thing, and we . . . shouldn't take it lightly. [¶] [M]y bottom line is, it's a very serious thing and . . . we shouldn't rush to anything. I think we should look at all the facts." Sometimes death could be the correct punishment, but "[i]n other instances, as we've seen — in some instances there have been mistakes made, so I think we should be very careful about what we do."

R.P. later clarified that his concerns extended to incarceration in general: "[T]here are people being released across the country, where either evidence was not substantiated, DNA, a lot of different avenues, and my thought

behind that was we have to look at things beyond just face value, we have to make certain that things are true." R.P. was concerned as well that, in his view, the African-American community was substantially overrepresented both generally in prison, and on death row in particular. This disparity suggested something was "fundamentally wrong" with the criminal justice system.

R.P.'s expressed concerns are held by many. Yet they also provide a legitimate reason why a prosecutor, tasked with securing the conviction of an African-American defendant for a crime heavy with racial overtones, might view R.P. as a problematic juror. The court's determination that the reason was genuine and race-neutral finds support in the record. The concerns R.P. had about the criminal justice system are not unique to African-Americans: A prospective juror of any ethnicity might equally share them. In exercising peremptory challenges, advocates may excuse jurors who have such concerns, so long as their reasoning does not rest on impermissible group bias. (See *People v. Smith*, *supra*, 4 Cal.5th at p. 1153; *People v. Winbush*, *supra*, 2 Cal.5th at p. 439.)

Further, given R.P.'s responses about jury service in noncapital cases, the prosecutor might be legitimately concerned that he might lean toward a verdict that would be emotionally less taxing. The record supports the court's acceptance of that reason. No other juror gave such answers.

Armstrong relies on comparative juror analysis to argue that the prosecutor's reasons were pretextual. He contends seated White Juror Nos. 2, 4, 5, 10, and 11, and Alternate Juror Nos. 5 and 6 were likewise apprehensive in varying degrees about the prospect of imposing a death verdict. But unlike R.P.,

none of these jurors had had the visceral experience of serving on two murder juries and dealing with the emotional aftermath. Moreover, the court did not rely on a single concern expressed by the prosecutor, but on three. None of the jurors Armstrong identifies also expressed concern about overuse of the death penalty or bias in the criminal justice system. Overlap on one concern will seldom be sufficient: "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624.)

The Constitution makes clear that group bias is unacceptable. Cases decided over decades have condemned it. Prospective jurors must be evaluated as individuals, in light of all the information gleaned during voir dire. What matters is the full range of responses and whether, because of widespread similarities aside from race or gender, a reasonable comparison casts doubt on the honesty of the neutral reasons offered. Armstrong has not identified jurors with such similarities as to cast doubt on the trial court's acceptance of the prosecutor's reasons as genuine. Accordingly, he has failed to carry his burden.

B. *Guilt Phase Evidentiary Issues*

1. *Refusal to Admit Out-of-court Evidence of Racial Slurs*

Before trial, the prosecutor advised that she intended to introduce the statement defendant gave to detectives after his arrest. She offered it as a statement of a party opponent (Evid. Code, § 1220), but sought to redact parts of it as "self-serving hearsay." Armstrong had related that as he, Hardy, and

Pearson were walking toward the bus stop, "some racial slurs were said by somebody that was on the opposite side. [¶] . . . [¶] They was like 'I hope—like I hope you all die niggers.' 'Niggers I hope you all die.' " In response to further questioning, Armstrong said he heard: "Like, 'Fuck you niggers' or 'the niggers are gonna die.' " After the statements were made, Hardy started walking across the street and encountered a woman, later identified as Sigler. Pearson and Armstrong followed him. Over defense objection, the court ordered the quoted statements redacted. Armstrong contends his statements as to what he heard should have been admitted. He is correct; the ruling was error.

The interview Armstrong gave to detectives was an out-of-court statement offered against him by the prosecution, thus falling within the hearsay exception for statements of a party. (Evid. Code, § 1220 ["Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party"].)[19] The prosecutor argued, in essence, that the words Armstrong attributed to

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[19] The text of Evidence Code section 1220 defines the exception as embracing "a statement" made by a party offered by an opposing party. The exception is listed in Division 10, Chapter 2, Article I of the Code, titled "Confessions and Admissions," and section 1220 is titled "Admission of party." However, Evidence Code section 5 provides: "Division, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code." As a result, and as a general rule, any otherwise relevant "statement" of a party is admissible against him, regardless of whether the statement would meet the narrower definition of a confession or admission. (*People v. Rodriguez* (2014) 58 Cal.4th 587, 637; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049; Simons, Cal. Evid. Manual (2018) § 2:28, p. 105.)

Sigler were a second level of hearsay. They were not Armstrong's statements but those of Sigler, who was not a party to the litigation. As a result, Sigler's statements, recounted by Armstrong, did not fall within the exception. If Sigler's statements had been offered for their truth, the prosecutor would have been correct. Sigler's words were nonetheless admissible for two reasons: (1) they were not hearsay, and (2) they were admissible under Evidence Code section 356.

In arguing that the redacted statements should remain, the defense was not seeking to prove that all members of Armstrong's race, which Sigler rudely maligned, would die, or even that Sigler hoped for such an outcome. Accordingly, the defense did not seek to offer Sigler's words for the truth of their content. Instead, the defense urged the victim's statements were relevant to explain the subsequent conduct of Armstrong and his companions and to support a conclusion that when they assaulted Sigler, their motive was revenge, rather than robbery or rape. "When evidence that certain words were spoken . . . is admitted to prove that the words were uttered and not to prove their truth, the evidence is not hearsay. (People v. Smith [(2009)] 179 Cal.App.4th 986, 1003 . . . .)" (Simons, Cal. Evid. Manual, *supra*, § 2:5, p. 84.)

To the extent the prosecution argued Sigler's slurs fell outside Evidence Code section 1220, because the prosecution was not seeking to introduce them, they nevertheless were admissible under section 356, often called the rule of completeness. That rule provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing

is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.)

"The purpose of [Evidence Code section 356] is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.] Thus, if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission . . . in evidence.' " (*People v. Arias* (1996) 13 Cal.4th 92, 156.) The rule reflects the " ' "equitable notion" ' " that a party seeking introduction of one part of a statement cannot selectively object to introduction of other parts necessary to give context. (*People v. Melendez*, *supra*, 2 Cal.5th at p. 26.) "Although framed as an expansion of the concept of relevancy, Evidence Code [section] 356 most often operates in the manner of a hearsay exception." (Simons, Cal. Evid. Manual, *supra*, § 1.16, p. 21.)

The redaction here allowed the prosecution to create a misleading impression. As Armstrong originally recounted, the men were walking toward a bus stop when someone shouted racial slurs from across the street. The yelling prompted Hardy to cross the street and confront the person who had shouted. When he approached Sigler, Hardy asked if she would perform an act of oral sex on all three men for $50. Sigler responded with a grunted "no," walked past Hardy and Pearson, and slapped Armstrong as she passed him as well. Sigler then walked a distance away, extended both middle fingers, and hurled additional racial epithets. The full version recounts that the men were unaware of Sigler's presence and only approached her

after she insulted them in a racially-charged manner. The redacted version makes it appear that the men approached Sigler because she was a woman walking alone at night and began the encounter by asking her to engage in an act of prostitution. If the prosecution wanted to introduce the remainder of Armstrong's statement under Evidence Code section 1220, Armstrong was entitled to include the redacted portion under section 356 to avoid mischaracterization.[20]

As we discuss in greater detail when addressing the claim of prosecutorial misconduct, we conclude that the error does not require reversal of the guilt judgments. (See *post*, pt. II.D.1.)

2. *Refusal To Admit Victim's Toxicology Report*

Before trial, the prosecution moved to exclude a medical examiner's toxicology report showing Sigler was intoxicated on the night she was killed. Defense counsel argued Sigler's intoxication was relevant to corroborate Armstrong's testimony about the racial epithets, and to support an argument that Armstrong acted out of revenge rather than an intent to rob, rape, or kill. The court granted the motion, ruling the relevance, if any, of Sigler's potential intoxication was substantially outweighed by other considerations. (Evid. Code, § 352.)

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[20] A defendant may not use the prosecution's introduction of his out-of-court-statements as an opportunity to introduce "extraneous statements contained in the recording" that might favor him, without the burden of testifying and submitting to cross-examination. (*People v. Gurule* (2002) 28 Cal.4th 557, 604; see *id.* at p. 605.) But the rule is different when, as here, the portions the prosecution seeks to redact are not extraneous but integral to an understanding of the course of conduct the admitted portions describe.

The toxicology report is the same report we concluded was properly excluded as irrelevant in *People v. Hardy*, *supra*, 5 Cal.5th at pages 86–87. In *Hardy*, as here, the defendant argued the report tended to corroborate allegations that Sigler had issued racial slurs before she was raped and killed. The report was properly excluded there because "the prosecution never argued that Sigler did not yell a racial slur; indeed, she said during her opening statement that the jury would 'hear testimony or evidence that [Sigler] made some racial remarks, and that [Hardy] and his companions approached her as a result of these.' " (*Id.* at p. 87.) In Hardy's trial, the prosecution acknowledged Sigler's shouted slurs. The fact she was intoxicated at the time carried little to no relevance because the content of her shouting was not a "disputed fact." (Evid. Code, § 210.)

The calculus is somewhat different here. Unlike Hardy's trial, the prosecution successfully excluded portions of Armstrong's original statement to police about Sigler's racial slurs. It then contended no slurs were made. When the prosecution chose to deny the slurs took place, its tactical decision put the intoxication question in a different light. Given alcohol's effect on judgment and self-control, her intoxication could have a "tendency in reason" (Evid. Code, § 210) to explain why a diminutive woman, alone at night on a deserted street, would start a confrontation with three larger strangers. That explanation would have been consistent with the defense theory and Armstrong's testimony.

We need not decide whether exclusion of the toxicology report was an abuse of discretion. Any error was harmless, as explained in greater detail in connection with our discussion of prosecutorial misconduct. (See *post*, pt. II.D.1.)

3. *Refusal To Admit Evidence of Alternate Theory Concerning Semen Deposit*

Armstrong sometimes stayed at his mother's home, which was searched pursuant to warrant. Police recovered a stained cream-and-black shirt. Tests revealed the stain consisted of a large amount of semen and small amount of blood. DNA in the stain matched Armstrong.[21] The prosecution argued that Armstrong wore the shirt during the attack and the semen deposit showed his direct participation in Sigler's rape.

The People called Armstrong's girlfriend, Jeanette Carter, to testify. On cross-examination, Carter said she had never seen the cream-and-black shirt before. Defense counsel then began to ask about Armstrong's practices after having intercourse. The court sustained a relevance objection.

During a recess, defense counsel offered that he was trying to find out whether Armstrong sometimes put his shirt back on after intimacy with Carter. If he did, the presence of semen on the shirt might be explained. The court adhered to its ruling. Carter had never seen the shirt, so any response to such a question would have been irrelevant.

Armstrong renews his evidentiary claim, but the court's ruling was correct. Carter twice said she had never seen the shirt. Whether Carter had ever seen Armstrong put on a *different* shirt after intercourse with her could have no bearing on how semen found its way on to *that* shirt. Nor did Armstrong

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[21] The laboratory was unable to determine the source of the blood.

urge that the semen might have been deposited after a liaison with a different partner.[22]

4. *Admission of Kendrick's Testimony*

Keith Kendrick testified that on December 30 or 31, 1998, he was watching the news with Pearson, Armstrong, and a third man when a report about the Sigler murder came on the air. Kendrick said, "Oh, I know who did that. [¶] . . . [¶] Killer Kev [Kevin Pearson] did it." Armstrong whispered to Pearson, "How did [Kendrick] know?" Pearson then recounted details of the crime, including that Hardy, Armstrong, and he had encountered a woman, raped her in the bushes, and then beat her with a stick. The People introduced a tape of Kendrick's January 1999 police interview, which included additional specifics from Pearson and Kendrick's conversation in Armstrong's presence. Armstrong sat silently throughout the discussion.

Before Kendrick's testimony, Armstrong objected that Pearson's statements were inadmissible hearsay and allowing Kendrick to testify about them would violate his confrontation clause and due process rights. The People argued that Armstrong, by listening and saying nothing, had adopted Pearson's statements as his own admissions. The court agreed, finding neither a hearsay bar nor a confrontation clause problem. Armstrong renews his constitutional claims on appeal.

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[22] Armstrong did not offer this evidence as that of "habit or custom" under Evidence Code section 1105. Thus, the record contains no evidence he could have satisfied the foundational requirements of that provision.

The court was correct. "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) " 'Under this provision, "[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." ' " (*People v. Chism*, *supra*, 58 Cal.4th at p. 1297.) Armstrong implied that Kendrick's accusation of Pearson was true when he asked, "How did he know?" Armstrong then did not challenge the recitation of events, instead sitting silently as Pearson recounted Armstrong's participation in the crime. Kendrick's recitation of Pearson's statements fell within the adoptive admission exception to the hearsay rule.

Nor does introduction of this testimony raise constitutional concerns. Adoptive admissions pose no problem under the Sixth Amendment of the United States Constitution and *Crawford v. Washington* (2004) 541 U.S. 36 because " '[t]he "witness" against the defendant is the defendant himself,' " notwithstanding that the words the defendant adoptively admitted were spoken by someone else. (*People v. Jennings* (2010) 50 Cal.4th 616, 662; see *People v. Cruz* (2008) 44 Cal.4th 636, 672–673; *People v. Roldan* (2005) 35 Cal.4th 646, 711,

fn. 25.) The high court has never suggested that the *Crawford* rule bars admission of a defendant's own statement.

Armstrong objects that Pearson was potentially unavailable for cross-examination because he might choose to invoke his right against self-incrimination. But Pearson's availability is immaterial. Through his silence, Armstrong adopted Pearson's statements as *his own* and bore witness against himself. Armstrong cannot complain that he was deprived of his confrontation clause rights by the introduction of his own admissions.

Moreover, only testimonial hearsay falls under the *Crawford* doctrine. (*Ohio v. Clark* (2015) 576 U.S. __, __ [135 S.Ct. 2173, 2179–2180]; *People v. Rangel* (2016) 62 Cal.4th 1192, 1214.) Whether a statement is testimonial turns on " 'whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an out-of-court substitute for trial testimony." ' " (*Rangel*, at pp. 1214–1215, quoting *Clark*, at p. 2180.) Determining whether a statement is testimonial can often be challenging, but is straightforward here: Pearson's casual, conversational statements to Kendrick, adopted by Armstrong, were not intended to substitute for court testimony. Because the hearsay was not testimonial, its admission did not give rise to a *Crawford* violation.

5. *Refusal To Admit Evidence of Pearson's Reputation*

On direct examination, Armstrong described things he did at Pearson's direction. After Armstrong testified he was afraid of Pearson, counsel asked why. The court overruled the prosecutor's relevance objection, but when Armstrong

answered, "Because of his reputation —," the court interrupted and directed a sidebar. This exchange followed:

"The Court: The defendant was ready to testify about Kevin Pearson's reputation.

"[Defense Counsel]: I was not aware of that.

"The Court: It would be hearsay, obviously, because it would be something that he heard from sources. There's no foundation for reputation evidence. We're not going to have a trial on Kevin Pearson's reputation, are we?

"[Defense Counsel]: No.

"The Court: I just want to make sure it's not an area that I cut you off.

"[Defense Counsel]: No. [¶] . . . [¶]

"The Court: After the word 'Yes,' the rest of the answer is stricken.

"[Defense Counsel]: Okay."

Armstrong argues that his fear of Pearson and the reason for it was improperly excluded. The argument fails. His testimony that he was afraid of Pearson was allowed to stand. As for evidence of Pearson's reputation, counsel indicated he did not intend to explore this subject and lodged no objection to its exclusion. Accordingly, the claim is forfeited. (Evid. Code, § 354, subd. (a); *People v. Capistrano* (2014) 59 Cal.4th 830, 867.) Nor, as Armstrong now argues, would an objection and offer of proof have been futile. (See Evid. Code, § 354, subd. (b).) Throughout the trial, the court showed a willingness to rethink its rulings in light of arguments from counsel. If counsel had wanted to explain what Armstrong would say and why it was

either not based on hearsay or otherwise properly admissible, he could have done so.

Further, Armstrong fails to show how the omitted testimony would have significantly altered the evidentiary picture. The jury heard a great deal about Pearson's callous violence on the night of the crime and that Kendrick called him "Killer Kev." Nothing in this record undermines the conclusion that Pearson was a man rightly to be feared.

6. *Sufficiency of the Evidence To Support the Torture-murder Special Circumstance*

Armstrong contends there was insufficient evidence to support the torture-murder special-circumstance finding. On review, we examine the entire record in the light most favorable to the prosecution to determine whether a rational jury could have found the circumstance true beyond a reasonable doubt. (*People v. Hardy*, *supra*, 5 Cal.5th at p. 89.)

To prove a torture-murder special circumstance, the prosecution must show that the defendant intended both to kill and " 'to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 65.) Intent may be inferred " 'from the circumstances of the crime, the nature of the killing, and the condition of the victim's body.' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1187.)

Here, there was ample evidence that Armstrong intended to cause extreme pain. Prosecution evidence showed Armstrong assisted Pearson and Hardy in raping, stomping, and beating Sigler, and repeatedly inserting a wooden stake into her vagina. Armstrong himself kicked the victim several times. Armstrong had reason to know Sigler was alive until the end of the assault

and that she was in considerable pain. The autopsy showed 11 broken bones and more than 100 distinct injuries. Contrary to Armstrong's assertion, the jury was not limited to considering only his self-serving statements that he thought Hardy's and Pearson's actions were "wrong" and "scandalous." Given the extended duration of the encounter, the brutal escalation of the attack, and Sigler's extraordinary pre-mortem injuries, a rational jury could conclude that Armstrong intended to inflict extreme pain and suffering.

C. *Instructional Issues*

1. *Circumstantial Evidence Instructions*

The jury received four standard instructions on circumstantial evidence, CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1. These instructions advised that if circumstantial evidence supported two reasonable interpretations, the jury "must" adopt the interpretation more favorable to the defendant. If, instead, one interpretation appeared reasonable and the other unreasonable, the jury "must" adopt the reasonable interpretation. Armstrong argues that telling the jury it must adopt a reasonable interpretation of the evidence if the alternative was unreasonable deprived him of the right to have a jury convict only upon proof beyond a reasonable doubt.

We have repeatedly rejected this contention. (E.g., *People v. Delgado* (2017) 2 Cal.5th 544, 572–573; *People v. Watkins* (2012) 55 Cal.4th 999, 1030; *People v. Bonilla* (2007) 41 Cal.4th 313, 338; *People v. Koontz* (2002) 27 Cal.4th 1041, 1084–1085.) "[T]hese instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other 'reasonable' interpretation can be drawn. Particularly when viewed in

conjunction with other instructions correctly stating the prosecution's burden to prove defendant's guilt beyond a reasonable doubt, these circumstantial evidence instructions do not reduce or weaken the prosecution's constitutionally mandated burden of proof or amount to an improper mandatory presumption of guilt." (*People v. Kipp* (1998) 18 Cal.4th 349, 375.) Armstrong offers no new authority that would support reconsideration.

2. *Instruction on Juror Unanimity Concerning the Theory of Murder*

The jury was instructed on three different theories: deliberate and premeditated murder (CALJIC No. 8.20), felony murder (CALJIC No. 8.21), and murder by torture (CALJIC No. 8.24). (See Pen. Code, § 189.) At the People's request, the court instructed the jury that it need not unanimously agree on which theory was correct in order to find Armstrong guilty of murder in the first degree.

Armstrong contends the court was required to instruct that the jury must agree unanimously on which theory, if any, supported a guilty finding, and the failure to do so violated the state and federal Constitutions. He acknowledges that we have repeatedly rejected this claim, but seeks to preserve the issue for federal court review. Armstrong relies on *People v. Dillon* (1983) 34 Cal.3th 441, which, he contends, establishes that premeditated murder and felony murder have distinct elements and must be distinct crimes. He then urges that under *Schad v. Arizona* (1991) 501 U.S. 624, 636–637, due process required the jury be instructed it must unanimously agree on one theory or another.

We have consistently stated this argument is a misreading of *Dillon*. While it is true that under *Dillon* " 'the two forms of murder have different elements[, nevertheless] there is but a single statutory offense of murder.' [Citations.] When, as here, the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed, the jury need not unanimously agree on the theory under which the defendant is guilty." (*People v. Benavides* (2005) 35 Cal.4th 69, 101; see *People v. Sattiewhite* (2014) 59 Cal.4th 446, 479.) *Schad v. Arizona*, *supra*, 501 U.S. 624, does not require otherwise. (*People v. Grimes* (2016) 1 Cal.5th 698, 727–728; *Benavides*, at p. 101.)

3. *Instructions on Conspiracy*

Although no conspiracy was charged, the jury was instructed on its elements. (CALJIC Nos. 6.10.5, 6.11, 6.12.) Armstrong contends the instructions should not have been given. The claim is forfeited for lack of objection. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Armstrong does not argue that the forfeiture should be excused on the ground his substantial rights were affected. (See Pen. Code, § 1259; *People v. Henriquez* (2017) 4 Cal.5th 1, 33.)

The claim is also meritless. Armstrong's undeveloped assertion is unclear. To the extent he argues a conspiracy charge is a prerequisite to these instructions, the law is to the contrary. The prosecution may prove an uncharged conspiracy as a means of establishing liability for the underlying substantive crime. (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at pp. 1200–1201; *People v. Valdez* (2012) 55 Cal.4th 82, 150.) Evidence of a conspiracy, whether charged or not, is sufficient to support the giving of conspiracy instructions. (*People v.*

Rodrigues (1994) 8 Cal.4th 1060, 1134.) To the extent Armstrong argues "there was no evidence that such a conspiracy ever existed," he concedes otherwise in his briefing, complaining that the court "permitted the jury to hear extensive evidence of the uncharged conspiracy."

Armstrong also urges that the instructions reduced the prosecution's burden of proof. We have rejected this argument before and do so again. (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at pp. 1201–1202; *People v. Valdez*, *supra*, 55 Cal.4th at p. 150.) He contends the lack of a charged conspiracy deprived him of notice and an opportunity to defend himself. He did not make this argument below, and it is likewise without merit. Armstrong had ample pretrial notice that the prosecution would proceed in part on the theory that Armstrong, Pearson, and Hardy conspired to rob and murder Sigler. The prosecutor's voir dire questioning and the preceding trials of Pearson and Hardy demonstrated this theory was likely to be pursued. Given Armstrong's awareness of the prosecution's theory, there was no unfair surprise and no due process violation. (See *Hajek and Vo*, at pp. 1201–1202.)

Finally, Armstrong argues that the conspiracy instructions allowed the jury to find him death-eligible based on a crime that cannot be subject to the death penalty. It is true conspiracy to commit murder will not support a death sentence in California. (*People v. Hernandez* (2003) 30 Cal.4th 835, 864–870.) However, Armstrong was not found eligible for the death penalty based on conspiracy, but on a jury determination that he was guilty of first degree murder with special circumstances.

D. *Misconduct and Bias*

1. *Prosecutorial Misconduct*

Armstrong contends that the prosecutor committed misconduct in empaneling the jury, seeking to exclude admissible evidence, and engaging in other improper conduct throughout trial. Most challenges fail. One is well-founded but did not prejudice Armstrong.

Prosecutorial misconduct requires reversal when it "so infect[s] a trial with unfairness [as to] create a denial of due process. [Citations.] Conduct by a prosecutor that does not reach that level nevertheless constitutes misconduct under state law, but only if it involves the use of deceptive or reprehensible methods to persuade the court or jury." (*People v. Watkins*, *supra*, 55 Cal.4th at p. 1031.)

Armstrong's first few claims derive from and duplicate his other assignments of error. He objects that the prosecutor improperly had qualified jurors excused. Several jurors were erroneously excused for cause, an error requiring reversal of the penalty verdict. He is obtaining relief on that basis. He contends that the prosecutor based peremptory challenges on race and gender. This argument has been rejected. (See *ante*, pt. II.A.)

Most of the allegations of misconduct not tied to claims we have already addressed are also without merit. Armstrong contends that the prosecutor was aggressive and hostile toward defense counsel and twice accused counsel of lying to the court. Defense counsel responded in equal measure with his own accusations of lying. Because it occurred outside the jury's presence, this acrimony could not have affected the verdict.

Armstrong complains the prosecutor used "hypertechnical and unnecessary objections" during his direct testimony. To the extent these objections were meritorious, making them could not have been misconduct. Evidentiary objections often are technical and their "necessity" a question of tactics and perspective. While a handful of objections were overruled, there is no reason to conclude they would have injected unfairness into the trial. Armstrong also takes issue with the cross-examination, which he characterizes as hostile, repetitive, and argumentative, with frequent accusations of lying. Even accepting this characterization at face value, it supplies no basis for a claim of misconduct. This was the cross-examination of the defendant in a capital murder case. Effective and legitimate cross-examination may involve assertive and even harsh questioning. It is permissible to accuse a witness of being untruthful. Simply because an examination is confrontational does not make it argumentative.[23] Armstrong identifies no line of questioning, and the transcript reveals none, that crossed over any boundaries of fair play or that would have led the jury to decide this case on anything other than the facts and the law.

Armstrong objects that the prosecutor asked leading questions of direct witnesses. He cites no question or questions, simply pointing to the entire transcript for a half-dozen witnesses. To the extent Armstrong failed to object, the claim is forfeited. (*People v. Pearson* (2013) 56 Cal.4th 393, 426.) To the

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[23] "An argumentative question is a speech to the jury masquerading as a question. . . . An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony . . . ." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.)

extent Armstrong objected and the court sustained the objection, we discern no effect on the jury or its verdict. As for the third possible category, leading questions and answers erroneously allowed to stand, Armstrong identifies not a single such question and does not explain how any such questions or their answers could have engendered unfairness.

However, Armstrong is correct that the prosecutor misled the jury during closing argument. She told the jury, as a matter of fact, that in response to Armstrong's loud comments about the coming new year, Sigler called back, "Happy New Year." There was no such evidence. The prosecutor directly asked Armstrong during cross-examination whether Sigler had made such a statement. He unequivocally denied it and no other testimony supported the prosecutor's assertion.

Some inaccuracies in closing argument may flow from innocent misrecollection, but it is difficult to credit that explanation here when what Sigler said was a principal point of contention. The prosecutor moved to redact from Armstrong's initial police statement the assertion that Sigler yelled racial slurs before the attackers encountered her on the street. (*Ante*, pt. II.B.1.) She also persuaded the court to exclude evidence of Sigler's intoxication. (*Ante*, pt. II.B.2.)

To be clear, assertively arguing fine points of evidence will seldom constitute misconduct, and an advocate is generally entitled to rely on a court's ruling, even one held erroneous on appeal. What an advocate cannot do is knowingly mislead the jury. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 758.) "[S]tatements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." (*People v. Kirkes* (1952) 39 Cal.2d 719, 724; accord, *People v. Hill*

(1998) 17 Cal.4th 800, 828 [" 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct' "]; *People v. Bolton* (1979) 23 Cal.3d 208, 212.)

These principles are not new ones. In *People v. Kelley* (1977) 75 Cal.App.3d 672, 680, Justice Fleming observed, "As the representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the orderly administration of justice as a servant and representative of the law. . . . As the court said in *Berger v. United States* (1935) 295 U.S. 78, 88: . . . . '[The Prosecutor] may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.' "

A prosecutor may honestly urge that a defendant lied. Convincing the jury that he did so is a potent weapon. An advocate may argue that the record contains no evidence of a given fact when that is the case. She may invite the jury to accept reasonable inferences from the record, even if the evidence is in dispute. (*People v. Daggett*, *supra*, 225 Cal.App.3d at p. 757.) But she may not mislead the jury as to what the record actually contains.

However, as inappropriate as the prosecutor's argument was here, that argument and the actual or assumed evidentiary errors that preceded it (see *ante*, parts II.B.1 and II.B.2) are insufficient to warrant reversal of the guilt determinations. Defense counsel conceded in closing argument that there was ample evidence of Armstrong's guilt on charges of robbery, rape, rape in concert and kidnapping. Even under Armstrong's own version of events, he facilitated each of the crimes he attributed to his compatriots. After Pearson said he was "fixing to BKC

this bitch," Armstrong held Sigler down while Pearson robbed, beat, and raped her. After Pearson said, "This ain't over yet, bitch. Let's kill this bitch," Armstrong kicked Sigler repeatedly, knowing she was in great pain. Aware of Pearson's intent to kill Sigler, Armstrong jumped over a fence and held it down so Sigler could be thrown over it and moved to a more remote area. Rather than leaving, he stood at the ready while Pearson beat Sigler with the stake and while Pearson and Hardy sexually penetrated her with it. Armstrong then helped Pearson move Sigler a second time, further up the freeway embankment. After they abandoned the body, Armstrong disposed of both the stake and Sigler's clothes.

Of course, it would have been no defense to argue that Sigler engaged in offensive conduct. Nevertheless, it is noteworthy that no heat of passion argument was made here. Indeed, excised statements and toxicology results would have also been consistent with a theory that the torturous brutality of the 30-minute assault was sparked by Sigler's drunken insults.

Based on Armstrong's statements to investigators and his girlfriend, his adoptive admission of Pearson's statements, and his own trial testimony, it is not "reasonably probable that a result more favorable to [Armstrong] would have been reached" at the guilt phase. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

While the excluded evidence would not have provided a defense against guilt for these offenses, the calculus of prejudice might well be different at the penalty phase. In determining whether to impose the ultimate punishment, the jury could consider evidence of Sigler's conduct as "[a]ny other circumstance which extenuates the gravity of the crime even

though it is not a legal excuse for the crime." (§ 190.3, factor (k).) Because the death verdict is being set aside for error in jury selection, we need not discuss this question further.

"Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system. In the vast majority of cases, these men and women perform their difficult jobs with professionalism, adhering to the highest ethical standards of their calling. This case marks an unfortunate exception . . . . We are confident the prosecutors of this state need no reminder of the high standard to which they are held, and that the rule prohibiting reversals for prosecutorial misconduct absent a miscarriage of justice in no way authorizes or justifies the type of misconduct that occurred in this case." (*People v. Hill* (1998) 17 Cal.4th 800, 847–848.)

2. *Judicial Bias*

Armstrong argues he was deprived of a fair trial, in violation of various constitutional guarantees, because the court was biased against him. The rulings and remarks Armstrong relies upon do not demonstrate bias.

As with Armstrong's prosecutorial misconduct claim, his allegation of judicial bias is largely derivative. Armstrong contends the court demonstrated bias by erroneously excusing jurors for cause. On the merits, some jurors were improperly excused, requiring reversal of the penalty verdict. However, a judge's "rulings against a party — even when erroneous — do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) The same is true of Armstrong's argument that the court showed bias by failing to see through the prosecutor's assertedly

pretextual reasons for excusing African-American men and by excluding various items of evidence. We have evaluated and rejected the underlying claims on the merits. The court's rulings, supported by substantial evidence and rules of evidence, do not demonstrate bias against Armstrong.

To the extent Armstrong's claim is not derivative, it is largely forfeited. Armstrong "never claimed during trial . . . that his constitutional rights were violated because of judicial bias. 'It is too late to raise the issue for the first time on appeal.' " (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1111.) Only claims of "pervasive judicial bias" are preserved in the absence of an objection, on the ground that objection in that instance may be futile. (*People v. Banks* (2014) 59 Cal.4th 1113, 1177.)

No pervasive bias is evident here. Armstrong identifies three times when the court derided defense counsel's questions as "unintelligent," "unintelligible," or "incomplete." Armstrong also points to a handful of occasions when, in response to a prosecution objection, the court supplied a basis for the objection, then sustained it, or otherwise handled objections in ways with which Armstrong disagrees. Finally, Armstrong identifies as indicative of bias one sidebar conversation. Armstrong had been personally admonished before testifying to not discuss remorse. Both sides agreed the issue was irrelevant at the guilt phase. After he violated that admonition, the court remarked at sidebar that Armstrong "knows better" than to testify as he did.

Without reciting every remark Armstrong identifies as signifying bias, we observe that the court's statements were justified. For example, the court described as "unintelligible" this defense question: "Between you and Jeanette — when you

talked to Jeanette, did the subject matter of how it was that you were in contact with this lady?" The court made its remark only in the context of asking counsel to rephrase after the prosecutor and witness both indicated they could not understand the question. The court's sidebar remark that Armstrong knew better than to testify as he did was warranted in light of an express direction not to do so.[24] Collectively, the statements Armstrong points to do not suggest "any judicial misconduct or bias, let alone misconduct or bias that was 'so prejudicial that it deprived defendant of a " 'fair, as opposed to a perfect, trial.' " ' " (*People v. Maciel* (2013) 57 Cal.4th 482, 540.)

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[24] Before Armstrong took the stand, the following exchange occurred:

"The Court: On the remorse and sympathy issue, do you agree remorse and sympathy are not issues in the guilt phase?

"[Defense Counsel]: That's correct.

"The Court: And your client is not going to testify how sorry he is . . . and he is asking for their forgiveness, is that correct?

"[Defense Counsel]: That's correct.

"The Court: Mr. Armstrong is present in court. I make that [a] court order. He is not to do so. If he is to do so, I will interrupt immediately during the proceedings and advise the jury that we have had this instruction and your client has failed to obey the court's instructions. All right, I want to make that crystal clear."

Despite this instruction, when asked why he confessed, Armstrong testified, "I wanted to tell [the police I knew nothing], but since it was on my heart, heavy, I just told them." An objection ensued. At sidebar, the court accepted that counsel was not trying to elicit testimony in violation of its order, but observed that Armstrong knew better than to answer as he did.

E. *Cumulative Error*

Armstrong contends errors during the guilt phase of his trial were prejudicial when considered in combination. We have evaluated the two actual or assumed evidentiary errors and related prosecutorial misconduct together for purposes of assessing prejudice and have concluded Armstrong was not prejudiced at the guilt phase. (*Ante*, pt. II.D.1.)

F. *Penalty Phase Evidentiary Errors and Challenges to the Constitutionality of California's Death Penalty*

Armstrong asserts various evidentiary errors occurred during his penalty phase trial. He also contends California's death penalty is unconstitutional. Because the penalty judgment is reversed based on erroneous exclusion of jurors for cause, we need not address these claims. The People retain the discretion to determine whether to retry the penalty phase on remand.

III. DISPOSITION

We reverse the judgment of death. We remand to the superior court with directions that it correct the abstract of judgment to reflect that (1) each of Armstrong's convictions was pursuant to a jury verdict, not a guilty plea; (2) Armstrong was sentenced to 8 years for rape on count six; (3) the determinate portion of his sentence is 30 years; and (4) in addition to the determinate term for rape in concert, sexual penetration with a foreign object, and sexual penetration with a foreign object while acting in concert, on counts four, six and seven, Armstrong received a 25-year-to-life term under section 667.61, subdivisions (a) and (d), which was then stayed under section

667.61, subdivision (g). We affirm the judgment in all other respects.

CORRIGAN, J.

We Concur:

CANTIL-SAKAUYE, C. J.

CHIN, J.

KRUGER, J.

PEOPLE v. ARMSTRONG

S126560

Dissenting Opinion by Justice Liu

Defendant Jamelle Armstrong, a black man, was sentenced to death for raping, torturing, and murdering Penny Sigler, a white woman. Armstrong objected to the prosecutor's peremptory strikes of four black men in the jury venire. (See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) The prosecutor gave reasons for each strike, and the trial court rejected Armstrong's *Batson* claims. Today's opinion upholds the trial court's rulings.

This is a case with "definite racial overtones" that " 'raise[ ] heightened concerns about whether the prosecutor's challenge was racially motivated.' " (*People v. Hardy* (2018) 5 Cal.5th 56, 78 (*Hardy*).) In the capital trial of Armstrong's confederate, Warren Hardy, the same prosecutor struck every black juror she could have removed and gave six reasons for striking a black man, Frank G., from the main panel. Although this court rejected Hardy's *Batson* claim, our opinion acknowledged that three of the reasons for striking Frank G. on their own appeared "weak" or "not . . . very convincing." (*Hardy*, at pp. 82, 83.)

In this case, the prosecutor struck four black male jurors, leaving no black man on the jury. As to the strike of Prospective Juror R.C., I agree the record supports the trial court's finding that the prosecutor was credibly concerned that she and R.C. had a "personality conflict." (Maj. opn., *ante*, at pp. 48–50.) But

as to the other three strikes, Armstrong raises more substantial objections. Especially troublesome, in my view, is the strike of Prospective Juror E.W. The prosecutor gave eight reasons for this strike, but in several respects, the reasons were not supported by the record. The discrepancies were numerous and significant; they were not " 'isolated' " misstatements or "slight" misrepresentations. (*Hardy*, *supra*, 5 Cal.5th at p. 80.) The trial court did not probe these discrepancies, nor did it probe the prosecutor's disparate treatment of nonblack jurors who were more similar to E.W. than she suggested in explaining her strike. Had the trial court examined these anomalies, perhaps the prosecutor could have elaborated further on her concerns. But "the duty of [the trial court] and counsel to ensure the record is both accurate and adequately developed" was not fulfilled here (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1172 (*Gutierrez*)), and we are left with a record that is not sufficient to sustain the trial court's ruling. Because "[e]xcluding by peremptory challenge even 'a single juror on the basis of race or ethnicity is an error of constitutional magnitude' " (*ibid.*) that requires reversal, I must dissent from today's affirmance of Armstrong's convictions.

I.

"We review a trial court's determination regarding the sufficiency of tendered justifications with ' "great restraint," ' " upholding the ruling if it is supported by substantial evidence. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1159.) But "[a] trial court's conclusions are entitled to deference only when the court made a 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.' " (*Ibid.*; accord, maj. opn., *ante*, at p. 37.) A "*reasoned*" effort involves, at a minimum, evaluating whether a proffered justification is supported by the record and, where a

proffered reason is "not borne out by the record," either "reject[ing] [the] reason or ask[ing] the prosecutor to explain further." (*Gutierrez*, at p. 1172.) A trial court "should be suspicious" and should probe further when " 'the facts in the record are objectively contrary to the prosecutor's statements . . . .' " (*People v. Silva* (2001) 25 Cal.4th 345, 385.) To prevail on a *Batson* claim, the defendant must show "it was more likely than not that the challenge was improperly motivated." (*Johnson v. California* (2005) 545 U.S. 162, 170.)

Prospective Juror E.W., the third black man struck by the prosecutor, was a 28-year-old homeowner in Signal Hill who worked as a satellite engineer for Boeing and had been the student body vice-president at the University of California at Irvine. He planned on returning to school for postgraduate studies and considered focusing on astronautics, law, or business. At voir dire, E.W. said he could vote for either life imprisonment without the possibility of parole (LWOP) or death in the appropriate case, and that his decision would depend on the evidence.

Today's opinion concludes that the trial court properly focused its evaluation on those reasons the prosecutor said "really bother[ed]" her about E.W. — i.e., E.W.'s belief that LWOP is a more severe sentence than death, and his belief that the death penalty, when imposed, causes too much additional litigation. (Maj. opn., *ante*, at p. 51.) The court acknowledges that the prosecutor mentioned E.W.'s profession, engineering, as an additional area of concern. But the court says that because "[t]he prosecutor did not identify this as one of the 'two things that really bother [her]' about E.W., . . . [w]e may infer that in the prosecutor's eyes the juror's profession alone fell short of a sufficient reason to exercise a strike." (*Id.* at p. 57.)

At the outset, it must be noted that this characterization of the record is significantly incomplete. What the record actually shows is that the prosecutor gave eight different reasons for striking E.W. (numbered (1) to (8) below), and it is dubious to say the prosecutor did not regard E.W.'s engineering background as a main reason for the strike.

When the prosecutor began her explanation for striking E.W., she said, (1) "[F]irst of all, the one thing that really bothers me" is that E.W. "believes that life without the possibility of parole is the most severe sentence." But the prosecutor did not stop there. (2) "The next thing that concerns me," she said, "is his training, as an engineer. He is trained to look at all possible doubt. There is no way I can prove this case to him beyond a reasonable doubt." As discussed further below, the prosecutor devoted significant effort to exploring this issue with E.W. during voir dire.

The prosecutor went on to give six additional reasons: (3) "He also in his questionnaire has indicated that he believes that the prosecutor tends to be over-zealous to convict. I find that to be a problem. I personally am a very assertive and aggressive prosecutor." (4) "He also, in his questionnaire has indicated that he feels that the death penalty needs to be reformed just like affirmative action . . . ." (5) "[H]e indicates that he has had bad experience with police officers in his questionnaire. . . . [¶] . . . [H]e indicated during *Hovey* voir dire, . . . 'Police officers have pulled me over more than once for questionable reasons.' He also indicated today that more often than not it's happened here in Long Beach. This case involves Long Beach police officers, in fact, the majority of my witnesses will be related to the Long Beach Police Department." (6) "He also indicates that what he thinks are the three most important problems with the criminal

justice system is bad police officers, and lawyers and that the system is biased against economically disadvantaged defendants." (7) "He indicated on his questionnaire, as well as, during *Hovey* voir dire that he finds that the death penalty causes so much additional litigation that we should just let it go. [¶] I asked him during *Hovey* voir dire, 'Would it be accurate to say that you are for the death penalty?' He said, 'I don't have feelings one way or the other for it.' And he kept indicating that he is neither for nor against. [¶] To me, if someone cannot say that they believe in the death penalty, I don't believe they can impose it." (8) "Then another thing that bothers me about this particular juror, he seems to have a lot of information about the law. . . . He already has additional information that other jurors don't have. He is not in the same position that other jurors are currently."

The prosecutor concluded by saying: "The two things that really bother me [are] that he believes that life without the possibility of parole is the most severe sentence and he also believes that since if the death penalty is imposed it caused so much litigation, he doesn't believe it should be, just let it go, is what he says. To me that is indicative of what his verdict is going to be. [¶] . . . Also the fact that he is an engineer, there are no other engineers in this panel and he is the only engineer and he is trained to look for all possible doubt. [¶] And I find that I can never reach that standard. I cannot possibly prove this case beyond all possible doubt nor is that the standard and that's what he does in life look for all possible doubt." After a reply from defense counsel, the prosecutor then said her "primary motivation" for striking E.W. was that he "indicated life without the possibility of parole is the most severe sentence." At that point, the trial court credited the prosecutor's first

reason and, without examining any of the other reasons, upheld the strike.

Four months later, in denying Armstrong's motion for a new trial, the trial court returned to the *Batson* issue and said: "[E.W.] is an engineer and very articulate. This juror, however, indicated that he believes that life without parole is the most severe sentence. If this is the crime that deserves the most severe punishment, the People believe that he automatically would vote for life without parole. Therefore, it is unlikely under any circumstances that he would vote for death. *More importantly*, the People articulated that, as an engineer, this juror will likely require to make the People prove the case more than beyond a reasonable doubt. Both these reasons are race-neutral; this court found and now finds that [E.W.] was excused with the use of People's peremptory for race-neutral reasons . . . ." (Italics added.)

There is no question that E.W.'s belief that LWOP is a more severe sentence than death was, according to the prosecutor, an important reason for the strike. But so was the prosecutor's concern about E.W.'s training as an engineer. The fact that the trial court originally upheld the strike of E.W. after examining and crediting only the LWOP concern does not mean "the trial court did not originally consider the prosecutor to have proffered [the engineering concern] as a justification." (Maj. opn., *ante*, at p. 57.) As the record shows, the prosecutor thoroughly explored the engineering concern during voir dire, and she repeatedly identified it as a reason for the strike. The trial court, in later ruling on the new trial motion, described this concern not merely as an "additional genuine" reason for the strike (maj. opn., *ante*, at p. 60), but as *more important* to the prosecutor's credibility than the LWOP concern. In today's

opinion, the court substitutes its own judgment and refuses to acknowledge what the record clearly indicates: that both the prosecutor and the trial court considered the engineering concern to be a significant reason for the strike.

As I explain in a moment, a careful examination of the engineering concern reveals significant cause for suspicion, and the LWOP concern does not fare any better. But before undertaking that analysis, it bears mention that the trial court's and this court's narrow focus on those reasons implicates concerns we recently expressed in *People v. Smith* (2018) 4 Cal.5th 1134 (*Smith*). Our unanimous opinion in *Smith* cautioned that a prosecutor's " 'laundry list' " approach to justifying a peremptory strike "carries a significant danger: that the trial court will take a short-cut in its determination of the prosecutor's credibility, picking one plausible item from the list and summarily accepting it without considering whether the prosecutor's explanation as a whole, including offered reasons that are implausible or unsupported by the prospective juror's questionnaire and voir dire, indicates a pretextual justification. A prosecutor's positing of multiple reasons, some of which, upon examination, prove implausible or unsupported by the facts, can in some circumstances fatally impair the prosecutor's credibility. [Citation.] In assessing credibility at the third stage of a *Batson*/*Wheeler* decision, trial courts should attempt to evaluate the attorney's statement of reasons as a whole rather than focus exclusively on one or two of the reasons offered." (*Id.* at pp. 1157–1158.)

As *Smith* instructs, the trial court should have examined the prosecutor's stated reasons for striking E.W. "as a whole." (*Smith*, *supra*, 4 Cal.5th at p. 1157.) To be sure, the trial court could have assigned greater weight to the reasons that appeared

more important to the prosecutor. And it follows that problems with such reasons should carry greater weight in the trial court and on appellate review. (See *Foster v. Chatman* (2016) 578 U.S. __, __ [136 S.Ct. 1737, 1752] (*Foster*) ["[W]e would expect at least *one* of the two purportedly principal justifications for the strike to withstand closer scrutiny. Neither does."].) At the same time, if other reasons are implausible or unsupported by the record, that is a relevant consideration bearing on the prosecutor's credibility. In *Hardy*, the same prosecutor gave six reasons for striking a black male juror, Frank G.; we upheld the strike, but not before examining all six reasons and finding them race-neutral when "[c]onsidered in combination." (*Hardy*, *supra*, 5 Cal.5th at p. 79; see *Foster*, at p. __ [136 S.Ct. at pp. 1751–1754] [finding *Batson* violation upon considering all relevant circumstances, including analysis of "principal" and "secondary" justifications among the 10 reasons stated by the prosecutor for striking a black juror].) By minimizing the engineer issue and by conducting no meaningful examination of other proffered reasons that the trial court also left unexamined, today's opinion fails to properly account for weaknesses in those reasons that provide cause for suspicion.

II.

Let us begin with the prosecutor's stated concern that "as an engineer," E.W. "is trained to look at all possible doubt. There is no way I can prove this case to him beyond a reasonable doubt." In articulating this concern, the prosecutor said, "[T]here are no other engineers in this panel and he is the only engineer." This was not true. Juror No. 11, whom the prosecutor had accepted, was a white woman who had worked as an engineer for Conoco Phillips for over 20 years. The trial court did not notice this discrepancy, and the record contains no

explanation for the prosecutor's misstatement. Today's opinion says that Juror No. 11 had more favorable views on the death penalty than E.W. (maj. opn., *ante*, at pp. 57–58) and that the prosecutor "might be willing to trade some small risk of an unfavorable guilt phase verdict for better odds of a desired penalty phase verdict" (*id.* at p. 58). But if the prosecutor's concern was, as she put it, that engineers are "trained to look at all possible doubt" and that she "cannot possibly prove this case beyond all possible doubt," it is not clear how an engineer's views on the death penalty could outweigh that concern.

Had the trial court noticed that Juror No. 11 was an engineer, the court might also have recalled that when Juror No. 11 came up for voir dire, the prosecutor asked no questions about Juror No. 11's engineering training or how that training would affect her application of the beyond a reasonable doubt standard. In fact, there were 20 prospective jurors in the overall pool who had engineering training or who had worked in jobs involving engineering. Thirteen were dismissed by stipulation without the prosecutor questioning them about their engineering training. Among the remaining engineers, four came up for voir dire before E.W.: Juror No. 11, who was seated; then Prospective Juror No. 7420 and Prospective Juror No. 9961, both of whom the prosecutor excused for cause; and then Prospective Juror No. 8423, whom the defense excused with a peremptory strike. The prosecutor extensively questioned all four of these jurors about a variety of topics, but she did not ask them any questions about their training or work as engineers.

E.W. was the first engineer whom the prosecutor questioned about his engineering background, and it was only after questioning E.W. that the prosecutor questioned other

engineers (the remaining two) about their engineering background. Moreover, it is evident that the prosecutor pursued a different line of questioning with E.W. than with the remaining two engineer jurors after E.W. Here is what the prosecutor asked E.W.:

> "Ms. Locke-Noble: Okay. Now, in your training does that cause you to look for all possible doubt?
>
> "[E.W.]: To look for all possible doubt?
>
> "Ms. Locke-Noble: Yes.
>
> "[E.W.]: I would say that it helps me to see many different angles.
>
> "Ms. Locke-Noble: Okay. Do you look for all the possible doubts there might be in your job?
>
> "[E.W.]: Yeah. I certainly consider them, sure.
>
> "Ms. Locke-Noble: And do you have this okay, what if this, what if this, then this? 'What if this' type bantering about in your job?
>
> "[E.W.]: We tend to try to, like I said, see things from many different angles. And yeah, what if this happened, then what will happen because of it? Cause and effect, sure."

The prosecutor also questioned E.W. about the role that speculation played in how he approached a specific area of his work, i.e., writing operations manuals for telemetry satellites:

> "Ms. Locke-Noble: Okay. So do you write into these chapters if this happens, do this?
>
> "[E.W.]: Correct.

"Ms. Locke-Noble: Okay. So you kind of speculate as to a problem that might occur, and then you write a solution for it?

"[E.W.]: Sure."

After E.W., the next engineer up for voir dire was Prospective Juror No. 4629, a white male. The prosecutor also questioned this juror about his engineering background, first (as with E.W.) eliciting statements that he was "trained to speculate" in his work. But then, the prosecutor pursued a line of questioning that she had not pursued with E.W., focusing on whether Juror No. 4629's engineering training would impair his ability to apply the beyond a reasonable doubt standard of proof:

"Ms. Locke-Noble: Okay. As an engineer, do you always say, well, what if this and what if that? Is that how you approach things?

"[Juror No. 4629]: What? Please rephrase.

"Ms. Locke-Noble: Do you look at all of the possibilities?

"[Juror No. 4629]: As many as possible.

"Ms. Locke-Noble: Okay. In this case there is a standard of proof, and the standard of proof is beyond a reasonable doubt; you can't look at all of the possibilities. Can you follow that law?

"[Juror No. 4629]: Oh, certainly, of course.

"Ms. Locke-Noble: Because if you start looking at all of the possibilities, you then become an advocate or a partisan for one side of the other, you become the lawyer for one person or the other. Does that make sense?

"[Juror No. 4629]: This would be a violation of my civic duty to be impartial. If you are an advocate and defense

> counsel are advocates, I am not an advocate and I will never act as one.
>
> "Ms. Locke-Noble: Right. And that's what I'm getting at. Because you're an engineer, and engineers are trained to look at all of the various possibilities, and in human affairs we cannot — I cannot prove all of the possibilities.
>
> "[Juror No. 4629]: Oh, heavens. That's wrong about engineering too, for that matter. There are significant factors and there are things that are insignificant. The insignificant digits, you do not concern yourself with. That's putting it in language that you're — a proper answer."

This juror was ultimately dismissed by stipulation because he had discussed his questionnaire answers with another juror.

The prosecutor also questioned the final engineer in the panel, Prospective Juror No. 5128, a white male. As she did with Juror No. 4629, the prosecutor first asked Juror No. 5128 about the role that speculation played in his work and then pivoted to whether he could refrain from speculating in his role as a juror:

> "Ms. Locke-Noble: Are you trained to say, what if this? What about that possibility?
>
> "[Juror No. 5128]: Yes, very much so.
>
> "Ms. Locke-Noble: You can't do that in this case.
>
> "[Juror No. 5128]: That's right, I don't know — I'll accept that I can't do that.
>
> "Ms. Locke-Noble: You cannot come up with a hypothesis and then prove it.

"[Juror No. 5128]: I understand. [¶] . . . [¶] . . .

"Ms. Locke-Noble: And so for twenty years you have been on a daily basis going through this process, what if this? This could happen. What if that? This could happen, correct?

"[Juror No. 5128]: That's right, my profession involves the design of systems that go on [airplanes], so it's a natural type of occurrence.

"Ms. Locke-Noble: You are taught to look at all possibilities?

"[Juror No. 5128]: Yes, definitely. Well, I've learned to do that. [¶] . . . [¶] . . .

"Ms. Locke-Noble: As you know you can't go back and speculate. You can only base your verdict on the testimony that is presented in this courtroom?

"[Juror No. 5128]: Yes ma'am. I understand that.

"Ms. Locke-Noble: You can't do what if this, or what if that, because if you do that, you have now become the lawyer for either one of the sides.

"[Juror No. 5128]: I understand.

"Ms. Locke-Noble: Would you agree with that?

"[Juror No. 5128]: I agree, yes."

After voir dire, the prosecutor attempted to strike this juror for cause for two reasons unrelated to his engineering background. Juror No. 5128 was ultimately dismissed by stipulation.

In sum, the record shows that before questioning E.W., the prosecutor did not question any of several engineers about their engineering training, even though she did question those jurors

about other topics. Only after she questioned E.W. did she question the remaining two engineers about their engineering training. In doing so, the prosecutor elicited from E.W., Juror No. 4629, and Juror No. 5128 answers that acknowledged the role of speculation in their work and training. But the prosecutor elicited only from Juror No. 4629 and Juror No. 5128, and not from E.W., answers that confirmed their ability as jurors to avoid looking at "all possibilities" and instead to stick to the evidence presented and apply the proper standard of proof. These disparities "at least raise[ ] a question as to how interested [the prosecutor] was in meaningfully examining whether" E.W.'s training as an engineer would impair his ability to apply the beyond a reasonable doubt standard. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1170.) Today's opinion does not dispute the accuracy of the voir dire record quoted above; the court's only response is a bald assertion, with no analysis of the prosecutor's questioning, that the record does not "reveal[ ] any significant disparity." (Maj. opn., *ante*, at p. 61, fn. 18.)

I would add one more observation: In explaining this area of concern, the prosecutor said she was troubled not only by E.W.'s engineering training, but also by the fact that E.W. was "working on his master's in pneumatics," which she characterized as "also a study of looking for all possible doubts." This assertion at best "left some lucidity to be desired." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1169.) Pneumatics, according to various dictionaries, is the study of the mechanical properties of air and other gases. It is hardly "an obvious or natural inference" (*ibid.*) to say that pneumatics is "a study of looking for all possible doubts." The trial court did not probe this statement, and the prosecutor's questioning of E.W. "failed to shed light on the nature of [her] apprehension or otherwise

indicate [her] interest in meaningfully examining the topic, and the matter was far from self-evident." (*Id.* at p. 1171.)

III.

Let us now consider the prosecutor's concerns about E.W.'s views on LWOP and the death penalty. In its original ruling on the strike of E.W., the trial court determined that these concerns were genuine, race-neutral justifications, and today's opinion concludes that "[t]he record substantiates that E.W. held the views the prosecutor ascribed to him." (Maj. opn., *ante*, at p. 51.) But there are several problems here.

In explaining her concern that E.W. believed LWOP is a more severe sentence than death, the prosecutor said, "All the other jurors currently sitting in the box have indicated that death is the most severe punishment that can be given, with the exception of [the juror then seated in the fourth position], who has indicated both are equal." Later, the prosecutor said that "all peremptory challenges have been on that basis, if they said they believe in life without the possibility of parole is the most severe punishment then I have pre-empted them or challenged them for cause." Later still, the prosecutor said that "none of the other jurors up on that panel right now have indicated life without the possibility of parole is the most severe sentence, with the exception of one who has indicated it is both."

The trial court, in its ruling, did not make a reasoned attempt to evaluate the prosecutor's claim that she had sought to remove every juror who said LWOP is more severe than death. It merely said that "*if* Ms. Locke-Noble is consistently challenging by way of peremptory, folks who cannot impose the death penalty or feel that life without parole is the most severe sentence and that is not a race basis for excusing a juror."

(Italics added.) As it turns out, the prosecutor's claim was materially incomplete and potentially misleading.

The prosecutor was correct in her characterization of the seated jurors' answers to an item on the juror questionnaire asking whether death or LWOP is a "more severe punishment." But, as today's opinion acknowledges (maj. opn., *ante*, at p. 56), the prosecutor accepted no fewer than three seated jurors (Juror No. 4, Juror No. 5, and Juror No. 9) and one alternate (Alternate Juror No. 5) who, like E.W., had selected LWOP as opposed to death in response to a separate item on the questionnaire asking which punishment is "worse for a defendant." To be sure, the prosecutor did remove many jurors with views similar to E.W.'s. (*Id.* at pp. 54–55.) But not only did she accept four jurors who, like E.W., indicated that LWOP is a worse punishment than death; one of those jurors, Juror No. 5, had already been seated by the time the prosecutor made her assertion about the composition of the panel. The prosecutor's repeated and emphatic assertion that none of the seated jurors had identified LWOP as the most severe sentence was potentially misleading and presented a significant concern that the trial court, in its initial ruling and especially when it revisited the *Batson* issue in its new trial ruling, should have noticed and addressed.

The Attorney General contends that the seated jurors differed from E.W. insofar as they indicated that LWOP was worse than death on only one of two items on the questionnaire, whereas E.W. indicated that view on both items. The Attorney General also suggests it is significant that the seated jurors chose death as opposed to LWOP on the item asking "Which do you believe is a more severe punishment" because this question, he says, is designed to elicit a juror's objective rather than subjective views.

Today's opinion does not endorse the Attorney General's argument, and rightly so. The two items on the questionnaire are virtually indistinguishable (see maj. opn., *ante*, at p. 43, fn. 7), and the court does not suggest otherwise. The record shows that the prosecutor herself did not see a distinction between the two questions. In questioning Prospective Juror No. 9807, she engaged in the following exchange:

> "Ms. Locke-Noble: Question 198 says, 'If a defendant convicted of first degree murder, and one or more of the special circumstances is found true, the law provides for one of only two possible punishments, death or life in prison without the possibility of parole. Overall in considering the general issue of punishment, which do you think worse[,] death or life in prison without the possibility of parole.' Which do you believe?
>
> "[Juror No. 9807]: I think we have already answered that. For me, personally, I would have rather have death, but I don't know what is best for everybody else.
>
> "Ms. Locke-Noble: Would you personally want death?
>
> "[Juror No. 9807]: I couldn't stand to spend the rest of my life in jail.
>
> "Ms. Locke-Noble: So would you say that it is your belief that life without the possibility of parole is a more severe punishment because, personally, you believe that spending the rest of your life in jail would be worse?
>
> "[Juror No. 9807]: Yes, I think I would agree with that."

Moreover, on both items, E.W. made clear that his answer indicated his *subjective* view on the severity of LWOP compared to death; on one item, he wrote, "I would hate to be incarcerated

that long — useless," and on the other, he wrote, "To me, I'd rather die . . . ." His view is indistinguishable from the view of Juror No. 4, a white woman, who answered that she thought LWOP would be worse for a defendant because "I can only base this on my own personal choice. And I value freedom." Similarly, Juror No. 5, a white man, answered that he thought LWOP would be worse because "I don't know how [the] defendant feels, but myself."

Today's opinion attempts to distinguish these jurors from E.W. on the ground that E.W. used the word "useless" to describe the death penalty, whereas Juror No. 4, Juror No. 5, Juror No. 9, and Alternate Juror No. 5 each hedged their responses with some support for the death penalty in some circumstances. (Maj. opn., *ante*, at p. 56.) But E.W.'s views also had nuance. As E.W. explained: "I guess it's kind of like the question [i.e., whether he was ever for or against the death penalty] is asking like political views almost, because the answer that I gave was kind of like, 'Okay, well, I'm okay with it, but realizing also the social ramifications of what it does to the court system and the criminal system and whatnot, maybe we should find another way.' I'm thinking in the terms of the legislators. I'm not saying when I sit here that I can't apply the law."

During voir dire, the prosecutor questioned E.W. about his views at length. When questioned about his *objective* views, E.W. left no doubt that he — like the seated jurors — understood death, not LWOP, to be the more severe sentence under the law. The prosecutor asked E.W., "So my question to you, if you personally believe that in this case and it's a severe case, and you believe that it deserves the most severe punishment, would you be able to impose death instead of life without the possibility

of parole?" E.W. answered, "Yes." The prosecutor then gave E.W. a hypothetical scenario of a bank robbery involving three people: one who goes into the bank with a gun, one who waits outside the bank as a lookout, and one who waits in the car with the motor running. In the prosecutor's hypothetical, the three people agree to rob the bank; all three know that the first person has a gun and that the gun is loaded; and during the robbery, the person with the gun shoots and kills someone. The prosecutor then asked, "So in your mind would all three be equally guilty of the murder?" E.W. responded, "Yes." Next, the prosecutor asked, "Now . . . in your mind would you be able to impose the death penalty on the person waiting out in the car, if the aggravating circumstances substantially outweigh the mitigating circumstances?" E.W. responded, "I would say, based on the circumstances you gave me, I lean towards life on the person — the people outside." When the prosecutor asked E.W. to explain his answer, E.W. said that the people outside "did not have the opportunity to make the decision at the moment of the crime of murder, whether or not it would take place. [¶] . . . [T]hey are guilty for aiding someone in participating in the crime, but they are not as guilty." E.W. further explained, "Once again, because they created a situation where a murder could happen, they are all guilty of it, but as far as punishment, I don't believe that all three are equal and should be punished in the same way."

This exchange, in which E.W. said he would give LWOP to the hypothetical bank robbers who were "not as guilty," makes clear that E.W. was able to separate his subjective view about the severity of death from an objective understanding that death, not LWOP, is reserved for the most serious offenses. Today's opinion suggests that the only "significance" of this

exchange is that it shows E.W.'s views would not "substantially impair his ability to vote for execution." (Maj. opn., *ante*, at p. 52; see *ibid.* ["E.W. was not excused for cause."].) But the court ignores the key point: E.W.'s voir dire responses show that his views on the relative severity of death and LWOP were no different than how the prosecutor purportedly understood the views of Juror No. 4, Juror No. 5, Juror No. 9, and Alternate Juror No. 5. The LWOP concern, "while not explicitly contradicted by the record, [is] difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [E.W.] an unattractive juror." (*Foster*, *supra*, 578 U.S. at p. __ [136 S.Ct. at p. 1750].)

The trial court did not examine whether the record of voir dire supported the prosecutor's concern that E.W. believed LWOP is the more severe punishment. Although it is possible that the prosecutor was somehow left unconvinced by E.W.'s answers at voir dire, that is not apparent in the record. If the trial court had probed the discrepancy between the prosecutor's statements and the voir dire responses of E.W. and the seated jurors above, the prosecutor could have elaborated further on her concern. But as the record stands, we are left with a stated reason that is unsupported by the record of voir dire. "The court may have made a *sincere* attempt to assess the [prosecutor's] rationale," but in light of its failure to probe further, "we cannot find under these circumstances that the court made a *reasoned* attempt to determine whether the justification was a credible one." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1172.)

IV.

As the discussion above shows, the main reasons credited by the trial court — the engineering concern and the LWOP

concern — present significant questions about the prosecutor's credibility. Let us now consider the rest of the prosecutor's stated reasons, which today's opinion dismisses with only cursory analysis. (Maj. opn., *ante*, at p. 61.) Those reasons have their own weaknesses and do not bolster the prosecutor's credibility when considered in combination with the others.

As to the prosecutor's concern that E.W. believed prosecutors are too zealous to convict, E.W. wrote in his juror questionnaire that he based this opinion on "T.V. shows — obviously I don't give this opinion much weight." E.W. identified a similar concern regarding defense attorneys (they "[t]end to manipulate [the] system to win") and said he based this opinion on "T.V. shows. Obviously I don't give this opinion much weight." The prosecutor did not question E.W. about this issue during voir dire, and the trial court briefly observed that "he is really talking about television shows" and does not "give this opinion much weight."

As to the prosecutor's concern that E.W. believed "the death penalty needs to be reformed just like affirmative action," E.W. made this statement during voir dire in response to the prosecutor asking him whether the death penalty should be abolished. E.W. answered, "No," and then explained that the death penalty needed reform, "just like affirmative action. . . . [¶] I'm not against it."

As to the prosecutor's concern that E.W. said he had been subject to questionable stops by Long Beach police officers, it gives me pause to credit a reason that is so widely applicable to African Americans and that may itself be the product of racial bias, whether conscious or unconscious. (See *Floyd v. City of New York* (S.D.N.Y. 2013) 959 F.Supp.2d 540, 572–589

[discussing expert analyses of 4.4 million police stops in New York City between 2004 and 2012, and finding that blacks and Hispanics are far more likely than whites to be stopped and frisked, and that police stops of blacks or Hispanics are substantially less likely than police stops of whites to uncover a weapon or contraband]; Pierson et al., A Large-scale Analysis of Racial Disparities in Police Stops Across the United States (2017) <https://5harad.com/papers/traffic-stops.pdf> [as of Feb. 4, 2019] [analyzing 60 million traffic stops in 20 states between 2011 and 2015, and finding that black drivers are stopped more often than white drivers after controlling for age, gender, location, and other variables, and that black and Hispanic drivers are searched on the basis of less evidence than white drivers]; all Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.)

As to the prosecutor's assertion that E.W. was "neither for nor against" the death penalty, the record indicates that E.W. was "for" the death penalty according to how the prosecutor defined the term. During voir dire, the prosecutor explained to E.W. that "when I say 'for it' not that you are out there protesting for it, something like that, but you are not against it." In response, E.W. clarified, "Right, I'm not against it." The prosecutor then asked, "You don't believe that California should abolish it?" E.W. answered, "No."

That leaves the prosecutor's concern that E.W. identified "bad police officers, and lawyers and . . . bias[ ] against economically disadvantaged defendants" as "the three most important problems with the criminal justice system," as well as her concern that E.W. seemed to know more about the law than other jurors. Although these concerns are not inherently

implausible, they are somewhat underwhelming, and the prosecutor did not question E.W. about them. The trial court did not find, nor does this court suggest, that these reasons weigh significantly in favor of the prosecutor's credibility.

V.

In light of the problematic record in this case, it is worth underscoring some guidance we recently provided: "Though we exercise great restraint in reviewing a prosecutor's explanations and typically afford deference to a trial court's *Batson*/*Wheeler* rulings, we can only perform a meaningful review when the record contains evidence of solid value. Providing an adequate record may prove onerous, particularly when jury selection extends over several days and involves a significant number of potential jurors. It can be difficult to keep all the panelists and their responses straight. Nevertheless, the obligation to avoid discrimination in jury selection is a pivotal one. It is the duty of courts and counsel to ensure the record is both accurate and adequately developed." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1172.)

The record here contains a number of proffered explanations for the strike of a black juror that are implausible, misleading, contradicted by the record, or difficult to credit in light of the prosecutor's disparate treatment of similarly situated jurors. The trial court should have pressed the prosecutor on these points, but it did not. As in *Gutierrez*, we are left with anomalies and inconsistencies that are simply too numerous and significant to permit a conclusion that the trial court's ruling rests on a reasoned effort to evaluate the prosecutor's reasons in light of all relevant circumstances. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1175.) "Rarely does a record contain direct evidence of purposeful discrimination. More

often, . . . the inquiry calls on courts to assess the credibility of reasons given for a strike by drawing inferences from ' "such circumstantial . . . evidence of intent as may be available," ' including comparative juror analysis." (*Id.* at p. 1182 (conc. opn. of Liu, J.), quoting *Foster*, *supra*, 578 U.S. at p. __ [136 S.Ct. at p. 1748].) On this record, I cannot say with certainty that the prosecutor's strike of E.W. was improper; had the trial court probed further, the prosecutor might have clarified the discrepancies. But we must take the record as it comes to us, and certainty is not the standard. In this case, the record leads me to conclude that the trial court's denial of Armstrong's claim that "it was more likely than not that the challenge was improperly motivated" (*Johnson v. California*, *supra*, 545 U.S. at p. 170) was unreasonable. I respectfully dissent.

LIU, J.

We Concur:

CUÉLLAR, J.
PERLUSS, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate District, Division Seven, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion People v. Armstrong

Unpublished Opinion
Original Appeal XXX
Original Proceeding
Review Granted
Rehearing Granted

Opinion No. S126560
Date Filed: February 4, 2019

Court: Superior
County: Los Angeles
Judge: Tomson T. Ong

Counsel:

Glen Niemy, under appointment by the Supreme Court, for Defendant and Appellant.

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S126560

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JAMELLE EDWARD ARMSTRONG, Defendant and Appellant.

The petition for rehearing is denied.

CANTIL-SAKAUYE

Chief Justice

No. S126560

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent,

v.

JAMELLE EDWARD ARMSTRONG, Appellant.

Upon request of appellant for appointment of counsel, Glen Niemy is hereby appointed to represent appellant Jamelle Edward Armstrong for the direct appeal in the above automatic appeal now pending in this court.

~~Acting~~ *Chief Justice*

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	No S126560
	)	
Plaintiff/Respondent	)	Los Angeles County
vs.	)	
	)	NA051938-01
JAMELLE EDWARD ARMSTRONG	)	
	)	
Defendant/Appellant	)	
	)	
	)	

APPELLANT'S OPENING BRIEF

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Tomson Ong, Judge.

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Detective Thrash also testified that he reviewed the Long Beach Police Department data based which revealed that appellant was a member of the Rolling 20's gang. (29 RT 6226-6228.)

Tom Keleler, was a Long Beach Police Officer working South Division Patrol. He made contact with Jamelle Armstrong who stated that he was a member of the "terrorist street gang the Insane Crips." (29 RT 6231.)[3]

ARGUMENTS

JURY SELECTION ARGUMENTS

I. THE TRIAL COURT COMMITTED FUNDAMENTAL CONSTITUTIONAL ERROR UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY EXCLUDING QUALIFIED POTENTIAL JURORS FROM PARTICIPATION IN THE PENALTY PHASE

A. DISCUSSION OF THE LAW

The nature of the weighing process in the penalty phase has essentially been distilled into CALJIC 8.88 which states to return a verdict of death, each of the jurors, *individually*, must be persuaded that the aggravating factors "are so substantial in comparison with the mitigating

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3. It is unclear from the transcript whether this characterization of the gang was made by appellant at the time of contact or whether it was a gratuitous remark by Officer Keleler.

that it warrants death..."

This basic maxim of California law leads to the question that is at the center of appellant's argument. On what basis may the trial court exclude prospective jurors for cause on the grounds that their personal beliefs are such that they cannot follow the law. The answer has evolved from decisions of the United States Supreme Court and this Court over many years and clearly demonstrates that the trial court committed reversible error in this case in excusing many qualified prospective jurors.

Over forty years ago, in *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court made clear that the Sixth and Fourteenth Amendments to the United States Constitution prohibited the sovereign from excluding jurors who said they were opposed to capital punishment and/or who indicated that they had conscientious scruples against inflicting it but could otherwise follow the law and impose it under the law. (*Id.* at 513.) The High Court expressly rejected the notion that such individuals could be constitutionally excluded because they will frustrate the states interest in the legitimate enforcement of its death penalty statute. (*Id* at 518-519.) *Witherspoon* rejected the exclusion of potential jurors because of personal opposition to or bias against the death penalty.

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to

him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. (*Witherspoon, supra,* at 519.)

Witherspoon then firmly corrected the trial court that uniformly excluded those jurors with personal qualms against the death penalty stating;

...when (the court) swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. (*Witherspoon, supra,* p.520,521.)

The High Court concluded

It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' (Citations omitted) It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict or death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. (*Witherspoon, supra,* at 521-522.)

In *Wainwright v. Witt* (1985) 469 U.S. 412, the High Court reiterated

that the State cannot exclude prospective jurors for cause "because their acknowledgment that the possible imposition of the death penalty would or might affect their deliberations." (*Witt* at 420-421.) The Court stated that the fact that a prospective juror "would be more emotionally involved or would view their task with 'greater seriousness and gravity' did not demonstrate that the prospective jurors were unwilling or unable to follow the law or obey their oaths." (*Ibid.*)

In addition, the *Witt* Court affirmatively adopted the standard promulgated by *Adams v. Texas* (1980) 448 U.S. 38, 45 which stated that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Witt, supra,* 469 U.S. at p. 420.)

Obviously, there may be instances where the responses of a prospective juror as to his or her capacity to sit on a capital juror under the above law contain ambiguities as to said juror's true feelings about their ability to do their duty. The United States Supreme Court and this Court have recognized that the trial court is in the best position to resolve ambiguities in juror responses and to this end can look to the individual juror's demeanor and the totality of his voir dire to make the determination as to whether he or she should be excused under the above law. (*Darden v.*

Wainwright (1986) 477 U.S. 168, 178; *Wainwright v. Witt, supra,* 469 U.S. at 421.) In cases where after proper questioning, a particular juror's state of "substantial impairment" remains ambiguous, the trial judge must resolve this ambiguity. As stated by this Court "[o]n appeal we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Cunningham* (2001) 25 Cal.4th 926, 975 citing to *People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

However, as stated above, the ambiguity and conflict must exist within the context of the juror's responses to questioning. "Ambiguity" does not refer to a potential juror who can follow the law in spite of a personal bias against the death penalty. In *People v. Stewart* (2004) 33 Cal.4th 425, 446, this Court explained that "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled-indeed, duty bound-to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror."

Stewart pointed out that "decisions of the United States Supreme Court and of this Court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for

excluding that person from jury service in a capital case under *Witt* [citation omitted.] (*Stewart, supra,* 33 Cal. 4th at 446.) This Court further cited to *Lockhart v. McCree* (1986) 476 U.S. 162, 176, in which the Supreme Court clearly stated that "[n]ot all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *(Ibid.)*

This Court's holding is not of recent vintage. Twenty years ago in *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court made a similar observation. In referring to the conditions under which a trial court can excuse a "life-leaning" prospective juror for cause, *Kaurish* referred to both *Witt* and *Witherspoon* stating;

> Neither Witherspoon (citation omitted) nor Witt (citation omitted) nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty. The real question is whether the jurors attitude will " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "

The *Stewart* Court cited to its decision in *Kaurish, supra,* 52 Cal.3d 648, recognizing that since California law "contemplates that jurors will take into account their own values" in determining the penalty, the fact that

such beliefs would make it very difficult to impose the death penalty is not equivalent to the "substantial impairment" standard of *Witt.* (*Stewart*, *supra,* 33 Cal.4th at 447.)

Regarding the burden of proof for such an excusal, in *People v. Stewart* (2004) 33 Cal.4th 425, 445, in citing to *Witt*, this Court stated that the prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors.

Relying on the rulings of the United States Supreme Court, this Court has held that a trial court's error in excluding even a single juror who was not "substantially impaired" pursuant to the above law requires reversal of the death penalty, "without inquiry into prejudice." (*People v. Stewart, supra,* 33 Cal.4th at 454, citing to *Gray v. Mississippi* (1987) 481 U.S. 648, 659-667.) Hence, any such error mandates reversal of the death judgment.

In this case, as set forth more fully below, appellant contends that nine jurors were improperly recused for cause.

B. THE DISMISSAL FOR CAUSE OF THE FOLLOWING PROSPECTIVE JURORS WAS A VIOLATION OF THE ABOVE LAW

1. PROSPECTIVE JUROR GERARD PFEFER -JUROR # 2644

a. Answers to Questionnaire (CT7371-7418.)

Prospective Juror Gerard Pfefer was a sixty-six year old Jewish male. (26 RT 7374,7380.) After reading the summary of the case facts Mr. Pfefer indicated that he could be fair in this particular case.[4] (26 CT 7410, Q 177.) He also stated that the death penalty "was appropriate in some cases" (*Ibid.* Q 178), indicating that he was neither strongly in favor of it or against it. (*Ibid.,* Q 179.) Mr. Pfefer also stated that at one point in his life he was more strongly in favor of the death penalty, but his attitude was somewhat affected by reports of verdicts overturned because of DNA evidence. (*Ibid.*, Q 181,182.) He further stated that he felt that the death penalty was applied "too randomly" but was not part of any group that advocated any position on the penalty. (*Ibid.,* Q 183.)

Mr. Pfefer stated that the death penalty should not be abolished, and the state should have the death penalty as "in some cases it is called for."

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4. There was a short summary of the charges in this case placed immediately before the questions in all of the questionnaires that related to the imposition of the penalty. (See 26 CT 7409)

(26 CT 7411, Q 186-187.) While he opined that life in prison without parole is the "worse" penalty ("to be locked up for 20-30 years or more years would be worse") and he recognized that it is "difficult...to have someone's life in your hands," he could "set aside religious, social, or philosophical convictions and decide the penalty question based solely upon the aggravating and mitigating factors presented to (him) about defendant's crime and his background and the law as given by the judge." Mr. Pfefer stated that "all facts should be presented" before he would impose either of the two penalties. (26 CT 7412-7413, Q198, 200, 203.)

In describing a hypothetical case in which death would be the appropriate penalty, Mr. Pfefer stated it was where "someone has without any thought taken another's life to gain money, property or hunted down another to kill them." (26 CT 7414, Q 209.) Mr. Pfefer further stated that he would not automatically vote for either penalty. (26 CT 7415, Q 214-217.) While indicating that he was "torn" between the two penalties and recognized the seriousness of his responsibility, he believed that he could do his duty. (26 CT 7417, Q 228, 231.)

b. Oral Voir Dire[5]

As with all of the prospective jurors, the oral examination began with the court. After advising Mr. Pfefer of the basic process of the weighing of the aggravating and mitigating factors, the trial court informed him that

> ...the weighing of the factors is not quantitative but qualitative in which the jury, in order to fix the penalty of death must be persuaded that the bad factors are so substantial in comparison to the good factors that death is warranted instead of life without parole. (7 RT 1410.)

Mr. Pfefer indicated that he understood. (*Ibid.*) The prospective juror further stated that he would not automatically vote for either penalty. (7 RT 1411.)

In response to questioning from appellant's counsel, Mr. Pfefer indicated that he could evaluate all of the evidence to determine whether appellant should be sentenced to death. (7 RT 1412.) The prospective juror also stated he could consider "any aspect of defendant's character or record, or any circumstance that the defense offers as a basis for a sentence of less than death." (7 RT 1413.)

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5. This Argument contains numerous references to and quotations from the voir dire as it is necessary to demonstrate that this and other jurors were not ambiguous in their responses.

The prosecutor's examination commenced with the prospective juror restating that he was neither strongly in favor of nor strongly against the death penalty. (7 RT 1415.) Pressed for the circumstances in which he could impose a death sentence, the prospective juror replied;

> Well, I think when the case calls for it, as the judge has just said in the penalty phase the mitigating circumstances or the circumstances that would, you know, either defense or prosecution would convince me that it called for the death penalty, I'd have to listen to the different circumstances. And hopefully keep an open mind, but don't, I would not go into a case feeling immediately that, you know, either one way or the other. (7 RT 1415.)

Not satisfied, the prosecutor again asked the prospective juror under what circumstances he could impose the death penalty. (7 RT 1415-1416.) Mr. Pfefer responded as follows:

> Well, I guess if all the evidence pointed to that , I guess, the something that calls for death, the circumstances that the crime was committed, the various things that maybe happened before, prior history, things like that, outweighs whatever good this person has done, then I think I can do it. (7 RT 1416.)

The following exchange between the prosecutor and the prospective juror then occurred:

> Question: You think you could do it?
> Answer: Right.
> Question: You are not sure
> Answer: Well, I have never been in that place before.

Question: Would you believe it that many of the people who sat in that same chair have said the same thing.
Answer: I think it is a big responsibility.
Question: Absolutely. And do you find that it would be too difficult for you?
Answer: I don't think so. I think I am willing to do it. As part of society I have never had to do it. I could live without doing it, but I feel I could do it. I feel I could do what I'm called to do.

The prosecutor then turned to the prospective juror's lack of absolute certainty as to which of the two possible penalties is "worse."

Question: .....on Question 227, it says "Which do you believe is a more severe punishment."? And you did not circle either death or life without the possibility of parole and under the explanation you put "I do not really know."
Answer: No, I don't know, because I have never been there before. I have heard arguments both ways. I have heard argument that keeping a person in prison for 50 years is a terrible thing or putting them to death, here in the State of California that takes anywhere from 15-20 years with all the appeals and so on. I reject the argument about the financial thing that people usually use. In fact, we discuss it in my class but there are a lot of kids that always say it costs too much money to keep a person in prison for that many years. I do not think that's got a point, to the decision the jury has to make.
Question: Okay, but if you don't know which is worse, life without the possibility of parole or the death penalty, how can you
Answer: Well, I think again, I go back to what takes place during the trial, during the penalty phase. I would listen to all the evidence, and I don't know what the, you know what I mean, what we are trying to prove by killing someone or putting him in prison forever. Let me explain a little bit further. Again, if the circumstances surrounding the crime and all the factors leading up to it called for the death

penalty, then I think, I could do that too. (7 RT 1418.)

The prosecutor then referred the prospective juror to Question 228, in which he stated he was "torn between" the two penalties and asking if this were the case "how will we know you are able to impose the appropriate punishment." (7 RT 1418-1419.) The following exchange then occurred.

> Juror: Well, I don't know how you would know. I really don't. Again, you have to take my word that I would listen to all the evidence and make the decision I think is right. And since you are on the prosecution side, you would have to convince me, not maybe convince me like I was resisting it, but show me that this man deserves the death penalty in this case.
> Question: Okay. What is that I would have to do to convince you of that?:
> Answer: Possibly show me a history of cruelty and maybe committing other crimes. I don't know what you will offer in evidence because I have never been on a trial like this. In fact, I have never been on a trial. Showing something that he has done this before.
> Question: If I'm unable to show you that he has done anything like this before are you going to vote for life without possibility of parole.
> Answer: I don't know. There may be other evidence there, one crime maybe because of the circumstances surrounding it and all of the different charges, maybe that would be enough to impose the death penalty. (7 RT 1419.)

After the prospective juror assured the prosecutor that he would not require more than one victim to find for the death penalty (7 RT 1419-1420), the prosecutor once again asked the prospective juror what he would

need the prosecutor to present for the prospective juror to vote for the death penalty. (7 RT 1420.)

> Juror: I think what I just said about the circumstances, the type of crime that it was. We were read the charges. And it sounds like it may have been a cruel thing to do, but again, until I hear the evidence, I don't know. I don't know anything about the case itself.
> Question: Are you going to require me to prove all the charges that were listed in order to vote for the death penalty.
> Answer: Well, I'm not sure. I think the judge said there were six charges that led to the special circumstances. I am not sure. Maybe only one is bad enough. We will probably find out, the judge or the attorneys will tell us that it only takes one of the circumstances to require the death penalty. 7 RT 1420-1421.)

Mr. Pfefer declined to say that for certain special circumstances standing alone he could not impose the death penalty. (RT1421-22.) The prosecutor endeavored to put words in the prospective juror's mouth, asking "isn't it true that you believe that (life) would the better punishment." The prospective juror again denied holding this view.

> Juror: I do not think the better punishment. I think it could be used. I know we are one of the few countries in the world that still uses the death penalty. A lot of industrialized countries feel like life imprison (sic) is good enough punishment for somebody.
> Question: Do you feel the same way?
> Answer: No, I go back to thinking that the circumstances surrounding the crime call for the death penalty.
> Question: What circumstances can you think of call for the death penalty?

> Answer: Maybe in case like this case, possibly, the charge the way the charges were read with torture and things like that rape with using the foreign object, the cruelty of the crime, possibly assuming that all this took place, and the defendant committed these crimes, then it could call for the death penalty. (7 RT 1423.)

The prosecutor then asked Mr. Pfefer to state that he believed the death penalty to be the "worse" penalty. (7 RT 1424.) However, the prospective juror clearly that he only thought that it "might be," stating that when he said that it might be in the questionnaire he was thinking of his own perspective. (*Ibid.*)

Ignoring Mr. Pfefer's thoughtful reply, the prosecutor pressed the prospective juror to agree that he could not say whether he could impose the death penalty;

> Question: And since you don't know how you feel about the death penalty, how are you able to determine whether or not your could impose the death penalty, if the circumstances warrant it?
> Answer: If the circumstances warrant it, I would be able to impose it. (7 RT 1424.)

The prosecutor then told the prospective juror that up to this point he had not been able to tell her what circumstances might warrant a death sentence when in fact the prospective juror had answered this question several times before. (7 RT 1425.) The prosecutor then asked the prospective juror if he was the prosecutor on this case, would the

prospective juror want himself on the jury. Mr. Pfefer stated he would. In response, the following exchange occurred;

> Question: Even though in your frame of mind you are torn between life without the possibility of parole and between the death penalty.
> Answer: No, I think in my frame of mind, I'm willing to listen to all the circumstances from both sides and make up my mind then about whether to impose the death penalty on someone or life in prison. (7 RT 1425.)

After the prosecutor gave Mr. Pfefer a synopsis of the weighing process and how a verdict is reached, she yet again asked whether he could follow the law and reach a verdict on the penalty. The answer was an unequivocal "Could I? Yes, yes." (7 RT 1427.)

In spite of multiple unambiguous statements from Mr. Pfefer that he could follow the court's instructions, the prosecutor was unremitting in trying to force some sort of ambiguous statement from the prospective juror.

> Question: Okay. Do you have an question in your mind? Do you have a question. (7 T 1427.)

Mr. Pfefer once again made it perfectly clear that he can perform his duties under the law.

> Answer: Well, I was thinking of the aggravating and mitigating and that's what I think I have been saying. That if I, in my mind, feel that the aggravating circumstances

outweigh or are more than the mitigating circumstances then, yes, I could impose the penalty. (7 RT 1428.)
Question (by Prosecutor): Could you come back into this courtroom and tell the defendant you are going to kill him? Can you look him in the eye and say "I'm going to kill you."
Answer: Well. I don't think so, I'm not killing him, but the State is killing him.
Question: But by coming back with a verdict of death, you are going to kill him.
Answer: Well, I could say it if the circumstances surrounding the crime, yes, that the crime deserves that punishment.
Question: I'm going to hold you to that.
Answer: That's why I'm here. (7 RT 1428.)

The prosecutor then posed a hypothetical question in which one man held a victim while the other beat him,[6] and asked if Mr. Pfefer believed that the two men were "equally guilty"; the prospective juror said he did. (7 RT 1428.) In response to the prosecutor's additional questioning, Mr. Pfefer stated that there was "no doubt" in his mind that he could impose the death penalty on the person holding the hypothetical victim, if that victim died. (7 RT 1428-1429.)

Although, this prospective juror had enunciated numerous times that he understood the process and could find for death should the circumstances warrant, the prosecutor once again asked "[s]o what are your ideas about the use of the death penalty?" (7 RT 1429.)

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6. This hypothetical was employed by the prosecutor in the individual voir dire of the jurors improperly excluded by the court . It will henceforth be referred to as the "assault" hypothetical.

Mr. Pfefer stated that the death penalty was not a deterrent because it wasn't consistently enforced. (7 RT 1429-1430.) The prosecutor seized upon this rather self-evident statement, and accused the prospective juror of not being able to impose the death penalty because of his feeling about deterrence. (7 RT 1430.) The prospective juror responded, "[w]ell, I don't think that just because my idea is that death penalty is not a deterrent it doesn't keep me from imposing the death penalty." (7 RT 1430.)[7]

The prosecutor followed up with yet another misleading, provocative question: "But that's what you said here "[i]f the facts do not meet my ideas of the death penalty then I will not impose it."

Mr. Pfefer rejected this interpretation, stating "[w]hat I said if the circumstances surrounding the crime call for the death penalty, I can make that decision. (7 RT 1431.)

Unable to convince Mr. Pfefer that he was conflicted regarding the imposition of the death penalty, the prosecutor referred to a question on the questionnaire.

> Question: Okay, you wrote here on that same question where it days "describe the circumstances that would be an appropriate case to impose life without possibility of parole " and you put "Someone who may have been with others in

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7. Deterrence is not, of course, the only justification offered for capital punishment.

murder." So are you saying if someone was just an accomplice that they deserve life without possibility of parole without the death penalty?"
Answer: Well to go back to your example one person holding someone and the other person doing whatever and/or killing than person, yes, I think that they are equally guilty.
Question: But my question...here in the questionnaire you indicated that the circumstances that would be appropriate for life without the possibility of parole is someone who may have been with others in the murder.
Answer: Right, maybe they didn't take place, maybe they were with them, maybe they were driving in the car, maybe they were standing over someplace and watching the crime take place.. They were there, maybe you could convict then of being an accomplice and so on and so forth, maybe they don't deserve the death penalty. (7 RT 1432.)

The prosecutor then proffered yet another hypothetical to Mr. Pfefer. This one consisted of three people involved in a bank robbery; one goes into the bank to rob it, one stands at the door as a look-out and one waits in the car. The person in the bank kills somebody while he was in there.[8] (7 RT 1432.)

In response to the prosecutor's questioning by saying he thought that all were equally guilty (7 RT 1432) the following exchange then occurred:

Question: And would you be able to impose the death penalty on the person in the car, if the aggravating circumstances substantially outweigh the mitigating circumstances.
Answer: Well, when you put it, if it outweighs.

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8. This hypothetical was employed by the prosecutor in the individual voir dire of the jurors improperly excluded by the court . It will henceforth be referred to as the "bank robbery" hypothetical.

Question: That is the only situation in which you can impose the death penalty.?
Answer: Right

The prosecutor then continued with this scenario which had absolutely nothing to do with the facts of this case, pressing Mr. Pfefer to state in that hypothetical, he would impose the death sentence. The prospective juror responded, "I probably wouldn't impose the death penalty." (7 RT 1433.)

The prosecutor again returned to the prospective juror's views that life in prison might be worse and in spite of Mr. Pfefer's repeated assurances that his opinion would not affect his obedience to the law, she again challenged him. To this, an obviously frustrated Mr. Pfefer stated, "I don't know how many times I can say I would go back to the circumstances of the crime and whatever. I don't think, I would not go into this case saying I'm not going to impose the death penalty, which, I think, is what you are asking me.

(7 RT 1433.)

Rejecting the prospective juror's honest and reasonable answer, the prosecutor then instituted the following exchange.

Question: ... I'm asking if you would impose what you think is the worse possible punishment for the worse possible crime.
Answer: What I think is the worse possible punishment, I

don't think has anything to do with it. It depends on the case.
Question: You believe that the worse possible punishment can be imprisonment for life.
Answer: For me, I am not talking about someone else. (7 RT 1433-1434.)

The prosecutor then engaged in what can only be described as an attempt to confuse the prospective juror, trying to convince Mr Pfefer, in spite of all that he said, that he could only impose life in prison. (7 RT 1434-1435.) The prosecutor then confronted the him with the "fact" that the he didn't know how he "felt" about the death penalty. The prospective juror stated, "Well, I really don't know what I'm supposed feel about the death penalty...that's all I can say. I don't know how I feel about the death penalty." (7 RT 1435-1436.)

In response to defense counsel's follow up questions, the prospective juror again made it crystal clear that he would be fair and objective, listen to the court's instructions, and be able to impose the death penalty in the event the aggravating circumstances substantially outweighed the mitigating. (7 RT1436-1437.)

c. Prosecutor's Challenge and Court's Ruling

The defense passed this prospective juror for cause. (7 RT 1438.) The prosecutor challenged on the following grounds:

Ms. Locke-Noble: He has indicated he doesn't know how he feels about the death penalty. There is no way we can

> determine whether or not he is for against or whether or not he will impose the death penalty. He says he will impose the death penalty, but on the other hand he says he feels that life without the possibility of parole is a replacement for the death penalty. He also believes that the death penalty is not a deterrent and yet if the facts don't meet his idea of the use of the death penalty, then he feels that life without the possibility of parole is what he is going to use. He is torn between life without the possibility of parole and the death penalty and on all of the special circumstances, he indicated he thought so, probably, he was reluctant, possibly. He couldn't give me any circumstances in which he would impose the death penalty, not even to say for example, mass murder, 911. He couldn't come up with anything. He doesn't know how he feels about it. (7 RT 1438.)

When asked to respond, defense counsel stated, "Your Honor, I believe the key to this inquiry is his statement based upon the charges read, this would call for death. And it's quite fact specific this case, based on the charges, is such a case that would call for death." (7 RT 1438.)

The trial court granted the challenge, stating the following;

> People's challenge for cause granted. I'll explain to you why. With respect to the state of mind under People v. Cox and Bradford, he teaches trial advocacy. He wants to serve on this jury, sort of like his laboratory to be able to serve. He indicates that most civilized industrial countries there is no death penalty. There is only life without parole and they seem to be functioning well. If it does meet his ideas of the death that he is not going to impose the death penalty of the (sic) And he indicates the death penalty does not deter. If it does not occur neither idead (sic) of logic ipso facto, you could infer that he could not impose, but that's the inference that has to be drawn based on the state of mind. He also indicated there is one other thing, when asked about the special

> circumstances, under which special circumstances would he consider as a potential for the death penalty. He is ...he waivers each one of them. Robbery, "I think I could," Kidnap for rape, same answer, "I think I could," rape with a stake, "probably but," and then he made a qualifier kidnaping for torture, probably there is not one. He said, yes, this is a special circumstance, I could consider as a factor. And we are talking about factor a issue here. He believes that life without is a replacement for the death penalty, I think intellectual. It's an intellectual thinking on his part because we have had quite a few jurors, pretty smart, and the way they answer the questions I consider to be some kind of intellectual sophistry. In this particular case, based even on the aider and abettor theory, he indicates he could not, based on the aider and abettor theory, the person driving the car with the...if the aggravating circumstances substantially outweigh the mitigating circumstances, he indicates that he could not impose the death penalty. He flat out said he could not. And if the theory of the People in this case is an aider and abettor theory that would preclude consideration of a potential penalty. Therefore based upon Wainwright versus Witt, and the California case that follow after this, in this court's view, based upon his state of mind, and the way he answers questions, he is a substantially impaired person of his duties, the court–and I'm going to grant the cause.

d. Application of the Law to the Challenge

The voir dire of Prospective Juror Pfefer represented a complete breakdown in the process set up by the United States Supreme Court to assure a capital defendant a fair penalty phase jury. The judge misunderstood the law and failed to listen to the responses of the prospective juror. The prosecutor's questioning was driven by her zeal to purge this obviously thoughtful, intelligent and independently-minded man

from the jury. The only person involved that seemed to have any inkling of what constituted a properly qualified juror in the penalty phase was Mr. Pfefer. Mr. Pfefer instinctively understood that it was irrelevant how *he* felt about deterrence or how *he* felt about the meaning of the death penalty to him in his personal life, or how *he* felt about giving the death penalty to an imaginary person, sitting in an imaginary car, in the vicinity of an imaginary bank; a scenario that was concocted only to confuse the prospective jurors.

Mr. Pfefer sensed what this Court knows. The only relevance of a juror's personal beliefs is whether they substantially impair his ability to follow the law. (*Witt, supra.*) As will be discussed below, it is highly questionable if Mr. Pfefer ever stated or inferred any personal views in opposition to the imposition of the death penalty, at all. He repeated over and over again that his respect for the law was such that he could follow it to the letter.

The reasons for the court's granting the challenge were factually incorrect. It is almost as if the court was paying no attention, whatsoever, to what the prospective juror said. Mr. Pfefer never said that he could not impose the death penalty in an aider and abettor situation. He certainly never suggested that the life penalty should replace the death penalty regardless of the circumstances. To the contrary, he stated repeatedly that

the appropriate penalty depends on the circumstances of the case.

As stated in Section B 1 a of this Argument, there was absolutely nothing in the questionnaire that even suggested that Mr. Pfefer did not qualify under the law to sit on this jury. In fact he specifically stated that he could "set aside religious, social or philosophical convictions and decide the penalty question based solely upon the aggravating and mitigating factors presented to (him) about defendant's crime and his background and the law as given by the judge." (26 CT 7412-7413, Q 200.) When asked for a hypothetical case in which he would impose the death penalty, he stated it was where "someone has without any thought taken another's life to gain money, property or hunted down another to kill him." (26 CT 7414; Q 209.) Such a scenario is very similar to the facts of this case.

The oral voir dire by the prosecutor was hostile and provocative. It was clearly designed to intimidate the prospective juror into saying something that the prosecutor could use to dismiss this man from the case. She repeated the same questions multiple times, hectoring the prospective juror that his answers were inconsistent when clearly they were not.

However, Mr. Pfefer was not intimidated. He would not bow to the prosecutor's attack on his unambiguous assertions that he could follow the law in imposing the penalty. The prosecutor's challenge for cause was based on falsehoods and complete mischaracterization of what Mr. Pfefer

said. The claim that there was no way to determine whether the prospective juror would vote for death because he allegedly did not know how he "feels" about the death penalty is specious. This man made it clear on occasion after occasion that he believed that the death penalty was appropriate in certain cases, including situations where a defendant was charged as an aider and abettor. He stated that he understood the way the process worked and was willing to subjugate his personal beliefs to it.

Further, the prosecutor's argument that the prospective juror could not serve because he did not feel that the death penalty was a deterrent has no legal basis. Nowhere in the law is there any requirement that a juror must be a zealous advocate of the death penalty before he can sit on a capital case. Mr. Pfefer's comments about deterrence were based upon an accurate observation of the state of affairs in California; the death penalty takes so long to be executed that it is not a credible deterrent to would be murderers. However, the prospective juror also stated that this would not prevent him from following the law and servings on this case.

The prosecutor's claim that the Mr. Pfefer could "not come up with" any scenarios in which he would vote for the death penalty is nothing less than an outright prevarication. The prospective juror gave several scenarios on the type of case in which he could impose the death penalty, including a scenario very similar to this case. (7 RT 1428-1423.)

In granting the prosecutor's challenge, the trial court speculated without any factual basis that the prospective juror was a teacher who fancied himself some sort of social scientist whose motivation for sitting on this jury was to use it as a "laboratory" and subvert the process. The court characterized Mr. Pfeffer as an "intellectual" and like other "intellectual" prospective jurors he practices "some kind of intellectual sophistry." (7 RT 1440.) It was on this completely baseless and inexplicable characterization of Mr. Pfefer, that the trial court analyzed the challenge.

The trial court was as inaccurate as the prosecutor in its characterization of Mr. Pfefer's answers. Contrary to the court's statement, Mr. Pfefer did not "waiver" in what he said about the death penalty. He repeatedly refused to commit himself to as penalty before he heard all of the facts. However, he said that he would listen to all the facts and apply the law as the court gave it.

The court further cited to the prospective juror's answers regarding whether he could execute a hypothetical wheelman in a robbery, stating that the prospective juror indicated he could not, and that since the States case was based on an aiding and abetting theory, the prospective juror was unfit to serve.

In fact, Mr. Pfefer plainly stated that he could impose the punishment on the hypothetical driver "if the circumstances surrounding

the crime...deserves the punishment." (7 RT 1428.) The prosecutor accepted this answer stating to the prospective juror "I am going to hold you to that," to which Mr. Pfefer answered "[t]hat's why I am here." (*Ibid.*) However, in spite of this rare concession by the prosecutor, and the actual answers provided by the prospective juror, Mr. Pfeffer was disqualified.

As stated many times by this Court, the real question that must be answered through the use of voir dire in a capital case is "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.* " (emphasis added) (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 citing to *People v. Bradford* (1997) 15 Cal.4th, 1129, 1318; *People v. Hill* (1992) 3 Cal 4th 959,1003; *see also People v. Heard* (2003) 31 Cal 4th 946, 958.)

The prosecutor's repeated use of this bank robbery hypothetical throughout the voir dire clearly was not intended to answer this question, as it had only the most peripheral connection to this case. While the facts of appellant's trial invoked an aiding and abetting instruction, unlike the prosecutor's hypothetical, they involved an allegations of direct, hands on, violent conduct by appellant. In the simplistic, misleading hypothetical given by the prosecutor, the "person in the car" had no direct part in any of the activity leading up to the killing. He was in a remote location, presumably knew nothing of any plan to harm anyone, never saw the

victim, did nothing to aid in the killing. This hypothetical criminal is what was once referred to as a "wheelman." The prosecutor chose this example because the imposition of the death penalty on such an uninvolved criminal, while legally possible, would give pause to most citizens. This hypothetical person's relative lack of involvement is factually so removed from the facts of the instant case that the use of this hypothetical is useless in predicting a juror's attitudes in this case.

However, there is yet another problem with the use of such a hypothetical. Not only is the "wheelman" hypothetical factually irrelevant to this case, it was legally defective because it was incomplete and impossible to answer. The felony-murder special circumstance is applicable to a defendant who is not the actual killer, only if the defendant acted with the "intent to kill" or "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [one of the eleven enumerated felonies]." (California Penal Code section 190.2, subd. (d); *People v. Estrada* (1995) 11 Cal.4th 568, 572.)

> The portion of the statutory language of section 190.2(d) at issue here derives verbatim from the United States Supreme Court's decision in *Tison v. Arizona* (1987) 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (hereafter *Tison*). In *Tison*, the court held that the Eighth Amendment does not prohibit as disproportionate the imposition of the death penalty on a

> defendant convicted of first degree felony murder who was a "major participant" in the underlying felony, and whose mental state is one of "reckless indifference to human life."[citation omitted] (*People v. Estrada, supra,* 11 Cal.4th at 575.)

Therefore, even if Mr. Pfefer had personal scruples against imposing the death penalty upon the hypothetical driver who had no suspicion that anyone's life many be in danger[9], his hesitancy would find very good company in Justice O'Connor who wrote for the *Tison* majority.

Obviously, it was not in the prosecutor's interest to fully explain the legal underpinnings of sentencing an aider and abettor to death. Nor did the trial court feel it necessary to correct, or forbid, this factually and legally flawed hypothetical. Perhaps it was Mr. Pfefer's "intellectual" character that instinctively sensed that there was something wrong with the prosecutor's simplistic and misleading hypotheticals. This prospective juror was wrongfully dismissed on the basis of a prosecutorial misstatement that the he was not able to sentence to death a hypothetical defendant, in a completely unrelated fact scenario, in a situation where the United States Supreme Court itself might well preclude such a sentence.

Appellant has not found any case that directly discusses the prosecutor's use of irrelevant hypotheticals to challenge an otherwise *Witt*

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9. As stated in this Argument, Mr. Pfefer plainly stated that he could impose the death penalty on such an imaginary person.

qualified juror. However, much can be learned *People v. Butler* (2009) 46 Cal.4th 847, which discussed how much a prospective juror should be told about the facts of the case in an effort to ascertain whether said juror's personal beliefs create a substantial impairment under *Witt.* The *Butler* Court stated that while questions about the specific facts of the case that invite prejudgment or educated the jury as to the facts of the case should be avoided. (*Butler, supra*, at p. 859), the trial court "must probe prospective juror's death penalty views to the general facts of the case." (*Butler,* supra, at p. 860 citing to *People v. Earp* (1999) 20 Cal.4th 826, 853.)

> Reconciling these competing principles dictates that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation omitted] In deciding where to strike the balance in a particular case, trial courts have considerable discretion. [Citations.] ; *People v. Cash, supra,* 28 Cal.4th 703, 721-722; *People v. Zambrano*, supra, 41 Cal.4th at 1120-1121: see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1285-1287.)

This Court did make it clear that the decision as to whether a juror can sit as a juror on death cases must be based upon the general facts of the case in question. In the instant case, the prosecutor urged the court to make its decision on the facts of some hypothetical situation that had nothing to

do with this case. The trial court erroneously obliged, ignoring all of the prospective juror's unambiguous answers indicating his qualification to serve.

Along these same lines, in *People v. Cash* (2002) 28 Cal.4th 703, 720, this Court stated that regarding *Witt* challenges "a challenge for cause may be based upon a juror's response when informed of facts or circumstances likely to be present in the case being tried." The Court's logic was that this sort of questioning enables the trial courts to ascertain if the juror "harbors bias" as to some fact or circumstance that would cause them not to follow the penalty phase instructions.(*Ibid.*)

This prospective juror unambiguously and repeatedly stated that he could apply the law as set forth by the court as to the imposition of the penalty. If the court felt that there was any ambiguity –the record shows there was not– it was its affirmative duty to clear up any misunderstanding by making appropriate inquiry using the only approved standard: whether this prospective juror could set aside any personal beliefs and could carry out his duty without "substantial impairment." (See *People v. Martinez* (2009) 47 Cal. 4th 399, 425-427.) As stated by the High Court in *Morgan v. Illinois;*

> The adequacy of voir dire is not easily the subject of appellate review (citation omitted) but we have not hesitated,

> particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections. [Citations omitted.] (*Morgan v. Illinois* (1992) 504 U.S.719, 730.)

This trial court did not make such inquiry. It simply ratified the legally and factually flawed rationale of the prosecutor by improperly dismissing Mr. Pfefer.

A representative survey of this Court's cases affirming the dismissal of prospective jurors on *Witherspoon/Witt* grounds reveals nothing that even resembles what occurred in this case. In *People v. Ochoa*, supra, *26 Cal.4th* at 428-430, the answers to the controlling *Witt* question by the jurors that were properly excluded were that the death penalty was "state sanctioned murder," that the juror "would never be able to vote for the death penalty," and that the prospective juror would never be able to impose the death penalty regardless of the evidence.

In *People v. Pinholster* (1992) 1 Cal.4th 865, 916, which involved a felony-murder charge, the dismissed prospective juror made it "unequivocally"clear that her opinions about the death penalty would effect her vote at the guilt phase. She further stated that she could not vote for death regardless of the circumstances. In *People v. Bradford* (1997) 15 Cal.4th 1229, 1319, the dismissed prospective juror said it was "very unlikely" that she could ever vote for the death penalty and that the only

crime in which she could do so would be one involving the death of a child or if defendant was a commandant of a concentration camp.

In *People v. Hill* (1992) 3 Cal.4th 1004, 1005, the dismissed prospective juror, after a good deal of thought, eventually told the court that he could not vote for the death penalty. In *People v. Viscotti* (1992) 2 Cal. 4th 1, 45, the dismissed prospective juror was so against the death penalty he stated that he could not even impose it on Adolph Hitler.

All of these examples are cases in which the prospective jurors in question expressed an "unalterable preference" against the death penalty. (*Morgan v. Illinois, supra,* 504 U.S. at 734-736.) None of the first eight dismissed jurors in this Argument gave answers remotely like those in the above. None of them had any fundamental personal reservations against the death penalty.

Regarding the burden of proof for such an excusal, in *People v. Stewart, supra,* 33 Cal.4th at 445, in citing to *Witt*, this Court stated;

> Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath (citations omitted)...The prosecution, as the moving party, bore the burden of demonstrating to the trial court that this standard was satisfied as to each of the challenged jurors.

The prosecutor did not even come close to sustaining her burden.

Mr. Pfefer was improperly excused from the jury panel. There was absolutely nothing in his voir dire that could justify a trial court excusing him from service on a capital jury according to the law stated above. According to the highest court in the land, no further prejudice need be shown. (*Gray v. Mississippi, supra,* 481 U.S. at 659-667.) The death judgment must be vacated.

2. PROSPECTIVE JUROR LEONARDO BIJELIC- #6179

a. Questionnaire Responses

Mr. Bijelic was a fifty-four year old man was born and raised in Croatia, who moved to California when he was twenty-three years old. (53 CT 15433, 15435.) Nothing in the answers on his questionnaire hinted at any *Witt*-disqualifying answers. When asked his general feelings about the death penalty he answered "I am for it." (53 CT 15469, Q 178.) He further stated that the death penalty is used "too seldom." (*Ibid,* Q 183.) He further stated that "[i]f very violent crime is comited (sic) death penalty is justified." (53 CT15470, Q 186.) He further stated that the imposition of the death penalty depended on the facts. (53 CT 15471, Q 196.)

Mr. Bijelic also stated that he had no personal beliefs that would

make it difficult for him to impose the death penalty and he would be able to impose it based on the facts and the law that the judge would give. (53 CT 15471-15472, Q 199-200.) He expressed concern that a person who received a sentence of life without parole might eventually be freed. (53 CT 15473, Q 208.) Mr. Bijelic stated he would not automatically vote for either penalty. (53 CT 15474, Q 215-218.) He also indicated that death is the worse of the two possible penalties. (53 CT 15476, Q 227.)

b. Oral Voir Dire

In response to the trial court's standard introductory questioning, Mr. Bijelic made clear that he understood the legal process involved in the jury's determination of the penalty and would not automatically vote for either penalty. (11 RT 2108-2111.)

Further, in response to the questioning by appellant's counsel, Mr. Bijelic stated that he did not favor one penalty over the other. He also said he had an open mind to both penalties and could follow the law as explained by the judge. (11 RT 2111-2115.)

After listening to the prosecutor's explanation of the weighing process, Mr. Bijelic stated that he could impose the death penalty if the aggravating circumstances substantially outweighed the mitigating. (11 RT 2115-2117.) The prosecutor then referred the prospective juror to his answer on questionnaire question 191, in which he wrote that the death

penalty should be imposed for cases that were "premeditated and brutal." (11 RT 2118.) In order to ascertain what the prospective juror meant by this answer the prosecutor gave the following hypothetical and received the following answer.

> Question: Someone is walking down the street. He has gun with him. He is not planning on doing anything. He is just walking down the street. He goes by a liquor store. It's got big glass window. He looks inside and sees the cash drawer open. It's piled high with cash. He wants that cash. He has not planned anything. He goes inside the liquor store. He takes the cash out of the drawer, and he kills the cashier, in your mind, is that sufficient to impose the death penalty...would that be sufficient in your mind to impose the death penalty, if the aggravating circumstances substantially outweigh the mitigating circumstances....
> Answer: If aggravating factors substantially outweigh the good ones, yes, I would be able to.
> Question: Even though --
> Answer: Even if it's not like I said, premeditated. (11 RT 2118-2119.)

In response to the prosecutor's additional questions, Mr. Bijelic stated that even though he was concerned that the law might change and life without parole prisoners may be released, he could vote for the life penalty where warranted. (11 RT 2119.)

When queried as to what types of crimes would warrant life without parole, the prospective juror stated "self-defense and sickness." (11 RT 2119.) The prospective juror described "sickness" as a situation where a

defendant was an adult but had a mind like a five or six year old. (11 RT 2120.) Mr. Bijelic also stated that intoxication did not excuse a person's criminal actions. (11 RT 2121-2122.)

The prosecutor then posed the "assault" hypothetical to the prospective juror. (11 RT 2123.) Mr. Bijelic told the prosecutor he would be able to impose the death penalty on the person who was doing the beating but the penalty as to the holder would largely depend on his intent. (11 RT 2123-2124.)

In response to the robbery hypothetical, the prospective juror stated all three participants were not necessarily equally guilty. However, if the hypothetical defendant in the car knew that the defendant was carrying a gun and might possibly kill the victim, he could impose the death penalty. (11 RT 2124-2127.)

c. Prosecutor's Challenge and Court's Holding

Appellant passed this prospective juror for cause, but the prosecutor challenged on the ground that Mr. Bejelic could not impose the death penalty in aiding and abetting cases.

> Yes, your honor, I don't believe this juror can apply the law with regards to aiding and abetting. He is the only juror we have had so far that has had the opposite response of the two hypotheticals that I have given.
> The Court: And a very good response and very interesting one. This is a very smart juror.

Ms. Locke-Noble: That's the basis of my challenge for cause.(11 RT 2127.)

The discussion continued:

The Court: Ms. Locke-Noble is saying as a matter of law the person cannot impose based on aiding and abetting circumstances that, that is a proper basis for cause and your response is?
Mr. Patton: In the circumstances proposed by the people in terms of the robbery situation, he indicated he would impose death.
The Court: That's assuming that there has a weapon, but if there is no weapon used, no gun, because of the issue of a gun there is no gun used. I usually call guns weapons, if there is no gun use, he cannot impose even if it is aiding and abetting
Mr. Patton: I don't mean to bring this up again, is the court saying my continuing objection, we are pre-judging what the evidence would show.
The Court: I have no evidence. I don't know what the evidence is. Every case is unique. I try every case with a clean slate. I don't pre-judge anything, but if the case law, certain circumstances, aiding and abetting. In this case, it appears that on the aiding and abetting theory, he could not impose the death penalty. If that is the theory, that the people have. I don't know if it is, but that's the direction wouldn't they be at a disadvantage because at the get-go because we can't have a person or that person would be substantially impaired from performing his duties with the oath and in accordance with oath and instructions.
Mr. Patton: I don't think so, your honor, submitted.
The Court: Ms. Locke-Noble?
Ms. Locke-Noble: Submitted. (11 RT 2127-2129.)

In granting the challenge the court stated "[t]he challenge for cause is granted. You know, I'm reading from Ms. Locke-Noble's stance if one of the jurors on the aiding and abetting theory, that the

aiding and abetting theory is none (*sic*) weapon or none (*sic*) gun aiding and abetting theory and therefore that seems to be the predominate hypothetical that this court will be considering." a(11 RT 2129.)

d. Application of the Law to the Challenge

The removal of this prospective juror follows the pattern previously established by the prosecutor and the court. The prosecutor again employed legally incorrect and factually irrelevant hypotheticals to remove a prospective juror, the totality of whose voir dire clearly reveals a person qualified to sit on a capital jury. Again, the court's granting of the challenge has nothing to do with *Witt/Witherspoon* and their progeny, but rather resulted from a misreading of answers to hypotheticals.

From the record, it appears, like Mr. Pfefer, this prospective juror was the only person involved in his voir dire process that fully understood the law. The "assault" hypothetical was even more legally flawed and deceptive as the "robbery" hypothetical. As stated by this Court several times;

> To prove that a defendant is an accomplice ... the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [citations omitted] When the offense charged is a specific intent crime, the accomplice

> must 'share the specific intent of the perpetrator' this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' (Ibid.)" [Citations omitted] What this means here, when the charged offense and the intended offense-murder or attempted murder-are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

This was precisely what the juror was trying to explain to the prosecutor in his voir dire, when he stated he was assuming that the person holding the hypothetical victim did not know that the victim was going to be severely beaten. (11 RT 2124.) Mr. Bijelic wisely sensed that he could not possibly answer the "assault" hypothetical because he did not know the intent of the hypothetical person holding the victim. Unless the "holder" had a specific intent to kill, he could not be convicted of first degree murder under California law, let alone be subject to the death penalty.

The judge was correct when he stated Mr. Bijelic was smart.[10] He was smart enough not to be lured into an easy answer to a hypothetical that was nothing less than a trick question, impossible to properly answer on the facts given. This is not a proper basis for excusal for cause.

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10. Unlike with Mr. Pfefer, this time the judge did not paint Mr. Bijelic's intellegence in perjorative terms, but still ultimately dismissed him from service.

The court also settled upon the prosecutor's other argument in granting the challenge; that the prospective juror stated that he could not impose the death penalty on a hypothetical wheelman if that person had no idea that the robber in the bank had a gun. As with Mr. Pfefer, this hypothetical was legally defective because it was incomplete and impossible to answer. The prosecutor's simplistic and misleading hypotheticals therefore served as a platform from which to argue for excusal when no legal cause was shown. The prosecutor continued to rely upon a tactic of positing a hypothetical completely factually removed from the facts of this case and wording this hypothetical in such a way that virtually any prospective juror would have a great deal of trouble finding for death. If prospective jurors could be eliminated from capital trials because they would not impose the death penalty in the hypothetical that the prosecutor presented, the only people left on the jury panel would be jurors so enthusiastic about the implementation of the death penalty that they would truly be a tribunal "uncommonly willing" to condemn a man to death. (*Witherspoon v. Illinois, supra,* 391 U.S. at 520.)

The removal of Mr. Bijelic for cause violated both the letter and spirit of the law set forth by High Courts of the United States and California. There was no ambiguity on Mr. Bijelic's part that needed to be resolved by the court. The dismissal of this prospective juror for cause

violated appellant's rights to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and corollary provisions of the State Constitution. The unconstitutional dismissal of but one prospective juror who qualified to sit under the law is cause for reversal of the death judgment.

3. PROSPECTIVE JUROR SAM RUTIGLIANO # 3489

a. Questionnaire Responses

Sam Rutigliano was a thirty-one year old male of Italian descent (40 CT11633.) He felt that the death penalty is "a big deterrent to many others who may wish to kill." (40 CT11669, Q 178.) For this reason, he felt that California should continue to have the death penalty. (40 CT 11670, Q 186.) He further stated that the death penalty should be imposed in "extremely cruel cases." (*Ibid*, Q 191.)

Mr. Rutigliano also made it clear that each case should be determined on its own facts, and that death was the worse of the two possible penalties. (40 CT 11671, Q196-198.) He also indicated that he could set aside any personal beliefs and decide the case on the facts and the law as set forth by the court, indicating that his "duty as a juror (is) to be fair and unbiased." (40 CT 11671-11672, Q 200.)

Mr. Rutigliano stated that in a case that involved acts such as mutilation and torture he could find for death. (40 CT 11673, Q 209.) He

further stated that he would not automatically refuse to vote for either penalty. (40 CT11674, Q 215-218.) He also stated that he would like to sit on the case because "I know I am a fair person. I have always been one to listen to both sides of an argument. I also know people that have done good things, and people who have done bad things. A defendant/prosecution deserve jurors that are not one-sided and biased." (*Ibid.*, Q 231.)

b. Oral Voir Dire

The oral voir dire again began with preliminary questioning by the court in which it described the special circumstances, the two phases of the trial, the general nature of aggravating and mitigating factors and the basic weighing process. The court also explained the finding that the jury must make before reaching a verdict of death. (8 RT1562- 1565.) Mr. Rutigliano informed the court that he understood this law (*Ibid)*, and stated that he did not have any personal beliefs that would cause him to automatically vote for either penalty. (8 RT 1564-1565.)

In response to questioning from defense counsel, Mr. Rutigliano stated that going into the trial, he had an open mind about which of the two penalties to impose. (8 RT 1565.)

The prosecutor commenced by asking about the prospective juror's response to questionnaire question 210, in which he stated that an example of a crime for which life without parole was the proper sentence was one

which was "accidental or not premeditated." (8 RT 1566.) The prospective juror made it clear that he could follow the court's instructions and impose a death sentence for felony murder;

> Question: Let me add one more thing. As the court has told you, the only way you can impose the death penalty is if he's found guilty of first degree murder. And a murder in the course of a robbery is a special circumstance, which is what happened in this factual situation I gave you, and the aggravating circumstances substantially outweigh the mitigating circumstances. Would you be able to impose the death penalty then?
> Answer: Yes. I mean, if that's what the judge says.[11](8 RT 1169.)

The prosecutor gave her own explanation of the weighing process, and Mr. Rutigliano's responses made it clear that he could find for death if appellant was found guilty of murder and at least one of the special circumstances was found true. (8 RT 1572-1574.)

The prosecutor then employed the "assault" hypothetical, where on person is holding someone's arms and the other is beating on the victim.

> Question: Okay. Do you believe that the person holding the arms is as equally guilty as the person doing the hitting?
> Answer: Maybe not equally, but close.
> Question: Okay. Why don't you think he's equally guilty?

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11. By this simple statement, Mr. Rutigliano made it clear that he would follow the law as given by the court.

Answer: He's not actually doing the hitting, I mean, so it depends on what the charges are, if you're saying he's hitting him, he's not hitting him or her, which ever, it all depends on what you're being accused of doing.
Question: Okay. If the person holding the victim's arms, if the victim is unable to escape or defend themselves, do you believe they're equally guilty?
Answer: Yes.
Question: Okay. So now looking at that, person is holding the arms of the victim and the other person is beating them, are they both equally guilty? If you don't believe they are, that's fine.
Answer: It's something I'd really have to think about.
Question: But we have to know your answer today.
Answer: You know, I would still kind of say probably not equally.
Question: Okay. So let me ask you this additional fact. The victim, the person that was being beaten, dies. It's first degree murder and there is a special circumstance that's been found true. Would you be able to impose the death penalty on the person holding the arms?
Mr. Patton: Objection. Incomplete hypothetical.
Ms. Locke-Noble: -- if the aggravating circumstances substantially outweigh the mitigating circumstances?
Prospective Juror No. 3489: Yes.
Question: Now, why can you impose the death penalty on that person, but yet you don't believe that person is equally guilty?
Answer: You just said that the aggravating is more than the mitigating, so -- I mean, when we were talking earlier I said right now I kind of didn't weigh it equal, but when you stated it that way, you're saying that the aggravating was far more than the mitigating, so that kind of is tipping the scale more.
(8 RT 1574-1576.)

Even though Mr. Rutigliano made it perfectly clear that he could impose the death penalty on both persons, the prosecutor took the position that he was hypocritical when he stated he could impose the death penalty

on someone who was not as "equally guilty" as another hypothetical participant. However, in spite of the prosecutor's attempts to put words in the prospective juror's mouth, Mr. Rutigliano again made it clear that his mind was open to the death penalty.

> Question: But the court has said that you do not have to impose the death penalty when the aggravating circumstances substantially outweigh the mitigating circumstances, so I don't understand what you are telling me. If you find that someone is not as guilty, how can you impose the death penalty on them?
> Answer: Actually, you asked if I could, if that was possible, if it was more. I could. I'm not saying I would, you know, you're saying could I.
> Question: But what I don't understand is if you don't think that the two people are equally guilty, wouldn't you give them different punishments, because they weren't equally guilty?
> Answer: Well, when we were saying they weren't equally guilty, that was before you started saying the mitigating and the aggravating was outweighing it. But now, I mean, if there was more stuff to it than what you've just said, you know, and you start saying they did this, they did this and this, that's starting to bump it up more than just holding on. That, to me, it's like raising the scale more than from being equal, from wherever, that would possibly be life. Now you're talking about it being far worse.
> Question: I just said substantially outweighs, I didn't say that it was far worse. I just said it substantially outweighs. And the court says even if it substantially outweighs, you can still impose life without the possibility of parole.
> Answer: Yes.
> Question: So in your mind, because the person holding the arms is not as guilty as the person actually doing the punching, wouldn't you impose life without the possibility of parole on him and give the other guy, the one actually doing the punching, the death penalty?

Answer: I could do both in that. Like I said, you asked could I do either, so - -(8 RT 1576-1577.)

Not succeeding in her attempts to disqualify this prospective jury by leading him into saying he could not impose the death penalty, the prosecutor then used the same completely factually unrelated, legally flawed hypothetical she used on prospective juror Pfefer, the "bank robbery" hypothetical. This hypothetical included the "fact" that neither the lookout nor the driver had any idea that the hypothetical man in the bank had any intention of shooting anyone. (11 RT1578.) In response to the prosecutor's questions, Mr. Rutigliano stated that he did feel that the lookout or the driver were as guilty as the shooter, and would "probably" not impose the death penalty on them if they did not know that there was going to be a shooting. (11RT 1578-1579.)

However, when given the opportunity to explain the type of case in which he would impose the death penalty, Mr. Rutigliano described a situation just like the instant case. He stated that it would be a "horrible crime" (11 RT 1579) where "you would have to really be trying to really hurt that person, I guess, make it far -- you know, more pain." (11 RT 1580.)

Obviously not content in being told by the prospective juror that he could impose the death penalty in a case such as the one actually being

tried, (*People v. Cash, supra,* 28 Cal.4th at p.720), the prosecutor again busied herself in unearthing some hypothetical set of facts under which Mr. Rutigliano could not impose death. However, she had little success, with the prospective juror unambiguously stating that he could find for death in a robbery felony murder and that he could go into such a case with a "clear" mind. (11 RT1580-1581.)

Having failed several times to ferret out some set of facts under which Mr. Rutigliano could not impose death, the prosecutor tried yet again. This time, she parsed the individual special circumstances, and presented them in a factless vacuum.

> Question: Let me ask you this. If the defendant was convicted of first degree murder and the special circumstance was only the rape, would you be able to impose the death penalty, if the aggravating circumstances substantially outweighed the mitigating circumstances?
> Answer: Could I or would I?
> Question: Would you?
> Answer; I'm not sure.
> Question: If the only special circumstance proved to be true was the kidnap for rape, would you impose the death penalty if the aggravating circumstances substantially outweighed the mitigating circumstances?
> Answer: Possibly.
> Question: And assume the same hypothetical for the rape with a stake.
> Answer: Possibly.
> Question: And the same circumstances, the same hypothetical for just a plain kidnaping.
> Answer: I'm not sure.
> Question: And the same circumstances for a torture.
> Answer: Probably. (11 RT 1582-1583.)

c. Prosecutor's Challenge and the Court's Ruling

As soon as the voir dire ended and before the prosecutor even made her challenge for cause, the court actually encouraged the prosecutor make such a challenge, pointing out to her that she previously challenged another prospective juror who gave similar responses. (8 RT 1584-1585.)

The prosecutor, taking her cue from the court's improper suggestion that a challenge was warranted, stated inaccurately stated that Mr. Rutigliano answered that he "could not" impose the death penalty on the persons serving as the lookout or the driver in the bank hypothetical. She further argued that the juror was "inconsistent" in saying he could impose the death penalty on the holder in the beating example, even though the holder was not "equally guilty" to the person who did the beating. (8 RT 1585-1586.)

Appellant's counsel reminded the court that he had a standing objection to the hypotheticals that the prosecutor was using. (8 RT 1587.) Further, counsel argued to the court that Mr. Rutigliano's answers made it clear that he was not substantially impaired under *Witt.* (8 RT 1586-1589.)

Counsel expanded upon his objections to the aiding and abetting hypotheticals that the prosecutor had been proffering.

I think jurors, without any law being given to them with

respect to aiding and abetting, really are left kind of to fend on their own. They're not trained as lawyers, that is the point that I'm trying to make. They're not trained as lawyers. If the court was to tell them, like in a preliminary fashion, we could probably avoid this by giving an aiding and abetting instruction, giving an instruction with respect to when a person who is not the actual slayer can be held responsible for the special circumstances, and that is when he's aware that his conduct involves a grave risk of harm or of death. And this particular prospective juror, he said, "well, was the guy aware that the guy was going to go in the bank and shoot him, you know?" So I would just ask you to allow me one more opportunity to, you know, put this on the record. okay? If the court, perhaps, would tell them the law with respect to aiding and abetting is such and such, the law with respect to a non-slayer -- see, that's a complicated matter. (8 RT 1589-1590.)

The court responded to this request by asking if not giving the instruction was not a better way to test a juror's views on capital punishment.

The Court: By not giving the instruction, wouldn't that be a better view, wouldn't that be a better way to test their mind, a true test of their mind, as to whether or not they would be able to impose the penalty of death, whether they could on an aider and abettor?
Mr. Patton: I don't believe so, your honor. because I think if they are aware of what the law is – you see, and I think I learned in law school years ago, and I think even in the media right now, some people – there is a divided point of view about to what extent should a person who assists another in a crime --
The Court: Well --
Mr. Patton: -- be responsible.
The Court: honestly, you don't believe everything you see in the media, do you?
Mr. Patton: I'm speaking about, you know – this is -- I am saying, your honor, that the lay public, the non-trained

> lawyer, feels that the accomplice rules sometimes, as well as the felony murder rules, are very harsh. But they realize that's the law, and they will follow the law and hold each person responsible. (8 RT 1591-1592.)

The prosecutor then stated her views on this issue.

> If a juror knew the law, the juror would then frame his question in accordance with the law. A true test of the juror's state of mind with regard to aiding and abetting, and accomplices, is to find that out without pre-instructing them, because then we know what their true views are. If they know what the law is, in advance, we can not find out what their true views are, because they want to follow the law. (8 RT1593.)

The court essentially adopted the prosecutor's argument and refused to give further generalized instructions as to the aiding and abetting theory. (8 RT 1597-1598.)

> ...based on this court's look at (juror No.)3489 and his state of mind that this court is required to assess, based on Bradford and Cox, in applying Witt versus Wainwright, this court sees, in part, (juror no.)3489 in the same way as (juror no.) 2644. He picks and chooses the special circumstances that he believes he would be able to consider the penalty of death on, and that shifts and changes the burden of the people, because, you know, you have to fit the special circumstances for him. The second thing is that in terms of an accomplice, or an aider and abettor, it is his true state of mind that they're not equally guilty, and even if they are guilty, they're not equally guilty. In other words, in these folks' eyes, the person is guilty, but there's a degree of guilt. And that is really the true test of whether or not they would be able to consider the penalty of death or automatically vote for life without parole.

> And this person is honest. He says probably not on the getaway driver and the lookout person, probably not, giving the state of mind to this court that that's really the right way we do aider and abettor questions. I didn't really know, and perhaps now I do, that the people's theory in this case probably is an aider and abettor theory. I didn't realize that, because I sit tabla rosa -- I'll give you that spelling later, madam reporter. Now this court is being educated as to how this case probably will be presented, so that is a fair way to ask the questions. the challenge for cause is granted as to (juror no.)3489. (8 RT 1598-1599.)

d. Application of Law to the Challenge

The court and prosecutor were right about one thing. Mr. Rutigliano was very similar to Mr. Pfefer. (Juror #2644.) They were both improperly excused. Both the prosecutor and court mischaracterized the jurors' statements to create the impression that this juror's personal belief would impair him from imposing the death penalty in a case such as this. In reality, there was nothing in the juror's answers to suggest that. In fact, as with all of the dismissed jurors, this particular question, critical to the *Witt* process, was never even asked of Mr. Rutigliano. Instead, once again the prosecutor spent her time trying to get the prospective juror to state that in some hypothetical case, that has absolutely no connection with the instant case, he would be reluctant to impose death.

Even though this juror made it clear in the oral voir dire and in his questionnaire that he would follow the law as stated by the court, it would

have been understandable that the prosecutor might want to test these statements by the juror by asking pertinent and relevant questions as to the general fact pattern of *this* case. However, it is clear from the voir dire that the prosecutor sought only to extract from the prospective juror anti-death statements by the use of confusing and irrelevant hypotheticals.

Once again, the prosecutor argued that Mr. Rutigliano's statement that he "probably" would not impose the death penalty on a hypothetical wheelman or lookout person if they didn't know that the man in the bank intended to kill disqualified him. However, again this hypothetical was completely irrelevant as to whether Mr. Rutigliano could impose the death penalty in *this* type of case, where the theory of the prosecution was that appellant was directly and intimately involved in the events that caused the victim's death.

The prosecutor also relied upon her confusing incomplete hypothetical as to one person holding a murder victim while the other beat him to death. The prosecutor argued that the juror was inconsistent when he stated that, while he did not believe that the two perpetrators were "equally guilty," he could impose the death penalty upon the holder if the aggravating circumstances substantially outweighed the mitigating. However, it was not the juror who was "conflicted'" it was the hypotheticals themselves.

Again, the prosecutor introduced the legally meaningless and ultimately misleading phrase "equally guilty" into the voir dire. The implication that there are different gradations of guilt is obviously wrong. One is either guilty or is not. As discussed previously, aa assault is not a predicate felony for felony murder. The only way that the holder could be convicted of murder is if he shared the striker's intent to kill. In the hypothetical the prosecutor gave, it is impossible to tell if the holder is guilty of the murder, as his guilt obviously rests upon sharing the intent of the person actually doing the striking.

Therefore, given the juror's lack of legal knowledge and the legally flawed suggestions that there are degrees of guilt, the prospective juror's answer that he could impose death on the holder even though he was not "equally" guilty was quite reasonable.

The prosecutor and the court vetoed any attempt to clear up the confusion that these aiding and abetting hypotheticals invariably created. Appellant's counsel rightly informed the court under *Witt* the question that had to be answered was whether a juror could bend his own beliefs to the will of the law and the only way to ascertain this answer was to inform the prospective jurors as to the nature of the law that they would have to follow. (*Witt, supra,* 469 U.S. at 420.)

Counsel correctly explained this law to the court and asked that the prospective jurors be instructed, to permit a determination of whether their personal beliefs would substantially impair them in doing their duty. Instead, both the prosecutor and the court again relied upon the jurors' uninformed answers to irrelevant and confusing hypotheticals.

Mr. Rutigliano had no personal beliefs against the use of the death penalty. His dismissal was based upon factually irrelevant and/or legally flawed and confusing "hypotheticals." The court explicitly precluded any attempt to explain the law upon which these hypotheticals were based. A prospective juror's uninformed personal opinion of the law is irrelevant in the *Witt/Witherspoon* equation. It is whether that juror can follow the *actual* law that controls.

The dismissal of this prospective juror for cause violated appellant's rights to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution according to the interpretation of both the United States Supreme Court and this Court. The trial court's error as to this prospective juror alone mandates reversal of the death judgment.

4. PROSPECTIVE MAXINE MORALES- #2442

a. Questionnaire Responses

Maxine Morales was a sixty year old Hispanic female. (24 CT 7324.) In her questionnaire, she made it clear that while she had no real feeling about the death penalty (24 CT 7361, Q 178-179), California should have it and she could personally impose it. (24 CT 7362, Q 186, 188.) She further stated that any decision between life and death should be made based upon the individual case. (*Ibid,* Q 189-192; 24 CT 7396, Q 196; 24 CT 7365, Q 209-210.) She also stated that she could set aside any personal beliefs and decide the case on the facts and the law, further stating "I would do the best that I could to have justice served." (24 CT 7363-64, Q 200.) Ms. Morales also stated that the two penalties are equally severe. (24 CT 7368, Q 227.)

b. Oral Voir Dire

After advising her of the basic process of weighing of the aggravating and mitigating factors, the court informed Ms. Morales that the "weighing of the factors is not quantitative but qualitative in which the jury, in order to fix the penalty of death must be persuaded that the bad factors are so substantial in comparison to the good factors that death is warranted instead of life without parole." (7 RT 1444.) The juror indicated that she understood and that she would not automatically vote for either penalty. (8

RT 1445-1445.)

Ms. Morales stated that she was "equally open" and "neutral" to both penalties and that she could follow the court's instructions and consider the factors she was given in determining the penalty. (7 RT 1445.) She also indicated that she could take appellant's childhood into consideration but could impose death if the aggravating circumstances substantially outweighed the mitigating, even though the law never requires the imposition of the death penalty. (7 RT 1446-1448.)

The prosecutor attempted without success to use Ms. Morales' fairness and lack of pre-determined attitudes as a factor *against* her ability to sit as a juror. However, Ms. Morales neutralized the prosecutor's attempt to misstate her most reasonable and balanced views as to the imposition of penalty.

> Question: You indicated that you are neutral. You are not more in favor of the death penalty nor more in favor of life without the possibility of parole, correct?
> Answer: That's correct.
> Question: So how can I determine whether or not you would impose the death penalty, if it was an appropriate case?
> Answer: I don't know that you can determine that at this point. I think that determination or decision would be made after the information was given to me or any other juror. At this point, I don't have a say one way or the other, because I haven't heard anything. So at this point that's why I say I'm neutral. I'm not leaning one way or the other.
> Question: Are you for the death penalty?
> Answer: I'm not for or against it.

> Question: Now, you indicate on question 178, "What are you general feelings about the death penalty?" you put, "none."
> Answer: You know, I'm going to say something that may be good for the court to hear, just is as a juror filling out the that form. When I was filling that form from 11:00 until 4:30 that I turned it in. It was very taxing. It was, I felt the important part of the gist of that question was left to the end which in some respects me, personally, felt should have been more at the beginning. If you look at my writing the beginning of my writing, I write very neatly, trying to be very concise and accurate. As I got further into the form, I was like so exhausted that you could even tell by my handwriting, it is haphazardly done. It's done quickly. At that point I was interested in getting the information completed, but I also was concerned with completing it appropriately. So when I said, I have no opinion, at that point I go back to what my original statement was. I feel that this is a very high responsibility would be placed on me.
> Question: In your hands.
> Answer: And I certainly would want to do the right thing by the defendant or by the other side. I would want to do whatever the evidence or the information warranted. And I -- at this point I couldn't say that I have a decision one way or the other or I feel one way or the other way. I don't. I don't feel one way or the other about it. I feel like I would have to have it proven to me and that the information would be concise and the information that I would take away from it to help me make the decision. It would be a very difficult decision if I had to decide that it was a death penalty. I don't think anybody would walk away feeling great about doing that, but I feel I have to do what was warranted by the case. (7 RT1448-1450.)

By any definition, this was a prospective juror who took her responsibility very seriously, understood it, and was able to follow it. However, dissatisfied with the juror's answer, the prosecutor continued to relentlessly pursued the juror, asking "[h]ow can you impose the death

penalty if you don't even know what your feelings are regarding it?" (7 RT 1450.)

Yet again, Ms. Morales informed the prosecutor that while she did not have a personal opinion on the death penalty, she was very neutral and if the facts of the case warranted death she could vote for that penalty. (7 RT1450-1452.)

In response to further prosecutorial questioning, Ms. Morales stated:

> I'm sure that you form opinions as you go through life, but this isn't forming an opinion. This is real. This is happening so in other words, I would have to walk away from this situation with a clear conscious. If I was selected as a juror, I would want to weigh all of the facts, the good and the bad, and what the other jurors would have to say before I could make a decision. Things that I have formed as opinions in my life time, I think are -- they have no consequence as it deals with the real life. This is the real life being approached about sitting on jury for a death case or a murder case. (7 RT 1452.)

To this reasonable, fair and legally qualifying statement, the prosecutor once again repeated the same legally irrelevant question; how the juror "could possibly impose a death sentence if you have no feelings toward it one way or other you have no opinion." (7 RT 1452-1453.) Ms Morales remained consistent in her answer.

> I think the feelings that I have, if it's appropriate for the case. If the evidence, the bad things outweigh the good things, and it's decided consistently with the other jurors involved that I would be comfortable with going with the death penalty. (7 RT 1453.)

Unable to discredit Ms. Morales legal qualifications to sit on appellant's jury, the prosecutor turned to her hypotheticals. Regarding the "assault" hypothetical, Ms. Morales indicated that she could sentence both to death. (7 RT 1455.)

Regarding the "bank robbery" hypothetical, when asked if all of the three participants were "equally guilty" (7 RT 1456.) Ms. Morales stated that she thought that the men standing lookout outside of the bank and the driver were less guilty that the man who pulled the trigger. (*Ibid.*) The prosecutor then asked if the juror could impose the death penalty on the wheelman if the aggravating evidence outweighed the mitigating, and the juror said "yes." This followed:

> Question: Now, why? How could you impose the death penalty on that person when you said he wasn't as guilty as person who did actual shooting?
> Mr. Patton: Objection, your honor that's improper.
> The Court: The objection is noted and it is sustained. I think that she did not say it's not guilty it's not as guilty.
> Question Ms. Locke-Noble: I believe she said he was less guilty.
> The Court: I'll let you follow up on that.
> Question Ms. Locke-Noble: You indicate that the person waiting in the car was not as guilty as the person who pulled the trigger, correct?
> Answer: Right.
> Question: so how can you impose the death penalty on the person who is waiting out in the car, when you believe he is not as guilty as the person who pulled the trigger?
> Mr. Patton: Objection, it is not complete, the factors are -- it's not complete.

Answer the court: Okay. The objection is that it is an incomplete hypothetical. That's overruled. I understand the hypothetical. Answer, please.
Answer: Why would I feel comfortable in saying that he should get the death penalty as well as the one that pulled the trigger because he is less guilty?
Question: Right.
Answer: Because you said that the bad -- mitigating. I get that word confused, the bad issues about him were more than the ones that weren't bad.
Question: But the law says that you do not ever have to impose the death penalty. You always have the option of imposing life without the possibility of parole. It is only when the bad factors substantially outweigh the good factors that you can impose the death penalty. The law never requires you to impose the death penalty. Knowing that, would you impose the death penalty on the person waiting in the car?
Answer: No. (7 RT1457-1458.)

c. Prosecutor's Challenge and Court Ruling

Appellant passed this juror for cause. The prosecutor made the following challenge.

> Well, I think this is the same situation that we had on the previous juror. She indicated under aiding and abetting, she would not be able to impose the death penalty. And I think that would substantially impair her ability to be a juror in this particular case. Along with the fact that she doesn't know what her feelings are, whether she is for or against the death penalty. (7 RT 1460.)

The challenge was opposed by appellant. (RT1461.) The court granted the prosecutor's challenge stating;

> Challenge for cause is granted, same as the last one. The law does not require the imposition of the death penalty, that is a correct statement of the law. And in this particular case even Mr. Patton trying to rehabilitate the second time around this juror is adamant that since the law does not require in an aider and abettor, the person outside whether that person is, I assume, is the getaway driver or the one keeping the car warm for the getaway, less guilty but still guilty. And she understood the concept of guilt or guilty versus not guilty, but just the same guilty, but will not impose the death penalty, will not consider that as an option and believes that life without parole is a sufficient penalty. This is the exact same situation as the previous juror, and based on the Wainwright, which is Witt and Cox and Bradford. She is substantially impaired from performing her oath and duties as a juror in this case and I'm going to excuse her based upon people's challenge. (7 RT 1461-1462.)

d. Application of the Law to the Challenge

Once again, a juror who several times made it perfectly clear that she was fair and open minded and would follow the law as given by the judge was prohibited from serving because she couldn't impose the death penalty on a hypothetical wheelman in the car, a hypothetical far removed from this case. Once again, this chimera of the prosecutor's imagination is allowed to stand in the place of the people and events involved in this case. Once again, the court accepted the prosecutor's legally insupportable theory that if one cannot impose the death penalty in every conceivable situation that it could technically be imposed, you can't sit as a death penalty juror.

What makes this so troublingly disingenuous is that appellant's counsel requested that the prospective jurors be instructed as to the law regarding aiders and abettors before they answered voir dire questions, and the prosecutor and judge refused to do so. The prosecutor much preferred her own court approved approach in order to purge this jury of anyone who wasn't a true death penalty enthusiast, eager to impose the death penalty for whatever offense the law may theoretically allow. Even if it could be said that there was some sort of ambiguity in Ms. Morales answers, the court made no attempt to resolve it.

The dismissal of this prospective juror for cause violated appellant's rights to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution according to the interpretation of both the United States Supreme Court and this Court. Regardless of how this Court finds as to the dismissals of any other of the prospective jurors presented in this argument, the trial court's error as to this prospective juror alone, mandates reversal of the death judgment.

5. PROSPECTIVE JUROR ORLANDO SALAZAR JUROR-# 5849

a. Questionnaire Responses

Mr. Salazar was a sixty-two year old male of Columbian descent.

(20 CT 5926.) In the questionnaire, when asked how he felt about the death penalty, he stated that he "[must] follow the law." (20 CT 5962, Q 178.) He said that he didn't know how he felt about the death penalty or whether he could personally vote to enforce it. (*Ibid,* Q 187-188.) He also wrote that life in prison was worse for a defendant because death was quicker. (20 CT 5964, Q 198.) However, he also stated that he could set aside any personal beliefs and decide the case based on the facts presented and the law given by the court. (20 CT 5964-5965, Q 200.)

Mr. Salazar could see himself voting for the death penalty, stating again that he "must follow the law." (20 CT 5966, Q 209.) He would not automatically vote for either penalty. (20 CT 5967, Q 215-218.) Mr. Salazar also stated "I have a duty to my country and community, I have the time now and I will do my best to be fair and help bring a fair trial." (20 CT5969, Q 231.)

b. Oral Voir Dire

After advising him of the basic process of the weighing of the aggravating and mitigating factors, the court informed Mr. Salazar that,

> the weighing of the factors is not quantitative but qualitative in which the jury, in order to fix the penalty of death must be persuaded that the bad factors are so substantial in comparison to the good factors that death is warranted instead of life without parole. (6 RT 1208.)

The juror indicated that he understood (*Ibid.*), and that he would not automatically vote for either penalty. (6 RT 1206-1210.)

Mr. Salazar confirmed that he could impose the penalty based on the facts of the case and the law and stated that his personal opinions would "have nothing to do with it." (6 RT 1210.)

In response to the prosecutor's questions, Mr. Salazar indicated that he did not have any opinions about the frequency of the use of the death penalty nor whether California should have it as a penalty for murder, indicating that was a decision for the "authorities," not him. (6 RT1211-1212.) The prospective juror indicated that he wasn't aware that California still used the death penalty and that he didn't feel that he was qualified to say whether California should have the option of death. (6 RT 1212-1214.)

Mr. Salazar then stated that although his church's dogma opposed the death penalty, this would have no affect on him and he could follow the law. (6 RT 1214.)

The prosecutor then asked a series of questions in an attempt to confuse the juror into stating he could not impose the death penalty. Mr. Salazar would not be fooled.

> Question: The law says you do not have to impose the death penalty.
> Answer: The law says what?
> Question: You do not have to impose the death penalty. The law doesn't say that –

Answer: No, it doesn't.
Question: The law says that you can impose the death penalty, so you're telling me that you will follow the law? Well, the law says you can always impose life without the possibility of parole, so will you always impose life without the possibility of parole.
Answer: No, ma'am. That's why you go into deliberations with the rest of the 12 or 11 members.
Question: But this is you. I'm talking about you, not the other 11 people, just you.
Answer: If I feel like it should call for the death penalty and if I am satisfied that it is appropriate, yes, I would.
Question: Okay. How are you telling me that you could vote for the death penalty, when you said that what you're going to do is follow the law, and the law says you don't have to impose the death penalty?
Answer: Because at this point, ma'am, at this point I don't have anything to go by. I don't have any hatred. I don't have any bad feelings against anybody, to be able to say, yeah, I'm going to vote for that. I have to sit through the whole thing and analyze it, and have at least a feeling of what's going on before I even -- I'm able -- before I'm able to have any idea that I might want to go for the death penalty. I need to have enough -- something to substantiate that decision you're asking me something without knowing anything, and at this point I only believe that the person being charged is innocent, as far as our law says. Up to this point, that's it. Now, it's up to the district attorney or the state to prove differently, and then that's when you become aware of -- okay, then it merits it. (6 RT 1214-1216.)

Unwilling to accept Mr. Salazar's assurances that he could indeed follow the law, the prosecutor renewed her attempt to get him to say something that would disqualify him. However, the prospective juror continued to assure the court that he could impose either penalty if the facts of the case and the law warranted it. (6 RT 1218-1222)

The prosecutor then referred Mr. Salazar to jury questionnaire question 198, in which he indicated his opinion that life without parole is the worse penalty because "death is quick" and "life is long" with prison being "hell." (6 RT 1222-1223.) The prosecutor then attempted to convince Mr. Salazar that because of this opinion, he could not impose the death penalty if the aggravating circumstances substantially outweighed the mitigating. (6 RT 1223.) However, Mr. Salazar distinguished his personal opinion from the law and gave no indication that he would not be able to follow said law. (6 RT 1223-1226.)

Mr. Salazar made it clear that, before hearing the facts, he could not say if he would impose the death penalty. (6 RT 1226-1227.) The prosecutor then proffered the "assault " hypothetical and Mr. Salazar indicated the punishment as to the holder would depend on whether the aggravating circumstances substantially outweighed the mitigating. (6 RT 1227-1228.) Mr. Salazar then reiterated that he needed additional facts to make any decision but that by the end of the case he would be able to do so. (6 RT 1228-1229.)

c. Prosecutor's Challenge and Court Ruling

Appellant passed this juror for cause (6 RT 1230.) The prosecutor challenged this juror for cause stating the following;

> Ms. Locke Noble: Yes, your honor. I'm challenging him for cause for the following reasons: first of all, he thought the death penalty was abolished. He has no feelings, one way or the other, concerning the death penalty. He can't tell me whether or not life without the possibility of parole is -- actually, he did tell me it was a worse sentence, and then he said, well, death is final. So I'm not sure that he meant that was worse, but he kept saying life without the possibility of parole is worse. He indicated pretty much that he had to have hatred or bad feelings about the defendant, personally, in order to impose the death penalty, although he backed off on that a little while later. I truly don't know where he stands. It appears to me that he is going to impose life without the possibility of parole, because he believes that life without the possibility of parole is the worse punishment, and someone should have to live with it, which is what he said on his questionnaire. It's question no. 227, which is, "which do you believe is a more severe punishment, death or life without the possibility of parole?" And he put, "life without the possibility of parole. He'll live in hell for the rest of his life." He said he doesn't even want to think about it. He doesn't want to think about the penalty. He's not qualified to say what the penalty should be. It's something ugly and I don't want to think about it. And he also said that he follows the doctrines of the catholic church, in which they believe that you should not impose the death penalty, to a point. He couldn't tell me what point. He says he doesn't want to think about it. He can not decide. He went back and forth. And I think he falls under Cox. (6 RT 1230-1231.)

Appellant's counsel objected to the challenge but the court granted it stating;

> The Court: People's challenge for cause is granted. I'll explain to you why. Let me invite any reviewing court, should there be any review, particularly to the question area on question 198, when asked whether or not if there's a first degree plus special circumstances, plus aggravating outweighs mitigating, whether or not he could make an election between the death penalty or life without parole, or would he automatically vote for life without parole. I remember that his answer is "Death is quick. Life is long. Prison is hell." He then, when asked directly in open court, he said he'd prefer not to say "prefer death." And then, in fact, I emphatically seen him with his right fist waving, he said, "I'm not for death. Death. death. Death." He says that's his own feeling. He's got to have a lot more. He just simply did not want to answer the question. I think that he is very conflicting in his answers in this case. One of the other things also that concerned me is that he wanted to interject his own personal feelings into the case, in order for him – because, I understand, based on his state of mind, to even consider the issue of capital punishment he has to have hatred or bad feelings for the defendant. He said, "I have no hatred or bad feelings for the defendant." I heard that explicitly, it rung my ear as I turned around. And I think that is not the standard that would be appropriate. Based thereon, this court believes that he's substantially impaired in the performance of his duties, in accordance with his instructions and the oath. (6 RT 1232-1234.)

d. Application of Law to Challenge

It is hard to imagine a more intellectually dishonest challenge by a prosecutor or response from a court as was the case with this juror. Mr. Salazar was an honest, thoughtful juror, prepared to do his duty to his country. He was deprived of this opportunity, not because he could not

impose the death penalty, but because he did not fit the profile of a juror predisposed to blindly impose the death penalty.

As with the other prospective jurors discussed in this argument, Mr. Salazar was subjected to prosecutorial questioning designed not to discover whether the juror could follow the law and consider both penalties, but to elicit an answer that could be twisted to suggest the opposite. Both the prosecutor and the court completely mischaracterized his answers in the oral voir dire. Mr. Salazar never stated that his religious beliefs would substantially impair him from imposing the death penalty. In fact, he specifically stated that in spite of his religion's teachings, he realized that it was his "duty to follow the law." (6 RT1214-1215.)

Further, the juror never indicated that his personal preference of penalties for himself would be life without parole meant that he could not follow the law and impose the death penalty on appellant. Again, he indicated the contrary. (6 RT RT1223-1226.) The trial court's statement that he saw Mr. Salazar in "open court"...emphatically...with his right fist waving, (saying), "I'm not for death, death, death, death." (RT1233) might establish ambiguity except for one thing: nowhere in the record does such an utterance by Mr. Salazar ever appear. The only words similar to these appeared as Mr. Salazar was trying to explain his neutrality on the penalty.

> What I'm trying to feel in my conscience is not that I'm going to be a -- what can I say -- a person that will go for the death, you know. Some people are like, no, I don't even want to think about that much, because I take it very serious. But if it's called for and if it is one of the options, and if I sat on the case long enough to understand what's going on, I think that I am more equipped to have a very good answer at that time. I'm not going to sit here and tell you, yeah, death, death, death; I'm not. I'm not for that. I'm for justice. And after sitting through the whole case and analyzing the situation, then I'd be better equipped to say, yeah, death or life imprisonment. At this point I couldn't -- I don't feel like -- death, to me, is final, it's something that I'm not going to answer readily, just because somebody wants me to answer that way. (6 RT 1224-1225.)

This comment by the juror represents a careful, neutral thought process, well aligned with the law of *Witt* and *Stewart.* However, both the prosecutor and court either ignored or intentionally misconstrued what Mr. Salazar actually said.

Both the prosecutor the court made much of the "fact" that the prospective juror said that he needed to have "bad feelings or hatred" before he could impose the death penalty, concluding as he did not have such feelings he was disqualified from sitting on the jury. Once again, Mr. Salazar's words were taken out of context and twisted. The prospective juror never said this. What really was said was as follows:

> Question: Okay. How are you telling me that you could vote for the death penalty, when you said that what you're going to

do is follow the law, and the law says you don't have to impose the death penalty?
Answer: Because at this point, ma'am, at this point I don't have anything to go by. I don't have any hatred. I don't have any bad feelings against anybody, to be able to say, yeah, I'm going to vote for that. I have to sit through the whole thing and analyze it, and have at least a feeling of what's going on before I even -- I'm able -- before I'm able to have any idea that I might want to go for the death penalty. I need to have enough -- something to substantiate that decision. You're asking me something without knowing anything, and at this point I only believe that the person being charged is innocent, as far as our law says. Up to this point, that's it. Now, it's up to the district attorney or the state to prove differently, and then that's when you become aware of -- okay, then it merits it. (6 RT 1216)

The juror then made it perfectly clear that he could follow the law.

Juror: Perhaps I wasn't understanding that I had already sat through the whole case and they had already proven that the defendant was guilty. Okay. So he's guilty. Now, we're in the final phase, in deciding the sentence --
Ms. Locke-Noble: Correct.
Juror: And if it is what the law says it should be, yes, of course (6 RT1217-1218)

Mr. Salazar never said that he "couldn't think about" the death penalty in the context that he could not impose it. He simply informed the prosecutor that he did not think much about it as a part of his daily life. (6 RT 1213.)

The dismissal of Mr. Salazar was based, *in toto*, on an intellectually dishonest process. There was no ambiguity in his voir dire that indicated that he could not be able to be impartial and follow the law. Even if there

was some ambiguity in Mr. Salazar's answers, the court did nothing to resolve it but simply decided that a refusal to pre-judge amounted to a disqualification. As with the above four jurors improperly challenged by the prosecutor and dismissed by the trial court, there was no follow up questioning by the court. As stated in *Witt*;

> [T]he trial court has a serious duty to determine the question of actual bias, and a broad discretions in its rulings on challenges therefore...In exercising its discretion, the trial court must be zealous to protect the rights of an accused. (*Wainwright v. Witt, supra,* 469 U.S. at 429-430 citing to *Dennis v. United States* (1950) 339 U.S. 162, 168.)

The court's discretion bears the concomitant responsibility of an affirmative and proactive duty to ascertain the true state of mind of the prospective juror, and protect a defendant against a jury "stacked" to impose the death penalty.

The dismissal of this juror was not based upon serious questions of the law as to close issues vis a vis *Witt* or its progeny. It was based upon what appears to be the prosecutor's deliberate misquotations of Mr. Salazar and the court's unquestioning acceptance of the prosecutor's specious arguments. It simply did not matter what Mr. Salazar said. He was a marked man by the prosecutor. This sort of bending of the truth and twisting of the law to deprive a citizen of this country an opportunity to do his duty has no

place in any American courtroom. The fact that a man's life was at stake only made the conduct of the prosecutor and court that much more chilling.

For yet a fifth time, a perfectly acceptable, intelligent and thoughtful prospective juror was culled from this jury panel in violation of the United States Constitution. This dismissal was based wholly upon distortions of Mr. Salazar's words. Again, a single dismissal mandates reversal of the death judgment.

6. PROSPECTIVE JUROR MILA HANSON - #9961

a. Questionnaire Responses

Ms. Hanson was a fifty-five year old woman born and raised in Russia, who immigrated to the United States when she was thirty. (22 CT 6378). She did not have any strong opinions but was for the death penalty in "some cases." (22 CT 6412, Q 179, 182.) She stated that the penalty that a person receives "depends on the facts" (22 CT6414, Q 196), and also felt that death was the worse of the two possible penalties. (*Ibid*, Q 198.)

Ms. Hanson had no personal convictions that would make it difficult for her to impose the death penalty, and said could decide the penalty on the facts according to the law given by the judge. (22 CT 6414-6419.) Further, she could "see herself" voting for death. (22 CT 6416, Q 209.) She also

stated she would not automatically vote for either penalty. (22 CT 6417, Q 215-218.)

b. Oral Voir Dire

The juror understood the court's explanation of the death penalty scheme and the weighing process and again stated she would not vote automatically for either penalty. (6 RT 1249-1252.)

In response to questioning by appellant's counsel, Ms. Hanson indicated that she has an open mind to the penalty and if the facts warranted she could impose the death penalty. (6 RT 1253.)

In response to the prosecutor's questioning, Ms. Hanson professed to have little personal opinion as to whether California should have the death penalty or whether it should be abolished. (RT1254-1255.)

> Q: Okay so. Here is my hard question.
> If you have no thoughts, no opinions and it's not for you to judge, how could you possibly impose the death penalty on someone?
> A: It depends on the circumstances and the facts, if I think if it's really horrible crime and deserves probably deserves, it's every juror will probably judge the way they feel how it will affect them.
> Q: Well, you have to base your decision on the facts not how you feel, but on the facts.
> A: On the facts.
> Q: And if you feel that the aggravating circumstances substantially outweigh the mitigating circumstances, it is at that point in time in which you could impose the death penalty and what I'm hearing, you don't want to be involved. You don't want to make a decision. You don't feel qualified to judge in this

particular situation.
A: I don't feel that I am less qualified than any other person. And if I have to make a decision, I will. I don't think anybody wants to make decisions like that so.
Q: I agree with you. No one would want to make that decision, but what I'm trying to find out, along with counsel, is if you can impose the death penalty, can you come out here look the defendant in the eye and say I'm going to kill you?
A: I think I can. I can. (6 RT 1255-1256.)

Having failed to convince the juror that she could not impose the death penalty, the prosecutor then commenced her oft used attempt to confuse the prospective juror as to which was the "worse" penalty.

Q: You indicated on your questionnaire, that you thought death was the worse punishment, but for you personally life without the possibility on of parole would be the worse punishment?
A: No. I indicated that I would prefer life without possibility of parole.
Q: So I misunderstood what you were saying.
A: Uh-huh.
Q: Okay the question is 227, "which do you believe is a more severe punishment death or life without the possibility of parole?" You circled death and then you put the question is, "why do you think that is the more severe punishment?" You circled is more severe punishment you did not circle and you put, "I prefer life for myself. So as I understand what you are telling me, and tell me if I'm wrong, death is the worst punishment and death would be worse for you, but if you were in this situation, you would rather have life without the possibility of parole, am I correct?
A: Right.
Q: Now, I understand what you are saying, because you personally would prefer to have life without the possibility of parole. Are you going to put yourself in the place of the defendant and give him the punishment that you want?
A: No. (6 RT 1256-1257.)

In response to the prosecutor's continuing questions, the prospective juror indicated that while she is concerned that "sometimes innocent people are convicted" this would not play a role in her deliberations. (6 RT 1257.) The prosecutor presented the "assault" hypothetical asking if the two perpetrators were equally guilt. As with many of the other jurors, she was confused by this question as she did not know the intent of the holder. (6 RT 1260-1261.) When the prosecutor asked if both perpetrators should get death, the prospective juror wisely stated that "it should be more to it than holding." (6 RT 1261.)

> Q: So are you saying, "no, I cannot. I impose the death penalty on the person who is holding the arms"?
> A: If it's all the information I have.
> Q: This is the information you have.
> A: No.
> Q: And is that because you don't believe that he as guilty as the person who is doing the beating?
> A: Maybe he is guilty, but he is not the one who the is doing beating and he is probably not such a bad person compared to the other who was doing the beating.
> Q: So do you think that someone has to be bad in order to have the death penalty imposed upon them?
> A: It usually is...
> Q: If the aggravating circumstances substantially outweigh the mitigating circumstances, do you believe that life without the possibility of parole would be the punishment that you would give to the person who was holding the person who died?
> A: No.
> Reporter: Excuse me?
> Ms. Locke-Noble: She said "no."

Q: Would you be able to impose the death penalty on that person the person holding the arms?
A: Yes.
Q: You just changed your mind.
A: You said aggravating circumstances.
Q: Do you remember when I posed the hypothetical to you the person that is holding the arms? Do you recall that?
A: Yes, that's the one information you gave me from the beginning.
Q: No. Listen. When I first gave you the hypothetical, the first thing I asked you is the person that is holding the arms is equally guilty as the person who punched. You said, no, because there should be more because the other person is doing more. Do you remember
that?
A: It's not exactly the way I answered. Well –
Q: Is that correct? Is that how you feel?
A: The way I answered the person who did the beating is probably leader. He probably influenced the other people. Maybe they did it just to please him. There are lots of different reasons could be, and if at the end you say anyway aggravating circumstances are outweigh mitigating.
Q: We are just talking about the first part of the hypothetical. We will get to the other part.
A: I think he is less guilty.
Q: And that's what you said before.
A: He might be less guilty.
Q: Now I added they facts. I said now let's consider the person that is being beaten died, it's murder in the first degree and the special circumstances have been found to be true, then I said with the -- if the aggravating circumstances substantially outweigh the mitigating, would you be able to impose the death penalty on the person holding the arms?
A: Yes.
Q: You said, "no."
A: Maybe I don't remember,
but I think you did not mention the comparison of circumstances before.
Q: I did.
A: Or I just missed it, sorry.
Q: Okay. Because I did ask you that and

you have now changed your mind.
A: No, I didn't change my mind, probably I didn't hear you.
Q: And you also said that someone has to be bad in order to impose the death penalty upon them, do you recall saying that?
A: Yes.
Q: Are you changing your mind with respect to that?
A: No.
Q: You still believe somebody has to be of bad character and have some history or some person who can do it to another person.
A: Yes, it's a bad person.
Q: And that person, in order for you to impose the death penalty, you have to believe that that person is bad, correct?
A: Absolutely. (6 RT 1262-1266.)

c. Prosecutors Challenge and the Court's Ruling

Ultimately, the prosecutor challenged Ms. Hanson stating that she could not sit because "she had no opinion" as to the imposition of the death penalty or whether California should even have the death penalty. (6 RT 1270.) The prosecutor also challenged on the grounds that Ms. Hanson could not be relied upon to impose the death penalty because she gave confusing answers to the "assault" hypothetical. The prosecutor further stated that the juror could not sit because she would only impose death on a "bad" person. (6 RT 1270-1271.)

Counsel opposed the challenge. (6 RT 1271.) The court granted the challenge on the grounds that she gave conflicting answers, that she could only execute a bad person, interpreting that to mean that the juror would

only execute a person of prior bad character. The court also said that the juror failed to speak audibly. (6 RT 1271-1272.) The court held "she is not an appropriate juror for this case." (6 RT 1273.)

d. Application of the Law to the Challenge

This was yet another perfectly qualified juror who was wrongly excused despite being able to impose either penalty.

As stated, the "assault" hypothetical is fatally flawed. It misstates the law and is inherently confusing. The guilt of the holder depends on his intent. If the prospective juror does not know the holder's intent, she cannot answer the question. Not only did the prosecutor once again refuse to expand the hypothetical so it made legal sense, she directly told the juror that she must give an answer without further information about the intent of the holder. (6 RT 1262.)

This voir dire was yet another cynical exercise in which the prospective juror was asked an inherently unanswerable question and was dismissed for not blindly answering it to the satisfaction of a prosecutor with an agenda that went far beyond the selection of a fair jury. Ms. Hanson did her best to try to answer a series of deliberately confusing questions from the prosecutor as to these "hypotheticals." However, she had no real knowledge of the law and how the aiding and abetting law actually operated. Instead, the prosecutor forced her to guess. Neither the prosecutor

nor the court had any intention of informing the jurors as to what aiding and abetting actually signified in the hypothetical given. (8 RT 1589 et seq.)

By doing so, the court missed the entire purpose of the *Hovey* voir dire. The purpose of this process is not to probe a juror's misconceptions about the law. Obviously, very few jurors in our system of jurisprudence understand much about the law before they arrive at the courthouse door and fewer still understand the intricacies of California's death penalty scheme.

The trial court's role in this process is to inform them of the pertinent law. In a death penalty case, this responsibility acquires an additional significance, as the law of *Witt* requires that the court determine whether the prospective juror could set aside any of her personal beliefs and follow the statutory death penalty scheme. Therefore, it is essential for the prospective juror to understand that law so that the key determination under *Witt* may be made.

In this case, the court and prosecutor deliberately kept the prospective jurors in the dark, then asked them to opine on the legal meaning of inaccurate, confusing and extreme hypotheticals. The court never once intervened to disabuse a prospective juror of any legal misconceptions and ask said juror if he or she could follow the law as it was written.

The questioning regarding whether a person would have to be "bad" before Ms. Hanson could impose the death penalty was not only misleading, it was based upon the utterly absurd premise that a juror who cannot execute a "good" person should be dismissed under *Witt*. Ms. Hanson was perfectly content to follow the law. She framed the issue of guilt and punishment in terms of the word "bad," which was exactly the term that the court used in describing aggravating factors.

The prosecutor's statement that Ms. Hanson should be dismissed because she didn't have any fixed beliefs as to the death penalty again shows how far this prosecutor would go to remove open-minded people from this jury. There is absolutely nothing requiring that a prospective juror must have an opinion about the legislative wisdom of the death penalty to be allowed to sit. Ms. Hanson said she could remain open minded and follow the instructions of the court. The fact that she really had not given much thought to the death penalty was irrelevant.

The court's apparent frustration that the juror did not speak as audibly as he would have liked while having absolutely nothing to do with the constitutional fitness of Ms. Hanson to sit on appellant's jury, was indicative of the trial court's fundamental misunderstanding of its duty to provide appellant with a fairly constituted jury. It was yet another specious reason to cast off yet another open-minded, intelligent prospective juror.

Ms. Hanson and the other prospective jurors had the constitutional expectation that if they could follow the law and subrogate their personal feelings to it they could sit on this most solemn tribunal. Jamelle Armstrong had that constitutional expectation as well. Instead, yet another juror was subjected to sophistic, cynical, confusing and at times hostile questioning by the prosecutor, questioning intended from the outset to dismiss a prospective juror that the prosecutor thought might question a clear, unobstructed path to the death chamber.

Another qualified, open-minded and intelligent person was sent home for all the wrong reasons. Appellant was once again deprived of a constitutionally constituted jury to decide whether he lived or died. The judgment of death must be reversed.

7. PROSPECTIVE JUROR LORRAINE MENDOZA- #3058

a. Questionnaire Responses

Lorraine Mendoza was a thirty year old woman of Spanish descent. (26 CT 7474.) She stated that she has always been "open-minded" to the death penalty, (26 CT 7510, Q 178-179) and that she supports the ultimate penalty. (26 CT 7511, Q 188.) She also indicated that death was the worse penalty. (26 CT 7512, Q 198.) Ms. Mendoza further stated that she had no personal convictions that would make it difficult for her to impose the death penalty and she could decide the penalty on the facts according to the law

given by the judge. (26 CT 7521-7522, Q 199-200.) She could impose the death penalty depending on the case and would not vote automatically for either penalty. (26 CT 7514-7515 Q209, 215-218.) She also indicated that life without parole was the worse penalty. (26 CT 7517, Q 227.)

b. Oral Voir Dire

Ms. Mendoza clearly stated that she favored neither penalty and would be able to follow the court's instructions in determining which one to impose. (6 RT 1062-1064.)

The prosecutor accused the juror of not being able to impose the death penalty because the prospective juror did not have any strong opinions about it. (6 RT 1068.) Ms. Mendoza summarily rejected this illogical presumption and assured the prosecutor that her determination of penalty would depend solely on the evidence. (*Ibid.*) Ms. Mendoza was then presented the "assault" hypothetical to which she responded by stating that she could impose death for the holder. (6 RT 1072.) Trying to provoke the juror into changing her answer, the prosecutor told Ms. Mendoza that she noted a hesitancy in her answer. Ms. Mendoza explained her answer was reflective of the time she needed to picture the question in her mind. (*Ibid.*)

In her questionnaire, Ms. Mendoza stated that life without parole could be the worse of the two penalties because the defendant would have

to carry the guilt his entire life. The prosecutor then asked a series of objectionable questions in the vein that if a life without possibility of parole prisoner appealed his sentence it meant that he was not living with guilt. (6 RT 1080-1081.)

The prospective juror said that if the bad evidence substantially outweighed the good she would vote for death. However, the prosecutor then told her that you never have to give the death sentence, and the juror then stated that she would give it in the worst cases. (6 RT 1083-1084.) Upon further questioning by appellant's counsel, Ms. Mendoza stated that if the bad evidence substantially outweighed the good she would impose the death sentence. (6 RT 1087.)

c. Prosecutor's Challenge and Court Ruling

The prosecutor challenged Ms. Mendoza on the ground that her personal belief that life without parole is the worst of the two sentenced left her substantially impaired. (6 RT 1088) Over counsel's objection , the court granted the challenge for this reason. (6 RT 1089.)

d. Application of the Law to the Challenge

The crux of voir dire was not whether the prospective juror believed that life in prison was the worse of the two penalties. It was whether Ms. Mendoza could set aside her personal beliefs and follow the law. There was nothing at all in her voir dire that indicated she could not do so. Ms.

Mendoza plainly told the prosecutor that she could impose the death penalty if the aggravating circumstances substantially outweighed the mitigating. (6 RT 1071-1072.) Ms. Mendoza stated once again that she could impose death on the "holder" in the assault hypothetical. (6 RT 1072.) She also specifically stated that she could put her personal feelings aside and listen to the court's instructions and follow the law. (6 RT 1075.)

Further, Ms. Mendoza stated that if the bad outweighed the good she would have to vote for the death sentence. (6 RT 1082-1083.) It was only then after a series of leading and suggestive questions by the prosecutor that Ms. Mendoza stated that it was her "opinion" and "belief" that life without parole might be the proper sentence in such a situation, because, to her it was the worse of the two sentences. (6 RT 1083-1084.)

There was nothing at all in this exchange to suggest that Ms. Mendoza was unable to aside any personal feelings and follow the law. Her responses indicated she could do just that. Even if there was an ambiguity, it was the responsibility of the trial court to resolve it. Yet, the court left possible ambiguities simply hanging in the air, resolving them in favor of the prosecution. It is well accepted that trial court must make a good faith attempt to resolve any ambiguities. (*See People v. Heard, supra,* 31 Cal.4th at p. 985.) While great deference is shown by the appellate courts to this resolution, the resolution must be "fairly supported by the record." (*Ibid.*)

This was not a question of resolution based on a juror's "demeanor" or non-verbal cues. (See *People v. Bramit* (2009) 46 Cal.4th 1221, 1235.) Up to the prosecutor's leading questioning, the prospective juror seemed quite comfortable in her assessment that she could follow the law. It should come as no surprise that a trained lawyer, left uncontrolled by the court, can get an inexperienced prospective juror to state something slightly contradictory. What was a surprise was the court's consistent refusal to attempt to clear up ambiguities by asking some impartial common-sense questions. It is of note that there wasn't a single occasion where the court asked any follow-up questions to any of the dismissed prospective jurors discussed in this Argument.

The burden was on the prosecution to justify their challenges. As with all of the other jurors referenced in this Argument, the burden was not met. Reversal of the death judgment is the only remedy.

8. PROSPECTIVE JUROR KIBIBI GREEN -#5354

a. Answers to Questionnaires

Kibibi Green was a twenty-four year old African American woman. (54 CT 15882.) Her answers to the death penalty related questions showed absolutely no constitutional infirmity as to her service. She stated that the death penalty was appropriate "if the nature of the crime permits that." (54

CT 15917, Q 178.) She stated that her death penalty views had not changed over the years. (*Ibid.*, Q 182.) She felt that California was right to have the death penalty (*Ibid.*, Q 186) and indicated that she could impose the death penalty depending on the case. (*Ibid.*, Q 186-193.) She also stated that death was the worse of the two penalties. (54 CT 15919, Q 197.) She said that the purpose of the death penalty was "to serve justice on the criminal." (54 CT 15918, Q 192.)

b. Oral Voir Dire

After hearing the court's explanation of the sentencing process, Ms. Green unambiguously stated that she would never vote automatically for either penalty. (11 RT 2212-2214.) She then stated that if the aggravating factors substantially outweighed the mitigating factors, she could return a verdict of death and would do so based upon the legal instructions given by the court. (11 RT 2214.) She was personally neutral as to the penalty and could be fair to both sides.

In response to the "assault" hypothetical, Ms. Green stated that she could impose the death penalty on both perpetrators. (11 RT 2217-2218.) She also stated that she could impose death for crime like the ones which appellant stood accused. (11 RT 2224.)

After the prosecutor re-explained the sentencing procedure, Ms. Green confirmed that she could follow the law and find for death where

appropriate. (11 RT 2221.) Then the prosecutor presented her with the "bank robbery" hypothetical. Ms. Green indicated that while the people serving as the lookout and the wheelman were guilty of robbery, they were not guilty of murder under her rather limited knowledge of the law. (11 RT 2242-2245.)

The following exchange then occurred concerning the burden of proof.

> Q: (By prosecutor) Okay, question no. 44, it says, "what are your opinions in general about criminal defense attorneys?" And you put, "there to prove innocence."
> Answer: Yes.
> Question: Are you going to require the defense to prove their client to be innocent?
> Answer: Yes. (11 RT 2245-2246.)

No further inquiry would be made about Ms. Green's above statement which was completely out of character with the rest of her written and oral voir dire.

Follow up questioning by appellant's counsel better explained the felony murder concept as it pertained to the bank robbery hypothetical. Once the juror better understood what the law required, she stated that she could hold all three participants liable as required by the law. (11 RT 2246-2253.)

c. Prosecutor's Challenge and Court's Ruling

Appellant passed Ms. Green for cause. The prosecutor challenged the juror for cause on the basis that the prospective juror would make the defense prove the innocence of appellant. (11 RT 2254-2255.) The prosecutor stated that even though Ms. Green's misapprehension of the law would not prejudice the prosecution, she could not sit as a juror. (11 RT 2255.)

Appellant's counsel argued that Ms. Green's response to the burden of proof question was appropriate and understandable and did not signify that she didn't believe in the presumption of innocence. (11 RT 2256-2257.) Counsel then requested that the court allow him to reopen the questioning. (11 RT 2260.) The court refused to do so. The court instead granted the challenge solely on the presumption of innocence grounds stating;

> One of the important things, of course, in assessing jurors in this case. If I don't grant the cause now, I'll grant the cause at the general voir dire. But we the question I keep coming back to, specifically, is when Ms. Locke-Noble asked question no. 44, on whether or not the defense would have to prove the innocence of their client, and she said, "yes." And that was after the court gave the instruction of reasonable doubt and the defendant's presumption of innocence. If I retain this juror, what will happen is one of two things, assuming an adverse decision is with Mr. Armstrong; either they will argue that this court kept a juror that it should not have kept, because justice demands or in the alternative, they will argue that that is what is going to happen, and I can't let it happen, because then we will have to do this all over again.

> In fairness to Mr. Armstrong, he is presumed innocent in my eyes until 12 people say otherwise, and he is presumed innocent. The burden is on the people. This juror sees it differently, that the burden is on the criminal defense attorney to prove the innocence of their client. even after I instructed 2.90, at the very beginning, and this questionnaire was filled out on the day that I gave that instruction, which is fresh in her mind. I will grant the cause in the interest of Mr. Armstrong's presumption of innocence. (11 RT 2262-2263.)

d. Application of Law to the Challenge

Ms. Green passed all of the prosecutor's tortured tests as to her fitness under *Witherspoon/Witt*. This juror was excused because she thought that a defense attorney's job was to prove defendant's innocence. The word "innocence" is used interchangeably with "not guilty" by a large segment of the public. This did not mean she had a set view as to the burden proof that would preclude her from sitting as a juror. Only a few questions of the oral voir dire were addressed to this subject, as well as a single written question. There was nothing else in either the oral or written voir dire that would suggest that this prospective juror in any way rejected this fundamental axiom of American jurisprudence. She had never sat on a jury before (26 CT 15889), and likely was not aware of the burden of proof.

Appellant's counsel realized he should have probed further and after the questioning was over, he asked the court to be allowed to reopen the

voir dire on this subject. For some completely inexplicable reason the court refused to allow this area to be further explored.

It was not as if this court was placing strict time and content limits of the voir dire in this case. To say that the jury selection process in this case was exhaustive is a grand understatement. The prosecutor was allowed to spend endless hours on irrelevant hypotheticals, trick questions, and outright deception and argument with the prospective jurors. Yet the court could not take a few moments to personally inquire into whether this juror could obey the law of presumption of innocence. If the court was truly interested in protecting Mr. Armstrong's constitutional interests, it would have personally conducted an impartial voir dire into Ms. Green's brief statements as to the presumption of innocence and role of counsel.

It is of note that none of the eight prospective jurors discussed up to this point had any fundamental problem with the imposition of the death penalty. They all unequivocally stated that they could impose it if the aggravating circumstances substantially outweighed the mitigating. Yet, all were dismissed.

Once again, another qualified prospective juror was removed for cause; a "cause" that most likely was far less of a cause than a moment of confusion by a twenty-four year old young woman inexperienced in the workings of the criminal justice system. A few instructions and questions

by the court would likely have cleared up any ambiguity as to Ms. Green. The court could have carefully explained the law to the juror and asked if she could follow it. The court's error requires reversal.

9. PROSPECTIVE JUROR CHRISTINA CLARK #9432

a. Questionnaire Responses

Christina Clark was a twenty-five year old Afro-American woman. (18 CT 5175.) In response to the questionnaire, Ms Clark indicated that she thought the death penalty to be cruel. (18 CT 5211, Q 178.) She also stated that she thought that the death penalty should be abolished. (18 CT 5212, Q 187.)

However, Ms. Clark stated that she could impose the death penalty "depending on the facts." (18 CT 5213, Q 196.) She had no personal beliefs that would preclude or make it difficult for her to vote for the death penalty and could decide the penalty on the facts and law as given by the court. (18 CT 5213-5214, Q 199-200.) She also indicated she would consider the evidence in deciding which penalty to impose. (18 CT 5215, Q 209-210.) Further, she stated that she would not automatically vote for either punishment. (18 CT 5216, Q215-218.) She did express concern that imposing the death penalty is "in a sense playing God." (18 CT 5217, Q 222.)

b. Oral Voir

Upon being questioned by appellant's counsel, the prospective juror stated that if a person was convicted of murder with special circumstances she could vote for either penalty with an open mind, and that her decision would depend on the evidence. (4 RT 685-686.) After the prosecutor spent a good deal of time trying to convince Ms. Clark that her personal dislike for the death penalty would prevent her from following the law (4 RT 687-690), the juror made clear that if she had no doubt that a defendant committed the crime, she could impose the death penalty but it would have to be demonstrated that the defendant planned it. (4 RT 691-694.)

Appellant's counsel then directly addressed the only relevant area of inquiry;

> Q:... if you're selected to be on this case,
> the court is going to give you certain jury
> instructions, which is the law.
> A: Okay.
> Q: No matter how you feel about the death penalty and in playing god, if the instructions called for a decision, either life without parole or he death penalty, can you follow that law?
> A: Yes.
> Q: And is it your mind set that in every single case where a juror is to decide the punishment, that you're, in every case, automatically going to vote for life without parole?
> A: No.
> Q: All right. There are some situations, depending on the circumstances, that you would vote for death?
> A: I believe so; yes.

Q: And one of the things, in your mind, is having it proven to you that the defendant committed those crimes, number one, correct?
A: Uh-huh. That's correct.
Q: And something else you've talked about is it being planned?
A: Uh-huh.
Ms. Locke-Noble: Is that yes?.
A: Yes.
Q: Are you saying that it was intentional on the defendant's part, something that was thought about beforehand?
A: Yes. (4 RT 696-697.)

The prosecutor then confirmed that Ms. Clark could indeed follow the law.

Q: Okay. You indicated that --
when counsel asked you if you could vote for death, you indicated that you believe so. You hesitated, and then you said, "I believe so," and you nodded your head in the affirmative. Do you recall that?
A: Yes, I do.
Q: Okay. Now, we need to know for sure whether or not you could impose the death penalty, not whether or not you believe or don't
believe, but whether or not you could.
A: Yes, I could.
Q: Now, taking that into
consideration, all of the questions and answers on the jury questionnaire -- because you personally believe that imposing the death penalty would be playing god, correct?
A: That's what you --
Q: That's what you put in your questionnaire, correct?
A: That is what I put in my questionnaire, yes.
Q: And that's what you believe, correct?
A: Yes.
Q: So do you believe you could play God?
A: Yes. (4 RT 698-699)

c. Prosecutor's Challenge and the Court's Ruling

The prosecutor challenged Ms. Clark for cause because he did not believe that she was telling the truth. The prosecutor referred to the prospective juror's "mannerisms," hesitations," "shrugging of the shoulders," and the fact that she stated on the questionnaire that she knew people who had been arrested but did not list them by name. (4 RT 704-706.)

Over appellant's objection, the court granted the prosecutor's challenge. It stated that while Ms. Clark's statements were truthful, they were inconsistent. While she expressed a feeling that the death penalty was cruel, she indicated that she could impose it. The court further indicated that the juror stated that she would prefer that California not have the death penalty and at one point she said that "in a sense" only God can take life although she agreed that in this capacity she could play God. Based on the above, the court held that it could not be sure that the juror would follow the law. (4 RT 710-713.)

d. Application of the Law to the Challenge

Appellant will not restate the law that has been discussed at length above. However, it is clear from that law that this was yet another improperly excused juror. Ms. Clark came to the courthouse to do her duty as a juror. Like every other prospective juror who heeds the summons to

serve, she came with far more knowledge as to how she generally "felt" about certain issues than she did of the substance of the law that she would have to follow if she was chosen to sit.

Ms. Clark came to the court with a certain sense of personal discomfort about imposing the death penalty. She personally thought it was a cruel thing to do and a little too close to playing God for her liking.

However, Ms. Clark came to the courthouse with something else; a fundamental and very American sense that we are a nation of law and that the law must be followed. This is exactly what Ms. Clark said she would do. Ms. Clark understood that her reluctance to casually impose the ultimate penalty on a fellow human being must be subrogated to the need to follow the law. While she did not fully articulate this view at the outset of the questioning, after she came to the understanding of her obligation under the law, she indicated that she could indeed follow the law, and for this one instance "play God."

Under the law of *Witherspoon*, *Witt,* and *Stewart,* Ms. Clark said absolutely nothing that disqualified her to sit. As was her wont, the prosecutor did not seem to acknowledge the unambiguous words spoken by Ms. Clark. Instead, she fixated on the prospective juror's "shrugs," "hesitancy" and "mannerisms." As seen over and over again in this argument, this prosecutor was satisfied with nothing less than a juror who

could state without the slightest human pause or sense of the magnitude of the question that he or she would gladly and without hesitancy sentence a man to death. Any juror who showed any sense of the solemnity of the process was deemed inconclusive or untruthful.

The prosecutor's characterization of Ms. Clark as being untruthful was rejected by the court. She could set aside her personal feelings to the greater imperative of the law. She unambiguously stated on several occasions that she could impose the death penalty if the actions of appellant were "planned." The entire theory of the prosecution was that the attack on the victim was planned and that appellant knowingly participated in the attack.

The fact that the court could not be "sure" Ms. Clark could follow the law is simply a part of the human condition. Without first hearing the evidence no one can ever be one hundred per cent "sure" that they can say "death" to a fellow human being until the time comes to do it. However, there was nothing in this voir dire to suggest that Ms. Clark could not. Any ambiguity could have been clarified by additional questioning.

Yet another prospective juror, whose only failing was that she was not an enthusiast about the death penalty, was improperly excluded from this jury. Ms. Clark clearly was one of those jurors discussed in *Witt* and *Witherspoon* who qualified to sit in spite of her personal opinions because

she was able to subrogate her likes and dislikes to the greater good of the law.

There is no other remedy than to reverse the judgment of death.

II. THE TRIAL COURT'S DENIAL OF APPELLANT'S *WHEELER/BATSON* MOTIONS AND MOTION FOR A MISTRIAL VIOLATED STATE LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEMANDS REVERSAL OF THE ENTIRE JUDGMENT

INTRODUCTION

As stated in Argument I, and incorporated herein, appellant was unconstitutionally deprived of his right to a properly constituted penalty phase jury by the improper exclusion in the *Hovey* stage of the voir dire of prospective jurors who clearly stated they could follow the law regarding the imposition of penalty.

In addition to the trial court's ninefold error vis a vis the law of *Wainwright v. Witt, supra,* 469 U.S. 412 and *People v. Stewart, supra,* 33 Cal.4th 425, a pattern arose as to those prospective jurors who the prosecutor wanted excused from the jury. Of the nine improperly excused prospective jurors excused in the penalty qualifying voir dire, six were either black, Hispanic or Jewish. Two others were born outside of the United States and immigrated to this country.

This case was racially charged to an extraordinary degree. Appellant and his two co-defendants were young African-American males. The victim was a lone middle-aged white woman. Further, appellant testified that the woman instituted the attack by calling appellant and his friends "niggers." (23 RT 4926-4928.) There can be absolutely no doubt that it was in the prosecutor's interest to cull from the jury as many African-Americans and other minorities as possible.

The prosecutor's intention to create a jury virtually devoid of any minority groups was clearly demonstrated during the peremptory challenges. A total of six black prospective jurors, four of them male, survived the *Hovey* process. Of these, all four black male jurors were peremptorily challenged by the prosecution. One of the prospective black jurors, a woman, was seated on the jury, and the seated jury and alternates were empaneled without the sixth black prospective juror being called to the jury box.

The end result was that fifteen of sixteen jurors and alternates were white.[12] There were no African-American males. The following analysis will clearly indicate that the final composition of the jury and alternates thereto was not a result of chance or proper application of the law. It was

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[12] One of the alternates identified herself as "white/Hispanic"

the result of a deliberate attempt by the prosecutor to have Mr. Armstrong's fate decided by a jury carefully molded by the prosecutor to deprive him of the constitutionally mandated benefit of an impartial jury drawn from a representative cross section of the community.

As such, no conviction resulting from a jury so composed can be allowed to stand without violating both the law of the State of California and the Sixth, Eighth and Fourteenth Amendment to the United States Constitution. The entire judgment against Mr. Armstrong should be reversed.

A. GENERAL LAW AS TO THE DISCRIMINATORY EXERCISE OF PEREMPTORY CHALLENGES

It is indisputable that the United States Supreme Court has held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution prohibit the prosecution from discriminatorily exercising its peremptory challenges on the basis of a juror's race or membership in a cognizable group. (*Batson v. Kentucky* (1986) 476 U.S. 79, 84-87; *Miller-El v. Dretke* (2005) 545 U.S. 231, 238 ("*Miller-El II.*".) In addition, this prohibition also rests upon a defendant's state and federal constitutional right to an impartial jury drawn from a representative cross-section of the community. (*Batson, supra,* 476 U.S. at

p. 89; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-273; *People v. Lenix* (2008) 44 Cal.4th 602, 612.; Calif. Const., art. I, sec. 16; U.S. Const., Amend. VI.)

Moreover, as this a capital case, appellant's Eighth Amendment right to a reliable and non-arbitrary finding of guilt, death eligibility, and the appropriate punishment were violated as was his right to be tried by an impartial jury under the Sixth Amendment. (See *Turner v. Murray* (1986) 476 U.S. 28, 35.)

Citing to cases of long standing, the High Court in *Batson* set forth the constitutional rationale for the above law.

> Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder v. West Virginia* (1880) 100 U.S. 303, 308; see *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968) (*Batson, supra,* 476 U.S. at pp. 86-87.)

Referring again to *Staiider,* the *Batson* Court stated the "venire must be 'indifferently chosen,' to secure the defendant's right under the

Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'" (*Batson, supra,* 476 U.S. at pp. 86-87 citing to *Strauder, supra*, 100 U.S., at 309.)

By the above, *Batson* made clear that the rational for its holding went far beyond pigmentation or the chance place of national origin. Its holdings were fundamental to the very essence to the founding principles of this country; that the primary function of the United States Constitution is to protect the people from an over aggressive sovereign who abuses the power that has been granted to it by the people.

Batson further made it clear that the ban on this sort of racial discrimination not only rests upon the constitutional rights of the accused. With an emphasis on the founding principles of this nation the *Batson* Court stated, "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." (*Batson, supra,* 476 U.S. at p. 87.) As stated in *Miller-El v. Dretke, supra,* 545 U.S. at p. 238 "...the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting in the jury's neutrality.'" [citation omitted.]

This Court in *People v. Wheeler* (1978) 22 Cal.3d 256, 266-267 set forth why a "cognizable group" is so defined and the rationale behind their designation in the law.

> In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from "a representative cross-section of the community." The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

A similar definition was set forth in *People v. Estrada* (1979) 93 Cal.App.3d 76, 90, citing to *United States v. Guzman* (S.D.N.Y.1972) 337 F.Supp. 140, 143-144, affirmed 468 F.2d 1245 (2d Cir.), *certiorari* denied 410 U.S. 937.

> A group to be "cognizable" . . . must have a definite composition . . There must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the

> group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. That is, The group must have a community of interest which cannot be protected by the rest of the populace.

However, even in the light of the above, it is clear that the prosecutor has the right to peremptorily challenge any prospective juror for non-discriminatory purposes, even of that prospective juror is a member of a "cognizable group." It is the balancing the interests of the prosecutor, the defense and the court system as a whole that has occupied the attention of both the United States Supreme Court and this Court over the years. As stated by the *Miller-El II* Court

> The rub has been the practical difficulty of ferreting out discrimination in selections discretionary in nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the penal from which jurors are selected. (*Miller-El v. Dretke, supra,* 545 U.S. at 238.)

To this end, the High Court established the now familiar formula that the trial court must follow in its determination as to whether the prosecutor has engaged in prohibited discrimination in the exercise of a peremptory challenge or whether that challenge was based upon "race-

neutral" reasons. The formula is comprised of a three part inquiry. First, the defendant is initially burdened with establishing a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California* (2005) 545 U.S. 162, 168 citing to *Batson, supra,* 476 U.S. at 93-94.)

Second, "once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes." (Johnson, supra 545 U.S. at p. 168 citing to *Batson, supra,* 476 U.S. at 94.) The third step is "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." (*Johnson, supra,* 545 at p. 168.)

In *Johnson v. California, supra,* 545 U.S. 162, the High Court specifically set forth how these three steps interacted in the final resolution of the issue of the discriminatory exercise of peremptory challenges. *Johnson* made it clear that in order to meet the first step, the defendant did not have to prove that it was "more likely than not" that the prosecutor's challenge was discriminatory. (*Johnson, supra* at p. 168.) The Court made clear that in *Batson*

> We did not intend for the first step to be so onerous that the defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson* at p. 170.)

Further, the defendant could make this prima facie showing by reliance on the "totality of relevant facts about a prosecutor's conduct during defendant's own trial." (*Batson v. Kentucky supra,* 476 U.S. 94, 96.) It is at this point that the prosecutor must present an explanation for the strike. This step does not represent a "shift in burden" to the prosecutor, as the ultimate burden always remains with the challenger of the strike. (*Johnson, supra,* at p. 170.) This step is merely a procedural device to get to the court's determination of whether there was a discriminatory exercise of the challenge. (*Ibid.*) "It is not until the third step that the persuasiveness of the justification becomes relevant - the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Ibid.*)

It is the third step that ultimately involves the trial court. At this point, it is not sufficient for the trial court to take the prosecutor's explanation at its face value. (*Miller El- II, supra,* 545 U.S. 545 U.S. at p.

248; *People v. Fuentes* (1991) 54 Cal.3d 707, 720; *Williams v. Rhoades* (9th Cir 2004) 354 F.4th 1101, 1108.) Instead, the trial court must conduct a determination as to whether the reason tendered for the challenge was race-neutral or simply pretextual for racial discrimination. As stated in *Miller-El II, supra,* 545 U.S. at 239,

> Although there may be any number of bases on which a prosecutor reasonable [might] believe it is desirable to strike a juror that is not excusable for cause...the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge...The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

B. QUESTIONNAIRE RESPONSES AND "*HOVEY*" VOIR DIRE OF THE FOUR IMPROPERLY CHALLENGED "*BATSON*" JURORS

Prior to analysis of the peremptory challenges of the above mentioned four black male prospective jurors along the guidelines of the above stated law, it is necessary to examine both who these people were and the nature to their responses to both the questionnaire and the *Hovey* voir dire questioning.

1. Shawn Leonard- # 3385

a. Questionnaire

Mr. Leonard was a 34 year old African-American male who had two minor children. (VI CT 1442.) He served his country in the United

States Navy and was decorated for his service in the first Gulf War. (VI CT 1444-1445.) At the time of the trial, he was working for the United States Postal Service. (VI CT 1445.)

Mr. Leonard felt very positively about the jury system, feeling that it was "part of our democratic process." (VI CT 1449, Q 30.) He felt that sitting on the jury was a "civic obligation" that he would be glad to fulfill (VI CT 1450 Q 37; CT 1469, Q. 137.) He also specifically rejected the concept that Black-Americans are usually unfairly treated in our society. (VI CT 1468, Q 133.)

Regarding his opinion as to the imposition of the death penalty, Mr. Leonard felt that in the proper circumstances death would be a just punishment. (VI CT 1478, Q 178-179.) Although he stated that he thought that life without parole was worse than death for a defendant (VI CT 1480, Q. 198), he stated that it would depend on the facts whether he would impose the death penalty. (*Ibid.*, Q 196.; VI CT 1482, Q 209.) He further stated that he would not automatically vote for or against either penalty. (VI CT 1483, Q 214-215.) He believed that the death penalty was a proper penalty to keep a defendant from killing again. (CT 1484 Q 223.)

b. Hovey Oral Voir Dire

After the trial court explained the relationship of aggravators and mitigators and the weighing process in a death penalty case, Mr. Leonard

clearly stated that he would not vote automatically for either penalty. (9 RT 1725-1728.) In response to questioning by appellant's counsel, Mr. Leonard again made it clear that he could impose the death penalty "depending on the evidence and the background..." (9 RT 1728-1730.) Further, Mr. Leonard told counsel that he would only vote for life if he felt that appellant could be "rehabilitated" in prison. (9 RT 1730.)

Mr. Leonard stated that he thought that life in prison was a worse penalty than death because "the person would have the rest of their life to pay for what they did." He further stated his decision would be controlled by the "good vs. bad" as described by the judge. (9 RT 1732). Mr. Leonard further explained "[i]f the person has a history of just hateful decisions, I think it all comes down to the decisions people make and I think the background will show some indication, you know, where that person lies and you know, right or wrong the way that person feels about things right or wrong." (*Ibid.*)

The prosecutor then departed completely from the facts of the case and instituted the following misleading and fundamentally dishonest exchange:

> Prosecutor: What if this was the first time a hateful decision was ever made, would you be able to impose the death penalty if the aggravating circumstances substantially outweigh the mitigating circumstances, first time?
> Leonard: The first time, people make mistakes. It is a horrible mistake to make, but if there was something in his

background. Prosecutor: No, no, there is nothing in the background. This is the first time.
Leonard: First time.
Prosecutor: First time, no history.
Leonard: Yeah, maybe life in prison would be better then.
Prosecutor: So are you saying you would be unable to impose either penalty if this was the first time somebody made a hateful decision.
Leonard: I'm not sure. I mean a lot of details. I would have to consider
Prosecutor: But there are no details. This is the first time, no details...[13]
Leonard: I guess I would be swaying towards life in prison, so I guess that would be my answer. (9 RT 1732-1733.)

After having forced this misleading answer from Mr. Leonard, he was then given both the "assault" and "bank robbery" hypotheticals. Mr. Leonard stated that he could impose death on all individuals in these hypotheticals. (9 RT 1733-1735.) Further, Mr. Leonard stated that he would not require more than one victim before he could impose the death penalty. (9 RT 1735-1736.)

The prosecutor then embarked upon a very confusing series of questions as to which of the special circumstances Mr. Leonard could impose the death penalty. (9 RT 1736.) It took several iterations of these questions before Mr. Leonard was able to understand what was being asked. However, once the prospective juror understood that the murder of the victim was required for all of the special circumstances, he answered that he

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13. Of course, in reality there were "details." In fact the prosecutor's penalty case was replete with evidence of alleged other violent and "hateful" acts of appellant.

could. (9 RT 1736-1739.) Further, Mr. Leonard stated that he would be able to impose the death penalty in a hypothetical in which a person was walking down the street and impulsively decided to rob a liquor store, killing the cashier in the process. (9 RT 1742-1743.)

Unable to otherwise show that Mr. Leonard could not impose the death penalty, the prosecutor once again got him to say that if the instant crimes were appellant's first bad acts he would impose life without parole. (9 RT 1745-1746.) However, upon further consideration, Mr. Leonard stated that he could impose death. (9 RT 1747.)

The prosecutor requested that the court excuse Mr. Leonard for cause in that his answers to the death penalty questions indicated that he was substantially impaired because the prospective juror hesitated in some of his answers and gave inconsistent and disqualifying answers to some of her questions. (9 RT 1771-1754.) The court denied the cause challenge. (9 RT 1755.)

2. Roscoe Cook - #3654

a. Questionnaire

Mr. Cook was a 64 year old married African-American man. (VI CT 1492.) He had worked in education for the past thirty years and at the time of the trial was employed as an assistant principal. (VI CT 1495, Q 7.) He also possessed a doctorate in education. (VI CT 1497, Q 19.) Mr. Cook also

served on a prior murder jury and pledged that he would do the best that he could to be a good juror, having no personal beliefs that would prevent him from judging another. (VI CT 1499, Q 30-32.) When asked about his feelings about sitting on a jury he stated "It is my duty as a citizen!" and that he would pay attention and be honest. (VI CT 1500, Q 37-38.)

Mr. Cook harbored no animus against the criminal justice system, feeling that it was doing the best that it could and that it was the criminals themselves that were responsible for the crime problem. (VI CT 1515, Q 112; VI CT 1514, Q 103.) He also strongly believed in "innocent until proven guilty." (VI CT 1516, Q 116.)

Mr. Cook stated that he had been exposed to racial prejudice and had been called "nigger." (VI CT 1518, Q 129.) However, he indicated that he did not bear any hard feelings toward non-blacks because of this (*Ibid.,* Q 133), and reiterated that he could be an impartial juror because he was a "fair person" and would do his "best no matter what."(VI CT 1519, Q137-138.)

Regarding the death penalty, Mr. Cook stated that there was nothing about the charges that would prevent him from being fair and impartial. (VI CT 1528.) He also stated that he had no "general feelings" about the death penalty (VI CT 1528, Q 178), and was neither disposed for nor against its imposition. (*Ibid.*, Q 186.) Instead, Mr. Cook believed that "each case

should be weighed on its own" and neither life without parole nor death should be a mandatory punishment. (VI CT 1529, Q188-189.)

Further, Mr. Cook made in clear that depending on the facts, a person who intentionally kills another without justification should receive the death penalty (VI CT 1530, Q 196) and that all evidence should be considered. (VI CT 1531, Q 206.) In addition, Mr. Cook indicated that he could not possibly give an opinion on which was the "worse" of the two penalties. (VI CT 1530, Q 198.) However, he clearly stated that in the appropriate case he could and would vote for either penalty."depending upon info(sic) garnered at trial." (VI CT1532, Q 209-210.) When asked whether he could impose the death penalty for a felony-murder, Mr. Cook stated that "evidence will dictate the sentence." (VI CT 1533, Q 219.)

b. Oral Voir Dire

Mr. Cook's answers to both the court's and appellant's counsel's questions were very consistent with his questionnaire. After being informed of the penalty weighing process by the court, Mr. Cook affirmed his understanding and acceptance of the law. He also stated that he would not automatically vote for either penalty. (11 RT 2265-70.) When asked by counsel whether he had made up his mind as to what penalty would be appropriate, Mr. Cook answered as any thoughtful, educated person would in his position. He stated, "Oh, no. How could I," clearly mirroring his

previously stated opinion that all facts must first be considered. (11 RT 2271.)

However, as set forth in Argument I, the prosecutor was not interested in relevant *Witt* related inquiry. She began by noting that Mr. Cook had been a vice-principal at the Juvenile Hall and asked him if he had ever seen appellant there. (11 RT 2272.) Having begun her questioning with improperly telling Mr. Cook that appellant had a juvenile record, she then seized upon a tactic she frequently used in trying to dismiss qualified jurors. (See Argument I, *supra.*) From the outset, the prosecutor entered into an adversarial posture with a prospective juror that she did not want on the jury. She engaged Mr. Cook in a hostile, confrontational manner interrupting and chastising Mr. Cook for allegedly not fully answering the questionnaire inquiry as to jury service. (11 RT 2272-2275.)

Eventually, she turned her attention to Mr. Cook's answer to question 200, in which he stated that he would not set aside his personal belief system when he was a juror. (11 RT 2276-2277.) The prosecutor then stated that the juror was going to follow his personal belief system and not the law. (11 RT 2278.) Mr. Cook proceeded to clear up any misconception about his attitude by informing the prosecutor that his belief system included his adherence to the law and that he would indeed follow the court's instructions. (11 RT 2279.)

The prosecutor then intensely questioned Mr. Cook as to his questionnaire statements that he had no opinion as to the death penalty. Mr. Cook reiterated that indeed he had no personal feelings about the death penalty. (11 RT 2279-2280.) The prosecutor then commenced the same type of intentionally confusing and ultimately spurious exchange.

> Prosecutor: Okay. Here's my question to you. If you don't have an opinion regarding the death penalty, how will I know you will be able to impose it, should it be appropriate?
> Mr. Cook: You may not know.
> Prosecutor: Because you do not know what your opinion is regarding the death penalty, right?
> Mr. Cook: No, I didn't say that. I said "I don't have a disposition about that." (11 RT 2280-2281.)

Dissatisfied with the fact that Mr. Cook was not going to allow himself to be drawn into the prosecutor's attempt to mischaracterize his attitudes, the prosecutor continued with her attempt to get Mr. Cook to say something disqualifying.

> Prosecutor: Okay. Do you have an opinion on the death penalty.
> Mr. Cook: Are we talking about the same thing? I said I didn't have an opinion about the death penalty–
> Prosecutor: Okay.
> Mr. Cook: - - one way or the other.
> Prosecutor: I said to you, "I wouldn't be able to know whether or not you'd be able to impose the death penalty, because you don't know what your opinion is on the death penalty." Do you recall that..
> Mr. Cook: Yes.

> Prosecutor: And then you said that you wouldn't know. And I'm asking you how can you impose the death penalty, if you didn't know what your opinion is. And you said you had an opinion. And I said , well, what is it? And you said, well are we talking about the same thing? It's kind of confusing. (11 RT 2281.)

Being an educated, accomplished and logical man, Mr. Cook began to express some exasperation as to what had suddenly become a completely disingenuous process.

> Mr. Cook: Not to me I just don't know what you are talking about part of the time. (11 RT 2281.)

The following exchange then occurred.

> Prosecutor: Okay. What part is confusing?
> Mr. Cook: Oh man, this is- - you're asking me questions and it seems like your asking me the same question in order, and I don't always- - I'm not clear on what it is you're saying. I didn't know that this was going to be this kind of exchange or this kind of questioning and that. But had I known, I would feel the same, I'd feel exactly what I am saying to you now. (11 RT 2282)

In response to Mr. Cook's plea to get the voir dire back on some sort of rational track, the prosecutor completely departed from any semblance of proper questioning and turned this voir dire into a personal confrontation with Mr. Cook by asking "Do you feel threatened or something." (11 RT 2282.) Mr. Cook responded by saying that he did not feel threatened but felt that the prosecutor was "coming after" him. (*Ibid.*)

The prosecutor responded that she was "coming after him" because she needed to know the answer as to how he could impose the death penalty if he did not have an opinion as to its general application. (11 RT 2282-2283.) Once again, Mr. Cook responded to this same question again, essentially telling the prosecutor that without more facts he could not possible say what he would do. (11 RT 2283.)

For some reason, the prosecutor then questioned Mr. Cook about his earlier career in teaching. The following exchange then occurred.

> Prosecutor: You were a teacher?
> Mr. Cook: Yes.
> Prosecutor: Okay. What did you teach?
> Mr Cook: Everything
> Prosecutor: You taught history?
> Mr. Cook: I taught all subjects.
> Prosecutor: Okay. Well, what are all subjects to you? Because see, I don't know what you taught, because I don't know you, and all subjects to you could just be math and English.. So that's why I am asking, what subjects did you teach? (11 RT 2284.)

Exasperated once again at the prosecutor's refusal to accept his plainly stated answers, Mr. Cook stated,

> You're amazing. You're amazing. I taught history, English, art- - I taught all of the classes that are taught in a regular curriculum on an elementary level and most of them on a secondary level.(11 RT 2284.)

The prosecutor then asked for a side bar conference where she complained to the judge that Mr. Cook was hostile to and prejudiced against her. (11 RT 2285.) She claimed that she had never had a prospective juror demonstrate this sort of attitude. (11 RT 2286.) She then stated that it was necessary to ask further questions about Mr. Cook's attitude about her. Counsel objected because this sort of questioning was outside the *Hovey* purview but the court decided to allow this questioning to continue. (11 RT 2286-2288.)

The prosecutor's questioning about Mr. Cook's "attitude" continued. After once again sparring with Mr. Cook and justifying her own conduct[14] (11 RT 2289-2290), the prosecutor yet again returned to the same oft answered question, as to how Mr. Cook could impose the death penalty if he had no ethical opinions as to the penalty itself. (11 RT 2290.) Having already answered this question as best as he could, Mr. Cook had nothing further to add. (11 RT 2290-2291.) He did state that he was simply a citizen doing his duty and responding to jury duty. (11 RT 2291.) The prosecutor yet again asked Mr. Cook how could she be sure he could impose the death penalty as Mr. Cook had no opinion as to the death penalty. Mr. Cook only could reiterate his prior answer. (11 RT 2291) The

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14. The prosecutor provocatively and cynically accused Mr. Cook of simply not wanting to be in the courtroom.

prosecutor then asked Mr. Cook whether if he was in her shoes, would he want a juror such as himself on the jury. (11 RT 2292.) Mr. Cook stated that he did not have the educational background to answer such a question. (*Ibid.*)

The prosecutor then turned her attention to the hypotheticals discussed in Argument I. Mr. Cook told the prosecutor that he could impose the death penalty on the person holding the victim's arms in the "assault" hypothetical. (11 RT 2294.) Instead of accepting this answer as a sign that Mr. Cook could impose the death penalty, the prosecutor immediately went back to asking the same ultimately meaningless question. "Now, based on your answers, would you say that you are for or against the death penalty?" (11 RT 2295.) Mr. Cook's response was once again one of predictable and justifiable weariness "Lady, I keep telling you the same thing. I don't understand why you keep asking me the same thing." (11 RT 2295.)

The prosecutor yet again asked the same question, how Mr. Cook could impose death if he had no opinion as to the death penalty. Again, Mr. Cook tried to explain to his inquisitor that he would have to hear all of the facts before he could make a decision as to the penalty. (11 RT 2296.)

The prosecutor then posited the "bank robbery" hypothetical to Mr. Cook, who without hesitation indicated that he could impose the death

penalty on all three of the individuals involved, including the person who was serving as the "wheelman." (11 RT 2296-2297.) In spite of the fact that it was abundantly clear by this time that Mr. Cook was willing to impose the death penalty even on an abettor who had no direct role in killing, the prosecutor returned to the same exact irrelevant and provocative question she had been harassing Mr. Cook with from the outset of the voir dire. (11 RT 2297.) Counsel objected to the question but the court overruled the objection. (*Ibid.*) The prosecutor, for at least the fifth time, refused to accept that Mr. Cook was willing to impose the death penalty (11 RT 2300) and once again continued to focus on how could the juror impose death if he had no opinion as to the penalty itself. (11 RT 2300-2301.)[15]

During the balance of the prosecutor's questioning, Mr. Cook made clear that he was a open minded person who could follow the law and not be biased for or against one side or the other. (11 RT 2302-2316.)

The prosecutor ultimately challenged Mr. Cook for cause stating that Mr. Cook could not tell her whether he was for or against the death penalty. (11 RT 2318.) The court denied the challenge for cause, stating that Mr. Cook's responses to the questioning indicated that he could follow the

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15. This repeated fall-back to this question had absolutely no purpose. Time and time again, Mr. Cook made it clear that in any number of situations he was willing to impose the death penalty. Yet the persecutor continued to seek an answer to what had long since become a moot question.

law. (11 RT 2320-2322.) The court made it clear that while Mr. Cook did not answer the prosecutor's abstract questioning they way that she would have liked, his answers to the more practical questions was adequate to show that he qualified under *Witt*. (11 RT 2321.)

3. Ethan Walters - #5883

a. Questionnaire

Mr. Walters was a 28 year old, single African-American male. (VI CT1542.) He had a degree in mechanical engineering and had almost earned his Masters in astronautics. (VI CT1547.) He was working as an engineer for Boeing at the time of the trial. (VI CT 1545.) He was also a member of the National Society of Black Engineers. (VI CT1551, Q 48.) Mr. Walters made it clear that he did not have any feelings one way or the other as to his jury service, indicating that he would be a very neutral juror. (VI CT1549, Q 30.) However, he stated that the criminal justice system worked too slowly. (VI CT 1565, Q112.) He also stated that, as an African-American, he had been exposed to racism. (VI CT1568, Q 129; VI CT 1569, Q 136.)

Regarding the imposition of the death penalty, Mr. Walters stated that while he was for the death penalty in principle, he felt that it its current form it served no purpose as the process was so slow. (VI CT 1578, Q 178-179.) He further stated that the death penalty was not used often enough.

(*Ibid* Q 183.) Mr. Walters also stated that if death were executed in a timely fashion it would deter crime. (VI CT 1579, Q 186.) He also stated that the death penalty should be imposed for crimes of extreme violence and/or where rehabilitation seemed unlikely. (*Ibid* , Q191.)

While Mr. Walters stated that he would personally prefer death to life in prison (VI CT 1580, Q 198; VI CT 1585, 227), he stated depending on the facts he could vote for either penalty. (VI CT 1579-1583, Q 194-197, 209, 214-215.)

b. Oral Voir Dire

There was nothing in Mr. Walters oral voir dire that indicated in any way that he would not be a fair and impartial juror who could follow the law. After the court explained the penalty phase, Mr. Walters stated he would not automatically vote for either penalty. (12 RT 2394-2398.) He also stated that there was nothing about the nature of this case that would preclude him from being a fair juror. (12 RT 2398.) He also stated that while he indicated on the questionnaire that he would personally prefer a death sentence for himself, he would follow the law as to the imposition of the death penalty on appellant. (12 RT 2399.)

In response to counsel's questioning, Mr. Walters indicated that he understood the law of aiding and abetting and could follow it vis a vis the

imposition of death. (12 RT 2400-2401.) He further stated that he would consider all factors before he imposed a sentence in this matter. (12 RT 2403.)

The prosecutor then reviewed the basic penalty decision process with Mr. Walters, explaining how ultimately each individual juror must assigned his or her own particular weight to each "bad" or "good" factor and arrive at a penalty, under the law. (12 RT 2405-2408.) Mr. Walters made clear that he could follow the law, look a defendant in the eye and "say 'death'." (12 RT 2408.)

In response to the prosecutor's "assault" hypothetical, Mr. Walters indicated that he could sentence the person holding the victim to death. (12 RT 2409.) In addition, he stated that while he would personally prefer a death sentence as opposed to spending his life in prison, he would not impose his personal beliefs on anyone else or upon the system. (12 RT 2410.) Mr. Walters further stated that he would be able to base his verdict solely upon the evidence. (12 RT 2411.) He further said that he could impose the death penalty even if only one person died. (12 RT 2413.)

In response to the prosecutor's "bank robbery" hypothetical, Mr. Walters stated that all three participants would be guilty of murder. (12 RT 2417-2418.) Regarding the penalty, he stated that he would lean against the imposition of death for the person or persons outside the bank because of

their lack of participation and intent. (12 RT 2418-2420.) However, Mr. Walters stated that if the person in the car gave the shooter a loaded gun he might be able to impose the death penalty on the driver of the car. (12 RT 2419-2420.) After some further discussion with the prosecutor on this subject, Mr. Walters stated that he could see the persecutor's point and perhaps could impose death on all of the three participants after considering all of the facts. (12 RT 2421.)

Both parties passed Mr. Walters for cause. (12 RT 2424.)

4. Reginald Payne-#8871

a. Questionnaire

Mr. Payne was yet another accomplished African-American male. He was 56 years old, married with eight children, all of whom were either working or in school. (VI CT 1592.) He was employed as a plant operator for the Los Angeles County Sanitation District. (VI CT 1597, Q 5.) Mr. Payne served his community by serving as a juror on four cases, two of which were murders. (VI CT 1599, Q 32.) His son was a victim of an armed robbery (VI CT 1608-1609),and he was personally the victim of attempted intimidation by local gang members, causing him to start a Neighborhood Watch program. (6 VI 1611, Q 95.)

Mr. Payne also made clear that he fully understood that his obligation as a juror required that he neither favored the defense nor the

prosecution. (VI CT 1616, Q 116.) However, he did say that he was biased against gang members because of their "chilling effects on a community." (VI CT1618, Q 130.) He also stated that he could follow the law as the judge gives it without reference to any personal beliefs of his own. (VI CT 1624-1625, Q 170.)

Regarding the death penalty, Mr. Payne indicated that while it may be used too much, and should never be "used lightly," it does have its place in the criminal justice system. (VI CT 1628 Q 178-179.) He also stated that "our system of justice is not prepared to operate without it at this time" and "until we can find a viable alternative we can not abolish it." (VI CT 1629, Q 186-187.) Mr. Payne also stated that he could impose the penalty, and that the circumstances of the victim's death would have "great bearing" on the punishment. (RT 1630, Q 196.)

Mr. Payne also stated that he thought that life in prison was much worse than death given the conditions at California prisons. (VI CT 1629-1630, Q 193, 199.) However, he also stated that he could set aside his own beliefs and follow the law that the judge gives to the jury. (VI CT 1630-1631, Q 200.) He also stated that he would impose the death penalty when "a proven set of circumstances constitutes (its) imposition." (VI CT 1632, Q 209.) Mr. Payne also stated that he would not automatically vote for either

penalty. (VI CT 1633, Q 214-215.) He also stated that he would abide with society's rules in deciding whether to impose death. (VI CT 1634, Q 223.)

b. Oral Voir Dire

After the trial court explained the relationship of aggravators and mitigators and the weighing process in a death penalty case, Mr. Payne indicated that he understood the court's explanation and would not automatically vote for either penalty. (12 RT 2870-2874.) Appellant's counsel passed the juror for cause without any further questioning. (12 RT 2874.)

The prosecutor questioned Mr. Payne as to the armed robbery of his son and Mr. Payne's problems with certain gangs. (12 RT 2875-2877.) She also questioned him about a disagreeable incident that he and his other son had with the Long Beach Police. (12 RT 2876-2879.) However, Mr. Payne indicated that this would not affect his judgment in this case. (12 RT 2879.) In regard to his statement in the questionnaire that the death penalty was sometimes "overused," Mr. Payne stated that what he meant was that before imposing the death penalty it was necessary to "look at the facts" and not "rush to anything." (12 RT 2880.) Mr. Payne further stated that in other jurisdictions "some... mistakes have been made so I think we should be very careful about what we do." (12 RT 2881.) However, Mr. Payne also made it clear that his decision in this case would be based only upon the evidence

that was produced in the courtroom (12 RT 2884), and that he could live with himself after he imposed a penalty of death. (12 RT 2885-2886.)

Mr. Payne also stated that in spite of his personal feelings that life was a worse penalty that death, he could follow the law. (12 RT 2892-2893.) He also stated that while he felt that the death penalty was disproportionately imposed upon blacks, this experienced juror clearly stated that he would not consider this in the instant case as "that's not my job." (12 RT 2894-2896.) The prosecutor also made inquiry as to whether Mr. Payne believed that some people could have a productive life in prison. Mr. Payne agreed that is was possible but also stated that he would follow the law that defined the most serious penalty as death. (12 RT 2899-2901.)

Regarding the prosecutor's "assault" and "bank robbery" hypotheticals, Mr. Payne stated that he would be able to impose death on all defendants if the aggravating circumstances substantially outweighed the mitigating. (12 RT 2897-2899.)

The prosecutor then asked Mr. Payne whether he would inform the court if at any time either he could not follow his oath and the law or that he felt another juror was not doing the same. Mr. Payne responded in the affirmative. (12 RT 2901-2902.) Mr. Payne was then passed for cause by both counsel. (12 RT 2903.)

C. THE PEREMPTORY CHALLENGE VOIR DIRE

1. Procedural Review

Fifty-eight prospective jurors survived the *Hovey* voir dire. The above four black men were among them. The process for the selection of the jury was twelve prospective jurors were randomly selected from the *Hovey* qualified group of 58. These twelve were assigned seat numbers and seated in the jury box. Counsel were then allowed to conduct a voir dire on these jurors and exercise peremptory challenges. Once a prospective juror was peremptorily excused, another prospective juror was called to replace him in the jury box. This process continued until a jury was selected. Appellant exercised 19 of his 20 available challenges and the prosecutor 18 of hers before the jury was empaneled. After the impanelment of the sitting jury, the court undertook the selection of 6 alternate jurors. Of the original panel of 58 *Hovey* qualified jurors, 4 remained after the impanelment of the sitting jury. Of these, there was one black female juror (# 3383).

(7 CT 1836; 17 RT 3556.)

The selection of the alternates was done in the same fashion as the selection of the sitting jury. However, the selection of the 6 alternates was ultimately done by counsel stipulating as to which prospective jurors they found acceptable. The black female juror was never questioned, nor was she designated as one of the alternate jurors.

2. Peremptory Challenge to Shawn Leonard

As part of the above process, Mr. Leonard was randomly called by the court to replace an excused prospective juror in the seventh juror seat. (15 RT 3181.) In response to questioning by appellant's counsel, Mr. Leonard affirmed that he could judge this case fairly and indicated that after listening to the other prospective juror's being questioned, he would have no different answers. (15 RT 3182.)

In response to the prosecutor's questions, Mr. Leonard stated that he felt more sure that he was in favor of the death penalty than he was at the *Hovey* voir dire. (15 RT 3183.) Mr. Leonard stated that at the time of the *Hovey* voir dire he hadn't thought much about the death penalty but since that time he had time to consider his position. (*Ibid*)

In response to questioning by the prosecutor, Mr. Leonard stated that he had had no previous bad experiences with law enforcement. (15 RT 3183-3185.) The prosecutor then asked if Mr. Leonard knew anyone who had been convicted of a crime and he stated that his brother was convicted for a drug offence and that he visited him in prison. (15 RT 3183-3184.) He also stated that he would follow any instructions that the court may have regarding judging the credibility of witnesses. (15 RT 3184-3185.) Both sides then passed Mr. Leonard for cause. (15 RT 3185.)

It was at this point that appellant's counsel Patton asked for a sidebar conference (15 RT 3185), and stated that from the prosecutor's questioning he believed that she was about to exercise a peremptory challenge against him. (15 RT 3186.) He further referred the court to the case of *Miller El v. Cockrell,* 537 U.S. 322. (*Ibid.*) Mr. Patton also wanted it put on the record that Mr. Leonard was the only African -American seated on the jury at that time. (*Ibid.*)

The prosecutor's reaction to this could only be described as feigned righteous indignation.[16] She stated "I am extremely offended. I am extremely offended." (15 RT 3186.) She further stated that she needed a recess because she was so angry. (15 RT 3187.)

The trial court quite reminded all counsel that as no challenge had been made by the prosecution, the matter was not ripe for consideration. (15 RT 3188.)[17]

After a few other jurors were questioned, the prosecutor did exactly what Mr. Patton predicted she would; she peremptorily challenged Mr. Leonard. (15 RT 3221) Mr. Patton objected on the ground that there

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16. It was feigned because only a few minutes after the prosecutor's passionate remonstration about how "offended" she was over counsel's suggestion, she did indeed remove Mr. Leonard from the jury. Her disingenuity was fully confirmed when the only other black male jurors soon followed Mr. Leonard home.

17. The fact that Mr. Patton prematurely raised the issue is irrelevant to the determination of whether these challenges were constitutionally appropriate.

was nothing on the record to even suggest that Mr. Leonard would not be a qualified juror and maintained that the challenge was racially based. (15 RT3222.) Counsel then asked that the trial court to make a prima facie finding that there has been an exclusion on the basis of race stating that even the exclusion of a single person could be sufficient for such a finding. (15 RT 3223.)

The court bluntly told counsel that he was wrong in this assertion and the prosecutor gratuitously added that it was unethical to miscite the law to the court.[18] The court then denied the "*Wheeler*" motion stating that it had reviewed the *Hovey* voir dire and from the answers could see why the prosecutor would want to challenge Mr. Leonard. The court, in spite of Mr. Leonard clearly stated position, further stated that the peremptory challenge was not race based but rather based upon the "juror's inability to be able to impose death at the penalty phase." (15 RT 3224.)

The prosecutor then stated that Mr. Leonard was "not participating in the cooperative sense that all of the other jurors- -they are watching counsel, they're listening to questions, he's just looking straight ahead. I found that kind of unusual, because no one else is doing that out there." (15 RT 3225.) The trial court responded to this by stating that Mr. Leonard had

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18. Mr. Patton did not miscite the law. As will be later shown in this argument, it was the court and the prosecutor who were wrong.

his eyes on the court "throughout the questioning of the remainder of (sic) counsel." (15 RT 3225.)

3. Peremptory Challenge to Roscoe Cook

As part of the above process, Mr. Cook was randomly called by the court to replace an excused prospective juror in the ninth juror seat. (16 RT 3296.) In response to appellant's counsel, Mr. Cook reiterated that he could be fair. (*Ibid.*) Mr. Cook voluntarily offered that he wished to correct an unintentional misstatement he made in the *Hovey* voir dire. He corrected his *Hovey* questioning about his jury service to state he never actually sat on a murder jury. He had been called to the box but had been excused. (16 RT 3297-3298.)

Pursuant to the prosecutor's questioning, Mr. Cook indicated that 35-40 years ago, he was stopped often by police officers. In the vicinity of the Watts riots, a policeman pointed a shotgun at him. (16 RT 3299.) However, Mr. Cook readily stated that this long past incident would have no effect on him in this trial. (16 RT 3300.) In response to the prosecutor's further questioning, Mr. Cook stated that he could "always" follow the court's instructions and if the prosecutor proved the case beyond a reasonable doubt he would return a guilty verdict. (16 RT 3301-3302.) Both side passed Mr. Cook for cause. (16 RT 3302.)

After further discussion about other jurors, the trial court addressed the prosecutor. "And just to remind counsel...I know that Ms. Locke-Noble's favorite amazing friend is now seated in seat no. 9, and that is going to be a challenge again that we'll have to take a break for again. But I don't know, they have made up, I don't know." [19] (16 RT 3306.)

The prosecutor did indeed exercise a peremptory challenge on Mr. Cook. (16 RT 3319.) Counsel again objected to the challenge on *Batson* grounds, stating that along with the exclusion of Mr. Leonard, this challenge amounted to a systematic exclusion of African-Americans from the jury. (16 RT 3330.)

The prosecutor replied to this motion by indicating to the court that she had had a "personality conflict" with Mr. Cook at the *Hovey* voir dire and felt that as a result he could not fairly hear the People's case. (16 RT 3320.) She also indicated that Mr. Cook would not set aside his "personal belief system." (16 RT 3321.) She also argued to the court that the juror

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19. While there may be a time and place for levity in a court room, this was not it. Firstly, the court should never have suggested to the prosecutor whom she should challenge. Further, the prospective juror was an extremely well educated, very accomplished 64 year old gentlemen who currently had faith in our legal system in spite of the undeniable racism toward black Americans during the years he was growing up.(VI CT 1515, Q 112; VI CT 1514, Q 103; (VI CT 1516, Q 116.)
As was and will be more fully addressed, any animus between the prosecutor and Mr. Cook was created by the prosecutor's repeated attempts to twist his words at the *Hovey* voir dire.

had been unable to say "whether he was for or against the death penalty. (*Ibid.*)

The court did not find a *prima facie* case of systematic exclusion stating that the conflict between Mr. Cook and the prosecutor was sufficient reason for her to peremptorily challenge him. (16 RT 3322-3323.)

4. Peremptory Challenge to Ethan Walters

As part of the above process, Mr. Walters was randomly called by the court to replace an excused prospective juror in the third juror seat. (16 RT 3350.) The prosecutor began her voir dire with an extensive discussion of Mr. Walter's job. (*Ibid.*) Mr. Walters indicated that he was a satellite engineer, designing and building communication satellites. (16 RT 3351-3352.) Mr. Walters stated that he had a B.A. degree in engineering but was close to getting his Masters. (16 RT 3351-56.)

Mr. Walters also volunteered to the prosecutor that he had a cousin arrested for some sort of assault in Florida. (16 RT 3356-3357.) Mr. Walters got the impression from talking to his cousin that his cousin felt he was being treated unfairly. (16 RT 3358.) Mr. Walters indicated that a few times he felt he was "ticketed" unfairly and on one occasion he went to court and won his case. (16 RT 3358-3359.)

In response to the prosecutor's questions, Mr. Walters indicated that he could follow the law regarding circumstances and the evaluation of witnesses. (16 RT 3360.) Mr. Walters further stated to the prosecutor that if

the People proved their case beyond a reasonable doubt his verdict would be guilty. (16 RT 3361.) Both sides passed Mr. Walters for cause. (16 RT 3361.)

The prosecutor exercised a peremptory challenge against Mr. Walters, yet another American-American male juror. (16 RT 3372.) Counsel objected to this excusal and made another "*Batson*" motion, asking the court to find a prima facie case of systematic exclusion. The court found that a prima facie case had indeed been made and asked the prosecutor to explain her challenge. The prosecutor asked the court to review Mr. Walters' questionnaire before she began her explanation. The court agreed. (*Ibid.*)

After reading the questionnaire, the court stated that it still found a prima facie case of deliberate systematic exclusion. (16 RT 3375.) The prosecutor indicated that what "really bothers (her) about this particular juror" was that Mr. Walters believed that life without parole would be a more severe sentence than death. (16 RT 3375-3376.) The prosecutor stated she was also concerned that because of Mr. Walters' scientific training, she could never prove the case to his satisfaction. (16 RT 3376.) She also stated that on his questionnaire, Mr. Walters indicated that at times prosecutors can be overzealous.(*Ibid.*)

The prosecutor also claimed that the Mr. Walters indicated on his questionnaire that the death penalty needed to be reformed, "just like

affirmative action." (16 RT 3377.)[20] The prosecutor also stated that Mr. Walters stated that he had been pulled over by the police several times for "questionable reasons. (*Ibid.*) The prosecutor's stated that she was troubled Mr. Walters' opinions that the criminal justice was "too slow" and "biased against the economically disadvantaged." (16 RT 3377-3378.)

The prosecutor was also troubled by the fact that in the *Hovey* voir Mr. Walters stated "I don't have any feelings one way or another about (the death penalty.") (16 RT 3378.)[21] The prosecutor then told the court that "if someone cannot say they believe in the death penalty, they cannot impose it." (16 RT 3378.)[22] The prosecutor further stated that she had perempted all prospective jurors who stated they believed that life was a harsher penalty than death. (*Ibid.*)

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20. As will be fully discussed later, the prosecutor once again misstated a prospective juror's opinions to the court. The "reform" of which the prosecutor complained was Mr. Walters feeling that the death penalty was not imposed *often enough* and the system had to have more executions to create a real deterrent.(VI CT1578, QQ178-179, 183.)

21.This yet another misstatement of what was said. Immediately after saying this, he made clear that he was not against the death penalty and that California should have the death penalty (12 RT 2411-2412.)

22. Nowhere in the Mr. Walters' voir dire did he even suggest that he would not impose the death penalty if appropriate. As stated above, he actually was a proponent of rapid trial and exaction where appropriate. This prosecution's attitude toward the concept of "belief" in the death penalty raises executions to almost a religious state of grace, in which all jurors must come to the court room with an unshakable faith in the righteousness of the death penalty. She is not entitled to such a jury.

The prosecutor also was "bothered" by the fact that Mr. Walters "seem(ed) to have a lot of information about the law." (16 RT 3378.) The prosecutor complained that when she asked her questions and hypotheticals Mr. Walters was familiar with terms such as "intent" and "aider and abettor." The prosecutor claimed that Mr. Walters already had more information than the other jurors had. (16 RT 3378-3379.)[23]

At this point, the court interrupted the prosecutor to state that Mr. Walters' statements about "overzealous" prosecutors were coupled with his opinion that defense attorneys manipulate evidence. The trial court stated that Mr. Walters derived these rather vague opinions from television and said feelings should not be given much weight. (16 RT 3379.)

The prosecutor finished her argument by reiterating that her chief concerns about Mr. Walters was that he believed that life was the worse penalty and he stated that because the death penalty causes so much litigation it should be "let go."(16 RT 3380.)[24] The prosecutor also restated that because Mr. Walters was an engineer he would be unable to impose the

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23.As will be discussed further, what "bothered" the prosecutor was that Mr. Walters declined to have his views misrepresented at the *Hovey* voir dire. (See Argument I.) It does not take special legal knowledge for an intelligent, educated person to know that intent is a critical element in the criminal justice system. Further, the fact that he might be better educated or informed than the average juror does not constitute a "race-neutral explanation."

24. Once again, Mr. Walters' statement was taken totally out of context. As stated above, he was an advocate of the use of the dearth penalty and his only complaint about it was that the State did not have their heart into the execution of the imposition of death.

death penalty. She further stated that he was the only engineer on the panel and he is trained to look into all possible doubt. (16 RT 3380.)

Appellant's counsel strongly opposed the prosecutor's characterizations of Mr. Walters. He stated that the fact that a professional strived to do his best at work does not mean he or she cannot be a good juror. He also reminded the court that Mr. Walters made it perfectly clear that he was willing to uphold the law and vote for death where appropriate. (16 RT 3380-3381.)

The court accepted the prosecutor's explanation as race-neutral, stating that while he liked the juror very much, the prosecutor has been consistently excusing prospective jurors who thought that life without parole is a more severe sentence. (16 RT 3382.)

The following exchange then occurred.

> Prosecutor: I believe that as a result holding this hearing concerning *Wheeler,* I have to go now back and justify or state the reasons for the other two jurors who were excused previously
> Court: I was going to ask you to do that at this time. (16 RT 3382.)

The prosecutor responded by stating her "race-neutral" explanations for his challenges of Mr. Leonard and Mr. Cook. Regarding Mr. Leonard, the prosecutor claimed that the life penalty was worse than death. (16 RT 3383.)

She also complained that "he also believed that if the person had (sic) a past of hateful decisions, that would effect whether or not he would impose the death penalty," and he might lean to the life penalty if this was a defendant's first hateful act. (*Ibid.*)[25]

The prosecutor also stated that Mr. Leonard would make her prove all of the special circumstances, as well as intent. In addition, he also thought that rehabilitation was a goal of the penal system. She also was troubled that Mr. Leonard would prefer death over life imprisonment for himself, stating "For myself I couldn't stand to be incarcerated forever." The prosecutor also claimed that Mr. Leonard believed that life in prison was a more severe sentence than death. (16 RT 3384.) She also pointed out to the judge that Mr. Leonard said if he knew a defendant would never "do it again," he'd lean toward life in prison. (16 RT 3385.)

The court accepted the prosecutor's explanation as being race-neutral. (16 RT 3385.)

Regarding Mr. Cook, the prosecutor basically revisited her entire voir dire of the him that resulted in his alleged conflict with the prosecutor. She relied upon the fact that Mr. Cook indicated that he had memory problems (16 RT 3385), that he stated he would not set aside his beliefs (16

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25. From the context of the statement, the word "had" was a misprint. It should read "was."Further, as discussed later, how could Mr. Leonard's statement be construed as an unwillingness to impose the death penalty on *this* defendant, who had a long history of juvenile anti-social behavior.

RT 3386-3387) and alleged that he could not explain to the prosecutor which was the worse of the two penalties, stating "who knows" when the prosecutor asked that question of him. (16 RT 3387.) She also was bothered by the fact that no matter how many times she asked Mr. Cook for an answer he continued to state that he had no personal opinion for or against the death penalty. (16 RT 3387-3388.)

The prosecutor then commenced a long recitation of how poorly Mr. Cook treated her, stating that he made sarcastic remarks to her and essentially making her job that much more difficult by not answering her questions. (16 RT 3387-3393.) She further accused him of stating "I'm not for killing anyone" and that Mr. Cook essentially never said that he could face the appellant and impose the death penalty on him. (16 RT 3393.) She also claimed that Mr. Cook was evasive when she asked the question whether he had been exposed to racial prejudices. (16 RT 3393-3394.)

The court accepted the prosecutor's statement as race neutral stating that Mr. Cook did not answer the questions posed to him and that there was a lot of friction between the Mr. Cook and the prosecutor. (16 RT 3394.)

5. Peremptory Challenge of Reginald Payne

The peremptory voir dire of Mr. Payne was very brief. He made it clear that he would be able to follow all of the court's instructions. (16 RT 3452.) He also stated that if the People proved their case beyond a

reasonable doubt, he would find appellant guilty. (16 RT 3454.) Both sides then passed for cause. (*Ibid.*)

The prosecutor then exercised a peremptory challenge on Mr. Payne. (16 RT 3456-57.) She prefaced the actual challenge by naming some of the white prospective jurors that she had peremptorily challenged and the reason therefore. (16 RT 3445-3456.) She also stated that because the incidents with his sons, Mr. Payne had an animus toward the Long Beach Police Department. (16 RT 3457-3458.)

She also offered to the trial court that Mr. Payne stated that the death penalty was sometimes "overused," referring to other jurisdictions. However, she did admit that Mr. Payne indicated that this would not affect him in this case. (16 RT 3458-3459.) The prosecutor also stated that she found it "disturbing" that Mr. Payne was temporarily affected by the verdicts rendered on the murder cases stating that it wasn't always pleasant to do what has to be done. (16 RT3459-3460.)

The prosecutor then told the court that she was disturbed by Mr. Payne's statement that he believed that the life imprisonment was a harsher penalty than death because of the conditions in California prisons, indicating that she did not believe that Mr. Payne could impose the death penalty. (16 RT 3460-3461.) However, Mr. Payne had made it very clear

that he could impose the death penalty, "Because that would come under the instructions of the judge." (16 RT 3461; see also 16 RT 3463.)

Appellant's counsel opposed the prosecutor's characterizations, stating that this was a forthright and articulate person whose honest answers to the prosecutor's questions in no way indicated an animus toward the police nor that he was unable in good conscious to impose the death penalty according to the court's instructions. (16 RT 3464.) Counsel also reminded the court that Mr. Payne's answers regarding the death penalty reflected his own feelings about the idea of being locked up in a small cell for the rest of his life and was not a general statement that applied to all defendants. (16 RT 3464-3465.)

The prosecutor responded by stating that all that she considered was the position of the jurors on the death penalty, and never considered race, age, marital status or anything else. She further stated that in evaluating the prospective jurors she didn't even know who they were when she reviewed the questionnaires. (16 RT 3465-3466.)[26]

The court then declared a recess to look at the questionnaire and the transcript before rendering a decision. (16 RT 3466 et seq.) After the

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26. This is yet another prosecutorial utterance that is virtually impossible to take seriously. The first question of the questionnaire specifically asks the prospective juror his or her race, martial status, ethnic origin, etc. (See VI CT 1492.) Apparently, the prosecutor was asking the court to believe that she simply chose not to read this part of the questionnaire.

court reconvened, the prosecutor again maintained that she had no idea that Mr. Payne was black when she began reviewing the punishment section of his questionnaire. (16 RT 3471-3472.) She then summed up her reason as to all her peremptory challenges as follows:

> I don't believe that somebody, one, who believed that life without the possibility of parole is a more severe punishment than death can actually impose the death penalty, because they believe that spending the rest of *their life* in prison would be the more severe punishment that could be imposed. (16 RT 3472; emphasis supplied.)

The prosecutor then summarized, somewhat differently that earlier in her argument, her alleged race-neutral reasons for the peremptory challenges.

> ...as I have indicated to you, I have exercised peremptory challenges consistently for certain reasons, those reasons being:
> .Life without the possibility of parole is a more severe sentence than death;
> 2. They believe in rehabilitation. Therefore, in my opinion they would vote for life without the possibility of parole although they say that they could impose the death penalty;
> 3. A bad experience with a police officer, whether it is themselves or a family member;
> 4. Whether or not if they believed both punishments are equal;
> 5. Whether or not somebody would want to judge another person; and
> 6. If they sat on a hung jury.I have excused them as well or if indicated (sic) they indicated they returned a not guilty verdict. (16 RT 3478.)

After hearing the balance of the arguments, the court rejected the race-neutral explanation and informed the prosecutor that he will would not allow her to peremptorily excuse Mr. Payne. (16 RT 3479-3480.)

Predictably, the prosecutor reacted saying she "highly object(ed)" to the court's ruling and claiming that the trial court had just branded her a racist. (16 RT 3480-3481.)[27] She further opined that Mr. Payne "indicated he is not going to vote for the death penalty in this particular case."[28] (16 RT 3487.) After the court failed to be swayed by the prosecutor's argument, the prosecutor, without any basis in fact, bluntly that stated that Mr. Payne "will hang this jury." (16 RT 3488.)

In spite of the trial court having already fully reviewed and considered this matter, the prosecutor again requested that the court re-review the matter and revisit it after lunch break. (16 RT 3489.) The court agreed, citing its desire to be "fair-minded" and that the prosecutor was "very passionate about the decision." (16 RT^ 3490.)

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27. *Batson* and its progeny do not require that it be proven that the prosecutor had "racist" motives. It is sufficient that the prosecutor wants to win badly enough to deprive the defendant of his constitutional rights.

28. Once again, the prosecutor constructs facts to suit her argument. Mr. Payne never said this. If her did, he never would have made it to this point in the jury selection process.

After the break, the prosecutor rehashed her arguments at length, still trying to persuade the court that her reasons for the challenge of Mr. Payne were race neutral. (16 RT 3497-3514.)

She also stated that

> ...even if we get a conviction, I see this juror as ripe for the defense attempting to get him to change his mind and nullify the verdict that we may get in this particular case. He has basically told the defense if I'm on the jury, come see me, because I'm going to be going over it and over it in my mind, and maybe I will find a reason to change my mind. (16 RT 3523.)

The prosecutor then pointed out once again that the Mr. Payne put a certain emphasis on rehabilitation but that California was not a rehabilitation state. The prosecutor interpreted this to mean "that's why (Mr. Payne will impose life without the possibility of parole, because he believes people can be rehabilitated. That's what I see him saying in this instance." (16 RT 3525.)[29]

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29. This is yet another misstatement of the law. It is simply not true that California does not have rehabilitation. As will be seen later in this Argument, the mitigating factors of Penal Code section 190.3 include a defendant's capacity for rehabilitation. Further, the prosecutor's statement that if one believes in rehabilitation, one cannot vote for the death penalty is illogical, it is tantamount to stating that if a juror believes in the presumption of innocence, he cannot be trusted to vote for a conviction.

She also reargued that Mr. Payne's statement that proportionately more African-Americans were on death row and incarcerated, arguing that this precluded him from being a fair juror. (16 RT 3529-3530.)

The prosecutor also reargued that she exercises peremptory challenges against persons who have sat on hung juries because she doesn't want such a person "nullifying this jury." (16 RT 3531.)

After another recess, the trial court abruptly changed its mind and ruled that the prosecutor's explanations were race neutral and denied the *Batson* motion. (17 RT 3535-3536.) The court started that given Mr. Payne's feelings about the conditions in the prisons, the fundamental incarceration of black and overuse of the death penalty created a race-neutral reason for the exercise of the prosecutor's challenge. (17 RT 3537-3538.)

Appellant's counsel moved for a mistrial, stating that the case was highly charged with racial overtones and "from the jury selection process taking place in this courtroom, it is apparent that no black males, no African-American male will or can sit on this panel." (17 RT 3538.)

Without ruling on whether black males are a protected classification for equal protection purposes under state or federal law, the court denied the motion for mistrial. (17 RT 3539-3550.)

D. APPLICATION OF THE LAW TO THE INSTANT CASE

1. African-American Males are a "Cognizable Group" for Equal Protection and Cross-Section of Community Analysis

The word "cognizable" as used in this area of the law is a term of legal significance which goes far beyond the dictionary meaning of "knowable or perceivable." (The American Heritage® Dictionary of the English Language, Fourth Edition Copyright © 2009 by Houghton Mifflin Company.) If such were not the case, then red haired people or people with crossed-eyes would be considered cognizable. Instead, in *People v. Fields* (1983) 35 Cal.3d 329, 342, this Court stated, "It is clear that the groups recognized as cognizable classes are generally relatively large and well defined groups in the community whose members may, because of common background or experience, share a distinctive viewpoint on matters of current concern."

This Court's decisions mirror those of the United States Supreme. In *Castaneda v. Partida* (1977) 430 U.S. 482, 494, the High Court defined a cognizable group as "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied."
Under these definitions, it is clear that African-American males are indeed a "cognizable group." This group is large and well defined. Being a group whose history involved, and to some extent still involves, discrimination and

prejudice by long established institutions of authority, they indeed "share a distinctive view point on matters of common concern."

This concern includes the experiences that their group has had with the police, the courts and the prison system. There is also the common experience of being a group frequently targeted for improper police stops and detention. The social, economic and psychological experience of the African-American male in the United States has been long documented and much discussed. This group has indeed been "singled out for different treatment" and its members, for the greatest part, share a common perspective on life.

Further, this court has long held that African-American members of a given sex are considered, by law, to be a cognizable group for *Batson* purposes. (*See e.g., People v. Cleveland* (2004) 32 Cal.4th 704, 735; *People v. Motton* (1985) 39 Cal.3d 596, 605-606.)

2. A Prima Facie Case was Made as to the Systematic Exclusion of African-American Males from this Jury

The test as to whether a defendant has made a prima facie of discrimination is whether he has shown (1) that the prospective juror was a member of a cognizable group, (2) the prosecutor used a peremptory challenge to excuse that juror, and (3) the totality of all of the circumstances raises the inference that the strike was "motivated by race." (*Boyd v.*

Newland (9th Cir 2006) 467 F.3d 1139, 1143.) As stated in section A of this Argument, the systematic exclusion of such a cognizable group as African-Americans males not only runs afoul of the Equal Protection Clause but violates the fair cross-section of the community requirement of the United States Supreme Court.

> ...the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940), that '(i)t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' To exclude racial groups from jury service was said to be 'at war with our basic concepts of a democratic society and a representative government.' A state jury system that resulted in systematic exclusion of Negroes as jurors was therefore held to violate the Equal Protection Clause of the Fourteenth Amendment. Glasser v. United States, 315 U.S. 60, 85-86, 62 S.Ct. 457, 472, 86 L.Ed. 680 (1942), in the context of a federal criminal case and the Sixth Amendment's jury trial requirement, stated that '(o)ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government,' and repeated the Court's understanding that the jury "be a body truly representative of the community' . . . and not the organ of any special group or class.' (*Taylor v. Louisiana* (1975) 419 U.S. 522, 527.)"

The exclusion of the four African-American men was a systematic attempt to not just remove persons of a certain skin pigmentation but of a key part of the Los Angeles community, a part that may not be entirely sympathetic with all of the ethos of the prosecution, yet a part whose voice is

constitutionally required to be heard. That voice was silenced by the removal of each and every member of that part of that community. As counsel stated, the prosecutor would allow no African-American man to sit on this jury.

The High Court has held that a defendant can make out a prima facie case of discriminatory jury selection by "the totality of relevant facts" about a prosecutor's conduct in the case being tried. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 239.) That totality clearly includes the number or percentage of prospective jurors from the cognizable group in question. (*Miller-El, supra,* 545 U.S. at p. 240-241; *United States v. Collins* (2009) 551 F.3d 914, 921.) In this case, four African-American males survived *Hovey* and 100% of then were removed by the prosecutor's peremptory challenge.

As stated above, the bar for establishing such a prima facie case has not been set very high by the courts (*Collins, supra,* 551 F.3d at p. 920) and certainly not a "more probable than not test." All that must be shown is that "the totality of the relevant facts gives rise to an inference that the peremptory challenges are being used for a discriminatory purpose." (*Johnson v. California, supra,* 545 U.S. at 168.) Such a showing has been made.

The trial court specifically held that a prima facie case was established as to the third and fourth prospective African-American male

jurors, Walters and Payne. During the challenge of Mr. Walters, the court required the prosecutor to set forth her race neutral explanation for the first two challenges, Mr. Leonard and Mr. Cook. By doing so, the court *de facto* indicated that a prima facie case of discrimination was made as to these first two jurors, as well as the more explicit finding as to the third and fourth challenged African-American jurors, Mr. Walters and Mr. Payne. (*People v. Lenix* (2008) 44 Cal.4th 602, 613, fn 8.; 16 RT 3382.)

3. The Prosecutor's "Race-Neutral" Explanations For Her Challenges Were Pretextually and her Challenges Were Made to Unconstitutionally Exclude African-American Males from the Jury

a. Introduction

As stated in section A of this Argument, after the defendant has established a prima facie case of systematic exclusion by the prosecution, the burden of going forward is "momentarily" shifted to the prosecutor to offer "race-neutral" explanations for the challenge(s) of the given prospective juror(s) in question. (*Johnson v. California, supra,* 545 U.S. at 171.)

After these explanations are tendered, the trial court must decide, by the totality of circumstances whether the challenges to the jurors in question were constitutionally legitimate or made to unconstitutionally exclude one or more members of a cognizable group from the jury for racial reasons.

As previously stated, this was a case that was directly associated with racial perceptions and attitudes. The charges were that a white woman was killed by a group of young black men. Citing to the overruled case of *People v. Johnson* (2003) 30 Cal.4th 1302, the United States Supreme Court in *Johnson v. California* (2005) 545 U.S. 162, 167 stated these type of racially charged circumstances[30] were "highly relevant" to the *Batson* question and that "it certainly looks suspicious that all three African-American jurors were removed from the jury by the prosecutor."

A close examination of the facts surrounding the peremptory challenges of all of the four male African-American prospective jurors reveals the prosecutor's intention to exclude these four men for racial reasons, permitting the trial to proceed with a virtually all-white jury and a completely all-white set of alternates.

The four prospective jurors excluded were all well-established, law abiding, responsible men who had a very real stake in the Los Angeles County community. Mr. Leonard was a decorated veteran who honorably served his country in a war zone. He was currently working for the United States Government and supporting his two children. Mr. Cook was a very

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30. In *Johnson*, an African-American man killed his a young white child. at 162.) The instant case is far more racially charged than this.

well educated individual who has been involved in the education of our youth for many years as both a teacher and an assistant principal. He took his citizenship responsibilities very seriously and considered jury service as his duty to his community and country. Mr. Walters was a very accomplished engineer, so thoughtful and direct in is answers that the judge, himself, stated that he liked him "very much." (16 RT 3382.) Mr. Walters' only concern about the capital punishment laws was that by not executing punishment promptly, the system was losing credibility. Mr. Payne was a sanitation plant operator for the County of Los Angeles. He had raised eight children and actively and courageously opposed the infestation of gangs in his community.

In addition to the above, all of these men were dedicated to our system of justice and swore to uphold the law. None of them indicated in any way that their personal beliefs would hold sway over the law as stated by the judge. Each indicated he would follow the law and decide the case on only the facts and the law. None of them indicated that they had any complaint about the ultimate justice of their country's laws. They were each and every one honorable men.

These four men would make any community proud. They honored the call for jury duty and stood ready to serve in a fair and impartial manner. However, these men also had something else in common. They

were all African-American males. The were dismissed by a win-at-all-costs prosecutor not only because there were the same "color," but because she feared that as a result of "common background or experience, these jurors share(d) a distinctive viewpoint on matters of current concern" that may have not been advantageous to the prosecutor. (*People v. Fields* (1983) 35 Cal.3d 329, 342.)

The prosecutor's stated reasons for removing these four upstanding citizens from the jury were clearly pretextual, both in the light of the voir dire answers of these men, themselves, and the similar viewpoints of white jurors who were approved by the prosecutor to sit on the jury.

As stated above, the foundation of the prosecutor's alleged "race-neutral" explanation for the challenge of all of these men was "all that she considered was the position of the jurors on the death penalty." (3465-3466.) During her challenge of Mr. Walters, she summarized the specific factors she considered in making this determination. (16 RT 3478.)

> 1. A prospective juror who believed life without the possibility of parole is a more severe sentence than death;
> 2. A prospective juror who believed in rehabilitation, because he would vote for life without the possibility of parole although he says that he could impose the death penalty;
> 3. A prospective juror who had a bad experience with a police officer or had a family member with such an experience.

4. A prospective juror who believed both punishments are equal;
5. A prospective juror who would not want to judge another person; and
6. A prospective juror who sat on a hung jury or who had returned a not guilty verdict.

As will be seen in the below analysis, the "race-neutral" reasons as applied to the four American-American male prospective jurors in question were blatant misrepresentations or outright misstatements of their positions. The pretextual nature of these "race-neutral" reasons for challenging the four African-American men were clearly demonstrated by a comparative juror analysis, which revealed the stated "race-neutral" concerns for striking these jurors were not matters of prosecutorial concern as to white sitting jurors who felt the same as the challenged African-American males. These white jurors were allowed to sit in spite of having the same "infirmities" as the four African-American males.

In judging whether a prosecutor's peremptory challenge was truly "race-neutral" or merely pretextual, the "totality of relevant circumstances" must be considered. (*Batson, supra,* 476 U.S. at p. 94.) These facts can, and should, include a comparative analysis of the prosecutor's questions to and the responses thereto of jurors not in the "cognizable group" that were found acceptable by the prosecutor. (*Miller El II, supra,* 545 U.S. at p. 241.) As stated by the United States Supreme Court, when deciding whether or

not the "race-neutral" explanations tendered by the prosecutor were simply pretext.

> More powerful that bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white -panelists were allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as much to an otherwise-similar nonblack that is permitted to serve, that is evidence tending to prove purposeful discrimination at *Batson's* third step. (*Miller-El II, supra,* 545 U.S. at p. 241.)

More recently, in *Snyder v. Louisiana* (2008) 552 U.S 472 , 478-480, the High Court reaffirmed this principle by rejected the prosecutor's "race-neutral" reason for the challenge to an African-American male juror. The person in question was a student whom the prosecutor claimed would be distracted by college obligations. However, as the Court recognized, there was a sitting white juror whose level of occupation and family distraction far exceeded that of the black juror, but who was not challenged by the prosecutor. (*Id* at p. 483-484.) This discrepancy was considered by the Court to be evidence that the prosecutor's "race-neutral" explanation was merely a pretext. (*Ibid; See People v. Lenix, supra,* 44 Cal.4th at 620.)

Even more recently, the Ninth Circuit Court of Appeal in *Ali v. Hickman* (9th Cir 2009) 571 F.3d 902, 916 cited to Miller-El in stating "The fact that [a proffered] reason also applied to [these] other panel members,

most of them white, none of them struck, is evidence of pretext." (*Miller-El, supra,* 545 U.S. at p. 248.)

Further, in comparing the answers of two jurors for this purpose it is only necessary to find that these jurors were "similarly situated" not identically alike. (*Miller-El II, supra,* 545 U.S. at 247 fn 6.) As stated by the Court, "A per se rule that a defendant cannot win a *Batson* claim unless there is an identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Ibid.*)

b. Mr. Leonard

Regarding Mr. Leonard, at the time of the challenge, the prosecutor did not give an explanation for the challenge as the court did not find a prima facie case of discriminatory use of the peremptory challenge.[31] However, in response to appellant's objection to the peremptory challenge, she stated that Mr. Leonard was "not participating in the cooperative sense that all of the other jurors–they're watching counsel, they're listening to questions, he's just looking straight ahead. I found that kind of unusual, because no one is doing that out there." (16 RT 3225.)

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31. The prosecutor and the court effectively stated that appellant could not enter an objection on this ground based on a single peremptory challenge, and along with that the prosecutor chastised counsel for "misciting the law" when counsel argued that he was indeed entitled to make such a challenge. The court was mistaken. (*People v. Silva* (2001) 25 Cal.4th 345, 380.)

However, as the peremptory challenges against the black male prospective jurors mounted, the court compelled the prosecutor to further explain the reason for the challenge to Mr. Leonard. The prosecutor retroactively gave the following specific reasons for excluding Mr. Leonard from the jury, stating that Mr. Leonard believed that life without the possibility of parole was worse than death and stated that "for myself, I couldn't stand to be incarcerated forever." (16 RT 3383-84.) She further complained that Mr. Leonard stated that whether a person had a history of "hateful decisions" would effect his penalty vote and if the defendant didn't have such a history he might lean to the life penalty. (*Ibid.*) She further stated she excused Mr. Leonard because he believed in rehabilitation and would make her prove all of the special circumstances. (16 RT 3384) The court accepted the prosecutor's explanations as a "race-neutral." (16 RT 3385.)

To begin with, the prosecutor's "reason" regarding Mr. Leonard's statement regarding appellant's "hateful decisions" is so logically indefensible that it can only be viewed as an pretext to rid the jury of Mr. Leonard because he was an Afircan-American male. The whole point of the California death penalty law is to focus the jurors' attention on the statutorily stated aggravating and mitigating factors. (See *People v. Frye* (1998) 18 Cal.4th 894, 1015.) Those factors specifically encompass a

defendant's other acts of violence and "hate" (Penal Code section 190.3 (b)) as well as prior convictions (*Ibid.* 190.3 (c). They also encompass a defendant's good acts of charity and kindness or, at the very least, lack of prior "hateful" conduct. (*Ibid.* 190.3 (k).)

Mr. Leonard told the prosecutor that he would want to know something about appellant's history of violence and hate before he came to a decision about the penalty. There would be something terribly wrong with a juror who would not want this information. In addition, the fact that Mr. Leonard would lean toward life if this was appellant's first act of hate or violence would likely put him in the company of most prospective jurors judging the ultimate fate of an eighteen year old.

Just as importantly, this whole line of questioning was yet another cynical "hypothetical" that had absolutely no factual relationship to the case at hand. The charges against appellant were *not* his first acts of violence or evidence of "hateful decisions." The prosecutor knew full well that she intended to introduce penalty phase evidence indicating that appellant was involved in a violent gang culture and personally was involved in violent gang "jumping in" rituals, repeated assaults of innocent persons and violent assaults while in jail. (AOB, *supra,* p. 23 et seq.)

This so-called "race-neutral" reason was extracted from Mr. Leonard only after telling him that there "was nothing in the background.

This is the first time...there are no details." (9 RT 1733.) It was only after this misleading, questioning that Mr. Leonard stated that in such an instance, he would be "swaying towards life in prison." (*Ibid.)*

Seventeen of the eighteen seated jurors and alternates were white. Not a single one of them were questioned about first time "hateful decisions" or presented with the factually irrelevant hypothetical of a defendant whose first and only act of violent or hateful social deviance was capital murder. Further, none were asked how many special circumstances it would take to allow them to vote for death. This sort of contrasting voir dire resulting in a "race-neutral" explanation for the excusal of a member of the cognizable group in question is extremely suspect. (*Miller-El II, supra,* 545 U.S. at p. 255.)

If the prosecutor was as concerned about Mr. Leonard's feelings about such a hypothetical "first time evil" individual as she claimed she was, she certainly would have asked this question of other prospective jurors eventually seated. However, this questioning was reserved for a black male prospective juror, further evidencing that this supposed "race-neutral explanation" was clearly pretextual to facilitate the removal of a member of a targeted cognizable group. (See gen. *Pierre v. Louisiana* (1939) 306 U.S. 354, 361-362; *Ali v. Hickman* (9th Cir 2009) 571 F.3d 902, 916.)

Regarding the other "race-neutral" explanation that Mr. Leonard should be excused because of his opinions as to which penalty was worse, the following must be initially observed. Even discounting any racial motivations, the prosecutor's insistence that there was a correlation between a prospective juror's initial personal opinion of which is the "worse" of the two penalties and that jurors inclination to the follow the law as given by the judge is misplaced and illogical. In itself, the question as to which penalty a prospective juror thought was "worse" is virtually impossible for a juror to intelligently answer as the juror has no previous experience with being incarcerated in the prison system. Any such answer is pure speculation based upon a juror's personal preference based upon incomplete information.

In *Miller-El II, supra,* 545 U.S. at pp. 246-252, the voir dire relating to the panel's attitude as to which was the "worse penalty" virtually mirrored that in the instant case. The prosecution exercised peremptory challenges to several African-American prospective jurors, giving the "race-neutral" explanation that these jurors stated that they were not sure which was the worse penalty or stated that *for them* (emphasis added) life would be worse. In looking at the totality of the circumstances of the entire voir dire, the United States Supreme Court rejected this as a race-neutral reason. The Court pointed out that every one of the African-American

prospective jurors stated that regardless of these opinions, they would have no problems in imposing the death penalty under the law.

Further, the *Miller-El* Court stated that the plausibility of the state's argument was "severely undercut by the protection's failure to object to other panel members" who expressed views much like the challenged African-Americans. (*Miller-El, II, supra,* 545 U.S. at p. 248.)

In the case of Mr. Leonard, the prosecutor claimed that he should be excused because he thought life was worse that death. (16 RT 3383.) This was a mischaracterization of what Mr. Leonard said, the same type of mischarcterization used to excuse prospective jurors for their alleged inability to impose death under the law of *Witt.* (see Argument I.) When asked by the prosecutor why he wrote on his questionnaire that life without parole was the worse penalty, the following telling exchange occurred.

> Prosecutor: And can you tell me why you believe this is worse for a defendant.
> Mr. Leonard: Well, the person would have the rest of their lives to pay for what they did, you know, that it what I mean death, it's death you don't have to think about it any more.
> Prosecutor: So. You are saying that if you had to spend the rest of your life in prison you would think about what you did everyday?
> Mr. Leonard: I think I would.
> Prosecutor: What about someone who believed what they did was okay?
> Mr. Leonard: I think that's where the good versus bad comes into play to determine if that person should be put to death or not. (9 RT 1732.)

It is clear from this exchange that Mr. Leonard's belief that life in prison was the worse penalty was not based upon what was worse for any given defendant but, rather, his personal inherent sense of decency in that he would be haunted by the homicidal act his entire life. However, he recognized that the ultimate decision ultimately relies on the "good" versus "bad" analysis, meaning the law as the court and counsel had already described.

There is absolutely nothing in the balance of Mr. Leonard's written or oral voir dire to even hint that he would not follow the law exactly as the court would give it. He felt that sitting on a jury was a "civic obligation" (VI CT 1450, Q 37) and specifically rejected the notion that blacks were treated unfairly by the system. He also made it clear that he could "set aside religious, social or philosophical convictions" and reach a penalty decision based only upon the evidence heard at trial and the law as given by the judge. (VI CT 1480, Q 200)

Further, a comparative analysis of sitting white jurors, is another revelation of the pretextual nature of this particular "race-neutral" explanation. Seated Juror #4 stated in answer to Q 198 as to which penalty was worse stated that life in prison was worse stating "I can only base this on my personal choice. And I value freedom." (VII CT 1927.) However on

question 227 of the questionnaire, the juror gave a contradictory answer stating that death was worse. (VII CT 1932.) At the very least, these answers indicated that this white juror was at least conflicted about her own opinions. However, the prosecutor never even attempted to clear up this conflict in the voir dire (14 RT 2980 et seq), apparently being satisfied that none of this mattered very much as she had a juror who was not a black male.

The same situation occurred with white seated Juror # 5 who indicated in response to question 198 (VII CT 1927) that based on her perceptions, life was the worse of the penalties but then gave a conflicting answer in question 227. (VII CT 1932.) Once again, the prosecutor did not even bother to clarify these conflicting responses.

White seated Juror #10, in question 198, stated the question as to which penalty was worse was "too tough to answer". She proceeded to vacillate in her questionnaire answers between saying that death may be the worse sentence (VII CT 2230, Q 227) and stating that life appears to be the "more appropriate sentence." (VII CT 2229, Q 224.) She further stated that she would require overwhelming evidence for the death penalty. (12 RT 2604.) Again, none of this seemed to give the prosecutor pause.

White seated Juror #9 in response to question 198 stated that life was the worse penalty (VII CT 2225), then seemed to contradict himself on

question 227. (VII CT 2230.) This time the prosecutor questioned the juror about her feelings. (14 RT 3047-3050.) In doing so, the prosecutor established that this juror clearly believed that life in prison was the worse of the two penalties because, as also opined by Mr. Leonard, she felt that the defendant would have to live with the remorse. (14 RT 3047.) After additional questioning indicating that the juror felt that in spite of her feelings she could follow the law (14 RT 3048-3049), the following exchange occurred.

> Proseuctor: My concern is that you believe that life without the possibility is the worse possible punishment to give a defendant.
> Juror: Yes.
> Prosecutor: So if you believe that, and you believe that this case deserves the worse possible punishment, how could you ever impose the death penalty? Do you see what I am saying?...
> Juror:Well it was my understanding from the explanation from the judge, that there were several factors that have to be weighed here. (14 RT 3049-3050.)

From this exchange, it is clear that this juror believed that life was a worse penalty than death. Further, her answers virtually paralleled those of Mr. Leonard. Both believed that ultimately the decision would not be made on their personal opinion but the factors and the law. Both were willing to do their jobs under the United States Constitution and laws of the State of California. Only one was given their chance to do so. The juror who was

white remained sitting. The juror who was a African-American male was excused.

Alternative Juror #5, another white juror, made it clear that he also felt that life without parole was the worse of the two penalties. (9 CT 2571, Q 198.) However, on oral voir dire, the prosecutor limited her inquiry on this subject as to whether the juror would be able to impose the death penalty. (18 RT 3884.)

Further, white sitting juror #12, while stating that death was the worse penalty, indicated on her questionnaire that in general she would lean toward life without parole. (VII CT 2328, Q 224.) She was not even questioned by the prosecutor about her answer during the oral voir dire. (11 RT 2324 et seq.)

The above comparative analysis clearly demonstrates that the prosecutor's stated concern regarding Mr. Leonard's death penalty attitudes did not extend to a good number of the seated jurors or alternates. The prosecutor's repeated protestations that she was being "race-neutral" and only concerned about attitudes as to the death penalty ring utterly hollow in the face of her treatment of jurors who were not black males, demonstrating her "race-neutral" justification was pretextual.

The prosecutor's claim that Mr. Leonard's belief in "rehabilitation"

serves as a race-neutral reason for his removal from the jury is, again, a pretext to send home this reasonable and thoughtful African-American man. Once again, Mr. Leonard's very careful and precise answers were taken out of context. All that Mr. Leonard said about "rehabilitation" was he would only vote for life if he believed that a defendant could be "rehabilitated" in prison. (9 RT 1730.)

There is absolutely nothing about this statement that indicated that Mr. Leonard could not follow the law. The prosecutor's comment that no prospective juror who believes in rehabilitation would ever sentence a person to death regardless of what that juror may swear to in court is senseless. The whole point of the weighing process is to determine who should live and who should die based on all statutory factors including factor (k) which expressly permits the jury to consider any circumstance of defendant's character which would argue for a sentence of less than death. Therefore, a juror is supposed to consider whether he feels that a defendant is possessed of such a character that his time in prison would be productive or that the defendant may arrive at some state of personal redemption. (See *Skipper v. South Carolina* (1986) 476 U.S. at 1, 3-5; Eddings *v. Oklahoma* (1982) 455 U.S. 104, 110.)

There was nothing in Mr. Leonard's questionnaire or voir dire that he placed an inordinate emphasis on "rehabilitation," or that he could not

follow the law as given by the judge. However, none of this mattered to the prosecutor, who, according to the record, seemed to be far more interested in Mr. Leonard's racial point of origin than any individual thoughts he might have as an independent human being.

Further, once again, a comparative analysis, revealed that several of the sitting white jurors also indicated a personal belief in "rehabilitation" and its function in making a penalty decision. While not using the specific word "rehabilitation," seated juror #4 stated that life in prison would be "appropriate" depending upon "any potential (a defendant) may have left to contribute." (14 RT 2989.) She further explained, "I think a person with life in prison could still offer some positive contribution to society. If you are like writing books, helping other prisoners. It's not likely. You still have some life left, I guess." (*Ibid.*)

In spite of not using the word "rehabilitation" it could not have escaped the prosecutor's notice that Juror # 4 fully ascribed to the concept even to a greater extent than did Mr. Leonard. However, once again, what was bad for the black goose was not bad for the white gander. This juror, who spoke so clearly of rehabilitation, was seated with the prosecutor's blessing.

Similarly, seated Juror #11 twice stated on her questionnaire that the death penalty should be reserved for irredeemable people. (VII CT

2273, Q192; VII CT 2276, Q 209.) She reaffirmed this belief on oral voir dire. (4 RT 720.) There certainly may be some subtle differences between the concepts of "redemption" and "rehabilitation" but certainly not in this context. White seated Juror # 11 essentially stated that her penalty decision would be partially based on whether appellant could do something useful in prison. (VII CT 2273, Q 193.) This comment was a clear endorsement by this white juror of the concept of rehabilitation.

However, this juror also was allowed to sit on this jury, in complete contradiction to the prosecutor's own "race-neutral" explanation that any juror who believed in this concept would vote for life regardless of what he or she swore to at voir dire. (16 RT 3525.)

Alternate juror #6, also fully endorsed by the prosecution, stated specifically in her questionnaire that the penalty of life in prison without possibility of parole should be imposed "for a person who is truly sorry and can be rehabilitated to some usefulness and good." (9 RT 2619, Q 193.) Once again, this did not seem to particularly trouble the prosecutor. (19 RT 4027.) Alternate Juror #6, who was white was allowed to sit on appellant's jury, at the ready to decide Mr. Armstrong's fate. Mr. Leonard, an African-American male, whose views were essentially identical to this juror, was sent home.

Taking into account this comparative analysis, the prosecutor's alleged justification of dismissal because Mr. Leonard would give weight to rehabilitation was plainly pretextual. The prosecutor's claim of racial neutrality does not even bear the most casual consideration.

This pretextual challenge as to "rehabilitation" was very similar to that described in *Miller-El II, supra,* 545 U.S. 242- 245.) In *Miller-El, II,* an African-American prospective juror indicated on voir dire that he believed that the possibility of rehabilitation might affect his penalty verdict. However, this juror also stated that he had no moral, religious or philosophical reservations about the death penalty. (*Ibid.*) He also stated that his belief in rehabilitation would not prevent him from imposing the death penalty. (*Ibid.*)

The High Court noted that upon challenging this juror, the prosecutor "simply mischaracterized" the prospective juror's testimony by telling the trial court that the African-American juror stated that he could not vote for death if rehabilitation was possible, when, in reality the juror stated that he could impose the death penalty regardless of the possibility of rehabilitation. This is exactly what happened in the instant case. (*Miller-El, supra,* 545 U.S. at 242-245.) In addition, the Court noted, "If indeed (the challenged black juror's) thoughts on rehabilitation did make the prosecutor uneasy, he should have worried about a number of white panel members he

accepted without reservations." (*Id.* at 244.) Such again was the situation in the instant case.

The above-discussed "race-neutral" explanations for the peremptory challenge of Mr. Leonard were nothing but flimsy pretext. They were not even internally consistent. When a comparative analysis was employed, the pretextual and cynical nature of the prosecutor's neutrality is fully laid bare. Several white jurors felt the exact same way as Mr. Leonard, but were allowed to be seated as jurors or alternates. This would be the pattern of all of the prosecutor's peremptory challenges to the four black men.

Regarding the "race-neutral" explanation that Mr. Leonard would make the prosecutor prove all of the special circumstances, Mr. Leonard never said he would do this. This so-called "explanation" arose from an incredibly confusing series of questions that the prosecutor posed to Mr. Leonard in the oral voir dire. (9 RT 1736-1739.) It was clear from this voir dire that Mr. Leonard did not understand the prosecutor's questioning until the end of this exchange. Upon finally ascertaining what the prosecutor was asking, Mr. Leonard clearly stated that he could impose death even if only one special circumstance was found true. (9 RT 1739.)

Not only did the prosecutor again misstate Mr. Leonard's answer, but a comparative analysis reveals the reality that the prosecutor was far

more interested in setting up a trap for this African-American male prospective juror than she was in obtaining an answer to what she considered a critical question. None of the seated jurors or alternates were subjected to this type of questioning. None was asked how many special circumstances it would take to allow them to vote for death. This sort of contrasting voir dire resulting in a "race-neutral" explanation for the excusal of a member of the cognizable group in question is extremely suspect. (*Miller-El II, supra,* 545 U.S. at p. 255.) As stated above, if the prosecutor was so concerned about this particular issue, she certainly would have asked the jurors eventually seated the same questions she asked Mr. Leonard. She did not, because this was not a real issue for the prosecutor. Removing Mr. Leonard, on any pretext possible, was.

It is clear from the above analysis that Mr. Leonard was removed from the jury for having the same thoughts and feelings that were perfectly acceptable in the white jurors who were seated. All of this makes the prosecutor's statement that she was concerned that Mr. Leonard was not "fully participating in a cooperative sense" absolutely unbelievable. It was unclear what the prosecutor even meant at the time she made this statement, or what sort of further "participation" she was expecting from Mr. Leonard. As any good prospective juror, he had no personal interest in the outcome; he didn't care who won or lost, who sat on the jury and who did not. He

simply sat quietly and minded his own business while the other prospective jurors were being questioned. There was no indication in the record that he was not paying attention or was creating a distraction during the questioning of other prospective jurors. The trial court, itself, stated that during the questioning of the other jurors, Mr. Leonard was concentrating on the judge. (15 RT 3225.)

Perhaps the prosecutor harbored some sort of delusion that Mr. Leonard's job when not being questioned was to hang on her every word and "fully participate" as if the jury selection process was a camp sing-along. More likely, this was yet another attempt to rid the jury of a member of a racial group that she didn't feel would vote for conviction and death. In light of the "totality of the circumstance," and the ultimate challenging of all of the four African-American males, her statement to the court was yet another pretext to excuse this juror. As the High Court in *Miller-El II* stated it "reeks of afterthought." (*Miller-El II, supra,* 545 U.S. at 246.)

Even without considering the challenging of the other African-American males, the above makes it clear that the challenge of Mr. Leonard was racially based and constitutionally unacceptable. The final composition of the jury–whether the final composition included one or more minorities or members of as cognizable group– is not dispostive. What is dispostive is whether the prosecutor struck even one prospective

juror based upon unconstitutional bias against a cognitive group. (*People v. Silva* (2001) 25 Cal.4th 345, 386.) It is not necessary to establish a pattern of discriminatory challenges. The establishment of just one is sufficient for *Batson* purposes. (Ibid.) This was clearly established as to Mr. Leonard, alone.

In the instant case, the prosecutor not only misstated the responses of Mr. Leonard, but her explanation of the challenge was clearly pretextual in that other sitting white jurors had the same opinions as Mr. Leonard. As stated by this Court in *Silva*, deference is due to the trial court's findings of race-neutrality only when "the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva, supra,* 25 Cal. 4th at 386; see *People v. Fuentes* (1991) 54 Cal.3d 707, 720; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198.) *Silva* further held that, "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Ibid.*) The judge must be reasonably persuaded by the prosecutor that the challenge was not racially motivated. "If not persuaded otherwise, the judge may conclude that the

challenges rest on the belief that blacks could not fairly try a black defendant. This in effect attributes to the prosecutor that all blacks should be eliminated from the jury venire." (*Batson v. Kentucky* (1986) 476 U.S. 79, 101 (concurr opin of J. White).)

Hence, the trial court is not completed to accept the prosecutor's "race-neutral" reasoning on its face. The court must conduct a vigilant and probing search as to the real reasons why the prospective juror was excused, not blinding itself to the false reasoning of the prosecutor, reasoning that was laid bare within the "four corners" of the record. (*Miller-El v. Dretke, supra,* 545 U.S. at 3239-240.)

The trial court did not fulfill its responsibilities under *Batson*. As in Argument I, the court simply went along with the prosecutor's pretext and allowed the challenge of Mr. Leonard in spite of the many inaccuracies and inconsistencies in the prosecutor's argument.

A discriminatory intent on behalf of the prosecutor has clearly been demonstrated. A peremptory strike shown to have been motivated in substantial part by discriminatory intent can only be sustained if the prosecutor proves that race was not determinative. (*Snyder v. Louisiana* (2005) 552 U.S. 472, 485.) Further, "It does not matter that the prosecutor may have had good reason to strike the prospective jurors. What matters is the real reason they were stricken." (*Paulino v. Castro* (9th Cir 2004) 371

F.3d 1083, 1090.) The unconstitutional dismissal of Mr. Leonard is sufficient to mandate the vacating of the entire judgment in this case. However, on three more occasions, three more perfectly acceptable black men were removed from this jury. This was done until no more remained.

c. Roscoe Cook

Mr. Cook was the second black male juror to be challenged by the prosecutor. His high standing in the community and professional accomplishments and dedication to the law and ability to uphold it in a jury room have been documented. (Argument II, Section B 2 (a).)

In analyzing the legitimacy of the prosecutor's challenge, what must be first addressed is the tone and tenor of the *Hovey* voir dire conducted by the prosecutor. This is essential because the prosecutor's key "race-neutral" challenge to Mr. Cook was that he had a "personality conflict" with her. Mr. Cook was obviously a proud and respected man who responded to his jury summons and possessed a clear view of his role. He knew he was at the courthouse to decide a matter of life and death based upon the evidence and the law and not upon anything he may have endured as an African-American man during the course of his sixty-four years. He certainly was not at the courthouse to be asked trick questions designed to eliminate him from the jury.

The prosecutor's questioning of Mr. Cook concerning his "beliefs"

as to the death penalty was intentionally provocative and intended to confront Mr. Cook in such a way as to deliberately create a personality conflict. This type of confrontational and ultimately insulting questioning was unique to this man. None of the other prospective jurors had to endure anything like it.

As described in Section B 2 (b) of this Argument, Mr. Cook stated on voir dire that he had no "general feelings" about the death penalty and did not lean in either direction as to its imposition. (11 RT 2279-2280.) He stated that each case should be decided on its particular facts. He further stated that he could not possibly judge which penalty was worse but made it clear that he could vote for either penalty depending on the facts. (11 RT 2296.) He further stated that he could vote for the death penalty in a felony-murder situation. (11 RT 2296-2297.)

Any rational interpretation of Mr. Cook's above voir dire answers would result in a finding that he was a fair, honest man, whose neutrality as to the imposition of death would be an asset to any jury. However, the prosecutor became fixated, to the point of utter insensibility, on an ultimately irrelevant question. She began her harassment of Mr. Cook through the following exchange.

> Prosecutor: Okay. Here's my question to you. If you don't have an opinion regarding the death penalty, how will I know you will be able to impose it, should it be appropriate?

Mr. Cook: You may not know.
Prosecutor: Because you do not know what your opinion is regarding the death penalty, right?
Mr. Cook: No, I didn't say that. I said "I don't have a disposition about that." (11 RT 2280-2281.)

Mr. Cook made it clear that what he said about the death penalty was that he didn't personally have any leanings on the superiority of one penalty to the other. However, even if the prosecutor's statement was factually correct and Mr. Cook did not have any "opinion" about the death penalty, logically the prosecutor's attempts to make a direct correlation between someone who has no ingrained opinions as to the death penalty and their inability to impose the death penalty lack any logical connection. The ideal death penalty juror should not have formed definitive opinions on the death penalty, as these opinions would likely be based on bias and prejudice. Further, it is quite possible that an individual could live his life without giving the imposition of the death penalty any thought at all until he was called for jury duty in a capital case. In any event, nowhere in the Mr. Cook's voir dire did he even suggest that he would not impose the death penalty, if appropriate.

Mr. Cook's response to his "opinion" on the death penalty was absolutely clear and very reasonable. However, only seconds later the prosecutor launched herself at Mr. Cook again with the same question, posited in a far more confusing and misleading form.

> Prosecutor: Okay. Do you have an opinion on the death penalty.
> Mr. Cook: Are we talking about the same thing? I said I didn't have an opinion about the death penalty--
> Prosecutor: Okay
> Mr. Cook: - - one way or the other
> Prosecutor: I said to you, "I wouldn't be able to know whether or not you'd be able to impose the death penalty, because you don't know what your opinion is on the death penalty." Do you recall that..
> Mr. Cook: Yes
> Prosecutor: And then you said that you wouldn't know. And I'm asking you how can you impose the death penalty, if you didn't know what your opinion is. And you said you had an opinion. And I said , well, what is it?
> And you said , well are we talking about the same thing? It's kind of confusing. (11 RT 2281.)

The prosecutor was right about one thing. This whole exchange was confusing, but not in the way she stated. In this single page of transcript, the prosecutor misstated the facts twice. First, Mr. Cook never said that he might not know whether he could impose death. In response to yet another confusing question from the prosecutor he stated that *she* may not know whether in a given situation he would impose the death penalty. Second, Mr. Cook never said he had an opinion as to the death penalty, except that he did not favor or disfavor it in principle. Ultimately, there is absolutely nothing objectively confusing about Mr. Cook's position. As stated in the answers to the questionnaire and in the early part of the oral voir dire, he made perfectly clear that he could impose the death penalty in

the appropriate circumstance and that his personal belief system mandated that he follow the law as given by the court. He simply had no personal opinion as to the theoretical morality of the death penalty. Mr. Cook attempted to explain this to the prosecutor several times. The prosecutor's seeming indifference to the facts and predilection to misstating the obvious intent of the prospective juror's clear response was intended to provoke this educated, rationale, thoughtful, mature man.

As such a man, Mr. Cook simply could not fathom the prosecutor's repeated line of questioning. He already informed her, in writing and orally, that he had no preconceived biases for or against the death penalty and that he could impose it under the law given the proper factual situation. That was his "opinion."

At this point, Mr. Cook began to become concerned at the turn the voir dire had taken. He asked the prosecutor why she kept asking him the same question over and over again and stated that this sort of questioning was not what he expected. However, his answer to her questions remained the same. (11 RT 2282.)

The prosecutor responded to this logical feeling of frustration by taking the voir dire on a course assured to invoke bad feelings on the part of Mr. Cook. She asked him if he "felt threatened" by her questioning. (11 RT 2282.) Once this question was asked, any hope of maintaining a

working relationship between the prosecutor and Mr. Cook forever disappeared. This personal confrontation form of questioning was not seen in her voir dire of the other jurors. The prosecutor's extraordinary conduct caused the "personality" conflict of which she later complained.

For some reason, the prosecutor then questioned Mr. Cook about his earlier career in teaching. The following exchange then occurred.

> Prosecutor: You were a teacher?
> Mr. Cook: Yes
> Prosecutor: Okay. What did you teach?
> Mr. Cook: Everything
> Prosecutor: You taught history?
> Mr. Cook: I taught all subjects.
> Prosecutor: Okay. Well, what are all subjects to you? Because see, I don't know what you taught, because I don't know you, and all subjects to you could just be math and English.. So that's why I am asking, what subjects did you teach? (11 RT 2284.)

Again, the prosecutor's questioning was provocative and insulting. Even if such questioning was at all relevant in a *Hovey* voir dire, it was done in such a manner as to deliberately exasperate Mr. Cook. Twice, Mr. Cook informed the prosecutor that he taught "all subjects." If the prosecutor was truly interested in this line of inquiry, that should have been the end of this line of questioning. Instead, the prosecutor treated Mr. Cook as if he was too stupid to understand a simple question, telling Mr. Cook that "all subjects" may mean to him just English and math, in spite of

the fact that Mr. Cook just stated that he taught history. In light of this questioning, it is not surprising that Mr. Cook would express his exasperation with the prosecutor by calling her "amazing."

After this rather deflating exchange, the prosecutor once again returned to her battering of the Mr. Cook with the same question as to his opinion as to the death penalty. Twice again, she asked how Mr. Cook could possibly impose the death penalty about the death penalty if he had no ethical opinions as to its use. (11 RT 2290-2291.) Again, she asked the unanswerable question as to how she "could be sure" that Mr. Cook could impose the death penalty. (*Ibid.*) Mr. Cook could only tell the prosecutor that he was just a citizen responding to the call of jury duty and reiterate his answers given earlier in the voir dire. (*Ibid*)

Mr. Cook was then given the "bank robbery" and "assault" hypotheticals. He stated that he could impose death on all of the hypothetical defendants in those situations. (11 RT 2294-2300.) Unable to simply accept his answers as she did for the seated jurors, she again asked him that based upon these answers "would you say that you are for or against the death penalty." (11 RT 2295) By this point, all that Mr. Cook could say was, "Lady, I keep telling you the same thing. I don't understand why you keep asking me the same thing." (11 RT 2295.)

However, in light of the fact that all four African-American prospective male jurors were excused from the jury for reasons that applied at least as equally to the white seated jurors, (discussed further below, with respect to Mr. Cook) it is easy to understand why the prosecutor continued along this line of questioning. Having decided that she wanted this educated black man off of the jury, the prosecutor's voir dire was set up in such a way to provoke Mr. Cook into feeling that the prosecutor was harassing him. She then feigned surprise and consternation that Mr. Cook would not answer her questions the way she wanted them answered and used this as a "race-neutral" explanation. (16 RT 3387-3389.)

Ultimately, this preposterous line of questioning yielded a spurious "race-neutral" reason to challenge to Mr. Cook. The prosecutor stated that Mr. Cook could not impose the death penalty because he had no "opinions" about it.

As stated above, Mr. Cook made it unmistakably clear that he could impose the death penalty in any number of circumstances, and would follow the law. He simply did not harbor any preconceived allegiance to it nor any animus against it. As such, Mr. Cook presented a perfect death penalty juror. He would not carry any set of beliefs as to the righteousness of either penalty, therefore, would not be even unconsciously compelled to ratify his preconceived beliefs through his verdict. He was situated

squarely in the middle. However, he was also a black man and this is what made all the difference to the prosecution.

A comparative analysis of the sitting white jurors reveals that two seated white jurors and two white alternate jurors also had no "general feelings" as to the death penalty. Yet, the position that so "troubled" the prosecutor when taken by Mr. Cook, was found perfectly acceptable when taken by these white jurors.

Questionnaire questions 223 and 224 read as follows:

> Q 223: Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence on a person convicted of a murder with special circumstances?
> Q 224: Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a life without possibility of parole sentence on a person convicted of a murder with special circumstances?

White Juror #5 answered both these questions with the statement "I have no thoughts."(VII CT1980.) In spite of these answers being very similar, if not identical to Mr. Cook's questionnaire response, the prosecutor did not follow up in any way during her oral voir dire. (7 RT 1315 et seq.)

Similarly, Juror # 8, a white male, answered "don't have any" to both of these questions. (VII CT 2130.) When asked on oral voir dire to explain this in terms of whether he "believed in the death penalty" this juror

stated, "I believe in it if it is warranted...if it is not warranted I do not believe in it." (5 RT 867.)

It is impossible to distinguish Juror #8's opinion as to his "belief" in the death penalty from Mr. Cook's. Juror #8's also clearly did not have any preconceived notions or loyalty to the death penalty. To this juror, as with Mr. Cook, it was not a matter of "belief." It was a matter of practical application. Yet, Juror #8 proceeded to sit on the jury with no opposition from the prosecution.

Alternate Juror #1, a white male, answered both questions 223 and 224 by stating "I can't formulated thoughts at this time." (VIII CT 2378.) Alternate Juror #4, also white, simply answered both questions with the word "none." (VIII CT 2525.)

This comparative analysis clearly demonstrates that the so-called "race-neutral" explanation that Mr. Cook could not impose the death penalty because he had no ingrained general feeling about the death penalty was another pretextual and cynical device to cull from this jury all African-American male jurors.

That Mr. Cook was not sure of which would be the worse penalty for any given defendant in no way indicated that he could not impose the death penalty. At no point did he ever even hint that his decision would at

all be effected by his inability to read the minds of prisoners facing the terrible choice of death or life in prison. Furthermore, as the comparative analysis that was done in the discussion of Mr. Leonard indicates, there were several white jurors sitting on the jury that had similar feelings.

The "race-neutral" statement that Mr. Cook could not set aside his personal beliefs was yet another misstatement. While Mr. Cook, in question 200 , wrote that he would not set aside his personal belief system, he made it perfectly clear throughout the voir dire that his belief system demanded adherence to the law and allowed for the imposition of the death penalty.

> Prosecutor: So what is your personal belief system with respect to the law?
> Mr. Cook: I'm going to follow the law.
> Prosecutor: I'm sorry. Could you repeat that.
> Mr.Cook: I'm going to follow the law. (VIII CT 2279.)

Yet once again, the prosecutor confabulated another alleged "race-neutral" explanation by either misquoting a black male juror or taking a comment completely out of context. There was absolutely nothing about Mr. Cook's personal "belief system" that would prevent him from imposing the death penalty. This was unequivocally spelled out to the prosecutor by Mr. Cook, himself, who then supplied her own version of the facts to the court.

Regarding, the prosecutor's claim that Mr. Cook had been "evasive" in regard to his exposure to racial prejudice, there was nothing evasive about his answers. When asked this question on the questionnaire (VI CT 1518, Q129) he stated that he was so exposed and wrote the word "nigger." When asked to explain this at the *Hovey* voir dire, he told the prosecutor that there was a lot of use of the word in society (11 RT 2306) but that,

> I don't waste a lot of time wondering if you're okay or if someone else is okay about race, I don't have enough time left in my life for that, you know. But I do need to know what somebody is not okay about race, because that might help me in a lot of ways. (11 RT 2308.)

While he said that his experiences would cause him to feel "sympathy" for other African-Americans (*Ibid.*), there was no indication that this would affect his role as a juror. In fact, when asked in the questionnaire whether he had any "racist or ethnic attitudes" he answered "little to none". (VI CT 1519, Q135) He further stated that he thought he was a "fair person" and "I will do the best I can no matter what!!!. (punctuation by juror.) (*Ibid.,* Q 137-138.)

The trial court accepted the prosecutor's tendered reasons as race-neutral in that Mr. Cook did not answer the questions posed to him, and,

noted that there was "a lot of friction" between Mr. Cook and the prosecutor. (16 RT 3394.) With this conclusory and perfunctory remark, another violation against the United States Constitution was perpetrated.

The law as described in the above subsection of this Argument regarding the challenge to Mr. Leonard applies equally to Mr. Cook. After a comparative analysis to the seated white jurors, it is plain that the same answers and attitudes that she used to justify the challenge to Mr. Cook were given and held by many of the sitting white jurors. The entire tenor of the voir dire was directed to baiting Mr. Cook into a confrontation. In any situation, this sort of engagement of an unsuspecting potential juror by any attorney is unseemly and unprofessional. In this situation, it was yet another piece of trickery to usher yet another African-American male out the courtroom door. With the court's improper acceptance of this challenge, the prosecutor was halfway toward her goal of eliminating all African-American males from appellant's jury. She would take her next step with Ethan Walters.

d. Ethan Walters

The challenge of Ethan Walters demonstrated beyond any possible doubt that the prosecutor would not suffer a black male to sit on the jury. As stated above in this Argument, Mr. Walters was a well educated, highly

accomplished and very successful member of the community who designed and maintained communication satellites. If anything, his personal views as to the imposition of the death penalty seemed to favor the prosecution, as he felt that the process was too slow and for it to have any deterrent effect, more executions needed to take place. He stated he could faithfully follow the law and even though he personally would prefer life in prison over the death penalty, he understood that not all people felt that way and he would be able to impose the penalty according to the law. He was a man of integrity, accomplishment and reason.

However, the prosecutor exercised her third peremptory challenge against an African-American male juror against him. (16 RT 3372.) The court, now understanding that the prosecutor was challenging every black male on the venire, indicated that it found a prima facie case of discriminatory exclusion and asked for the prosecutor's "race-neutral" explanations.

As with Mr. Leonard and Mr. Cook, the first of the prosecutor's explanations was that Mr. Walters believed that a life sentence was a more severe sentence than death. (16 RT 3375.) This was yet another mischaracterization of what the prospective juror actually stated. Actually what Mr. Walters really indicated on his questionnaire was that *for him*

(emphasis added) death would be preferable "but I can understand someone wants to live or is 'actually' innocent would not (want to die)." He further made it perfectly clear at the *Hovey* voir dire that while he preferred death *for himself*," (emphasis provided), he would have no problem in imposing death under the law given by the judge. (12 RT 2399-2401.)

Mr. Walters' willingness to impose the death penalty in the appropriate situation can be seen in his other answers. He stated that he could impose the death penalty in an aiding and abetting situation (12 RT 2400-2401), would base his verdict on the evidence (12 RT 2411), and could impose the death penalty even if only one person died. (12 RT 2413.) He also stated that he could impose death on all of the perpetrators in the prosecutor's hypotheticals, including the driver of the car in the bank robbery hypothetical.(12 RT 2410-2413; 2417-2421.)

In summary, there was nothing, whatsoever, in the any phase of Mr. Walters' voir dire that indicated he could not follow the law as given by the judge or that he thought that life without parole was the worse of the two penalties in any global sense. In addition, as discussed above, as with Mr. Leonard, a comparative analysis with the sitting jurors clearly shows that the prosecutor endorsed several white jurors whose opinions as to the relative degree of the penalties were comparable or even more favoring a

life sentence than those of Mr. Walters. Therefore, as demonstrated above, the prosecutor's statement to the court that she had perempted all jurors who felt that life was a harsher punishment than death was not true. (16 RT 3478.)

The prosecutor also argued that by stating that he didn't "have any feelings one way or the other" about the death penalty, therefore he could not impose it. (16 RT 3378.) Apparently, the prosecutor based this "race-neutral" reason on the following exchange.

> Prosecutor: So you are going to go in there (the deliberation room) and follow the court's instructions and you are going to deliberate and come out with a verdict you feel is appropriate in this case based on the evidence and nothing else, is that accurate?
> Mr. Walters: Yes
> Prosecutor: Okay. So would it be accurate to say that you are for the death penalty?
> Mr. Walters: I'd say I don't have any feelings one way or the other for it like- -
> Prosecutor: When I say "for it" not that you are protesting for it, something like that, but you are not against it.
> Mr. Walters: Right, I am not against it.
> Prosecutor: You don't believe that California should abolish it?
> Mr. Walters: No (12 RT 2411.)

It is clear from the above that the prosecutor's quotation of Mr. Walters that he "didn't have any feelings about it (the death penalty)" was a complete misstatement of what Mr. Walters actually said. After stating

that he didn't have any personal feelings one way or the other, he stated that he was not against the death penalty and that California should retain it. (12 RT 2411-2412.) Further, Mr. Walters questionnaire answers made it clear that he had thought the death penalty over quite carefully. (VI CT 1577 et seq.) Mr. Walters statement that he didn't have any feelings one way or the other was simply an expression of neutrality. This quote was taken completely out of context and in no way represented what Mr. Walters told the prosecutor and the court. Once again, the prosecutor took a statement of a African-American male and twisted it in such a way to suit the purposes of her argument.

Even if the prosecutor's statement was factually correct and Mr. Walters did not have any "feelings" about the death penalty, as with Mr. Leonard and Mr. Cook, the prosecutor's attempts to make a direct correlation between someone who has no ingrained opinions as to the death penalty and their inability to impose the death penalty lack any logical connection. Nowhere in the Mr. Walters' voir dire did he even suggest that he would not impose the death penalty. He actually was a proponent of rapid trial and execution where appropriate. (VI CT1578, Q178-179, Q 183.)

In addition to the comparative analyses done above, another

comparison is illuminating. Several of the white jurors approved by the prosecutor indicated that they never thought about the death penalty at all before coming to court, a circumstance that could logically be said to show that they had no strong belief s "one way or the other" about its imposition. Question 179 of the questionnaire reads as follows:

> Have you ever thought about whether you were for or against the death penalty before coming to court? _____yes
> _____no What were your thoughts?

Four seated jurors answered this question in the negative. (Juror # 4, VII CT 1925; Juror #5, VII CT 1974; Juror #7, VII CT 2074; Juror #8 VII CT 2124; Alternate #1, VIII CT 2372; Alternate #4, VIII CT 2519). All of these jurors were white and none of them were challenged.

Yet another alleged "race-neutral" reason offered by the prosecutor was that Mr. Walters was an engineer and because of this the prosecutor could never prove the case to his satisfaction. (16 RT 3376.) To say that the logic of this "reasoning" is tortured would be charitable. As pointed out by appellant's trial counsel, the fact that Mr. Walters was careful at his work and did perform his job in a professional manner hardly disqualified him as a good juror. However, what is far more revealing about the prosecutor's true intent is that there was another engineer seated on the jury, Juror # 11.

As indicated in question #7 (VI CT 2239), he had been working as an engineer for various large oil companies since 1979. At the time of his completion of the questionnaire, the juror was overseeing plant operations at a Conoco/Phillips plant. (*Ibid.*)

None of this drew the slightest bit of attention from the prosecutor, who allowed this white juror to sit in spite of the fact that he had the same "disability" as Mr. Walters. This particular pretextual reason, in and of itself, speaks volumes about the prosecutor's true intentions, and the court's failure to pay sufficient attention to them. The trial court was, or should have been aware that there was a white juror on the panel who was also an engineer. It should have then conducted "a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. " (*People v. Silva, supra,* 25 Cal. 4th at 386.) If it had done so, the blatant pretextual nature of this allegedly "race-neutral" explanation would have jumped off the pages of the transcript. However, as with the *Witt* cause challenges (Argument I, *supra*), the trial court simply allowed the prosecution to complete her purge.

As with the other African-American male jurors, it is obvious that the prosecutor's "race-neutral" reasons are based upon misquotes of their actual positions or contrivances that do not withstand comparative juror

analysis. Time and time again, the four black male jurors are challenged for reasons that were not even considered by the prosecutor when evaluating the white jurors. Time and time again, the statements of these four men were taken out of context and twisted in an attempt to get them excused.

This is seen again when the prosecutor claimed that Mr. Walters should be excused because he believed that the death penalty should be "reformed like affirmative action." (12 RT 2412.) This statement is again taken completely out of context, making it look as if Mr. Walters was creating a racial issue out of the death penalty. What is clear from the entirety of Mr. Walters voir dire is that his concern was that unless the death penalty was not only imposed but used, there will be no deterrent effect. However, he asserted that if effectively used, capital punishment will serve as a deterrent. (VI CT 1578, Q 178 ; VI CT 1579, Q. 186.) Mr. Walters also made it clear that his general views would have no effect on his penalty vote in this particular case. (12 RT 2409-2410.)

The pretextual nature of the prosecutor's alleged justification is demonstrated by the fact that there were seated white jurors who indicated in their respective questionnaires (Q 183) that they were not satisfied with the way the death penalty was being enforced, either stating that it was used "too seldomly"(sic) or "too randomly." Jurors #4 (VII CT 1925), Alternate

1 (VIII CT 2372), Alternate #2 (VIII CT 2421), and Alternate # 3 (VIII CT 2470) checked the questionnaire box that the death penalty was used "too seldomly" (sic). Jurors #7 (VII CT 2074), # 8 (VII CT 2124), #9 (VII CT 2174), # 12 (VII CT 2322.), Alternate # 4 (VIII CT 2519), Alternate # 5 VIII CT 2569) and Alternate # 6 (VIII CT 2618) all checked the questionnaire box that the death penalty was used "too randomly."

The improper challenge of all of the Afircan-American male jurors and the prosecutor's transparently pretextual reasons made the rest of her "reasons" more than just highly suspect; they made them totally lacking in credibility. The prosecutor "reasoned" that Mr. Walters "seemed to have a lot of information about the law," because he was familiar with the terms "intent" and "aider and abettor," and that this would in some unexplained way affect his judgment. The reality is that it does not take special legal knowledge for an intelligent, educated person to know that intent is a critical element in the criminal justice system. Further, the prosecutor left unstated as to how this "knowledge" might work to her detriment.

The prosecutor's explanation that Mr. Walters felt that prosecutor's questions were "overzealous" was yet again taken out of context. In his questionnaire, Mr. Walters did state that his general opinion of prosecutor's "tend to be overzealous to convict." (VI CT 1550, Q42.) However, he also

stated that he thought defense counsel tended to "manipulate the system to win." (*Ibid.,* Q44.) However, Mr. Walters stated that both these opinions were "based on TV shows" and "obviously, I don't give this opinion much weight." (*Ibid.,* Q 43,45.) The trial judge confirmed that little weight should be given to either of these general opinions. (16 RT 3378.)

The prosecutor also cited as a "race-neutral" reason that Mr. Walters stated that he had been pulled over by the police several times for "questionable reasons," and that he felt that the death penalty was based against the economically disadvantaged. (16 RT 3377-3378.) Before discussing the particulars of this "race-neutral" reason, the following must be restated. The rationale behind the whole concept of "cognizable groups" vis a vis the purposes of jury selection has very little to do with the members of this group having some identifiable physical characteristic. The designation of a group of people as "cognizable" has far more to do with their shared life experience and mutual group perspective. As stated by this Court in *People v. Wheeler*, *supra,* 22 Cal.3d at p. 266-267;

> ...(in) our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and

> hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

As similarly stated in *People v. Estrada, supra,* 93 Cal.App.3d at 90, citing to *United States v. Guzman, supra,* 337 F.Supp.at 143-144, affirmed 468 F.2d 1245 (2d Cir.), *certiorari* denied 410 U.S. 937;

> There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of the juries hearing cases in which group members are involved. That is, The group must have a community of interest which cannot be protected by the rest of the populace.

African-American males are considered a cognizable group not simply because of their skin color and sex. They are so considered because they may share the some of the same general life experiences which may not be shared by all others, thus have perspectives to offer during the course of deliberation as well as perspectives and perhaps even biases against certain aspects of our society. Suffice it to say that the treatment of such persons since they arrived in shackles at our shores, by society in general and institutions of power in particular, is not a source of pride to any of us. It

cannot be disputed that in the Los Angeles area, African-American males have been inordinately stopped by the police, been incarcerated in disproportionate numbers, and in general been subjected to economic deprivation in far greater numbers than their white counterparts. This is simply part of the history of our nation, a history that all people of good will have struggled to change.

Therefore, the prosecutor's peremptory challenge of Mr. Walters because of his perceptions or interactions with the criminal justice system is simply code for black men need not apply. Certainly, if Mr. Walters indicated some animosity toward the system, a peremptory challenge would have been appropriate. However, as observed above, Mr. Walters was as solid a citizen as could be found. On many occasions he swore that he could follow the law, a law that he still honored in spite of some concerns and negative experiences.

All of the "race-neutral" reasons given for the challenge to Mr. Walters were pretextual. When joined with the pretext in the reasons for the challenges to Mr. Leonard and Mr. Cook, as described above, there is no room for any doubt that the prosecutor's motivation for these challenges was to rid the jury of African-American males. The final challenge to the

last of the African-American prospective jurors was as predictable as it was blatant.

e. Reginald Payne

The prosecutor's peremptory challenge of Roscoe Payne completed her successful campaign to rid the jury of African-American male jurors. The court found that a prima facie case of deliberate exclusion of a cognizable group and asked the prosecutor to provide an explanation. The prosecutor asserted that because of the incidents involving Mr. Payne's sons, he bore animus against the Long Beach Police Department. (16 RT 3457-3458.)[32] She also offered Mr. Payne's statement that he thought that the death penalty was times "overused" in certain jurisdictions, although she admitted that Mr. Payne stated that this would have no effect on his judgment in this case. (16 RT 3458.)

The prosecutor also offered that Mr. Payne stated that he had been called as a juror on two murder cases and that he stated that it wasn't always pleasant to do what had to be done. (16 RT 3459-3460.) She also indicated that she was "disturbed" by Mr. Payne's attitude that because of the horrific conditions in the California prison system, life in prison was the

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32. Mr. Payne indicated that he was upset the way two of his children were treated in chance encounters with the police. However, there was no indication that this Mr. Payne would even consider this in his deliberations in this case.

worse penalty. Because of this, the prosecutor stated that Mr. Payne could not impose the death sentence. (16 RT 3460-3461.) She further stated;

> I don't believe that somebody, one, who believed that life without the possibility of parole is a more severe punishment tan death can actually impose the death penalty, because they believe that spending the rest of *their life* in prison would be the more severe punishment that could be imposed. (16 RT 3472; emphasis supplied.)

The trial court initially rejected these explanations, and properly denied this peremptory challenge. (16 RT 3479-3480.) In response to the court's ruling, the prosecutor embanked upon an argument laced with misstatements, self-pity and hyperbole. She accused the trial court of branding her as a "racist." (16 RT 3480-3481.) [33] She further stated that Mr. Payne "indicated that he is not going to vote for death in this particular case" and, without any factual basis told the court that Mr. Payne was going to "hang this jury." (16 RT 3488.) In support of this baseless prediction, the prosecutor stated

> ...even if we get a conviction, I see this juror as ripe for the defense attempting to get him to change his mind and nullify the verdict that we may get in this particular case. He has basically told the defense 'if I'm on the jury, come see me,

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33. No one even suggested that the prosecutor was a "racist" and such as statement from her evidence the petulance and over-aggressiveness seen throughout the trial. The problem was not that the prosecutor didn't like African-American males. She just didn't like them on this jury.

> because I'm going to be going over it and over it in my mind, and maybe I will find a reason to change my mind.[34] (RT 3523.)

She further stated that Mr. Payne mentioned a certain belief in "rehabilitation" in his voir dire answers. She stated that "California was not a rehabilitation state," and claimed that Mr. Payne will not impose the death penalty because he believes people can be rehabilitated. (16 RT 3525.) After a recess, the court abruptly changed its ruling, stating that Mr. Payne's feelings about prison conditions, the ratio of incarceration of blacks and the overuse of the death penalty created a "race-neutral" reason for the exercise of the prosecutor's challenge. (17 RT RT3537-3538.)

The prosecutor's "race-neutral" explanations are nothing but more misstatements of fact and baseless accusations. Mr. Payne, was an accomplished black man, who currently managed a sanitation plant for the people of Los Angeles County, who served his community by sitting on four juries and organized a Neighborhood Watch to stand up to violent gangs. He made clear his dedication to the law and absolute willingness to set aside any personal feelings he may have to uphold the law to the letter.

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34. It is hyperbolic, almost paranoid statements like this that make it very hard to take any of the prosecutor's "race-neutral" arguments seriously. Not only is there absolutely no basis in fact for such an absurd claim, but the prosecutor is apparently trying to suggest to the court that she has uncovered some sort of unspoken conspiracy between this black prospective juror, the black appellant and his black attorneys to circumvent the integrity of the system.

Yet the prosecutor characterized Mr. Payne as someone who could not be trusted, a person who would act in league with the defense to "nullify" the verdict in this case. She characterized him as being the type of person who would allow his personal feelings to hold sway over his obligation to the law and whose belief that some people could be rehabilitated would translate into him being completely unable to render a death verdict, regardless of the facts in the instant case.

None of this was true. The prosecutor's concern about Mr. Payne's opinions about which was the worse penalty and the concept of rehabilitation were nothing but pretext as said concern did not extend to many of the sitting white jurors. (Argument II, *infra.*) As argued above, many of the seated white jurors felt much as Mr. Payne did regarding which penalty was worse and the concept of rehabilitation.

Further, the concept that the imposition of the death penalty was a very serious matter which deserved careful thought was hardly a radical notion. Mr. Payne simply expressed a concern that in other jurisdictions, the authorities had expressed a concern about the fairness of their systems, and it was necessary to take special care that this situation did not happen in California. (12 RT 2881.) However, he stated that this would not affect his

ability to follow the law in this case and there was nothing in his voir dire that indicated the contrary. (12 RT 2884.)

A comparative review of the voir dire of the sitting white jurors, reveals the same general concerns about the death penalty that Mr. Payne raised. Juror # 2 stated that she would vote for the death penalty only for "heinous crimes" and where the evidence was "overwhelming," where "everything pointed to (his) guilt." (13 RT 2792.) She further stated that the proof would need to be "100%" (13 RT 2796) and "indisputable." (13 RT 2798.) Juror #4 stated that it would be "difficult, but not impossible" to sit on a death penalty case. (VII CT 1928, Q 203.) She also expressed a concern over errors in the use of the death penalty in other jurisdictions. (14 RT 2985-2987.)

Juror #5 stated in the questionnaire that the death penalty was "a needed but a sad way to punish somebody." (VII CT 1974, Q 178.) Juror # 10 stated in the questionniare that the imposition of death was "not (an) appealing decision to make." (VII CT 2223, Q. 178.) On oral voir dire the juror stated she would require "overwhelming evidence" for the death penalty. (12 RT 2604.) Juror # 5 also stated she could not impose death on the driver in the "bank robbery" hypothetical. (12 RT 2614.) Juror # 11 stated that it would be difficult to sit on a death penalty jury as it was a

"hugely serious decision." (VII CT 2275.) Alternate # 6 similarly stated that it would be difficult to sit on a death penalty as it was an "awesome responsibility." (VIII CT2621, Q 203.) She was also concerned about the conviction of innocent people. (19 CT 4029.)

Alternate # 5 indicated on her questionnaire that, "I am a bit apprehensive about someone's life being put in my hands," (VIII CT 2540, Q 30) and said it was something she would be thinking about everyday. (18 RT 3881.)

In short, many of the seated white jurors were at least as concerned by the death penalty as Mr. Payne. However, their reservations meant little to the prosecutor, who, for the most part, did not even bother to probe into them.

Regarding Mr. Payne's comments about blacks being incarcerated and on death row in a greater proportion that other racial groups, Mr. Payne's statement was in response to a question from the prosecutor. (17 RT 3593-3596.) However, as Mr. Payne ultimately responded to the prosecutor's continuing probing, "Why are we, at this point in our history. Why are we denying a fact?" The following exchange then occurred,

> Prosecutor: Okay. I understand exactly what you are saying. That makes sense. Now with that in mind , are you going to take that into consideration in this particular case?

Mr. Payne: No, that's not my job. (14 RT 2896.)

In essence, at the *Hovey* voir dire, the prosecutor accepted Mr. Payne's observation as being one of fact and not a demonstration on animus against the state. More importantly, when asked if this fact would effect his judgment, Mr. Payne, fully understanding the role of a juror through his past experience, stated that he would not. This observation had great significance coming from a man who sat on four juries, including two murder cases. He knew what a juror's job was and knew that it was not up to him to change the law or make a social statement.

The same basic facts of life and law applied to Mr. Payne as applied to Mr. Walters. The reason why African-American males are considered a cognizable group is because their perspective and etperience may differ from those of other classifications. As stated above, The United States Supreme Court, as well as this Court made it clear that this perspective and experience must be given voice in the petit jury. (*People v. Fields*, *supra,* 35 Cal.3d at 342.) The fact that Mr. Payne may have shared this perspective and experience is not a race-neutral explanation. If it was, this voice could be silenced by any prosecutor who wishes to do so.

The fact that Mr. Payne rendered decisions on two separate murder cases, makes it clear that he can subrogate any personal discomfort

he may have in judging and impose a very serious judgment on his fellow man when the law requires him to do so. Apparently, what the prosecutor wanted was a jury that discounted all sympathy and human feeling, ready to condemn without a single hesitation or question to the prosecutor, the state's agent. Because of the history of the black male community in the United States, and their possible sympathy with appellant, the prosecutor could suffer no members of this cognizable group to be allowed to remain on the jury.

Mr. Payne was the last African-American male prospective juror left in the venire panel. It is for this reason alone he was the last to be excused. Like the other three African-American prospective jurors, he was challenged and ultimate excused not because he was unable to fairly decide the matter or because of his views. He was challenged because he was a member of group which had a constitutional right to bring their backgrounds and experiences to the jury box..

The improper challenge to and excusal of even a single prospective juror for racially motivated reasons is cause for reversal of the judgment. The prosecutor improperly challenged all four African-American males on the panel and the court accommodated her.

f. Summary

This Court has made very clear its position on the type of insidious racial discrimination that permeated the jury selection process in this case. Citing to *Miller-El II*, this Court warned about the "troubling" and "blatant" ways "in which racism can infect the justice system." (*People v. Lenix, supra,* 44 Cal.4th at p. 615.) This Court also recognized the long-standing commitment of the High Court "to eradicate this pernicious influence." (*Ibid.*)

This Court has always shared such a noble and absolutely essential goal. While hopefully we have elevated our courts above the more obvious racism of past generations, the more subtle, manipulative exclusion of an entire racial group from the jury still exists, and existed in the instant case. The petit jury is the people's most hallowed protection against government excess. It remains one of the few duties of citizenship in which a person may directly play a role in American democracy. Shawn Leonard, Roscoe Cook, Ethan Walters and Reginald Payne, were, by any measure, good citizens of the United States and the State of California. They sought only to serve their community. They were denied their right to do so by a prosecutor who was able to manipulate the system to prevent them from doing so because they didn't pass her standards as to which racial groups

did or did not serve her purpose; the conviction and execution of Mr. Armstrong. The above argument makes clear that any contrived prosecutorial remonstration to the contrary are engulfed by the totality of the record of this case.

> When the government's choice of jurors is tainted with racial bias, that 'overt wrong'...casts doubt over the obligation of the parties, the judge and indeed that court to adhere to the law throughout the trial.[citation omitted] That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality. (*Powers v. Ohio* (1991) 499 U.S. 400, 412; *Georgia v. McCollum* (1992) 505 U.S. 42, 49.)

The best evidence of discriminatory intent will most often be the conduct and actions of the prosecutor. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477.) The conduct of the prosecutor in this case was singularly hostile to the impanelment of a constitutionally sanctioned jury. The instant case gives offense to all people who respect the law and our system of justice. However, it most offends the condemned. Jamelle Armstrong was entitled to a jury free from this sort of racial manipulation. In addition to being protected by the Equal Protection Clause, appellant was entitled to a jury comprised of a cross-section of the community; meaning the entire community of Los Angeles, not just the part of the community that the prosecutor felt would be prone to conviction and death.

Mr. Armstrong was deprived of such a jury, and was deprived of his rights under the Equal Protection Clause of the United States Constitution and Sixth Amendment right to a jury representing a fair cross-section of the community. Under the Constitution of the United States and the unequivocal mandates of both this Court and the Supreme Court of the United States, the manner in which Mr. Armstrong's jury was selected renders its verdicts null and void.

Mr. Armstrong's conviction and death sentence must be reversed by this Court.

INTRODUCTION TO ARGUMENTS III-VI

On four separate occasions, the trial court, without legal cause, prevented appellant's counsel from presenting evidence that would have supported the heart of the defense; that appellant lacked the specific intent to commit the crimes in question and that he did not, in fact, commit any sexual offenses against the victim, nor murder her. The cumulative effect of the court's error was to deprive appellant of evidence that would have supported his own testimony, irrevocably damaging the defense and destroying appellant's credibility. The court's errors deprived appellant of his right to Due Process of Law, a fair trial and effective assistance of

counsel and a reliable determination of guilt and death eligibility under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as state law as set forth by this Court.

Further, this excluded evidence was, by its very nature, would have served as mitigating evidence in the penalty phase of this case. This excluded evidence would have served to inform the jury that appellant was not the monster portrayed by the prosecution, but rather a young man who got caught in the wrong place, at the wrong time, with the wrong companions. As such, the exclusion of the evidence also deprived appellant of his right to a fair determination of penalty under the Eighth and Fourteenth Amendments to the United States Constitution.

III. BY DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE OF THE VICTIM'S STATE OF INTOXICATION AT THE TIME OF THE CRIME, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW, EFFECTIVE REPRESENTATION OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, SPECIAL CIRCUMSTANCES AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the

corollary provisions of the California Constitution, including his rights to due process of law, to present a defense, a fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty, because the trial court erroneously precluded evidence of the victim's intoxication.

B. Procedural and Factual Summary

On January 27, 1994, at a pre-trial hearing, the prosecutor orally requested that evidence that the victim was intoxicated not be allowed before the jury. (3 RT 250.) While the prosecutor never stated the grounds for this request, the court characterized it as a Motion to Exclude under Evidence Code section 352, and questioned appellant's counsel as to this evidence's relevance. (*Ibid.*)

Counsel originally informed the trial court that the relevancy would be shown "when we get to the defense phase of the case." (3 RT 250.) However, the court insisted that there was a Motion to Exclude before it, and an offer of proof was required. (*Ibid.*) The trial court further asked, "Well, I will ask you how is it relevant? How is the toxicology of the victim in a murder case relevant? If she was drunk, should she be murdered?" (3 RT 251.)

Counsel stated that he could not make such an offer without compromising the defense. (3 RT 251.) The court then ruled that until counsel made an offer of proof, there would be no mention of the toxicology issue. (*Ibid.*) While counsel found this acceptable, the prosecutor objected, stating that in order to properly voir dire the prospective jurors she needed to know presently whether this type of evidence would eventually be admitted. (3 RT 251-252.)

The trial court reversed itself, telling counsel to make an offer of proof, immediately. (3 RT 252.) The prosecutor then revealed that there was a toxicology report received from the medical examiner, she specifically wanted excluded. (3 RT 255.) The trial court once again inquired about the relevancy of this report. Counsel stated that it would become clear when the defense presented its case. (3 RT 255.) However, after being informed by the trial court that he must articulate some relevance, counsel stated that it would be relevant to both the credibility of appellant, and what the victim's actions were prior to her death. (3 RT 256.)

Counsel further stated:

> (The victim's) sobriety would tend to support the believability of (appellant's) statement to the police officers as transcribed in the audio tape and transcribed from the audiotape in question. (3 RT 257.)

In response to the trial court's further inquiry about relevance, counsel argued;

> There is a statement not only that she, by him, that she is inebriated, but that she says the words "Fuck you niggers, all niggers should be dead" and it goes to what the state of mind of the party was at the time of the attack. Was it to rob? Was it to rape? Was or what was it? In other words there needs to be specific intent on his part to rob, to rape...The People's theory is that the attack was for the purpose of robbery and rape, because the attack is, because the person who was inebriated, in other words she uttered those words in the presence of three black individuals that, "fuck you niggers, all niggers should be dead." Whether or not the attack was for the purpose of robbery, rape or some other purpose. And the key issue is this, what a sober person, we have a lone white female in the hours around 12:00 midnight out in the streets, confront a person or three young black individuals and utter those words. I think the trier of facts should know this so they can make a determination that (appellant) is being truthful when he says she uttered these words. (3 RT 257-259.)

Counsel further argued that the importance of this evidence was its bearing upon whether appellant acted with the required intent to prove some of the crimes or special circumstances charged, or whether he acted out of revenge. (3 RT 262-263.)

The court excluded this evidence on the ground that it was irrelevant. In addition, the court indicated any relevance that the evidence could possibly have was substantially outweighed by

> the probability that its admission will create a mini-trial whether or not the person is in fact drunk or under the

> influence and will create substantial confusion as to the real issue in this case and will mislead the jury as to whether or not the seminal issue in this case is the specific intent of the defendant. (3 RT 263-264.)

B. Legal Argument

From its opening statement, the theory of the prosecution in this case was that appellant, Pearson and Hardy approached the victim for the purpose of robbing and raping her. (19 RT 4152.) When she was uncooperative they beat her, assaulted, raped her and eventually murdered her. (19 RT 4153.) During the guilt phase of the trial, the prosecutor continued to advance this theory, and in her summation she told the jury that the three men crossed the street to the victim with the express intent of robbing her and raping her. (24 RT 5305.) She further argued that the victim's death was a result of the crimes committed against the victim by appellant and his companions, who put into action their already formed intent. (24 RT 5305-5307.)

In view of the prosecutor's theory of the case, the evidence of the victim's intoxication was most relevant and the court erred in excluding it from the jury's consideration. Appellant's statement to the police and testimony to the jury was that the victim's use of racial epithets started the entire exchange. As further stated, such evidence clearly went to the critical issue of appellant's intent. Without evidence corroborating appellant's

account, appellant's statement and testimony would be easily disregarded, especially in the light of the prosecutor's vehement argument that the crimes were premeditated. Reasonable jurors would expect to hear evidence of intoxication if it existed. Excluding such evidence, allowed them to infer- falsely- that appellant's account of the encounter was fabricated. The excluded evidence provided corroboration and an explanation for a lone, smallish white woman confronting three young black men with the word "nigger" on an otherwise empty street after midnight.

Therefore, the evidence of Ms. Keptra's intoxication would have been powerful circumstantial evidence that appellant was telling the truth when he testified that on the night of Ms. Keptra's death he was not prowling the streets looking for someone to rape and rob. The exclusion of this evidence prejudiced appellant by denying him a viable defense to murder under the felony-murder theory. The jury was instructed on the felony-murder doctrine. (3 CT 819.) A conviction of murder under this doctrine requires proof beyond a reasonable doubt that the defendant acted with the specific intent to commit the predicate felony. This is true even though the predicate felony may be a general intent crime. (*People v. Hart* (1999) 20 Cal.4th 546, 608; *People v. Hernandez* (1988) 47 Cal.3d 315,346.) "Under the felony murder doctrine, the intent required for the

conviction of murder is imported from the specific intent to commit the concomitant felony." (*People v. Sears* (1965) 62 Cal.2d 737, 745.)

In *People v. Hood* (1969) 1 Cal.3d 444, 456-457, this Court expressed the distinction between specific and general intent crimes thusly:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

Therefore, appellant's lack of such specific intent to commit the predicate felonies charged in this case has a direct bearing on his conviction for murder. In addition, for the special circumstances charged in this case to be found true, the prosecution must prove appellant's specific intent to commit the underlying felony. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1299.)

In the instant case, the evidence excluded bore directly on the felony-murder theory as well as on the special circumstances alleged, and it was a circumstance of the crime which the jury was required to consider and weigh, should the case have proceeded to the penalty phase. By statutory definition, it was relevant. According to Evidence Code Section 210,

relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declaring, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts. (*People v. Fields* (2009) 175 Cal.App.4th 1001.) Further, it was not the court's function to exclude this evidence based upon its opinion that it may not be dispostive. (*In re Romeo* (1995) 33 Cal. App.4th 1838.) Appellant was deprived of his constitutional right to a full and fair trial by jury, and due due process of law, by the trial court's exclusion of evidence highly relevant to his defense. *(United States v. Cronic* (1984) 466 U.S. 648, 656.)

In the instant case, the intent of appellant was not obvious from the evidence. The prosecutor asked the jury to assume that the attack on Ms. Keptra was unprovoked and premeditated, carried out with a "wolfpack" mentality by appellant and his two companions, with intent to find a victim for the purpose of rape and robbery. Appellant took the stand to state that this was not true; that the victim initiated the initial contact by shouting out racial epithets. However, in light of the highly emotionally charged racial aspects of the crime, without evidence to corroborate appellant's testimony,

he stood little chance of swaying the jury without evidence indicating a reason why the victim would have uttered such provocative words while in such a vulnerable situation. Once the jury found that this aspect of appellant's testimony was a lie, it was far more likely to discount the balance of his testimony. In fact, appellant's jury was instructed as to this common sense principle. (3 CT 792.)

The prosecutor's evidence consisted almost entirely of appellant's statement to the police and his in court testimony. The forensic evidence could just as easily be interpreted as appellant being a passive observer as opposed to an active participant. The case largely was determined on appellant's credibility. Without evidence to corroborate his version of the events, appellant was made to look like not only a murderer, but someone who would defame the character of the woman he allegedly killed. The court's refusal to admit this evidence was a violation of the United States Constitution. As stated by the United States Supreme Court in *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691;

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation omitted] Chambers or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations omitted], the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." [citations omitted.] That opportunity would be an empty one if the State were permitted to exclude

> competent, reliable evidence... when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." (See also *United States v. Cronic, supra,* 466 U.S. at 656; *Washington v. Texas* (1967) 388 U.S. 14, 22-23.)

The excluded evidence was critical both to appellant's claim that he lacked the specific intent to commit the predicate felonies; its exclusion prevented the jury from fairly assessing his guilt or innocence of murder, the special circumstances, and general credibility. There was no "valid state justification" for the exclusion of this evidence. The court's reference to Evidence Code section 352 is wholly unavailing. Its concern that the admission of the toxicology report would create a "mini trial" as to the issue of the victim's state of intoxication was entirely misplaced. What appellant sought was the admission of a single, unambiguous report. There was no indication the admission of this evidence would have unduly consumed time or confused or distracted the jury. Compared to the prosecutor's protracted, repetitive and highly descriptive direct examination of the medical examiner, this very simple piece of evidence was uncomplicated, concise and non-inflammatory. There was absolutely no reason under state law to have excluded it. Instead, its admission was critical to appellant's

right to defend, rights to jury trial, due process, fair trial, and reliable determinations of guilt, special circumstances and penalty.

When the prosecutor seeks a conviction under alterative theories, such as felony murder and premeditated murder, if the conviction cannot be sustained under one of the theories, the conviction can only be sustained if it can be shown beyond a reasonable doubt that the jury relied on one of the other theories to convict. (*People v. Howard* (2005) 34 Cal.4th 1129, *People v. Calderon at* 1307, 1309, 1310.) There were three theories of liability for murder in this case: felony murder, murder by torture, and premeditated murder. There was little evidence to suggest that appellant had any actual intent to kill Ms. Keptra. Further, there was no evidence that appellant acted with the specific intent to inflict pain required for a conviction of murder under the torture murder theory. (*People v. Steger* (1976) 16 Cal.3d 539, 546.) Therefore, any legal deficiency as to the felony-murder theory necessitates a reversal of the murder conviction.

The error in excluding this evidence - which corroborated appellant's testimony, bore directly upon the circumstances of the offense and contradicted the prosecutor's arguments- did not only skew the adversarial process and effect the guilt phase trial. The circumstances of the crime are also a sentencing factor at the penalty phase. The Eighth Amendment

requires heightened reliability in capital cases (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638), as well as an individualized determination of the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) While the jury was required to weigh and consider this evidence it was never allowed to hear it. There is a reasonable probability that the outcome would have been different, had the jury been fully appraised of the victim's state of intoxication.

The exclusion of this critical evidence substantially prejudiced appellant and violated his rights to due process of law, jury trial, a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, and reliable determinations of guilt, capital eligibility and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden.

Even using the state standard, it is clear that appellant was substantially injured by the errors of which he complained and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson* (1958) 42 Cal.2d 818,

836.) This error was too great and manifest to be called harmless, particularly in conjunction with the trial court's redaction of appellant's statement to the police, as argued in Argument IV, as incorporated herein.

This entire judgement must be reversed.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE OF THE VICTIM'S PROVOCATORY RACIAL SLURS IMMEDIATELY PRIOR TO THE COMMISSION OF THE CRIME, THE COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corollary provisions of the California Constitution, including his rights to due process of law, to present a defense, a fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty, because the trial court erroneously precluded evidence of the victim's intoxication.

B. Procedural and Factual Summary

On January 28, 2004, the prosecutor filed her "Motion to Exclude Self-Serving Hearsay." (3 CT 675 et seq.) In said Motion, the prosecutor requested that the court redact from appellant's January 7, 1999, statement to the police that portion of said statement that referred to the racial slurs that Ms. Keptra uttered to appellant and his companions prior to the commission of any crime. (*Ibid.*) In said statement, appellant told the police what drew his attention to Ms. Keptra was someone yelling out something to the effect that "I hope–like I hope you all die niggers," "Niggers I hope you die" and "Fuck you, niggers," or "The niggers are going to die." (3 CT 676-677.)

The prosecutor claimed that these particular statements were "self-serving statements, to which there is no exception." (3 CT 677.) She further stated that these statement were irrelevant and did not relate to appellant's conduct. Further, the prosecutor claimed that appellant could not prove that Ms. Keptra made these statements. (3 CT 677-678.)

The trial court accepted the prosecutor's argument and redacted these statements from the tape of appellant's statement to the police that was subsequently played to the jury. (21 RT 4503-4509.) This error-particularly in conjunction with the error in excluding evidence of the victim's

intoxication, set forth in Argument III, incorporated herein by reference-deprived appellant of multiple constitutional rights and rendered the trial so unfair that the verdict cannot stand.

C. Legal Discussion

The trial court erred in ordering the redaction of these so called "self serving" statements because it applied the wrong section of the Evidence Code to the analysis. The applicable code section has nothing to do with declarations against interests or statements as to state of mind. What the court had before it was an admission as defined by Evidence Code section 1220.

> An "admission" is something less than a confession. Instead, is an acknowledgment of some fact or circumstance which in itself is insufficient to authorize conviction but which tends toward the proof of the ultimate fact of guilt. In contrast, a 'confession' leaves nothing to be determined in that it declares defendant's intentional participation in a criminal act, and it must be a statement of such nature that no other inference than that of guilt may be drawn therefrom. (*People v. Chan Chaun* (1940) 41 Cal.App.2d 586, 594.)

There is no principle of law that permits a prosecutorial proponent of a defendant's admission to edit that admission so as to remove those parts of it that might not be advantageous to the prosecution's case. If such were the case then any prosecutor would be allowed to manipulate the words of

a defendant to make them appear to be far more incriminating than they actually were. Therefore, with some skillful editing, all admissions would effectively become confessions.

This Court has made it clear that "if a party's oral admissions have been introduced in evidence, he may show other portions of the same interview or conversation, even if they are self-serving, which 'have some bearing upon, or connection with, the admission ... in evidence.'" (*People v. Arias* (1996) 13 Cal.4th 92, 156 ; *People v. Breaux* (1991) 1 Cal.4th 281, 302: *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174.) This Court has recognized that to hold otherwise would allow the prosecutor to create a false impression as to the full import of a defendant's admission, by culling out those parts of the admission that could have added a context to the admission favorable to defendant. (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

The court's ruling was more than an error in applying the evidence code. As argued in Argument III, *supra,* incorporated herein, the exclusion of this evidence deprived appellant of evidence crucial to his defense-and critical to demonstrating his reliability- and, as such, was a violation of due process of law and effective assistance of counsel. (*Crane v. Kentucky*, *supra,* 476 U.S. 683, 690-691.) Moreover, should the case have proceeded

to the penalty phase, the entire admission would have gone to factor (a), the circumstances of the offense, which the jury was constitutionally bound to consider and weigh.

The error in excluding this evidence - which corroborated appellant's testimony, bore directly upon the circumstances of the offense and contradicted the prosecutor's arguments- did not only skew the adversarial process and effect the guilt phase trial. The circumstances of the crime are also a sentencing factor at the penalty phase. The Eighth Amendment requires heightened reliability in capital cases (*Beck v. Alabama* (1980) 447 U.S. 635, 637-638), as well as an individualized determination of the appropriate sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) While the jury was required to weigh and consider this evidence it was never allowed to hear it. There is a reasonable probability that the outcome would have been different, had the jury heard the full extent of appellant's statement to the police.

The exclusion of this critical evidence substantially prejudiced appellant and violated his right to due process of law, effective assistance of counsel, a fair trial, and a reliable determination of guilt, capital eligibility and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. A trial court error of federal constitutional

law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden.

Even using the state standard, it is clear that appellant was substantially injured by the errors of which he complained and it can not be said that "it appears that a different verdict would not otherwise have been probable" if not for the error. (*People v. Watson* (1958) 42 Cal.2d 818, 836.) This error-particularly in conjuction with the error addressed in Argument III- was too great and manifest to be called harmless.

This entire judgement must be reversed.

V. THE TRIAL COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO PRESENT RELEVANT EVIDENCE AS TO AN ALTERNATE THEORY OF HOW APPELLANT'S SEMEN WAS DEPOSITED ON HIS SHIRT, DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, THE RIGHT TO DEFEND, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY BOTH UNDER STATE LAW AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

Appellant was deprived of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corollary provisions of the California Constitution, including his rights to

eligibility and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, requiring reversal of the death judgment.

XII. THE PROSECUTOR'S PERVASIVE MISCONDUCT IN THIS CASE DEPRIVED VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, INCLUDING HIS RIGHTS TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY AND IMPROPERLY WEIGHED THE SCALES IN FAVOR OF A DEATH JUDGMENT IN THIS CASE.

INTRODUCTION

The penalty and guilt phase errors complained of above were not only the result of improper application of statutory and Constitutional law. They were the result of misconduct by the prosecutor that permeated every aspect of this trial, from the selection of the jury to the final penalty arguments. As stated by this Court, "A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.

The prosecutor's intemperate actions in the unconstitutional selection of appellant's jury, preventing exculpatory evidence from being heard by

the jury, interfering in the attorney client relationship, disparaging treatment of witnesses and counsel and her further improper conduct at trial violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, including his rights to due process of law, a fair trial, effective assistance of counsel and a reliable determination of guilt, death eligibility and penalty and improperly weighed the scales in favor of a death judgment in this case.

In addition, to the prosecutor's blatant misconduct in preventing the impanelment of a constitutionally constituted jury, she also committed intentional misconduct in other aspects of the trial that had the independent and cumulative effect of depriving appellant's of his rights to a fair trial, effective assistance of counsel, Due Process of Law, and a reliable determination of guilt, death eligibility and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution, requiring reversal of the death judgment. This misconduct included suppression of evidence, interference in the attorney-client relationship between appellant ane his lead counsel, and disparaging questioning and treatments of witnesses.

A. DUE TO THE PROSECUTOR'S MISCONDUCT IN THE SELECTION OF THE JURY, APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The conduct of the prosecutor in the selection of appellant's jury has been fully documented in Arguments I and II, *supra,* incorporated here by reference. This improper conduct dominated every aspect of the jury selection. The prosecutor did virtually everything she could to intentionally deprive appellant of a constitutionally impaneled jury. Her conduct was inexcusable. She continually misrepresented the facts, misstated the law and tried to keep the true state of the law from the prospective jurors. Her examination of the prospective jurors she sought to excuse was little more than bullying or confusing the prospective jurors she did not like into making statements that a trial court sympathetic to the prosecution would use to improperly excuse those jurors.

During the *Hovey* voir dire, the prosecution was allowed by the trial court to set up a gauntlet of confusing, irrelevant and legally defective hypotheticals that she employed on selected prospective jurors who wished to excuse. (Argument I, *supra.*) She consistently attempted to confuse the prospective jurors that she did not like, and when that tactic failed she

simply misrepresented their clearly stated views to the court. She further used a tactic of half truths, misstatements and outright lies to exclude all black males from the jury in violation of appellant's right to a fairly constituted jury. (Argument II, *supra.*)

The prosecutor's baseless and completely unprofessional *ad hominem* attack on Mr. Cook, the second black male prospective juror to be improperly excused was but one example of the lengths to which this prosecutor would go to "win" this case. (Argument II, section B. 2.b at p 156 et seq.) However, it was one of the most blatant. This sort of personal verbal assault on a prospective juror in order to create a conflict which would allow the prosecutor to excuse an otherwise qualified juror because he was a black male was an exercise in pure cynicism that has no place in an American courtroom.

As stated in Argument II, *supra.,* the prosecutor claimed that she removed all of the black males for the jury for "race-neutral' reasons. The prosecutor had to have known that this argument was false as she permitted any number of white jurors to sit on the jury who had responded to her questions exactly as did the four black male jurors.

The removal of all of the black male potential jurors in this racially charged case by a combination of argumentative questioning, misstatement

of facts, hypocritical "reasoning" and sophistic argument reduced the jury selection procedure into an exercise in racial politics. The voice of an large segment of Los Angeles County was deliberately silenced by the prosecutor's intemperate behavior.

A prosecutor has a special duty commensurate with his unique power to assure that defendants receive fair trials. (*United States v. LePage* (9th Cir. 2000) 231 F3d 488, 492.) It has been long held by the United States Supreme Court that, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) The prosecutor

> is the representative not of any party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*People v. Fierro* (1991) 1 Cal.4th 173, 207-208.)

This prosecutor did not conduct herself as required above. Her role in the selection of appellant's jury was one of a win-at-all-costs partisan, who used every trick at her disposal to impanel a jury stacked toward conviction and a death verdict. Her continued misconduct through the trial

as set forth in the remaining sub-arguments to this Argument, incorporated here, reduced appellant's trial to a mockery. Reversal is required.

B. DUE TO THE PROSECUTOR'S MISCONDUCT IN THE SUPPRESSION OF RELEVANT AND LEGALLY ADMISSIBLE EXCULPATORY EVIDENCE, APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Like the trial court, the prosecutor was similarly responsible for the denial of appellant's right to present a defense, by improperly pressing to exclude relevant and admissible evidence critical to the defense. (See Argument III-VI, *supra,* incorporated herein by reference.) It is the function of the prosecutor to seek justice and not convictions. It is the prosecutor's job to see that the innocent not be made to suffer as well as that the guilty not escape punishment. (*Berger v. United States* 295 U.S. at 88.)

The prosecutor's theory of the case was that from the outset on the night of the crime, appellant had the intent to rape and rob. It was only the identity of the victim that was unknown to him. The prosecutor made this

theory clear to the jury in her opening statement, examination of the witnesses and summation. (19 RT 4151 et seq.)

In order to advance her theory, the prosecutor did everything she could to suppress competent evidence that would counter it. She successfully resisted the admission of the victim's intoxication and racial slurs, so that she might falsely argue appellant's pre-existing intent to rape and rob, and so that the credibility of appellant's testimony would be undermined. (See Arguments III and IV, *supra*), incorporated herein. She further successfully opposed any evidence as to why appellant was afraid of Pearson for the same reasons. (See Argument VI, *supra.*) She also prevented the admission of critical evidence that would have explained to the jury how appellant's semen may have been deposited on his cream-colored shirt. (See Argument V, *supra.*)

The prosecutor knew that all of this evidence was competent, relevant and otherwise admissible. However, she also knew that its admission would damage her case, and render her arguments far less effective. She took an intentional role in deliberately suppressing the truth in order to argue a false theory. By doing so, she abandoned her role as an impartial advocate of justice and, along with the court, deprived appellant of his right to a fair trial. The Constitution requires that a defendant be able to present a defense,

meet the state's evidence, and be convicted only on proof beyond a reasonable doubt. However, those rights and others-including his right to reliable determinations of guilt, capital eligibility and penalty- were grossly undercut by the prosecutor's conduct.

The prosecutor capitalized upon the exclusion of this evidence by making false statements in her summation. She indicated that prior to the attack, Ms. Keptra said "Happy New Year" to appellant and his companions. (24 RT 5306; 5386.) There was no evidence that this occurred. She further stated that there was evidence that appellant was wearing the cream colored shirt that night. (24 RT 5308.) There was no evidence of this, either. Argument of facts not in evidence violates the constitutional rights of confrontation and counsel. (*Turner v. Louisiana* (1965) 379 U.S. 466, 470-473.) A defendant may not be convicted if the evidence is insufficient to persuade a rational fact finder of guilt, beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319) ; that principle demands that prosecutors not rely upon theories with no basis in evidence.

Perhaps, the most cynical argument made by the prosecutor was when she rhetorically asked the jury why would a lone woman yelled out racial slurs to three men. (24 RT 5385-5386.) This was precisely the same argument that appellant's counsel used to urge the court to admit the

evidence of Ms. Keptra's intoxication so as to give a rationale explanation for her racial slurs.(Argument III, *supra.*) The prosecutor successfully argued to the court that this evidence was irrelevant, but, in summation, she used the absence of such evidence as relevant proof that the racial slurs were not uttered, therefore appellant was a liar who intended to rape and rob someone from the moment he left the Gmur house.

The trial court, as set forth in Arguments III and IV, improperly permitted this egregious misconduct. The prosecutor's consistent course of misconduct throughout this trial requires reversal.

C. BY INSISTING UPON EXTENDED HEARINGS DURING THE PENALTY PHASE INTO TRIAL COUNSEL'S ALLEGED DISCOVERY VIOLATION, THE PROSECUTOR DEPRIVED APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural History

Appellant's counsel called James Armstrong as a penalty phase witness. Mr. Armstrong testified that he had made money by selling drugs and illegally exploiting women as a pimp. He also stated that he used this money to support appellant and take him on a trip to Chicago. (28 RT 5904-5905.) At this point, the prosecutor asked for a side bar conference and informed the court that this information was not contained in the discovery

received from counsel in reports dated April 10, 1999 and April 11, 2003. (28 RT 5905-5909.) Therefore, she stated she would call defense investigators Joe Brown and Malcolm Richards in rebuttal to testify as to the nature of said reports. (28 RT 5910.) The court subsequently placed calls to these two individuals to secure their attendance. (28 RT 5910-5913.)

In the penalty phase Pamela Armstrong testified as a prosecution witness. Prior to her cross-examination, the defense handed the prosecution a 1999 letter from Mrs. Armstrong to Mr. Patton. (28 RT 6061.) The prosecutor claimed that Mrs. Armstrong was originally listed as a witness for appellant and that this report should have been turned over to the prosecution at the time Mrs. Armstrong was listed as a defense witness. (*Ibid.*) The prosecutor indicated that she was being "sandbagged" by Mr. Patton, in that he did not tender this letter in discovery. (28 RT 6076.) She further stated that there was a pattern of discovery violations by Mr. Patton. (28 RT 6080-6083.)

After Mrs. Armstrong's testimony, but before any other witnesses were called, the court held what it called an Evidence Code section 402 hearing regarding the proffered testimony of Investigator Joe Brown. (28 RT 6115 et seq.) Mr. Brown indicated that James Armstrong told him that

he took appellant to Chicago on a trip. During that trip, James indicated he used drugs in the presence of his son. Mr. Brown further stated that he never put this information in any report. (28 RT 6121-6122.)

The balance of this hearing was an attempt by the prosecutor to show that Mr. Patton was in possession of other information about the Chicago trip that was never included in any report tendered to the prosecution. (28 RT 6122-6154.)

After the testimony, the trial court informed Mr. Patton that it believed that he did not act in good faith, and that the court was "tremendously troubled" by Mr. Patton's conduct. (28 RT 6161-6164.) Mr. Patton indicated that he was very troubled by the court's characterization of his actions. (28 RT 6163.)

This hearing was continued to the next day. (29 RT 6169-6217.) As a result of this third hearing Mr. Brown was allowed to briefly testify in rebuttal as to the testimony of Mr. James Armstrong. (29 RT 6217.) Mr. Brown did briefly testify. (29 RT 6233-6238.)

However, this was not to be the end of the matter. After the close of all testimony, the prosecutor called Investigator Richards to the stand, apparently to demonstrate how Mr. Patton committed an discovery

violation, which, she argued was a breach of legal ethics. (29 RT 6245-6279.)

After Mr. Richards completed his testimony, the court confronted Mr. Patton, placing him on the defensive as to his perceived lack of ethics in the discovery matter. (29 RT 6279-6281.) The jury was not present for these extended hearings, but must have perceived that the interruption to the trial, following the prosecutor's objection, involved a serious matter.

B. Discussion of the Law

The defendant in any criminal action has a constitutional right to assistance of counsel for his defense. (US Const 6th Amend, Cal Const., art I, section 15.) The right to assistance of counsel is "indispensable to the fair administration of our adversarial system of justice" and "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." (*Maine v. Moulton* (1985) 474 U.S. 159, 168-169.)

> It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel and his Fifth Amendment right to due process of law. (*U.S. v. Irvin* (9th Cir. 1980) 612 F.2d 1182, 1185 citing to *Weatherford v. Bursey* (1977) 429 U.S. 545.)

Therefore, the prosecution is "obliged to refrain from unreasonable interference with that individual's desire to defend himself in whatever

manner he sees best, using every legitimate resource at his command." (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 431 citing to *People v. Crovedi* (l966) 65 Cal.2d 199, 206.) The proceedings against the accused are rendered improper when conduct on the part of authorities is so outrageous as to interfere with the rights of the accused to counsel and to due process of law. (*People v. Tribble* (l987) 191 Cal.App.3d 1108, 1116 citing to *Rochlin v. California* (1952) 342 U.S. 165, 172) ; *People v. McIntire* (1979) 23 Cal.3d 742, 748, fn.1.)

In effect, the trial court conducted a series of discovery sanction hearings (although sanctions did not follow) at one of the most crucial junctures on a capital trial. It was completely unnecessary to force Mr. Patton to defend himself while he should have been thinking of defending appellant. If there was a discovery violation, it was minor and of no prejudice to the prosecutor whatsoever. The final hearing after the witnesses had completed their testimony was simply gratuitous.

The final hearing held after all testimony had been completed was a gratuitous effort by the prosecutor and court to make trial counsel look and feel "guilty," embarrassing and distracting him immediately before he was to give his final plea for appellant's life. If there was a real discovery issue which truly offended the court, any sanction hearing could have been held

after the trial. However, there is nothing in the record to suggest that the trial court pursued this alleged ethical issue after the final hearing in which Mr. Richard's testified. (29 RT 6245-6279.)

Once again, the prosecutor clearly demonstrated her absolute indifference to the fairness of the process, employing any and all means necessary to secure a conviction. In doing so she breached the trust that the criminal system has placed in her office and denied appellant a fair trial.

The right of a criminal defendant to assistance of counsel for his defense is guaranteed by the California Constitution, Article I, section 15, and by the Sixth Amendment of the United States Constitution. The right of the effective assistance of counsel is "indispensable to the fair administration of our adversarial system of criminal justice," and "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." (*Maine v. Moulton* (1985) 474 U.S. 159, 168-169.)

Appellant was denied the effective assistance of counsel, not withstanding counsel's presence in court, because of these ill-timed attacks on defense counsel's integrity, honesty and professionalism. The prosecutor's conduct was aimed at disabling counsel from performing his role as an advocate. This constitutional error mandates reversal of the penalty verdict in this case.

D. THE PROSECUTOR'S CONDUCT IN HER STATEMENTS TO THE JURY, EXAMINING WITNESSES, AND DISPARAGING APPELLANT'S COUNSEL CONSTITUTED PROSECUTORIAL MISCONDUCT

In addition to the above cited prosecutorial misconduct, the prosecutor often engaged in disruptive and petty conduct during the trial. From the outset of the pre-trial hearings, the prosecutor conducted herself in an aggressive and hostile manner toward appellant's counsel. She gratuitously suggested to the trial court sanction trial counsel for a discovery "violation"in such a way that counsel would be forced to report himself to the state bar, although the matter was not even ripe for discovery sanction. (2 RT 97.)

During another pre-trial discovery proceeding, the prosecutor continued this hostile tactic, informing the court that the issue had arisen because trial counsel was getting a flat fee for his services and simply did not want to work all that hard. (2 RT 197-206.)

As set forth more fully herein, the prosecutor's opening statement was part of her concerted attempt to mislead the jury as to how the confrontation between Ms. Keptra and the three men was initiated. Having succeeded in suppressing evidence of Ms. Keptra's toxicology report and

use of racial slurs, the prosecutor was free to cynically, and without factual basis, tell the jurors that the victim was peaceably walking to a store when appellant and his companions came up to her and demanded money. (RT 20 RT 4152-4153.) She further told the jury that when the three men did not find any money they stated "why don't you give us these food stamps to begin with?" (*Ibid.*) There was no evidence that this exchange ever occurred.

The prosecutor's argument of facts not in evidence deprived appellant of his rights to confrontation and counsel (*Turner v. Louisiana* (1965) 379 U.S. 466, 472-473) and improperly promoted the inference that she had access to information not presented to the jury. (See *People v. Bain* (1971) 5 Cal.3d 839, 848; *People v. Bell* (1989) 49 Cal.3d 502, 539.)

Improper comments were directed toward counsel (19 RT 4402), including twice accusing him of lying to the court regarding a discovery issue. (22 RT 4731; 26 RT 5565.) She punctuated appellant's direct examination with hypertechinical and unnecessary objections intended to disrupt the concentration of appellant and destroy the flow of the testimony. (23 RT 4921; 4923; 4925; 4935; 4941; 4946-4950; 4953; 4959; 4963)

Further, the prosecutor conducted her cross-examination of appellant in such a way as to confuse and intimidate appellant. Her

questioning was repetitive and argumentative, confusing and hostile. She would repeatedly accuse appellant of lying and would essentially testify as she asked the same argumentative questions multiple times. (See e.g., 23 RT 4979; 4982; 4985; 4988; 4999; 5000; 5001; 5002; 5004; 5006; 5017; 5024; 5026; 5030; 5036; 5038-5039; 5042; 5047; 5049; 5055; 5058-5060.)

The prosecutor's examination of many of the witnesses was almost entirely leading. The prosecutor essentially testified for these witnesses. There was hardly a non-leading question asked to Joseph O'Brien, the victim's boyfriend. (21 RT 4350.) Large portions of the critical testimony of Keith Kenrick (21 RT 4447 et seq) was leading , as was the testimony of Detective Birdsall (21 RT4468 et seq), Jeanette Carter (21 RT 4509 et seq), Tyaire Felix (21 RT 4575) and Pamela Armstrong. (21 RT 4473.) Thus, in effect, the prosecutor herself testified with the benefit of the oath.

This questioning was not the result of misinterpretation of the rules of evidence. Instead it was yet another example of a prosecutor who made her own rules.

CONCLUSION

The Supreme Court has found that prosecutorial misconduct may occur in a variety of unique factual settings. (See *United States v. Williams* (1990) 504 U.S. 36, 60, (Stevens, J., concurring) ("[l]ike the Hydra slain by Hercules, prosecutorial misconduct has many heads".) "Each of these settings may have its own peculiar standards for finding prosecutorial misconduct and for determining whether a constitutional violation occurred as a result of such misconduct." (*Woods v. Adams* (C.D. Cal. 2009) 631 F.Supp 1261, 1278.)

Where prosecutorial misconduct has occurred, the relevant question then is whether the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Earp v. Ornoski* (2005) 431 F.3d 1158, 1171.) If the prosecutor committed "misconduct," the reviewing court must determine if such misconduct resulted in actual prejudice to the defendant, such that his trial was rendered "fundamentally unfair." (See, e.g., *Donnelly v. DeChristoforo* (1974) 416 U.S.637, 642.)

Because this was a capital case, the Constitution demands a heightened degree of reliability at both the guilt and penalty phases. (*Beck v. Alabama, supra,* 447 U.S. at 637-638; *Gilmore v. Taylor, supra,* 508 U.S.

at 345.) The prosecutor's misconduct, individually and systematically, rendered appellant's trial both unreliable and unfair.

As stated in Arguments I and II, the prosecutor's misconduct in the jury selection process created a "structural error" in which the error cannot be "harmless." The misconduct in preventing appellant from presenting evidence that went to the heart of his defense deprived appellant of the fundamental right to defend himself. Further, the prosecutor's argumentative, hostile, petty and disparaging attitude throughout the trial contributed to the fundamental unfairness of the trial.

A prosecutor represents the interests of all the entire citizenry and their interest ism, above all things, fairness. The prosecutor possesses a power unique to our system of justice and as such he also is charged with a unique obligation to assure that a defendant receives a fair trial. (*United States v. LePage* (9th Cir 2000) 231 F.3d 448, 642.) This did not happen in this case. Instead, the prosecutor used her unique power to place appellant on death row, in complete disregard of any notions of fairness.

Appellant incorporates all Arguments argued up to this point as if more fully stated herein. The instances of misconduct in this case were numerous, and the improprieties occurred throughout the trial rather than in a brief or isolated context. (See *People v. Kirkes* (1952) 39 Cal.2d 726.) The

nature of the prosecutor's misconduct implicated appellant's federal constitutional rights because "it [was] so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084.) The prosecutor's above stated misconduct in this case rendered the entire proceeding "fundamentally unfair," depriving appellant of due process of law, the right to a fair trial, the right to effective assistance of counsel, and the right to a fair and reliable determination of guilty, capital eligibility and penalty in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The entire judgment must be reversed.

CONCLUSION

By reason of the foregoing, appellant Jamelle Armstrong respectfully requests that the judgment of conviction on all counts, the special circumstance findings, and the judgment of death be reversed and the matter remanded to the trial court for a new trial.

Appellant was denied his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The grievous errors deprived appellant of his right to a meaningful determination of guilt and a reliable determination of penalty.

The citizens of the State of California can have no confidence in the reliability of any of the verdicts rendered in this case.

June 21, 2011

Respectfully submitted,

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