APPENDIX A

***People v. McDaniel*, No. S171393**

California Supreme Court Slip Opinion

August 26, 2021

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
DON'TE LAMONT MCDANIEL,
Defendant and Appellant.

S171393

Los Angeles County Superior Court
No. TA074274-01

August 26, 2021

Justice Liu authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Corrigan, Cuéllar, Kruger, Groban, and Jenkins concurred.

Justice Liu filed a concurring opinion.

PEOPLE v. McDANIEL

S171393

Opinion of the Court by Liu, J.

Defendant Don'te Lamont McDaniel was convicted of two counts of first degree murder for the shootings of Annette Anderson and George Brooks, two counts of attempted murder for the shootings of Janice Williams and Debra Johnson, and possession of a firearm by a felon. (Pen. Code, §§ 187, subd. (a), 664 & 187, subd. (a), former 12021, subd. (a)(1); all undesignated statutory references are to the Penal Code.) The jury found true the special circumstance of multiple murder. (§ 190.2, subd. (a)(3).) The jury also found true the allegations of intentional discharge and use of a firearm, intentional discharge resulting in great bodily injury and death, and commission of the offense for the benefit of, at the direction of, and in association with a criminal street gang. (§§ 12022.53, subd. (d), 122022.53, subds. (d) & (e)(1), 186.22, subd. (b)(l).) After the first penalty phase jury deadlocked, a second jury delivered a verdict of death on December 22, 2008. This appeal is automatic. (§ 1239, subd. (b).) We affirm.

I. FACTS

A. Guilt Phase

1. Prosecution Case

The events occurred in and around Nickerson Gardens, a large public housing complex in Southeast Los Angeles. In 2004, the Bounty Hunter Bloods gang was active in Nickerson Gardens, with about 600 members registered in law

enforcement databases. McDaniel and Kai Harris were members of the Bounty Hunter Bloods, as was one of the victims, Brooks.

On April 6, 2004, at 3:30 a.m., officers responded to reports of gunshots at Anderson's apartment in Nickerson Gardens. Entering through the back door, they observed the bodies of Anderson and Williams. Williams appeared to be alive. Brooks's body was slumped against the refrigerator. In the living room, an officer observed Johnson, who had a gunshot wound to the mouth and was trying to stand up.

Anderson died at the scene from multiple gunshot wounds. Stippling indicated that the wound to her face was inflicted at close range. Cocaine and alcohol were present in Anderson's body at the time of her death. Brooks also died at the scene from multiple gunshot wounds; he suffered five wounds to the face, and stippling indicated they were fired at close range. Williams survived gunshot wounds to her mouth, arms, and legs, and she spent three to four months in the hospital. Johnson also survived gunshots to the face and chest and underwent multiple surgeries.

Physical evidence collected at the scene included ten nine-millimeter and six Winchester .357 magnum cartridge cases. Investigators found one nine-millimeter cartridge case on Brooks's stomach and two .357 magnum cartridge cases on his neck. Two nine-millimeter cartridge cases were found near Anderson's hands. Investigators also recovered drug paraphernalia, including a metal wire commonly used with a crack pipe near Anderson's hand, a glass vial containing a crystal-like substance, and a plastic bag containing a rock-like substance in Brooks's pants.

Five days later, during a traffic stop, Deputy Sheriff Marcus Turner recovered a loaded Ruger nine-millimeter gun and associated ammunition from McDaniel. McDaniel identified himself as Mitchell Reed. About one month later, Officer Freddie Piro arrested a member of the Black P-Stone gang in Baldwin Hills, an area 13 miles away from Nickerson Gardens. During the arrest, Officer Piro recovered a .375 magnum Desert Eagle handgun.

Ten of the cartridges recovered from the scene matched the nine-millimeter Ruger recovered from McDaniel. Six of the cartridges found at the scene matched the .357 magnum Desert Eagle. The examiner also analyzed projectile evidence recovered at the scene and concluded that none was fired by the nine-millimeter gun. The source of other ballistics evidence was inconclusive.

In addition to this physical evidence, the prosecution introduced testimony from the survivors of the shooting and other witnesses who placed McDaniel and Harris at or near the crime scene. The defense case consisted primarily of exploiting inconsistencies in these witnesses' statements and the fact that many of the witnesses were intoxicated at the time of the shooting.

Williams testified that she was sitting at the table with Anderson on the evening of the shooting. Williams heard a whistle and then a knock on the back door. Elois Garner was at the backdoor and identified herself. Anderson opened the door, and Williams saw McDaniel enter the apartment shooting. After Williams was shot, she fell on the floor and lost consciousness. Williams had known McDaniel for about 10 years.

Although Williams had a history of drug use, she denied using drugs that night, but she testified that she had been drinking. She did not see Anderson or Brooks doing cocaine, nor did she see any other drug paraphernalia in the apartment. Williams did not realize that Johnson was in the living room and thought Johnson was in jail at the time. At the preliminary hearing, Williams testified that she had "nodded off" immediately before the shooting. When confronted with this prior testimony, she admitted to being "in and out" that night and that her head was down on the table at the time of the knock on the back door. Williams first identified McDaniel as the shooter on April 12, 2004, when officers showed her a six-pack photo lineup in the hospital.

Johnson died of unrelated causes before trial, so the prosecutor read her testimony from the preliminary hearing. At 3:00 a.m. on April 6, 2004, Johnson was sleeping on the living room floor at Anderson's home. She awoke to the sound of multiple gunshots coming from the kitchen. Johnson saw McDaniel enter through the back door then exit the kitchen and head toward the hallway. She looked up and saw McDaniel in dark clothes standing over her. He shot her and then crouched down and moved toward the front door. She heard two male voices during the shooting, neither of which was Brooks's. McDaniel was the only person she saw in the living room.

When Detective Mark Hahn interviewed Johnson at the hospital on April 9, 2004, she initially said she did not see the shooter because she was asleep when she was shot. During the preliminary hearing, she explained that she did not identify McDaniel because she was afraid. On April 12, the detectives showed her a six-pack photo lineup. Johnson circled McDaniel's photograph but did not tell the police his name; instead, she

wrote "shorter black boy." The court attempted to clarify whom she was comparing McDaniel to since she only saw one shooter in the house. She explained that Williams had told her at the hospital a second man was involved: "a tall, light-skinned dude at the backdoor."

The prosecution also introduced testimony from various witnesses recounting the events immediately before and after the shooting. On the night leading up to the shooting, Derrick Dillard was with Brooks at Anderson's apartment in Nickerson Gardens. Dillard and Brooks left Anderson's apartment to go to Harris's house a half-block away. After 15 minutes, they left to return to Anderson's apartment. On the way, Brooks, Harris, and Dillard ran into McDaniel. Brooks and McDaniel spoke briefly, and McDaniel asked Brooks "where have he been" and said that "Billy Pooh's looking for him." Detective Kenneth Schmidt testified that William Carey went by the name "Billy Pooh."

Dillard and Brooks proceeded to Anderson's house along with Prentice Mills. They went into Anderson's bedroom and used cocaine. Dillard testified that Anderson called out that someone was at the door for Brooks, and Brooks left the room. Dillard heard the back door open, followed by female screams and gunshots. After the gunshots stopped, Dillard did not hear anything and remained under the bed. After 10 minutes, he and Prentice left the room. Prentice left the house. Dillard called 911 and then left.

That night, Garner was drinking Olde English and walking in the vicinity of Anderson's apartment. She was approached by McDaniel and someone named "Taco," whom she later identified as Harris. She had seen both men before in the

neighborhood. McDaniel put a gun to her head and ordered her to knock on Anderson's back door. Both men were wearing black.

Garner's testimony diverged from the testimony of Dillard, Williams, and Johnson in several respects. Garner testified that she knocked at the back door but did not say anything. After knocking, she ran to a nearby parking lot. About five minutes later, she heard two gunshots and then two more, which conflicted with other witnesses' testimony that they heard immediate gunfire. She saw McDaniel and Harris run out of the back of Anderson's apartment toward the gym. After the shooting had ended, she returned to the apartment and looked inside. She saw Anderson on the ground.

During her first interview on April 15, 2004, Garner said she had heard the shots, but she did not identify the shooters or tell the police about knocking on Anderson's door. During an interview on May 26, she identified McDaniel and Harris, and she told police that McDaniel had held a gun to her head.

Angel Hill was Harris's girlfriend and lived with him at Dollie Sims's house a half-block away from Anderson's apartment. On April 6, Hill saw McDaniel and Harris sitting on Sims's porch. Hill left the house and went to a nearby parking lot. She heard gunshots. She was supposed to pick up Dillard from Anderson's apartment, so she got in her car and drove over. No one came to the back door when she knocked. After that, she returned to Sims's house where she saw McDaniel and Harris smoking on the porch. Hill, Harris, and McDaniel then went to the home of Tiffany Hawes, McDaniel's girlfriend.

Hill testified that at Hawes's home, McDaniel was "bragging about" the shooting like it was "a big joke." They

watched a news report about the shooting, and McDaniel explained what had happened in Anderson's apartment. He said to Harris, "You disappointed me, man." At some point, Carey arrived. McDaniel and Carey discussed what had happened, and McDaniel again bragged about the shooting.

The defense emphasized that Hill had provided conflicting testimony throughout the investigation. While Harris was in jail awaiting trial, he asked Hill to tell the police he had never left the house that night. Hill wrote Harris a letter saying she would do anything for him. In her first police interview on April 13, 2004, Hill said she was home with Harris the entire night. She was using PCP, crystal meth, cocaine, marijuana, and liquor on the night before the shooting.

Shirley Richardson also lived in Sims's house. Richardson testified that on the night of the shooting, she, Hill, and Harris were home getting high on PCP, crystal meth, and cocaine. McDaniel came over that night wearing black. He had a long gun and asked Harris to leave the house with him. Harris did not want to leave but eventually left. Richardson saw Harris with a Desert Eagle handgun that night. A few minutes after Harris left, Richardson heard gunshots. When McDaniel and Harris returned to Sims's house, Harris appeared upset.

On the night of the shootings, Sims returned home from work at 12:30 a.m. and saw Harris, Hill, Richardson, and Kathryn Washington in Harris's bedroom. Sims fell asleep for about 30 minutes and awoke to McDaniel banging on her back door and asking for Harris. Harris told her not to open the door and to go back to her room. From inside her room, she heard McDaniel tell Harris that someone in the projects had been robbing the places where he "hustled," and he wanted Harris to

help him "to go handle this." Fifteen minutes after McDaniel, Harris, Richardson, Hill, and Washington left the house, Sims heard gunshots. Ten minutes after the gunshots, Hill, Richardson, and Washington returned to the house. Five minutes later, Harris returned. When McDaniel returned, he talked about buying tickets for all of them to go to Atlanta, saying, "We can all take this trip and stuff and everything be cool. Just everything, keep it under the rock and we keep pushing."

On the morning of April 6, 2004, McDaniel asked Hawes to pick him up near 112th Street and Compton Avenue. She picked him up first, then picked up Harris and Hill at Sims's house. They went back to her house where they watched news coverage of the shooting. Contrary to Hill's testimony, Hawes testified that McDaniel did not say anything while watching the news and that she did not see Billy Pooh at her house that night.

When police searched Hawes's house in December 2004, they found a newspaper article about the shooting at Anderson's apartment and an obituary for William Carey (Billy Pooh), who was killed sometime after the shooting. The police also found bus tickets to Atlanta in Mitchell Reed's name.

Myesha Hall lived three doors down from Anderson in a second-story Nickerson Gardens apartment. Around 3:00 a.m. on April 6, 2004, she was standing at her window when she heard four single gunshots. She saw a short Black man wearing a white T-shirt run out of the back door of Anderson's apartment. After that, she heard "a lot of shots, like automatic." She then saw two tall Black men wearing dark-colored clothes run out of Anderson's back door. She did not hear any more gunshots after that.

2. Defense Case

The defense presented one witness, Dr. Ronald Markman, a psychiatrist familiar with the effects of PCP, methamphetamine, cocaine, marijuana, and alcohol. He testified to the effects of each drug on perception when used individually and the effects when used together. The "slowing" or "depressant qualities" of marijuana could possibly be neutralized by the stimulating effect of methamphetamine or cocaine. The symptoms that are common to the drugs would be accentuated when those drugs are taken together.

B. Penalty Phase

1. Prosecution Case

After the first jury hung in the penalty phase, the prosecutor presented the guilt phase evidence described above concerning the circumstances of the capital offense. The remainder of the prosecution's case focused on McDaniel's prior bad acts (section 190.3, factors (b), (c)) and victim impact evidence (section 190.3, factor (a)).

a. Prior Bad Acts

A little after midnight on April 6, 1995, Javier Guerrero's car broke down on the 105 freeway. He was given a ride to a payphone at 112th Street and Central Street in Los Angeles. While he was calling his family, three men approached him. One put a gun to his head. All three demanded money. The three men searched him, took his watch, then ran away. Guerrero identified a suspect that night in a field lineup but did not see that suspect in the courtroom. That night, Officer Hill saw the robbery and apprehended one of the participants, whom he identified as McDaniel.

On February 29, 1996, Thomas Tolliver was working as a campus security aide at Markman Middle School. At noon, Tolliver encountered McDaniel and two other individuals on the campus. Tolliver asked them to leave. McDaniel asked Tolliver if he was strapped. Tolliver again told McDaniel to leave. McDaniel said, "I'm going to come back and shoot your mother fucking ass." The three individuals then ran away.

On December 8, 2001, Officer Shear saw McDaniel and tried to detain him. As McDaniel ran away, Shear noticed a large stainless steel handgun in McDaniel's waistband. McDaniel fled into the upstairs bedroom of a nearby apartment. Shear obtained consent to search the apartment. McDaniel came outside and was handcuffed. Inside the upstairs bedroom, officers found a .357-caliber handgun containing five hollow point bullets.

On January 18, 2002, Officer Moreno was on patrol near Nickerson Gardens. When he observed McDaniel, he got out of the patrol car. McDaniel ran, and Moreno noticed that McDaniel had a handgun in his left hand. McDaniel fled into a nearby apartment. Inside that apartment, officers found McDaniel. In the stovetop, they found the unloaded TEC-9 handgun that they had previously seen in McDaniel's possession. Officer Shear was also pursuing McDaniel that day and searched the apartment. In an upstairs bedroom, Shear found an Uzi assault rifle and ammunition. The prosecutor presented evidence of McDaniel's conviction on June 27, 2002, for possession of an assault weapon.

On April 21, 2002, Ronnie Chapman was in his mother's backyard in Nickerson Gardens. Chapman's cousin Jeanette Geter saw McDaniel and his brother Tyrone approach

Chapman. She testified that she saw McDaniel shoot Chapman. Police officers saw McDaniel running less than a block away wearing a royal blue silk shirt. At trial, an officer testified that he found "the same blue shirt" at McDaniel's house in an unrelated incident.

On January 23, 2004, around midnight, officers responded to reports of gunfire at an address on East 111th Place. Officer Davilla secured the area by setting up a perimeter. McDaniel walked by and sat on the hood of a nearby car. Davilla ordered McDaniel to leave. McDaniel looked in Davilla's direction and said, "Fuck that shit." Davilla approached McDaniel, grabbed him, and escorted him away from the secured area. Davilla released McDaniel and told him he would be arrested if he did not leave. McDaniel raised his fists and walked toward Davilla, who pushed McDaniel backward. McDaniel then threw a punch at the top of Davilla's head. Davilla hit McDaniel in the face, and the two fell on the ground. Another officer hit McDaniel in the legs with a baton.

The defense called Joshua Smith, who witnessed this incident. Smith testified that this was a case of "police brutality" and that he had not heard McDaniel yell at the officer and had not seen him challenge the officer to a fight.

Kathryn Washington testified about the murder of Akkeli Holley, which occurred on July 4, 2003. Washington denied witnessing the murder, and the prosecution played a tape of a previous interview where she discussed witnessing the shooting. In her taped interview, she discussed seeing a shootout among Holley, a man named Roebell, and "R-Kelley" (McDaniel's moniker). Washington could not tell whether Roebell or R-Kelley was shooting. She testified that around the time Holley

was shot, she was using drugs daily, including PCP, cocaine, marijuana, alcohol, and methamphetamine. The defense again called Dr. Markman, who discussed the effects of these drugs on perception, as he had testified in the guilt phase.

On June 27, 2004, officers at the Men's Central Jail conducted a search of the cell that McDaniel shared with two other inmates. The search revealed several shanks that were concealed from view. Two shanks were found under one inmate's mattress. A single shank was found in a mattress that had McDaniel's property on top of it. The officer did not know how long McDaniel had been in that cell and acknowledged it was a transitional cell.

On June 21, 2006, McDaniel was using one of the phones in a cell in the Compton Courthouse lockup. A sheriff's deputy asked him to move cells, and McDaniel attempted to hit him with his right hand. The officer hit McDaniel twice in the face. McDaniel suffered bruising and swelling to his face, and the officer fractured his own hand.

On November 21, 2006, a sheriff's deputy was escorting an inmate from the law library back to his cell at the Men's Central Jail. As they passed the cell block, McDaniel and his cellmate threw several small cartons filled with excrement at the inmate.

b. Victim Impact Evidence

Anderson's brother testified about the impact of her death on their family. Anderson was the "backbone of the family" and "the life of the party. She just kept everybody's spirits up." She was a role model and lived in Nickerson Gardens "pretty much her whole life." Their mother took Anderson's death "real hard. . . . [H]er health just went down."

Anderson's only child, Neisha Sanford, testified about the impact of her mother's death. She described their close relationship and her mother's bond with her grandsons. Sanford discussed her mother's battle with cancer and the fact that "she wanted to start spending more time with [her grandsons] because she was sick." Anderson was the "core of the family." Since her mother's death, Sanford "[didn't] have a life anymore. My life ended four years ago. Him taking my mother's life, that was the end of my life."

Sanford's son also testified about the impact of his grandmother's death. He talked about spending "everyday" at his "little granny's home" and holidays like birthdays and Christmas. Her death "affect [*sic*] me a lot because me and my Grandma, we were really close. . . . [I]t make [*sic*] me sad all the time."

2. Defense Case

The defense case in mitigation focused on McDaniel's childhood, the pressures of living in Nickerson Gardens, his cognitive impairment from fetal alcohol syndrome, and his positive contributions to family members and friends.

McDaniel's mother testified that she drank while pregnant with McDaniel. McDaniel's father, who lived across the street with another woman, beat McDaniel's mother once in front of McDaniel and his brother. His early life was chaotic, and they frequently moved. At one point when McDaniel was about seven or eight, they lived on Skid Row. His mother started using cocaine at this time. She beat McDaniel with a belt to make him strong. Her brother Timothy was a father figure to McDaniel. Timothy sold drugs and was killed when McDaniel was about 12. His death affected McDaniel and made

him "angry and hostile, he really got involved with the gangs and stuff."

McDaniel's father testified that he and McDaniel's mother drank while she was pregnant with McDaniel. He never lived with McDaniel's mother and their children. He moved to Sacramento when McDaniel was two or three and did not return until he was 11 or 12. By that time, McDaniel had joined a gang. McDaniel's father testified that if you don't join a gang, you had problems and that Nickerson Gardens was a place people go to die.

The mother of McDaniel's two children described how McDaniel maintains a close relationship with them by sending cards and calling. She confirmed that McDaniel did "good things" for her and their children like buying diapers and being present at the hospital when they were born.

Two of McDaniel's cousins described Nickerson Gardens and the impact of Timothy's death on McDaniel. One explained, "Growing up in the projects as a young adult, especially a male, is a hard task. When you stay in it, you are bound to get caught up. And when I say caught up, that means either you are gonna die or you're going to go to jail for a long time."

McDaniel's friend testified that she wrote McDaniel from prison to tell him she was thinking about suicide, and he contacted the people in charge of the mental health unit to get her help. She credited McDaniel with saving her life.

Father Boyle is a Jesuit priest and the founder of Homeboy Industries, the largest gang intervention program in the country. Father Boyle did not know McDaniel but discussed the reasons that kids join gangs: "[T]hough the prevailing culture myth is that kids are seeking something when they join a

gang, . . . in fact they're fleeing something always. They're fleeing trauma. . . . They're fleeing sexual, emotional, physical abuse." He emphasized the need "to examine with some compassion the degree of difficulty there is in being free enough to choose" to join a gang.

Dr. Fred Brookstein is a professor of statistics and a professor of psychiatry and behavioral sciences. He directs a research unit that studies fetal alcohol and drug impacts on children. After analyzing a scan of McDaniel's brain, Dr. Brookstein found signs of brain damage caused by prenatal exposure to alcohol. He testified that people with this kind of damage have "problems with moral decisions."

Dr. Nancy Cowardin has a Ph.D. in educational philosophy and special education and runs a program called Educational Diagnostics. Based on her assessment of McDaniel in 2005 and a review of his school records, she opined that McDaniel has learning disabilities that predate his behavioral problems. McDaniel had a verbal IQ of 73 and a nonverbal IQ of 100. This "lopsidedness is what accounts for his learning disability."

II. PRETRIAL ISSUES

A. *Batson/Wheeler* Motion

McDaniel first claims that the prosecutor's use of a peremptory strike during jury selection prior to the guilt phase violated *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

1. Facts

During voir dire, the judge conducted a first round of questioning to elicit prospective jurors' views on the death penalty. The judge asked jurors to rate themselves on a scale of

one to four based on their ability to impose the death penalty. Category one jurors "would never ever vote for death regardless of what the evidence was." Category two jurors are "proponents of the death penalty. . . . If he killed someone, he should die." A category three juror is "the person who says I'm okay with the death penalty. . . . But not me. I can't vote to put somebody to death." A category four juror is "comfortable with the fact that [he or she] can go either way."

After the court and parties resolved for-cause challenges based on prospective jurors' death penalty views, a second round of questioning on the non-capital portion of the questionnaire began. Before beginning, the trial court emphasized to counsel that this round of questioning was to be a "very limited voir dire to back up the questionnaires if there are responses on, oh, things, that somebody writes his occupation and you don't know what it is that he does and you want some information." Not every juror was questioned, and at times the judge interjected to remind counsel of the limited nature of the questioning. The prosecutor questioned jurors on their beliefs that police officers lie, experiences with gangs, law enforcement experience, prior jury experience, familiarity with Nickerson Gardens, drug history, and religious beliefs.

After additional for-cause challenges, the parties began exercising peremptory strikes. After the prosecutor struck Prospective Juror No. 28, defense counsel made a *Batson/Wheeler* motion. At that time, the prosecutor had used three of his eight peremptory strikes to excuse Prospective Jurors Nos. 7, 13, and 28, all of whom were Black. Four other Black jurors were seated in the box.

In support of his motion, defense counsel noted that Prospective Juror No. 28 "seemed fairly strong on the death penalty. There was nothing obvious in his questionnaire that I could see. . . ." The trial court noted that "[h]e is a 73-year-old man. He is a retired electrician. His nephew was arrested and charged with a crime that was not specified." The court found no prima facie case: "There are a lot of African Americans on this panel. There are a number that are seated in the box as we speak. I will be mindful of it but I am not going to find a prima facie case at this time."

The prosecutor later used his 11th and 12th peremptory strikes to remove Prospective Jurors Nos. 40 and 46, both of whom were Black. At that time, three other Black jurors were seated in the box. Defense counsel made a *Batson/Wheeler* motion. The court noted the prosecutor's three previous strikes against Black jurors, then found "a prima facie case of excusals based on race," and excused the jury for a hearing on the motion. The court told the prosecutor: "I am concerned about the fact that of the twelve peremptory challenges the People have exercised, five have been to African Americans." The court asked the prosecutor to explain his reasons for the strikes.

As to Prospective Juror No. 7, the prosecutor explained that her responses that she would always vote against death were such that "[he] had initially hoped to actually dismiss [her] for cause. . . ." The court agreed with this justification: "My notes reflect she said she would not always vote for death penalty. Always vote for life. Death would not bring back the victims. That she thought life without parole was more severe."

The prosecutor gave three reasons to excuse Prospective Juror No. 13. First, he was concerned that Prospective Juror

No. 13's response that "police officers lie . . . if it suits the needed outcome . . . indicated an anti-police bias." Her questionnaire suggested "concern about the effectiveness of the death penalty" and that "the death penalty is appropriate for a child victim," but the case did not involve child victims. Her husband was also a criminal defense attorney. The court made no comments about this juror and asked the prosecutor to continue to Prospective Juror No. 28.

The prosecutor offered three reasons to excuse Prospective Juror No. 28. "My primary problem with this juror was the fact that he, along with many others, . . . indicated that life without parole is a more severe sentence, which I don't think is a good instinct to have on a death penalty jury." The prosecutor offered additional reasons for the strike. Prospective Juror No. 28 also stated in his questionnaire that he did not want to serve on the trial because it would be too long. "I try not to have jurors on death penalty cases that don't want to be here. . . ." Finally, the prosecutor explained that he was "also trying, to the extent possible with the jurors available to me, to have a jury with as much formal education as possible. And this juror I think just completed 12th grade. . . ."

Defense counsel responded: "There were many jurors — those particular reasons, the education, L-WOP is more severe, the uncomfortable — you know, the time issue with regard to the jury, there are a lot of people on this panel that have reflected — and you corrected them in your opening remarks and they all backed off of any problem in that regard. As far as education goes, I haven't gone through it particularly but there are lots of jurors —."

The court interjected to confirm whether Prospective Juror No. 28 answered "no" to the question about whether he could impose the death penalty if he thought it was appropriate. Defense counsel confirmed that Prospective Juror No. 28 responded no, but that during voir dire he said he had made a mistake. "Yeah I don't remember that one way or the other. I just have a blank on that," the court said. "All right, let me hear your next excuse number."

As to Prospective Juror No. 40, the prosecutor explained that he challenged her due to her response that "[she didn't] want the responsibility of deciding anyone's guilt or innocence and possibly being wrong." The court did not comment on this justification and asked, "What about 46?"

The prosecutor explained that Prospective Juror No. 46 did not believe the death penalty was a deterrent, "which is not an attitude that I considered to be a fair attitude." He was also concerned that Prospective Juror No. 46 listened to a "very liberal political radio station where they frequently have specials and guest speakers and interviews that are anti-death penalty advocates."

Turning to the merits of the defense motion, the court said: "I have a great deal of respect for the attorney in this case, Mr. Dhanidina. And I hold him in high regard. He has tried many cases before me. I have always found him to be an utmost professional. I have never thought that he was trying to do anything underhanded. I believe peremptory challenges should have some flexibility in the way the judge looks at them. I am accepting of the articulated reasons that have been advanced here. I suppose the defense is arguing that we should — that this court should not allow 46 to be excused or are you arguing

that this — that Mr. Dhanidina is making false representations to the court and that this panel should be dismissed and we should start all over again? I would just like to know what the defense is saying."

Defense counsel replied that he was "not asking that the panel be dismissed and start all over. I am just asking that Juror Number 46 not be excused." After a pause in the proceedings, the court granted the request. "I am going to strike the peremptory. I feel that the radio station that somebody listens to is not a valid reason."

The prosecutor emphasized that the radio station was only one of the justifications that he offered. "And the juror works for a nonprofit. Volunteers. Works for an organization of urban possibilities. Just throughout the questionnaire there are a number of race-neutral reasons." He asked for a brief recess to "consult with [his] supervisors about what to do in this situation. Because this is highly unusual."

"I don't like the *Wheeler* law," the court said. "I am trying to apply it the best I can. I think that he looked like an acceptable juror. . . . I am not going to give you more time to research it. We're going to seat him and let's go on with it." After the prosecutor exercised an additional five peremptory strikes, both sides accepted the jury. The final jury contained four Black, three Hispanic, three White, and two Asian jurors.

On April 29, 2008, the jury hung in the penalty phase of deliberations, and the court declared a mistrial. On May 28, the prosecutor filed a motion for reconsideration of the *Batson/Wheeler* ruling on the ground that the court improperly applied the for-cause standard for dismissal. Specifically, the motion argued that the court's stated acceptance of "the reasons

articulated here" should have been enough to shift the burden back to McDaniel, and that the court's follow-up comment that "the radio station that somebody listens to is not a valid reason" showed that the court was applying the standard "reserved for for-cause challenges, when a judge is to determine whether or not actual bias has been shown."

The court heard the motion in July 2008, before beginning jury selection for the second penalty trial. The court asked defense counsel whether he felt the court erred. Defense counsel replied, "I have talked to Mr. Dhanidina and I have seen how the jury came out racial-wise and in terms of how many African Americans there were on the jury at the end of it. And I told Mr. Dhanidina that I would submit it to the court."

Denying the motion, the court said, "[T]his is a motion brought that really has nothing to do with this trial. It has something to do with the prosecutor's perception of his record as a prosecutor. . . . And I am a little reluctant to get into this because I just feel that this is something we shouldn't be doing." The court continued, "I don't think that I was wrong and I stand by my ruling. . . . I still don't think they [the prosecutor's reasons for striking Prospective Juror No. 46] were valid under the circumstances because I think there were other jurors who said similar statements as this juror. I just felt that in an abundance of caution and since this was a capital case that I had to do what I did."

2. Analysis

The Attorney General argues that in accepting the reseating of Prospective Juror No. 46, McDaniel waived his right to a new trial, which is the remedy he seeks in this appeal. McDaniel argues that because the court never found a

Batson/Wheeler violation as to Prospective Juror No. 28, it follows that he never waived a remedy for that violation. We need not decide this issue because, as we explain, McDaniel's claim fails on the merits.

The Fourteenth Amendment to the United States Constitution prohibits a party from using peremptory challenges to strike a prospective juror because of his or her race. (See *Batson*, *supra*, 476 U.S. at p. 89.) The high court set forth a three-step framework in *Batson* to determine whether a litigant has violated this right. First, the moving party must establish a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Id.* at p. 94.) Second, once the moving party "makes a prima facie showing, the burden shifts to the [striking party] to come forward with a neutral explanation for challenging" the prospective juror in question. (*Id.* at p. 97.) Third, if the proffered justification is race-neutral, then the court must consider whether the movant has proved it was more likely than not that the peremptory challenge was based on impermissible discrimination. (*Id.* at p. 98.)

The present case involves *Batson*'s third-stage requirement that the opponent of the strike prove purposeful discrimination. Beginning our review at the third stage is appropriate in the circumstances presented here. (See *People v. Scott* (2015) 61 Cal.4th 363, 392 (*Scott*).) After the trial court found no prima facie case with respect to Prospective Juror No. 28, the court later asked the prosecutor to explain his reasons for the strikes — including the strike of Prospective Juror No. 28 — in connection with McDaniel's subsequent *Batson/Wheeler* motion following the strike of Prospective Juror No. 46. McDaniel thus renewed his challenge to the excusal of

Prospective Juror No. 28 at that time, and the court rejected this renewed motion before discussing the requested remedy for the violation found regarding Prospective Juror No. 46.

At step three, courts look to all relevant circumstances bearing on the issue of discrimination. (See *Snyder v. Louisiana* (2008) 552 U.S. 472, 478.) Relevant circumstances may include the race of the defendant, the ultimate racial composition of the jury, the pattern of strikes, and the extent or pattern of questioning by the prosecutor during voir dire. (See *Miller-El v. Cockrell* (2003) 537 U.S. 322, 240–241, 245 (*Miller-El*); *Batson, supra*, 476 U.S. at p. 97; *Wheeler, supra*, 22 Cal.3d at p. 281.) A court may also consider the fact that the prosecutor impermissibly struck other jurors "for the bearing it might have upon the strike" of the challenged juror. (*Snyder*, at p. 478.) The high court has also held that comparative juror analysis may be probative of purposeful discrimination at *Batson*'s third stage. (*Miller-El*, at p. 241.) We defer to a trial court's ruling only if the court has made a " 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered' " by the prosecutor. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1159 (*Gutierrez*).)

Here we find that the trial court made a sincere and reasoned attempt to evaluate the prosecutor's justifications based on the court's observations regarding the circumstances of the strike and its active participation in voir dire. In evaluating the justifications, the court asked the prosecutor questions and referred to its own notes, at times interjecting its own observations that confirmed the prosecutor's justifications. The record from the motion to reconsider the *Batson/Wheeler* ruling reveals that the court was also testing the applicability of the prosecutor's justifications against other jurors. In rejecting the prosecutor's reasons for striking Prospective Juror No. 46,

the court said: "I still don't think they were valid under the circumstances because I think there were other jurors who said similar statements as this juror." Throughout the process, the court made clear that it was cognizant of the prosecutor's rate of strikes and the current composition of the jury, which shows that the court considered the circumstances of the strikes.

Nor did the trial court overlook "powerful evidence of pretext," as McDaniel's briefing suggests, in declining to find a *Batson/Wheeler* violation as to Prospective Juror No. 28 when it granted McDaniel's *Batson/Wheeler* motion as to Prospective Juror No. 46. The parties dispute whether the court applied the correct standard in ruling on Prospective Juror No. 46. (See *People v. Baker* (2021) 10 Cal.5th 1044, 1076–1077 [focus is on the " 'genuineness' " of the proffered reasons, not their "analytical strength," though the latter may shed light on the former]; *People v. Cruz* (2008) 44 Cal.4th 636, 660; see also *Miller-El*, *supra*, 537 U.S. at pp. 338–339.) We can assume, without deciding, that it did. Although a prior *Batson* violation is a relevant circumstance for a court to consider in determining whether there was purposeful discrimination (see *Snyder*, *supra*, 552 U.S. at p. 478), the trial court here was well aware of the violation when it ruled on all five strikes at the same time.

McDaniel argues that under *Gutierrez*, a trial court is obligated to make specific findings "when the circumstances are so suspicious that follow-up and individualized analysis is the only way to create a record of 'solid value.' " In *Gutierrez*, we distinguished "neutral reasons for a challenge [that] are sufficiently self-evident, if honestly held, such that they require little additional explanation" from situations where "it is not self-evident why an advocate would harbor a concern." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1171.) In the latter instances,

particularly where "an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group," the court must "clarif[y] why it accepted the . . . reason as an honest one." (*Id.* at p. 1171.) But unlike in *Gutierrez*, the prosecutor's justifications here did not require additional explanation. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 111 ["It is reasonable to desire jurors with sufficient education and intellectual capacity"]; *People v. Cash* (2002) 28 Cal.4th 703, 725 ["possible reluctance to vote for death" and "seeming reluctance to serve" are race-neutral justifications].)

McDaniel also suggests that deference is inappropriate here because the court denied the motion regarding Prospective Juror No. 28 based on a reason not offered by the prosecution. But we do not agree with McDaniel's reading of the record in this regard. Even though, as McDaniel notes, the trial court brought up a potential reason from Prospective Juror No. 28's questionnaire, it is not apparent that the trial court relied on it in denying the motion. Applying deference to the trial court's ruling, we conclude that substantial evidence supports the race-neutral reasons given by the prosecutor for his strike of Prospective Juror No. 28.

McDaniel is Black, and at the time of the second *Batson* motion, the prosecutor had used five of twelve peremptory challenges to strike Black jurors. As discussed below, this strike rate is significantly higher than the share of prospective jurors who were Black and higher than the percentage of prospective jurors then seated in the jury box who were Black. However, at the time the prosecutor struck Prospective Juror No. 46, three other Black jurors were seated in the box who would eventually serve on the jury. Juror Nos. 8 and 10 had been sitting in the

box since the beginning of jury selection. The prosecutor had also declined three times to strike Juror No. 7, who was seated in the box at that time.

Despite the relatively high rate of strikes against Black jurors at the time of the motion, the final racial composition of the jury was diverse and contained more Black jurors than jurors of any other race. Comparing the final composition of the jury to the overall pool reveals that Black jurors were overrepresented on the jury, even factoring in the disallowed strike of Prospective Juror No. 46. Black jurors comprised 16 percent of the total juror pool. The final jury was 33 percent Black. Even without Prospective Juror No. 46, Black jurors would have comprised 25 percent of the empaneled jury. To be sure, the fact that the final jury contained four Black jurors is not conclusive since the "[e]xclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error." (*People v. Krebs* (2019) 8 Cal.5th 265, 292.) But the fact that the prosecution accepted a panel with three Black jurors when it had enough remaining peremptory challenges to strike them suggests that the prosecutor did not harbor bias against Black jurors. (See *id.* at p. 293.)

The same trend holds true when we compare the final jury to the composition of jurors who reached the box. Among the jurors who reached the box, 19 percent were Black. Although Black jurors comprised 42 percent of the prosecutor's strikes at the time of the *Batson/Wheeler* motion, the fact that Black jurors also comprised a disproportionate share (33 percent) of the empaneled jury compared to the Black percentage among jurors who reached the box tends to weigh against a finding of purposeful discrimination. (Cf. *People v Fuentes* (1991)

54 Cal.3d 707, 711–712 [finding *Batson* violation where prosecutor used 14 of 19 peremptory challenges to strike Black jurors and the sworn jury contained three Black jurors and three Black alternates].) At the same time, the fact that the trial court found the prosecutor violated *Batson/Wheeler* in striking Prospective Juror No. 46 is also a relevant consideration. (See *Snyder*, *supra*, 552 U.S. at p. 478.)

Although Prospective Juror Nos. 7, 13, and 40 were also the subject of peremptory challenges, McDaniel only challenges the strike of Prospective Juror No. 28. McDaniel urges us to find pretext in the fact that the prosecutor's voir dire of Prospective Juror No. 28 consisted of only one question, which was unrelated to his primary reason for the strike. In this case, after resolving the parties' challenges to prospective jurors for cause, the trial court urged both sides to limit voir dire. We have said that "trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions." (*People v. Lenix* (2008) 44 Cal.4th 602, 625.) Given the limitations on voir dire imposed by the trial court, as well as the fact that the prosecutor struck five non-Black jurors without asking them a single question, the observation that the prosecutor asked Prospective Juror No. 28 only one question is not by itself evidence of pretext.

McDaniel next argues that the prosecutor's education justification itself is a circumstance of pretext in that it disproportionately excluded Black jurors. " ' "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the

[classification] bears more heavily on one race than another." [Citation.] If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.' " (*People v. Melendez* (2016) 2 Cal.5th 1, 17–18, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 363 (*Hernandez*).) Educational disparities in the seated jurors fell across racial lines. None of the Black seated jurors had attended college. Of the three White jurors who served, two had graduate degrees and one was pursuing a graduate degree. But the fact that the jury ultimately included four Black jurors lessens the inference that the prosecutor used this criterion to exclude Black jurors.

Nor do we infer pretext from the fact that other Black jurors served who had comparable education levels to Prospective Juror No. 28. The prosecutor did not couch the education criterion in categorical terms; he explained that he was trying "to the extent possible with the jurors available to me, to have a jury with as much formal education as possible." In addition to these qualified terms, the education justification was, by the prosecutor's own account, not the primary reason for striking Prospective Juror No. 28. Finding pretext because the prosecutor did not uniformly deploy this criterion to exclude Black jurors would perversely incentivize litigants to use "subjective criterion [that] hav[e] a disproportionate impact" to uniformly exclude jurors of certain racial groups. (*Hernandez*, *supra*, 500 U.S. at p. 370.)

We next compare Prospective Juror No. 28 with similarly situated non-Black panelists whom the prosecutor did not strike. (See *Miller-El*, *supra*, 545 U.S. at p. 241.) The

individuals compared need not be identical in every respect aside from ethnicity: "A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Id.* at p. 247, fn. 6.)

Prospective Juror No. 28 was a 73-year-old Black man. Before retiring, he was an electrician at an aircraft company. He had served in the military. He marked his education level as "12 years." He believed that LWOP was a more severe penalty than death. He indicated that he would not be open to considering evidence of mitigation in the penalty phase. He answered "no" to the question of whether regardless of his views, he would be able to vote for death if he believed, after hearing all the evidence, that the death penalty was appropriate. He said he would not like to serve on a jury because it was "to [*sic*] long." During voir dire, Prospective Juror No. 28 put himself in category 4, and the court asked no other questions except to remark that "you don't want to serve because this case is going to be too long. I appreciate you being here." The prosecutor's "primary concern" about Prospective Juror No. 28 was his views on the severity of life without the possibility of parole. One non-Black seated juror, Juror No. 4, expressed the same view on the questionnaire, as did three alternate jurors.

Juror No. 4 was a 30-year-old Hispanic man who worked as an office services coordinator. Like Prospective Juror No. 28, he answered that life without the possibility of parole was a more severe penalty because "in prison you have someone telling you when to sleep; wake; etc. In death you are done. So in prison it makes you like a kid again and no grown person likes that." During voir dire, he clarified that he saw himself as belonging to category 4. During voir dire, Juror No. 4 indicated that he

understood that death was the more severe penalty. Because Juror No. 4 clarified that he understood death was the more severe penalty, he was materially different from Prospective Juror No. 28.

McDaniel urges us not to consider Juror No. 4's rehabilitation because neither the prosecutor nor the judge questioned Prospective Juror No. 28 on this point. As described above, the judge encouraged the parties to limit voir dire; many prospective jurors were not asked any questions. The prosecutor's practice of asking jurors to raise their hands in response to questions also impeded the development of a full record on this point. But in a *Batson/Wheeler* motion, the burden is on the defendant to prove purposeful discrimination. (*Batson*, *supra*, 476 U.S. at p. 90.) Faced with a record that is silent in this way, we have no basis to infer that Prospective Juror No. 28, upon questioning, would have given an answer similar to Juror No. 4's.

Three alternate jurors also thought LWOP was the more severe penalty. Alternate Juror No. 2, a 48-year-old White man, believed LWOP was a more severe penalty because "[t]here's a long time to think about what you have done and pay for it every day." Alternate Juror No. 4, a 53-year-old Hispanic woman believed that LWOP was the more severe penalty because "[t]hey need to think about what they did for the rest of their life." Alternate Juror No. 5, a 32-year-old Hispanic woman, believed that LWOP was the more severe penalty because "[y]ou live the rest of your life in prison without freedom." During voir dire, these jurors confirmed they were category 4 jurors but were not asked any other questions about their death penalty views.

It is significant that these alternate jurors shared the same LWOP views as Prospective Juror No. 28 and that the prosecutor said his "primary concern" about Prospective Juror No. 28 was his views on LWOP compared to the death penalty. As discussed, however, there are circumstances here that dispel suspicion. McDaniel relies on *Snyder* to contend that once the prosecution's LWOP justification fails comparative analysis, the inquiry into discriminatory intent must end. But in *Snyder*, the high court's finding of a *Batson* violation flowed not simply from comparative analysis, but also from the fact that the prosecutor's justification was "highly speculative" and untethered to the record. (*Snyder*, *supra*, 552 U.S. at p. 482; see *id.* at pp. 482–483.) That is not the case here. All of the prosecutor's stated reasons were supported by the record. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 924.) Moreover, in *Snyder*, the prosecutor struck all the Black jurors on the panel. (*Synder,* at p. 476.) At the time of the second *Batson/Wheeler* motion in this case, two Black jurors — Juror Nos. 8 and 10 — had been sitting in the box since the beginning of jury selection. The prosecutor had also declined three times to strike Juror No. 7, another Black juror who was seated in the box at that time. Finally, even excluding Prospective Juror No. 46, the jury would have contained the same number of Black jurors as it did White and Hispanic jurors, despite the fact that Black jurors comprised a lower percentage of both the overall jury pool and the prospective jurors who reached the jury box.

Ultimately, having considered the totality of the circumstances, including the fact that the judge found a *Batson/Wheeler* violation for Prospective Juror No. 46, we conclude that the trial court's ruling was supported by substantial evidence.

3. Motion for Judicial Notice

McDaniel urges us to take judicial notice of the *Batson/Wheeler* proceedings in his codefendant Kai Harris's trial. A reviewing court may take judicial notice of records of "any court of this state" provided that the moving party provides the adverse party notice of the request. (Evid. Code, § 452, subd. (d)(1); see also Evid. Code, §§ 459, 453.) Yet even when these criteria are met, the reviewing court retains some discretion to deny judicial notice. Without deciding whether such information is generally relevant to an appellate court's review of a trial court's *Batson/Wheeler* ruling on direct review, we exercise our discretion to deny the request here. We do so without prejudice to McDaniel presenting such information on a fuller record in connection with a petition for habeas corpus if he so chooses. (See *Foster v. Chatman* (2016) 578 U.S. __ [136 S.Ct. 1737]; *Miller-El, supra*, 537 U.S. 322.)

B. Denial of Motion to Suppress Firearm

McDaniel next challenges the trial court's denial of his motion to suppress the gun discovered during the April 11, 2004, traffic stop. McDaniel argues that because the officer lacked reasonable suspicion of criminal activity, he could not order McDaniel to remain in the car against his will. Because the gun would not have been discovered if he had been permitted to leave the scene, it should have been suppressed. McDaniel argues its admission was prejudicial error under the state and federal Constitutions.

1. Facts

Five days after the shooting, Los Angeles County Sheriff's Deputies Marcus Turner and Eric Sorenson were on vehicle patrol at 120th Street and Central Avenue near Nickerson

Gardens. Deputy Turner noticed a blue Toyota without a license plate and activated the lights to pull the car over. The car continued driving for about 10 seconds. Deputy Turner noticed the passenger's head moving back and forth "like he was conversating [*sic*] with the driver" but did not notice other suspicious movements. A few seconds after Deputy Turner activated the sirens, the car pulled over.

As soon as the car stopped, the passenger door opened, and a man later identified as McDaniel began to exit the vehicle. Deputy Sorenson had just begun to exit the police car. Deputy Turner, who was still in the driver's seat, testified on direct examination that "the passenger door came open and the passenger at the door stepped out and made a motion and tried to run out of the vehicle." On cross-examination, Deputy Turner acknowledged that McDaniel was standing up in the door well but had not stepped beyond the door. He acknowledged that it was not unusual for passengers to exit vehicles during traffic stops. Deputy Turner testified that his partner yelled, " 'Get back in the car,' " and McDaniel complied.

Deputy Turner arrested the driver of the Toyota for not having a driver's license and placed him in the police car. Because the driver had no driver's license, the deputies decided to impound the vehicle. Deputy Turner returned to the car to pull out the passenger so that he could inventory the car. As he extended his hand to McDaniel, he noticed a bulge in McDaniel's right pocket that resembled a gun. Deputy Turner patted him down and retrieved a loaded Ruger semiautomatic handgun and a separate loaded magazine.

After argument, the judge denied McDaniel's motion to suppress, saying, "I think the officer had every right to do what

he did under the circumstances and I was particularly persuaded by the fact that he had decided to inventory the car once he determined that the driver did not have a license. And I found his testimony to be credible."

2. Analysis

The Attorney General argues that McDaniel's claim is forfeited because defense counsel never explicitly stated that "the deputies violated his Fourth Amendment rights when they ordered him to return to the car" and did not cite any of the authorities relied on in this appeal. Because we can resolve McDaniel's claim on the merits, we need not decide whether it was forfeited.

For purposes of the Fourth Amendment, both the driver and passenger are seized when an officer pulls over a vehicle for a traffic infraction. (*Brendlin v. California* (2007) 551 U.S. 249, 251 (*Brendlin*).) Following a lawful traffic stop, a police officer may order the driver out of the vehicle pending completion of the stop. (*Pennsylvania v. Mimms* (1997) 434 U.S. 106, 111 (*Mimms*).) In *Maryland v. Wilson* (1997) 519 U.S. 408, 410 (*Wilson*), the high court extended the *Mimms* rule to the passengers of legally stopped vehicles. The high court observed that "traffic stops may be dangerous encounters," and the "same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger." (*Wilson*, at p. 413.) The court reasoned that the " 'risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.' " (*Id.* at p. 414, quoting *Michigan v. Summers* (1981) 452 U.S. 692, 702–703.) The case for the passenger's personal liberty is "stronger than that for the driver," but as a practical

matter, since the passenger is already stopped, "[t]he only change in their circumstances which will result . . . is that they will be outside of, rather than inside of, the stopped car." (*Wilson*, at p. 414.) The court characterized this additional intrusion as "minimal" given that the presence of "more than one occupant of the vehicle increases the possible sources of harm to the officer." (*Id.* at pp. 413, 415.)

Wilson left open whether an officer may order a passenger of a legally stopped vehicle to remain in the car after the passenger has attempted to exit. (*Wilson*, *supra*, 519 U.S. 408, 415, fn. 3.) McDaniel argues that *Terry v. Ohio* (1968) 392 U.S. 1 governs, requiring "articulable suspicion" to detain the passenger of a lawfully stopped vehicle. (*Id.* at p. 31; see also *id.* at p. 21, fn. omitted [officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop].) Yet the high court in *Arizona v. Johnson* (2009) 555 U.S. 323 (*Johnson*) observed that *Mimms*, *Wilson*, and *Brendlin* "cumulatively portray *Terry*'s application in a traffic-stop setting" and "confirm[ed]" that "the combined thrust" of those three decisions is "that officers who conduct 'routine traffic stop[s]' may 'perform a "patdown" of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.' " (*Johnson*, at pp. 331–332.)

Johnson further elaborated that "[a] lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. [Citation.] An officer's

inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." (*Johnson, supra*, 555 U.S. at p. 333.) Indeed, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' — to address the traffic violation that warranted the stop, [citation] and attend to related safety concerns." (*Rodriguez v. United States* (2015) 575 U.S. 348, 354.) Although "certain unrelated checks" by an officer may be tolerated, absent reasonable suspicion a traffic stop " 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission.' " (*Id.* at p. 354; see *id.* at pp. 354–355.)

McDaniel's detention here complied with high court precedent. Under *Johnson*, his temporary seizure was reasonable for the duration of the stop, and Deputy Sorenson "surely was not constitutionally required to give [McDaniel] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, [the officer] was not permitting a dangerous person to get behind [him]." (*Johnson, supra*, 555 U.S. at p. 334, fn. omitted.) There is no indication that the officers did anything more than that or otherwise prolonged the stop beyond the time reasonably required to complete the mission. Deputy Turner processed the driver for the Vehicle Code violation while Deputy Sorenson stood next to the passenger side of the vehicle with his gun drawn. Because the driver had no license, the deputies decided to impound and inventory the vehicle. The officers then promptly investigated whether McDaniel posed a threat. When Deputy Turner directed his attention to McDaniel, who was still sitting in the

passenger seat, he observed a bulge in his pocket that resembled the shape of a gun. A reasonable officer observing the outline of a gun in a passenger's pocket would perceive an ongoing safety threat that justifies a pat down search. Under these circumstances, admission of the gun was not error.

C. Admission of Kanisha Garner's Hearsay

McDaniel argues that the trial court improperly admitted hearsay evidence that was the basis for the gang enhancement under section 186.22, subdivision (b)(1). He claims that the admission of the hearsay evidence, in addition to being error under the Evidence Code, also violated his rights under the state and federal Constitutions to a fair and reliable capital sentencing hearing and due process.

1. Facts

Before trial, the prosecutor filed a motion in limine to introduce hearsay statements made by George Brooks to his sister Kanisha Garner concerning how he obtained the drugs he sold as a declaration against interest. In support he attached Kanisha's testimony from the trial of Kai Harris. (We refer to the witness by first name to avoid confusion with Elois Garner.) The court held a brief hearing during which defense counsel objected to the admission of the statements on federal constitutional grounds. The court asked whether Brooks's statement was testimonial, and defense counsel conceded that it was "probably not testimonial." The court admitted the statement "over objection."

The Attorney General urges us to find the argument forfeited because defense counsel did not object to Kanisha's testimony at trial. The Attorney General points to our decisions holding that a motion in limine does not always preserve the

issue if the party fails to object once the evidence is offered. (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Because we can resolve McDaniel's claim on the merits, however, we need not decide whether it was forfeited.

The parties also dispute which version of the hearsay statements should be considered: Kanisha's statements from Kai Harris's trial that the prosecutor proffered during the pre-trial motion or the statements that she actually made at trial. We need not decide which statements are the proper focus of review. Although cross-examination of Kanisha at McDaniel's trial yielded a more forceful declaration that Brooks did not intentionally steal the drugs, Kanisha's statements at Harris's trial were substantially similar. Both statements contain the admission that Brooks was dealing drugs. Both statements recount how he obtained the drugs, who gave him the drugs, as well as the fact that he did not pay for them and that Billy Pooh was looking for him.

2. Analysis

A declaration against interest is an exception to the general rule that hearsay statements are inadmissible under California law. (Evid. Code, §§ 1200, subd. (b), 1230.) "Evidence Code section 1230 provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was so far against the declarant's interests, penal or otherwise, that a reasonable person would not have made the statement unless he or she believed it to be true." (*People v. Westerfield* (2019) 6 Cal.5th 632, 704.) The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. (*People v.*

Frierson (1991) 53 Cal.3d 730, 745.) " ' "In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." ' " (*People v. Masters* (2016) 62 Cal.4th 1019, 1055–1056.) We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. (*People v. Grimes* (2016) 1 Cal.5th 698, 711 (*Grimes*).)

McDaniel does not dispute that Brooks's admission that he was dealing drugs was a declaration against his penal interest. He argues that the statements detailing how he obtained the drugs and from whom should be excluded as a collateral statement because they were not against his penal or social interest, and they lack indicia of trustworthiness.

The Attorney General argues that the collateral statements were sufficiently against Brooks's social interest because "Brooks's statement regarding whom he had stolen the drugs from and the circumstances surrounding the theft would most certainly subject Brooks to retaliation by Carey and appellant, and possibly the Bounty Hunters." McDaniel in turn argues that the statements were designed to enhance Brooks's social status because claiming "that he had obtained a few ounces of cocaine from a top level distributor in the projects . . . is clearly suggestive of 'an exercise designed to enhance his prestige.' " (See *People v. Lawley* (2002) 27 Cal.4th 102, 155 (*Lawley*) [a hearsay declarant seeking admission in Aryan Brotherhood who claims to be carrying out the organization's

will in killing victim might have been an exercise designed to enhance prestige].)

Unlike in *Lawley*, where the declarant was seeking full membership in the Aryan Brotherhood, the record does not suggest that Brooks, who was already a Bounty Hunter Blood, was seeking a higher social status in that gang. To the contrary, Kanisha testified that Brooks had recently been released from prison, and Carey "was trying to give him some stuff to make money with out of jail." Her responses to his description of the "incident" in which he did not pay for the drugs indicate that she feared for him and that she expected he would face retaliation from Carey and his associates who had "status in the projects." In light of this evidence, we conclude that the trial court did not abuse its discretion in admitting the statements as a declaration against social interest.

D. *Pitchess* Motion

McDaniel requests that we independently review the sealed record of the trial court discovery rulings pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) in order to determine whether the in camera review process complied with the law.

Before trial, McDaniel filed several *Pitchess* motions seeking to discover documents related to incidents that the prosecution planned to use in the penalty phase. McDaniel initially sought discovery into "complaints of dishonesty, lying, falsifying or fabricating evidence, committing perjury, and the like" for two Los Angeles County Sheriff's Department deputies. The trial court ruled McDaniel had not made a sufficient showing for an in camera hearing.

McDaniel subsequently sought discovery into "incidents of fabrication, lying, assaultive conduct, and excessive force" and "harassment" on the part of 14 Los Angeles Police Department officers. He additionally sought discovery into "assaultive behavior, mistreatment of people in custody, [and] dishonesty" for four Los Angeles County Sheriff's Department deputies. The judge found good cause and, due to the volume of the requests, conducted four in camera hearings.

" 'When a defendant shows good cause for the discovery of information in an officer's personnel records, the trial court must examine the records in camera to determine if any information should be disclosed. [Citation.] The court may not disclose complaints over five years old, conclusions drawn during an investigation, or facts so remote or irrelevant that their disclosure would be of little benefit. [Citations.] *Pitchess* rulings are reviewed for abuse of discretion.' " (*People v. Rivera* (2019) 7 Cal.5th 306, 338 (*Rivera*).) Although Evidence Code section 1045, subdivision (b)(1) excludes from disclosure "[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought," disclosure of such information may still be required under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). (See *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 13–15 & fn. 3.)

In this case, the record includes sealed transcripts of the in camera hearings and copies of all the documents that the trial court reviewed. With respect to Los Angeles County Sheriff's Department records, the custodian of records made all potentially relevant documents available to the trial court for review, was placed under oath at the in camera hearing, and

stated for the record " 'what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion.' " (*Rivera, supra*, 7 Cal.5th at p. 339.) The trial court found information for two deputies that it deemed discoverable. However, because the trial was about to start, the court, instead of disclosing this information to the defense, ruled that the prosecution could not use the incidents that involved these deputies.

With respect to the Los Angeles Police Department records, the custodian of records made available to the trial court for review all potentially relevant information from the relevant *Pitchess* periods and the time since. The record in this case also shows that defense counsel waived any right to have the custodian or the court review any older records that might have been available. Accordingly, this is not an appropriate case to further consider the handling of confidential records more than five years old. (*City of Los Angeles, supra*, 29 Cal.4th at p. 15, fn. 3; see *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 715–722 [resolving issue regarding prosecutors' *Brady* obligations based on the premise that defendants can ensure production of *Brady* material through the *Pitchess* process]; see also *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 55 [discussing *Johnson*'s reasoning].)

In sum, based on our review of these records, we conclude that the trial court examined all the relevant information and otherwise complied with applicable law.

III. GUILT PHASE ISSUE

Sufficiency of the Evidence for Gang Enhancement

McDaniel argues that there was insufficient evidence of collaborative activities or collective organizational structure to support the gang enhancement conviction under section 186.22, subdivision (b)(1).

To prove the existence of a criminal street gang, we explained in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*) that section 186.22, subdivision (f) requires: an " 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses." (*Prunty*, at p. 66.) McDaniel challenges the sufficiency of the prosecution's evidence connecting the predicate offenses to the Bounty Hunter Bloods and the evidence connecting himself to the Bounty Hunter Bloods.

Detective Kenneth Schmidt testified that between 1998 and 2006 he worked as a gang detective in Nickerson Gardens gathering intelligence on the Bounty Hunter Bloods. He described the signs and symbols particular to the Bounty Hunter Bloods, like hats and hand signs with the letter "B" and red clothing. Their turf was "predominately in and around Nickerson Gardens." Primary activities of the gang included "narcotics, street robberies and a lot of crimes involving shootings and murder."

Schmidt identified McDaniel in court and described his gang tattoos: a tattoo across his back that read "Nickerson," and the letters "B" and "H" on the back of his arms that stood for

"Bounty Hunter." McDaniel also had tattoos of "A" and "L" for Ace Line, "C" and "K" for Crip Killer, "BIP" for Blood in Peace, and "BHIP" for Bounty Hunter in Peace.

Schmidt also described a tattoo of "111," which stood for 111th Street, "the north end of the Nickerson Gardens, also known as Ace Line." Ace Line refers to "one of the clicks [*sic*] inside Bounty Hunters itself." Schmidt described the various cliques within the Bounty Hunters in Nickerson Gardens and the lack of "structured hierarchy other than O.G., old gangsters that have been around longer." The cliques "all grow up together. They live together. It could be at anyone [*sic*] point in time, they'll say they're Ace Line or Five Line." Sometimes there was "inner gang fighting" over turf for drug sales. He testified that he had seen William Carey (Billy Pooh), a known narcotics trafficker, with McDaniel on fewer than 10 occasions. He identified Carey, George Brooks, Derek Dillard, Prentice Mills, and Kai Harris as Bounty Hunter Bloods.

Schmidt described predicate crimes committed by Ravon Baylor, who "admitted to [him] that he was a Bounty Hunter Blood," and Lamont Sanchez, whom he "knew as a Bounty Hunter Blood also." This knowledge was based on statements and wiretaps overheard during an investigation for murder and attempted murder. The prosecutor introduced the certified records of Baylor and Sanchez's convictions.

" 'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction.' [Citation.] 'We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted

simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*Rivera*, *supra*, 7 Cal.5th at p. 331.)

McDaniel argues that under *Prunty*, the prosecution had to prove that McDaniel knew Baylor and Sanchez because these two gang members belonged to "an unidentified clique of the umbrella gang the Bounty Hunter Bloods." *Prunty* held that a showing of an associational or organizational connection is required when the prosecution, in seeking to prove that a defendant committed a felony to benefit a given gang, establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets. (*Prunty*, *supra*, 62 Cal.4th at p. 67.)

In this case, there were no allegations that Baylor and Sanchez were members of a subset of the Bounty Hunter Bloods. The prosecution relied on McDaniel's membership in the umbrella organization of the Bounty Hunter Bloods to prove the organizational nexus with the predicate offenses committed by two documented Bounty Hunter Bloods. In closing, the prosecutor argued that the shooting "benefitted the Bounty Hunters because it sent the message of what happens to you when you mess with one of the higher members of the gang." Defense counsel was free to cross-examine the gang expert as to the basis of his classification of the predicate offenders and establish their allegiance to a particular subset of the umbrella organization. McDaniel did not do so. Moreover, Schmidt's testimony established that, whatever their cliques, the Bounty Hunter Bloods gang members "all grow up together," "live together," and "at anyone [*sic*] point in time, they'll say they're Ace Line or Five Line," thus evidencing "fluid or shared membership among the subset or affiliate gangs" (*Prunty*,

supra, 62 Cal.4th at p. 78). And although McDaniel contends that the different cliques of the Bounty Hunter Bloods "feuded" like "Hatfields and McCoys," *Prunty* also observed that "evidence that subset gangs have periodically been at odds does not necessarily preclude treating those gangs collectively under the STEP Act [California Street Terrorism Enforcement and Prevention Act of 1988]." (*Prunty*, at p. 80.) We conclude that substantial evidence supports the enhancements.

To the extent we construe McDaniel's claims to challenge the sufficiency of an organizational nexus between himself and the Bounty Hunter Bloods, we find this claim unpersuasive. Unlike *Prunty*, where the defendant admitted he was a " 'Norte' and a 'Northerner' " but claimed identification with the Detroit Boulevard subset (*Prunty*, *supra*, 62 Cal.4th at p. 68), the evidence that McDaniel was a Bounty Hunter Blood includes more than the fact that he had Bounty Hunter Bloods tattoos. While the Norteños' gang turf encompassed the "broad geographic area" of Sacramento (*Prunty*, at p. 79), the Bounty Hunter Bloods' turf was limited to the area in and around Nickerson Gardens. Schmidt's testimony also revealed an association between McDaniel and Carey, a Bounty Hunter Blood. (See *Prunty*, at p. 73, ["long-term relationships among members of different subsets" and "behavior demonstrating a shared identity with one another or with a larger organization"].) And Schmidt testified that Kai Harris was a Bounty Hunter Blood, and six witnesses placed McDaniel and Harris together on the night of the murders. Angel Hill testified that McDaniel told Harris, "You disappointed me, man," and bragged about the shooting to Carey. From these facts, the jury could have inferred relationships, "shared goals," and the fact that these Bounty Hunter Bloods members " 'back up each

other.' " (*Prunty*, at p. 78.) These facts are sufficient to establish an organizational link between McDaniel and the Bounty Hunter Bloods.

IV. PENALTY PHASE ISSUES

A. Anderson's Cancer Diagnosis

McDaniel contends that the court erred in admitting evidence of Anderson's cancer diagnosis during the penalty phase, in violation of his rights to a fair penalty trial and a reliable penalty determination.

At the penalty trial, Anderson's daughter, Neisha Sanford, testified that her mother was diagnosed with cancer in 1989 and, from that point on, was "back and forth" in treatments like chemotherapy that caused her to lose her hair. Sanford testified that the treatments made her mother ill and "affected her a lot." "She drank, you know, she had on and off ongoing problems with drugs and stuff. Yeah. She dealt with it pretty rough," Sanford said. Anderson had a recurrence of cancer prior to her death and wanted to spend more time with her grandchildren.

Before the start of the penalty retrial, the trial court held an Evidence Code section 402 hearing to determine the admissibility of this evidence and to reconsider its prior ruling that the defense could not introduce evidence that Anderson had drugs in her system at the time of her death. The prosecutor argued that the cancer evidence was relevant to show Anderson was a vulnerable victim, which was a circumstance of the crime under section 190.3, subdivision (a). He argued that the evidence also contextualized the other victim impact testimony and mitigated evidence that Anderson had drugs in her system at the time of her death. The court noted that the cancer evidence and the toxicology report "kind of tie together" and

admitted both, reasoning that "[o]ne approach to take, is throw up my hands and let it all come in and let the jury there sort it out, which will probably be the safest way from an appellate review standpoint."

Under the Eighth Amendment to the federal Constitution, evidence relating to a murder victim's personal characteristics and the impact of the crime on the victim's family is relevant to show the victim's " 'uniqueness as an individual human being' " and thereby "the specific harm caused by the defendant." (*Payne v. Tennessee* (1991) 501 U.S. 808, 823, 825.) The federal Constitution bars this evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair. (*Ibid.*) In California, such evidence is generally admissible as a circumstance of the crime pursuant to section 190.3, subdivision (a). " 'On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.' " (*People v. Edwards* (1991) 54 Cal.3d 787, 836 (*Edwards*), overruled on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176.)

In *People v. Clair* (1992) 2 Cal.4th 629, 671, evidence of a victim's cerebral palsy was a relevant circumstance of the crime because it "could tend to show that defendant mounted and executed his fatal attack without significant resistance — and therefore with unnecessary brutality." Here, by contrast, the shooting occurred moments after Anderson opened the door, and the prosecution did not introduce evidence that linked her cancer with her vulnerability to this type of attack.

The Attorney General argues that this evidence was properly admitted and showed Anderson's uniqueness and the

impact of her death on family members. Yet we need not resolve the issue because even assuming admission of the cancer evidence was error, we find no prejudice. The mere reference to the fact that Anderson was ill at the time of her death was not likely to "divert[] the jury's attention from its proper role or invite[] an irrational, purely subjective response." (*Edwards*, *supra*, 54 Cal.3d at p. 836.) The court had already ruled that the prosecution could not use more inflammatory evidence of Anderson's cancer, such as photos of her undergoing chemotherapy. In light of other circumstances of the murders — such as the fact that Anderson was shot multiple times at close range — and the other acts of violence adduced during the penalty phase, there is no reasonable possibility that the cancer testimony affected the penalty phase verdict. (*People v. Abel* (2012) 53 Cal.4th 891, 939 ["[I]n light of the nature of the crime and the other aggravating factors, including defendant's criminal history, there is no reasonable possibility [victim's mother's testimony] affected the penalty verdict."])

B. Lingering Doubt Instruction

McDaniel next argues that the trial court erred in refusing to instruct the penalty phase jury on lingering doubt. He urges us to reconsider our holdings that a lingering doubt instruction is not constitutionally required. (*People v. Streeter* (2012) 54 Cal.4th 205, 265 (*Streeter*); *People v. Hamilton* (2009) 45 Cal.4th 863, 948 (*Hamilton*).) Even if not constitutionally required in all cases, McDaniel argues that the circumstances warrant an instruction.

During the penalty-phase instructional conference, the trial court considered defense counsel's request for an instruction that the jury "may, however, consider any lingering

doubt you have about the evidence in deciding penalty." The trial court denied the request, explaining "I am not going to give a lingering doubt instruction since this a retrial of the penalty phase. I don't want the jury speculating about the crime." After closing argument, defense counsel proposed two slightly different instructions related to lingering doubt. The trial court again rejected the instruction, explaining that "the problems I have with that is, that this jury did not hear the evidence in the guilt phase and I think it would be inappropriate. [¶] I allowed Mr. Brewer to make somewhat [*sic*] I thought was far ranging comments about the crime. . . ."

McDaniel argues that specific circumstances in this case warranted a lingering doubt instruction. The first circumstance is that he had requested a lingering doubt instruction. But an objection alone does not warrant an instruction. (E.g., *Streeter*, *supra*, 45 Cal.4th at p. 265 [trial court properly refused request for lingering doubt instruction]; *People v. Brown* (2003) 31 Cal.4th 518, 567 [same].)

McDaniel also argues that a lingering doubt instruction is warranted where the penalty phase jury is not the jury that had rendered the guilt verdicts. We have repeatedly held that a lingering doubt instruction for a second penalty-phase jury is not required where that jury is " 'steeped' " in the nuances of the capital crimes. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 326; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1239–1240.) In the penalty phase, the prosecution and defense introduced the guilt-phase eye-witness testimony and ballistics evidence that McDaniel asserts is relevant to lingering doubt. In closing argument, defense counsel emphasized the ballistics evidence from the gun linked to Harris to suggest that McDaniel did not cause the "mayhem" alone. Defense counsel also referenced

inconsistencies and gaps in the testimony of Angel Hill and Derrick Dillard to argue there was insufficient evidence that McDaniel himself created all the "carnage."

Next, McDaniel argues that the trial court repeatedly instructed the jury that it "must accept" the guilt phase jury's finding that McDaniel had personally killed Anderson, which left no room for them to consider lingering doubt. Compounding the error of this instruction, he claims, was the prosecutor's argument that McDaniel had personally killed Anderson, which relied heavily on an appeal to the findings of the prior jury. McDaniel's reliance on *People v. Gay* (2008) 42 Cal.4th 1195, 1224, where the trial court instructed the jury that the defendant's responsibility had been "conclusively proven and that there would be no evidence presented in this case to the contrary," is inapposite. In *Gay*, the error that the trial court's statements compounded was the trial court's limitation of evidence related to lingering doubt in the penalty phase. (*Ibid.*) As discussed above, ample evidence of this lingering doubt was introduced. Moreover, a statement that the jury "must" accept the guilt-phase findings is qualitatively different than a statement that the defendant's guilt has been "conclusively proven" and that no evidence would be introduced to the contrary. (*Ibid.*) Nor did the prosecutor's statements that "the verdicts have significance in this case, ladies and gentleman," preclude the jury from considering lingering doubt. These comments merely conveyed the fact that the prior jury found McDaniel to be the actual shooter.

In sum, the circumstances of this case do not warrant departure from our precedent holding that the lingering doubt instruction is not constitutionally required. (*Streeter*, *supra*, 54 Cal.4th at p. 265; *Hamilton*, *supra*, 45 Cal.4th at p. 948.)

C. California Jury Trial Right

McDaniel contends that Penal Code section 1042 and article I, section 16 of the California Constitution require the penalty phase jury to unanimously determine all "issues of fact," including factually disputed aggravating circumstances. He further contends that these provisions require the penalty phase jury to determine the ultimate penalty verdict beyond a reasonable doubt. Because numerous instances of aggravating evidence, including ten instances of past crimes, were introduced in the penalty phase, McDaniel contends that the failure to instruct on unanimity was prejudicial. McDaniel also argues that the failure to instruct on the reasonable doubt standard requires reversal. We asked the Attorney General for supplemental briefing to address these issues in greater detail, as well as a reply from McDaniel.

In light of our request for supplemental briefing, a number of amici curiae also sought leave to file briefs informing the court of their positions. These amici present a range of perspectives on the relevant issues before us. Some amici focus on the historical understanding of the California Constitution's jury trial right. Others argue that there is no binding precedent because this case presents issues that our cases have not carefully considered. Many amici focus on issues and arguments adjacent to the core questions posed by our briefing order, which specifically concerned Penal Code section 1042 and California Constitution article I, section 16. For example, some arguments are grounded principally in the federal jury trial right, including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. These arguments are distinct from the state law issues before us, and we address McDaniel's arguments related to the federal jury trial right separately below. Several amici,

including Governor Gavin Newsom, advance views of history and social context that link capital punishment with racism. These claims sound in equal protection, due process, or the Eighth Amendment's prohibition on cruel and unusual punishment, and do not bear directly on the specific state law questions before us. Finally, two amici support respondent and argue that neither the California Constitution nor the Penal Code requires unanimity or a reasonable doubt standard at the penalty phase.

With these perspectives before us, we examine (1) whether unanimity is required for factually disputed aggravating circumstances during the penalty phase and (2) whether reasonable doubt applies to the jury's ultimate penalty determination. At oral argument, the Attorney General acknowledged that McDaniel and amici advance "persuasive arguments . . . that imposing" the requirements "that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict . . . would improve our system of capital punishment and make it even more reliable." The Attorney General also noted that "statutory reforms to impose those requirements deserve serious consideration, particularly in light of the important policy concerns that McDaniel and his amici have raised." Nevertheless, the Attorney General contends, state law as it stands does not require jury unanimity on factually disputed aggravating circumstances or application of the reasonable doubt standard to the ultimate penalty determination. Having carefully considered these claims, we conclude that the Attorney General is correct.

1. Unanimity

Article I, section 16 provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., art. I, § 16.) Penal Code section 1042 provides: "Issues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state." Together these provisions codify a right to juror unanimity on issues of fact in criminal trials.

We have previously held that jury unanimity on the existence of aggravating circumstances is not required under the state Constitution. (See, e.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 515.) McDaniel urges us to reconsider this precedent because those cases rested on " 'uncritical' analysis" of the state jury trial right and did not discuss the applicability of section 1042. Various amici likewise suggest that there is no binding precedent on this issue or that we should depart from any such precedent. McDaniel appears correct that these decisions, while speaking generally of California constitutional provisions, did not rest on any considered analysis of our state constitutional or statutory guarantee. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 598 [summarily rejecting challenges under "the Sixth Amendment's jury trial clause, the Eighth Amendment's cruel and unusual punishment clause, the Fourteenth Amendment's due process and equal protection clauses, and the analogous provisions of, apparently, article I, sections 7, 15, 16, and 17"], disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758.) McDaniel also observes that although our decisions have primarily considered

application of the federal Sixth Amendment jury trial right to our capital punishment scheme (see, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16), the federal right is not coextensive with the state jury trial right (see *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1241).

We are mindful that McDaniel's "state constitutional . . . claim cannot be resolved by a mechanical invocation of current federal precedent." (*People v. Chavez* (1980) 26 Cal.3d 334, 352; see also *People v. Ramos* (1984) 37 Cal.3d 136, 153 [death penalty instruction was "incompatible with this [state constitutional] guarantee of 'fundamental fairness' " although it did not violate federal due process principles]; *People v. Engert* (1982) 31 Cal.3d 797, 805 (*Engert*) [former death penalty statute violates state due process clause although it likely did not violate Eighth Amendment].) As we explain, however, McDaniel does not persuade us that there is an independent state law principle grounded in Article I, Section 16 requiring unanimity among the penalty jury in order to find the existence of aggravating circumstances in the face of disputed evidence.

As an initial matter, we note that although McDaniel raises a question of state constitutional and statutory law with applicability to a wide range of factual determinations beyond the context of capital sentencing, his arguments also rest to a significant degree on the analytical underpinnings of the United States Supreme Court's Sixth Amendment jurisprudence. *Apprendi* and its progeny fundamentally concern sentencing and require any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be found by a unanimous jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at

p. 490.) The statutory maximum in this context means the maximum sentence permissible based solely on the facts reflected in the jury's verdict or admitted by the defendant. (*Blakely v. Washington* (2004) 542 U.S. 296, 303.)

We have rejected arguments that the Sixth Amendment requires unanimity with respect to aggravating circumstances because "the jury as a whole need not find any one aggravating factor to exist" under the statute and the penalty determination "is a free weighing of all the factors relating to the defendant's culpability." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; see *People v. Capers* (2019) 7 Cal.5th 989, 1014; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235.) Even if we were to revisit that conclusion, it is a discrete Sixth Amendment issue, not a general issue concerning the scope of the jury trial right with implications beyond the sentencing context. (See, e.g., Evid. Code, §§ 1101, subds. (b) & (c), 1108, subds. (a) & (b).) And we have not adopted *Apprendi*'s reasoning as our own independent understanding of article I, section 16 of the California Constitution, nor has McDaniel asked us to.

Separate and apart from Sixth Amendment principles, McDaniel argues that aggravating factors — in particular, factually disputed evidence of past criminal acts under factor (b) or factor (c) of section 190.3 — are "issues of fact" within the meaning of section 1042. Courts have described the state constitutional guarantee as attaching to "the trial of issues that are made by the pleadings." (*Dale v. City Court of City of Merced* (1951) 105 Cal.App.2d 602, 607; see also *Koppikus v. State Capitol Commissioners* (1860) 16 Cal. 249, 254 [state jury trial right is a "right . . . which can only be claimed in actions at law, or criminal actions, where an issue of fact is made by the pleadings"].) Section 1041 specifies that an "issue of fact" arises

"[u]pon a plea of not guilty." McDaniel relies on section 190.3, which states that "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." He argues that "[t]o the extent that aggravating factors and the punishment of death are required to be raised in pleadings," the aggravating evidence is an "issue of fact" within the meaning of section 1042. In response, the Attorney General argues that because a defendant cannot plead to a particular sentence during the penalty phase, the notice of aggravating circumstances is not within the scope of sections 1041 and 1042.

The focus of a capital penalty proceeding differs from the guilt trial. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1136 ["Choosing between the death penalty and life imprisonment without possibility of parole is not akin to 'the usual fact-finding process' "].) In the guilt trial, the statutory special circumstance establishes a factual predicate of the capital offense. We have characterized the statutory special circumstance as the eligibility factor that "narrow[s] the class of death-eligible first degree murderers." (*People v. Sapp* (2003) 31 Cal.4th 240, 287.) The "fact or set of facts" that undergird the special circumstance must be "found beyond a reasonable doubt by a unanimous verdict" in order to "change[] the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or life imprisonment without possibility of parole." (*Engert*, *supra*, 31 Cal.3d at p. 803, fn. omitted; see § 190.4, subd. (a).)

In the penalty trial, aggravating and mitigating circumstances aid the jury in selecting the appropriate penalty. After a true finding on the special circumstance, the penalty

phase jury must determine "whether the aggravating circumstances, as defined by California's death penalty law (§ 190.3), so substantially outweigh those in mitigation as to call for the penalty of death, rather than life without parole." (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) Aggravating circumstances, such as section 190.3, factor (b) or factor (c) evidence, "enable the jury to make an individualized assessment of the character and history of a defendant to determine the nature of the punishment to be imposed." (*People v. Grant* (1988) 45 Cal.3d 829, 851.)

Although section 190.3 requires notice of aggravating circumstances, this notice does not establish that an aggravating circumstance comes within the meaning of section 1041 or 1042. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 799 [contrasting notice requirement of section 190.3 with offenses charged in an information], abrogated on other grounds in *Scott, supra*, 61 Cal.4th 363.) As a matter of state law, the factual assessments for aggravating circumstances at the penalty phase are akin to the determinations jurors make in considering prior uncharged crimes in the guilt phase of a trial. (Evid. Code, § 1101, subd. (b) [evidence of prior misconduct relevant in determining motive, opportunity, and intent]; *id.*, subd. (c) [prior misconduct relevant for impeachment].) In some circumstances, admission of these prior acts also requires notice. For example, when a criminal defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense may be admissible under certain circumstances provided that notice is served on the defendant before trial. (Evid. Code, § 1108, subds. (a) & (b); see also § 1054.7.) Jury unanimity has not been held to be a prerequisite to individual jurors considering this evidence (see CALCRIM No. 1191A); the

mere requirement of notice, without more, does not transform these prior criminal acts into "issues of fact" within the meaning of sections 1041 and 1042.

Moreover, jury unanimity does not normally extend to subsidiary or foundational factual issues in other contexts. As McDaniel observes, the jury in a typical guilt trial must be unanimous in its verdict and must agree on the specific crime of which the defendant is guilty. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*); *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) But the jury need not unanimously agree on subsidiary factual issues, such as specific details of the act. (See *Russo*, at p. 1132 ["[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or . . . the 'theory' whereby the defendant is guilty."]; *People v. Mickle* (1991) 54 Cal.3d 140, 178, fn. omitted ["[T]he unanimity rule does not extend to the minute details of how a single, agreed-upon act was committed."].) We have said that aggravating factors for purposes of section 190.3 are such "foundational" matters that do not require jury unanimity. (*People v. Miranda* (1987) 44 Cal.3d 57, 99 ["Generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding."], disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; *People v. Hines* (1997) 15 Cal.4th 997, 1067 ["Jury unanimity on such 'foundational' matters is not required."].) We see no basis in section 1042 or article I, section 16 for the unanimity rule that McDaniel urges here.

McDaniel focuses specifically on factor (b) and factor (c) evidence and, relying on *Russo*, argues that because these

factors require consideration of multiple discrete crimes, they implicate section 1042. We explained in *Russo* that in a standard criminal guilt trial, "when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Russo, supra*, 25 Cal.4th at p. 1132.) To hold otherwise would create a " 'danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*Ibid.*) But the jury's consideration of factor (b) or factor (c) evidence in a capital penalty trial does not present the same concern. The finding of a prior offense under factor (b) or factor (c) alone is not sufficient under the statute for the jury to return a death verdict, nor does it automatically lead to such a result. Accordingly, neither factor (b) nor factor (c) evidence implicates section 1042.

This is not to say there are no limits on the introduction of aggravating evidence. The creation in 1957 of a bifurcated guilt and penalty trial in capital cases "broaden[ed] the scope of relevant evidence admissible on the issue of penalty," including evidence of other crimes, provided that its admission was consistent with other evidentiary rules. (*People v. Purvis* (1959) 52 Cal.2d 871, 883, disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2, 648–649 (*Morse*); see *Purvis*, at pp. 883–884 [evidence of other crimes cannot be proven with hearsay]; *People v. Hamilton* (1963) 60 Cal.2d 105, 134, disapproved on another ground in *Morse*, at pp. 637, fn. 2, 648–649 and *People v. Daniels* (1991) 52 Cal.3d 815, 866 ["flimsy, speculative testimony should not have been admitted" in penalty trial].) As evidence of past crimes became increasingly integrated into the penalty phase, this court has

expressed concerns that "in the penalty trial the same safeguards should be accorded a defendant as those which protect him in the trial in which guilt is established." (*People v. Terry* (1964) 61 Cal.2d 137, 149, fn. 8.) Evidence of prior criminal acts "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk* (1965) 63 Cal.2d 443, 450 (*Polk*).)

Recognizing the need for safeguards in the capital sentencing context, our cases have departed from the rule, applicable at guilt trials, that the preponderance of the evidence standard generally applies to proof of prior crimes before the jury may consider them. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 381; see also, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 1346 [in a guilt trial (1) the jury cannot "consider the evidence of defendant's prior crimes unless it found those crimes proven by a preponderance of the evidence; (2) it [can]not find defendant guilty unless the prosecution proved the charged offenses beyond a reasonable doubt; and (3) if the evidence of prior crimes was necessary to prove an essential fact, the jury [can]not rely upon that evidence unless the prosecution proved the prior crimes beyond a reasonable doubt"].) At capital penalty trials, before jurors can consider evidence of past crimes as an aggravating factor, "they must be convinced beyond a reasonable doubt" that the defendant committed the crime. (*Polk*, *supra*, 63 Cal.2d at p. 451; see *People v. McClellan* (1969) 71 Cal.2d 793, 804–806.) Relying on this precedent, we have read the same requirement into subsequent iterations of the death penalty statute. (See *People v. Robertson* (1982) 33 Cal.3d 21, 53–55 [applying this rule to the 1977 death penalty statute]; *Miranda*, *supra*, 44 Cal.3d at p. 97 [current death penalty statute]; see also *People v. Williams*

(2010) 49 Cal.4th 405, 458–459 [applying rule to factor (b) evidence].) We have since emphasized that "the rule is an evidentiary one and is not constitutionally mandated." (*Miranda*, at p. 98.)

McDaniel does not press a due process justification for the unanimity requirement, nor does he offer an evidentiary justification that would require unanimity on aggravating evidence. When trial courts have given a unanimity instruction on aggravating circumstances, we have said that requiring "a unanimous special finding in that regard actually provided greater protection than that to which defendant was entitled under the statute." (*People v. Caro* (1988) 46 Cal.3d 1035, 1057.) "As to the possibility that jurors who were not convinced of defendant's guilt in the uncharged crimes might have been influenced by the prejudicial effect of the evidence, such a risk is inherent in the introduction of any evidence of prior criminal activity under factor (b), and . . . 'the reasonable doubt standard ensures reliability.' " (*Ibid.*)

To the extent some amici argue that a constitutional right to unanimity also attaches to the ultimate penalty determination, we express no view on that issue as McDaniel does not advance this argument and the statute already contains such a requirement. (§ 190.4, subd. (b).)

In sum, while this court has previously imposed additional reliability requirements on the jury's consideration of aggravating evidence in the penalty phase, we hold that neither article I, section 16 of the California Constitution nor Penal Code section 1042 provides a basis to require unanimity in the jury's determination of factually disputed aggravating circumstances.

2. Reasonable Doubt

McDaniel also asks us to reconsider our prior holding that the state Constitution does not require the degree of certainty attached to the jury's ultimate decision to impose the death penalty to be " 'beyond a reasonable doubt.' " (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 515.) His arguments also seem to require the jury to be instructed that in order to choose a death verdict, it must find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt; various amici explicitly argue as much. McDaniel is correct that our prior decisions have not fully considered the state jury trial right or section 1042 in this context.

Pointing to *People v. Hall* (1926) 199 Cal. 451, McDaniel and various amici argue that the state jury trial right was historically understood to apply to the capital sentencing decision as a constitutional matter. *Hall* said: "Under the law the verdict in such a case must be the result of the unanimous agreement of the jurors and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements; first, a finding that the accused is guilty of murder in the first degree, and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion." (*Id.* at p. 456.) There, the jury returned a guilty verdict but made no penalty determination and specifically disclosed in its verdict that it could not reach a "unanimous agreement as to degree of punishment." (*Id.* at p. 453.) The trial court nonetheless entered judgment and imposed the death penalty. We viewed this as error and reasoned that "[i]n legal effect th[e jury trial] right was denied to the defendant in the case at bar," rejecting the government's argument that "the defect in the form of the

verdict constitute[d] no more than 'matter of procedure.' " (*Id.* at pp. 457–458.)

For further support, McDaniel points to *People v. Green* (1956) 47 Cal.2d 209 (*Green*), which overruled a line of our cases beginning with *People v. Welch* (1874) 49 Cal. 174 (*Welch*), and to Justice Schauer's dissenting opinion in *People v. Williams* (1948) 32 Cal.2d 78, 89–100, 101–104 (dis. opn. of Schauer, J.)). In *Welch*, a case predating *Hall*, this court interpreted the language in section 190 "as if it read" that a defendant convicted of first degree murder " '[s]hall suffer death, or (in the discretion of the jury) imprisonment in the State prison for life.' " (*Welch*, at p. 180.) *Welch* understood the jury's discretion to be "restricted" such that it "is to be employed only where the jury is satisfied that the lighter penalty should be imposed," and thus the lesser punishment of life imprisonment could be imposed only where the jury unanimously found it appropriate. (*Id.* at p. 179.) Under *Welch*, jury unanimity as to a judgment of death was not required, and a jury verdict of first degree murder that was silent as to punishment would result in a sentence of death.

After *Welch*, a line of our cases criticized its holding yet refused to find error in jury instructions following it. (*Green*, *supra*, 47 Cal.2d at pp. 227–229 [collecting cases].) In some cases, however, we adopted a different construction of section 190, holding that "the Legislature 'confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect.' " (*Id.* at p. 229, quoting *People v. Leary* (1895), 105 Cal. 486, 496). *Hall* partially receded from *Welch*'s holding and required jury unanimity for a sentence of death to be imposed, at least where the verdict was not completely silent on the matter. (*Hall*, *supra*, 199 Cal. at

pp. 456–458.) Yet it was not until 1956 that this court formally overruled *Welch* and its progeny by holding in *Green* that section 190 "indicates no preference whatsoever as between the two equally fixed alternatives of penalty" and that it would be "error to instruct contrary to the terms of the statute." (*Green*, at pp. 231–232.)

McDaniel points out that *Green* stated "it is for the *jury* — not the law — to fix the penalty" (*Green*, *supra*, 47 Cal.2d at p. 224) and cited with approval language from the high court's opinion in *Andres v. United States* (1948) 333 U.S. 740 that the Sixth Amendment's "requirement of unanimity extends to all issues — character or degree of the crime, guilt and punishment — which are left to the jury." (*Green*, at p. 220, quoting *Andres*, at p. 748.) Moreover, Justice Schauer's dissent in *Williams* explained his view that the state jury trial right "and the statutes (Pen. Code, §§ 190, 1042, 1157) give to a defendant charged with murder the right, where he does not waive a jury trial, to have the jury determine not only the question of his guilt or innocence and the question of the class and degree of the offense, but also, if the offense be murder of the first degree, the penalty to be imposed. The law does not give any preference to either penalty but leaves such selection solely to the jury, and it requires that the jury be unanimous in its determination of the penalty as it must be unanimous on the questions of guilt and class or degree of the crime." (*Williams*, *supra*, 32 Cal.2d at p. 102 (dis. opn. of Schauer, J.).)

Yet none of these authorities specifically discuss a reasonable doubt standard for the capital penalty determination; at most, they could support the conclusion that a defendant has the right to a determination by a unanimous jury. Because section 190.4, subdivision (b) already contains

such a requirement, we need not reach this question as a constitutional matter. If anything, the authorities cited by McDaniel and amici suggest that the ultimate penalty determination is entirely within the discretion of the jury, without any preference for either of the two available punishments, not necessarily that the jury may choose the death penalty only if it believes the punishment is warranted beyond a reasonable doubt.

The crux of McDaniel's argument is that article I, section 16 encompasses the protections of the common law right to a jury trial, including the right to factual findings by a jury beyond a reasonable doubt, and that article I, section 16 applies to the capital penalty determination, thereby requiring the jury to select the appropriate punishment using a reasonable doubt standard. For present purposes, we assume without deciding that McDaniel's foundational premise is correct — i.e., that the right to a reasonable doubt standard governing factfinding by a jury in criminal cases is secured by article I, section 16 and not solely grounded in due process (see *In re Winship* (1970) 397 U.S. 358, 364; *People v. Flood* (1998) 18 Cal.4th 470, 481). Even so, we conclude that the jury's ultimate decision selecting the penalty in a capital case does not constitute "factfinding" in any relevant sense.

We have consistently described the penalty jury's sentencing selection in terms that eschew a traditional factual inquiry. We have emphasized that the penalty verdict " 'constitute[s] a single fundamentally normative assessment' " (*People v. Duff* (2014) 58 Cal.4th 527, 569) and "is inherently normative, not factual" (*People v. Lightsey* (2012) 54 Cal.4th 668, 731). Indeed, we have rejected applying the harmlessness standard under *People v. Watson* (1956) 46 Cal.2d 818 because

a "capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also — and most important — to render an individualized, *normative* determination about the penalty appropriate for the particular defendant — i.e., whether he should live or die." (*People v. Brown* (1988) 46 Cal.3d 432, 448; see also *Watson*, at p. 836.)

We also have cited *Kansas v. Carr* (2016) 577 U.S. 108 to support our conclusion that capital "sentencing is an inherently moral and normative function." (*People v. Winbush* (2017) 2 Cal.5th 402, 489.) *Carr* considered whether "the Eighth Amendment requires capital-sentencing courts . . . 'to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.' " (*Carr* at pp. 118–119.) In rejecting such a requirement, the high court explained that whereas the statutory "facts justifying death . . . either did or did not exist[,] . . . [w]hether mitigation exists . . . is largely a judgment call (or perhaps a value call)" and "what one juror might consider mitigating another might not." (*Ibid.*)

As *Carr* and our precedent explain, the jury's selection of the penalty in a capital case under existing law is not a traditional factfinding inquiry. Even if the jury trial right under article I, section 16 is applicable to the penalty phase of a capital trial and encompasses the right to factual findings beyond a reasonable doubt, we do not understand it to require the penalty phase jury to select the appropriate punishment beyond a reasonable doubt.

As McDaniel and various amici note, at one time during the era of unitary guilt and penalty trials, our court expressed a preference for a reasonable doubt standard for the penalty

verdict. In *People v. Cancino* (1937) 10 Cal.2d 223 (*Cancino*), the court reasoned that "it would be more satisfactory in death penalty cases if the court would instruct the jurors that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser." (*Id.* at p. 230.) *Cancino* nevertheless upheld an instruction that omitted a burden of proof for the penalty verdict; the court found dispositive the fact that the instructions "fully informed" the jury "as to its discretion." (*Ibid.*)

In *People v. Perry* (1925) 195 Cal. 623 (*Perry*), the trial court apparently gave the jury three instructions related to the penalty determination. The defendant challenged one instruction that, consistent with *Welch*, said (1) "while the law vests [the jury] with a discretion as to whether a defendant shall suffer death or confinement in the state prison for life, this discretion is not an arbitrary one, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed." (*Id.* at p. 640.) This was given alongside two other instructions: (2) " '[i]f the jury should be in doubt as to the proper penalty to inflict the jury should resolve that doubt in favor of the defendant and fix the lesser penalty, that is, confinement in the state prison for life,' " and (3) "[i]n the exercise of your discretion as to which punishment shall be inflicted, you are entirely free to act according to your own judgment." (*Ibid.*) We stated the law as follows: "It is the jury's right and duty to consider and weigh all the facts and circumstances attending the commission of the offense, and from these and such reasons as may appear to it upon a consideration of the whole situation, determine whether or not in the exercise of its discretion, life imprisonment should be imposed rather than the infliction of the death penalty." (*Ibid.*)

We ultimately held in *Perry* that there was no error with the challenged instruction and that if "there was any vice . . . it was rendered harmless" by the third instruction quoted above. (*Ibid.*)

As McDaniel notes, *People v. Coleman* (1942) 20 Cal.2d 399 characterized *Perry* as having "held" that "if any doubt be engendered as to the punishment to be imposed, the jury should not impose the extreme penalty." (*Id.* at p. 406.) But this was not *Perry*'s holding, and we have instead cited *Perry* repeatedly for the proposition that it is the jury's "duty to consider and weigh all the facts and circumstances" and then to "exercise . . . its discretion" in selecting the penalty. (*Perry*, *supra*, 195 Cal. at p. 640; see *Hall*, *supra*, 199 Cal. at p. 455; *People v. Leong Fook* (1928) 206 Cal. 64, 69; *People v. Pantages* (1931) 212 Cal. 237, 271; see also *Green*, *supra*, 47 Cal.2d at p. 227 [describing *Perry* as a case where we "affirmed judgments imposing the death sentence where instructions based on the *Welch* decision . . . were given" but "disapproved the giving of such instructions"].) Today CALCRIM No. 766 and CALJIC No. 8.88 apprise the jury of its sentencing discretion. (See CALCRIM No. 766 ["Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances."]; CALJIC No. 8.88 ["To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."]; *People v. Leon* (2020) 8 Cal.5th 831, 849–850.)

Contrary to McDaniel's contention, *Cancino* and *Perry* neither hold nor suggest there is a constitutional requirement that a jury make the capital penalty determination using a

reasonable doubt standard. Those cases, decided in the context of unitary capital trials, found that giving such an instruction was not error under the statutes then in force when accompanied by an instruction explaining the jury's ultimate discretion in selecting the appropriate penalty. It is not clear that decisions like *Cancino* and *Perry* have any further significance to the constitutional question at hand. Rather, we think those cases must be understood in the context of this court's conflicting decisions regarding the jury's role in capital sentencing under section 190 following *Welch* and before that decision was finally overruled in *Green*. *Green* made clear that "[t]he law . . . indicates no preference whatsoever as between the two equally fixed alternatives of penalty." (*Green*, *supra*, 47 Cal.2d at p. 231.) And following *Green*, this court repeatedly rejected the argument that a reasonable doubt instruction as to punishment is required. (See, e.g., *People v. Purvis* (1961) 56 Cal.2d 93, 96 (*Purvis*), disapproved on another ground in *Morse*, *supra*, 60 Cal.2d at pp. 637, fn. 2, 648–649.)

McDaniel and amici also point to language in the 1957 death penalty statute, which bifurcated the guilt and penalty trials for the first time. That statute provided that "determination of the penalty . . . shall be in the discretion of the . . . jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict." (Stats. 1957, ch. 1968, § 2, p. 3510.) They argue that this statutory language treats the "determination of the penalty" as an "issue of fact" within the meaning of section 1042 and thus the reasonable doubt standard, as required by article I, section 16, applies.

But, as explained, the penalty jury's ultimate sentencing decision is not a traditional factual determination in any

relevant sense. Moreover, whatever the Legislature understood "issue of fact" to mean within the context of the 1957 death penalty statute does not control the meaning of "issue of fact" in section 1042, which far predates the 1957 law. Section 1042 was first enacted in 1872, when the death penalty was hardly an obscure or hidden feature for felony convictions. As amicus curiae Criminal Justice Legal Foundation noted in its brief, "Nearly all felonies were nominally capital offenses at common law. (See 4 W. Blackstone, [Commentaries (1st ed. 1769)] p. 98.)" (See *Tennessee v. Garner* (1985) 471 U.S. 1, 13 & fn. 11.) Section 1042's companion provision, section 1041, was also enacted in 1872 and specifies circumstances that give rise to an issue of fact under section 1042: "An issue of fact arises: [¶] 1. Upon a plea of not guilty. [¶] 2. Upon a plea of a former conviction or acquittal of the same offense. [¶] 3. Upon a plea of once in jeopardy. [¶] 4. Upon a plea of not guilty by reason of insanity." (§ 1041.) Even if section 1041 does not provide an exhaustive list, it is notable that the penalty determination is not an enumerated "issue of fact." Indeed, when section 1041 was last amended by the Legislature in 1949, California law specified the death penalty as an appropriate punishment for six separate crimes, ranging from first degree murder to perjury in a capital case and kidnapping for ransom. (See Subcom. of the Judiciary Com., Rep. on Problems of the Death Penalty and its Administration in California (Jan. 18, 1957) Assembly Interim Committee Reports 1955–1957, Vol. 20, no. 3, p. 22.)

Our early construction of the 1957 statute further confirms that the penalty determination is not an "issue of fact" under section 1042. The 1957 law set forth three phases of a capital trial with separate determinations: guilt, penalty, and sanity at the time of the commission of the offense. Consistent

with then-existing law, the penalty phase included an exemption from the death penalty for "any person who was under the age of 18 years at the time of the commission of the crime" (Stats. 1957, ch. 1968, § 2, p. 3510), which previously had been construed to "impose[] the burden of proof by a preponderance of evidence on the defendant . . . on the issue of under-age" (*People v. Ellis* (1929) 206 Cal. 353, 358). This structure appeared to recognize that burdens of proof can apply to certain determinations in the post-guilt phases, such as minority or insanity. But the statute did not specify a burden of proof for the penalty determination itself. To the contrary, the statute, consistent with *Green*, *Perry*, and *Hall*, entrusted the penalty determination entirely to "the discretion of the court or jury." (Stats. 1957, ch. 1968, § 2, p. 3510.) And, for whatever reason, the Legislature and the electorate chose not to retain this reference to "issue of fact" in subsequent iterations of the death penalty scheme.

Shortly after enactment of the 1957 statute, Justice Traynor, writing for the court, reiterated that "the jury has absolute discretion in fixing the penalty and is not required to prefer one penalty over another" and upheld the trial court's rejection of an instruction "that if [the jury] entertained a reasonable doubt as to which of the penalties to impose, the lesser penalty should be given." (*Purvis*, *supra*, 56 Cal.2d at p. 96, fn. omitted.) Despite the language in the 1957 statute now relied on by McDaniel and amici, *Purvis* rejected the argument that a reasonable doubt standard applies to the penalty determination and gave no indication that section 1042 had any bearing on the matter. Instead, *Purvis* construed the 1957 statute in a manner consistent with *Green*'s holding that the prior version of section 190 "indicate[d] no preference

whatsoever as between the two equally fixed alternatives of penalty." (*Green*, *supra*, 47 Cal.2d at p. 231.) Although *Purvis*'s discussion of this issue was brief, this court reaffirmed and applied *Purvis*'s holding in several cases. (See *In re Anderson* (1968) 69 Cal.2d 613, 622–623; *People v. Smith* (1966) 63 Cal.2d 779, 795; *People v. Hines* (1964) 61 Cal.2d 164, 173, disapproved of on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40; *People v. Hamilton*, *supra*, 60 Cal.2d at p. 134; *People v. Harrison* (1963) 59 Cal.2d 622, 633–634; *People v. Howk* (1961) 56 Cal.2d 687, 699.) We see no basis in section 1042 or in the 1957 statute or its legislative history to revisit *Purvis*'s holding, and we have rejected arguments that the current capital punishment scheme statutorily requires a reasonable doubt standard at the penalty phase. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1278.)

McDaniel also notes that Colorado, New Jersey, Nebraska, and Utah have read the reasonable doubt standard into their death penalty statutes based in part on concerns grounded in due process, the Eighth Amendment, and fundamental fairness. As the New Jersey Supreme Court explained, "[i]f anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt." (*State v. Biegenwald* (N.J. 1987) 524 A.2d 130, 156; see also *People v. Tenneson* (Colo. 1990) 788 P.2d 786, 797 ["[T]he jury still must be convinced beyond a reasonable doubt that the defendant should be sentenced to death."]; *State v. Wood* (Utah 1982) 648 P.2d 71, 83 ["Furthermore, in our view, the reasonable doubt standard also strikes the best balance between the

interests of the state and of the individual for most of the reasons stated in *In re Winship* [(1970)] 397 U.S. 358"]; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888, disapproved on another ground in *State v. Reeves* (Neb. 1990) 453 N.W.2d 359 [reading reasonable doubt burden into silent statute].) At least one state has imposed this requirement for the penalty verdict by statute. (Ark. Code Ann. § 5-4-603, subd. (a)(3).)

To the extent the Attorney General argues that implementation of the reasonable doubt standard and jury unanimity with regard to the ultimate penalty verdict would be unworkable, practice from other states suggests otherwise. Moreover, as noted, the Attorney General has acknowledged that requiring the penalty jury to "unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict . . . would improve our system of capital punishment and make it even more reliable," and that statutory reforms "deserve serious consideration." Nevertheless, to date our Legislature and electorate have not imposed such requirements by statute, and the out-of-state holdings above are based at least in part on due process or Eighth Amendment grounds. McDaniel does not ask us to reconsider our precedent that has concluded otherwise as a matter of due process.

In sum, having examined our case law and relevant history, we are unable to infer from the jury trial guarantee in article I, section 16 of the California Constitution or Penal Code section 1042 a requirement of certainty beyond a reasonable doubt for the ultimate penalty verdict.

D. Additional Challenges to the Death Penalty

McDaniel raises a number of challenges to the constitutionality of California's death penalty statute that we have previously rejected, and we decline to revisit those holdings in this case.

"Penal Code sections 190.2 and 190.3 are not impermissibly broad, and factor (a) of Penal Code section 190.3 does not make imposition of the death penalty arbitrary and capricious." (*People v. Sánchez* (2016) 63 Cal.4th 411, 487 (*Sánchez*).)

As described above, " '[e]xcept for evidence of other crimes and prior convictions, jurors need not find aggravating factors true beyond a reasonable doubt; no instruction on burden of proof is needed; the jury need not achieve unanimity except for the verdict itself; and written findings are not required.' " (*Sánchez*, *supra*, 63 Cal.4th at p. 487.)

Likewise, we have held that the high court's decision in *Hurst v. Florida* (2016) 577 U.S. 92 does not alter our conclusion under the federal Constitution or under the Sixth Amendment about the burden of proof or unanimity regarding aggravating circumstances, the weighing of aggravating and mitigating circumstances, or the ultimate penalty determination. (*People v. Capers*, *supra*, 7 Cal.5th at p. 1014; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235.) And we have concluded that *Hurst* does not cause us to reconsider our holdings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi*, *supra*, 530 U.S. 466, or that the imposition of the death penalty does not require factual findings within the meaning of *Ring v. Arizona* (2002) 536 U.S. 584. (*People v. Henriquez* (2017) 4 Cal.5th 1, 46.) As McDaniel

acknowledges, neither *Ring* nor *Hurst* decided the standard of proof that applies to the ultimate weighing consideration.

"Use in the sentencing factors of such adjectives as 'extreme' (§ 190.3, factors (d), (g)) and 'substantial' (*id.*, factor (g)) does not act as a barrier to the consideration of mitigating evidence in violation of the federal Constitution." (*People v. Avila* (2006) 38 Cal.4th 491, 614–615.) "By advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' " CALJIC No. 8.88 "clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias* (1996) 13 Cal.4th 92, 171.) "[T]he phrase ' "so substantial" ' in CALJIC No. 8.88 is not unconstitutionally vague." (*People v. Henriquez, supra*, 4 Cal.5th at p. 46.)

A trial court need not delete inapplicable statutory sentencing factors in CAJIC No. 8.85 from the jury instructions (*People v. Cook* (2006) 39 Cal.4th 566, 610) or instruct that the jury can consider certain statutory factors only in mitigation. (*People v. Beck and Cruz* (2019) 8 Cal.5th 548, 671 (*Beck and Cruz*).)

CALJIC 8.88 "clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse . . . ." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.)

We decline to reconsider our precedent holding that a jury cannot consider sympathy for a defendant's family in mitigation. (*People v. Rices* (2017) 4 Cal.5th 49, 88; *People v. Ochoa* (1998) 19 Cal.4th 353, 456.) The trial court need not instruct that there

is a presumption of life. (*Beck and Cruz, supra*, 8 Cal.5th at p. 670.)

"The absence of a requirement of intercase proportionality review does not violate the Eighth Amendment." (*People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 929.) "The California sentencing scheme does not violate the equal protection clause of the Fourteenth Amendment by denying capital defendants certain procedural safeguards afforded to noncapital defendants." (*Ibid.*) "California law does not violate international norms, and thus contravene the Eighth and Fourteenth Amendments, by imposing the death penalty as regular punishment for substantial numbers of crimes." (*Ibid.*)

E. Cumulative Error

McDaniel contends that the cumulative effect of errors at the guilt and penalty phase requires reversal. While we assumed that admission of Anderson's cancer was error, we concluded there was no reasonable possibility that the victim impact testimony affected the verdict. There are no other errors to cumulate.

CONCLUSION

We affirm the judgment.

LIU, J.

We Concur:

CANTIL-SAKAUYE, C. J.
CORRIGAN, J.
CUÉLLAR, J.
KRUGER, J.
GROBAN, J.
JENKINS, J.

PEOPLE v. McDANIEL

S171393

Concurring Opinion by Justice Liu

Over the years, this court has repeatedly rejected the claim that California's death penalty scheme violates the jury trial right guaranteed by the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and related cases. We do so again today, adhering to precedent. (Maj. opn., *ante*, at pp. 76–77.) I write separately, however, to express doubts about the way our case law has resolved a key facet of this claim. There is a serious question whether our capital sentencing scheme is unconstitutional in light of *Apprendi*, and I have come to believe the issue merits reexamination by this court and other responsible officials.

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) This holding spawned a major shift in Sixth Amendment jurisprudence, and the high court has been continually elaborating its far-reaching ramifications over the past 20 years. (See *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*); *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *U.S. v. Booker* (2005) 543 U.S. 220 (*Booker*); *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*); *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*); *Hurst v. Florida* (2016) 577 U.S. 92

(*Hurst*).) Many decisions, including several of the high court's own precedents, have been overruled in *Apprendi*'s wake.

Our case law has held that the *Apprendi* rule does not disturb California's death penalty scheme. Yet our decisions in this area consist of brief analyses that have largely addressed high court opinions one by one as they have appeared on the books. In my view, we have not fully grappled with the analytical underpinnings of the *Apprendi* rule and the totality of the high court's 20-year line of decisions.

The high court has made clear that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 542 U.S. at p. 303, italics in original.) Our precedent has repeatedly asserted that a defendant becomes eligible for the death penalty upon a conviction for first degree murder and a jury's true finding of one or more special circumstances. (See, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 589–590, fn. 14 (*Anderson*) ["[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense . . . ."]; *People v. Ochoa* (2001) 26 Cal.4th 398, 454 (*Ochoa*) ["[O]nce a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death. . . . Accordingly, *Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder."].)

But this assertion, in the context of *Apprendi*, appears incorrect. Under our death penalty scheme, "the maximum

sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Blakely*, *supra*, 542 U.S. at p. 303) upon a conviction for first degree murder and special circumstance true finding — with nothing more — is life imprisonment without parole. A death verdict is authorized only when the penalty jury has unanimously determined that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3; see *People v. Brown* (1985) 40 Cal.3d 512, 541–542, fn. 13, revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538) — which necessarily presupposes that the penalty jury has found at least one section 190.3 circumstance to be aggravating. (All undesignated statutory references are to the Penal Code.) Our cases have not satisfactorily explained why this additional finding of at least one aggravating factor, which is a necessary precursor to the weighing determination and is thus required for the imposition of a death sentence, is not governed by the *Apprendi* rule.

This issue is not a mere technicality. The *Apprendi* rule states what the Constitution requires in the context of criminal sentencing, and it has particular significance in cases where the special circumstance findings by the guilt jury are not necessarily aggravating. In such cases, the prosecution may rely on a bevy of prior criminal conduct under section 190.3, factors (b) and (c), some of which may be disputed, to show aggravation during the penalty trial. For example, the prosecution here introduced evidence of 10 prior criminal acts by McDaniel under factor (b), ranging from threatening a school official and instances of weapon possession to battery of peace officers and prior instances of robbery, shooting, and killing. Some of the evidence was vigorously contested by McDaniel, and

only one prior act — possession of an assault weapon — was accompanied by documentary evidence of a conviction under factor (c).

Especially where it is not clear that any special circumstance findings by the guilt jury are aggravating at the penalty phase, section 190.3, factor (b) or (c) evidence may prove critical to the sentencing decision. It is true that each penalty juror may consider evidence of prior criminal activity as an aggravating factor only if the juror is "convinced beyond a reasonable doubt" that the defendant committed the prior crime. (*People v. Polk* (1965) 63 Cal.2d 443, 451; see *People v. McClellan* (1969) 71 Cal.2d 793, 804–806.) Yet the penalty jury "as a whole need not find any one aggravating factor to exist." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32 (*Snow*).)

To illustrate: Suppose the prosecution introduces evidence of three prior criminal acts (A, B, and C). Some jurors may find that A was proven beyond a reasonable doubt, but not B and C; other jurors may find B proven, but not A and C; others may find C proven, but not A and B; and still others may find none proven at all and instead find some other circumstance to be aggravating. Or the jurors may find various prior crimes proven beyond a reasonable doubt but differ as to which one or ones are aggravating. There is little downside for the prosecution to provide a broad menu of aggravating evidence for the penalty jury to consider, since we presume on appeal that "any hypothetical juror whom the prosecution's evidence might not have convinced beyond a reasonable doubt . . . followed the court's instruction to disregard the evidence." (*People v. Yeoman* (2003) 31 Cal.4th 93, 132–133.) Our capital sentencing scheme allows the penalty jury to render a death verdict in these circumstances. But I am doubtful the Sixth Amendment does.

In the case before us, McDaniel raises some Sixth Amendment and *Apprendi* arguments, but this portion of his briefing focuses primarily on his state law claims. His *Apprendi* arguments mostly mirror his state law arguments or emphasize that the penalty jury's weighing determination is a factual issue subject to *Apprendi*. Those arguments are different from my focus here: the finding by the penalty jury of at least one aggravating factor relevant to the sentencing determination. Although today's decision does not revisit this issue, I believe the issue should be reexamined in a case where it is more fully developed. The constitutionality of our death penalty scheme in light of two decades of evolving Sixth Amendment jurisprudence deserves careful and thorough reconsideration.

I.

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." (*Alleyne*, *supra*, 570 U.S. at p. 104.) To convict a defendant of a serious offense, the jury's verdict must be unanimous. (See *Ramos v. Louisiana* (2020) 590 U.S. __, __ [140 S.Ct. 1390, 1397].)

In the 20 years since *Apprendi*, the high court's precedents in this area, individually and as a whole, have underscored how robust and far-reaching the *Apprendi* rule is. As noted, *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) *Apprendi* involved a plea agreement for multiple felonies arising from the defendant's "fir[ing of] several

.22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood." (*Id.* at p. 469.) To evaluate a hate crime sentencing enhancement that carried an extended term of imprisonment, the trial judge held an evidentiary hearing on the defendant's intent and "concluded that the evidence supported a finding 'that the crime was motivated by racial bias.' " (*Id.* at p. 471.) Because this subsequent factfinding by the judge under a preponderance of the evidence standard increased the maximum sentence, the high court held that this scheme violated the Sixth Amendment. (*Id.* at p. 491.) The high court's inquiry into whether a particular fact increases the penalty for a crime beyond the prescribed statutory maximum was functional in nature; it disregarded whether the fact is formally considered an element of the crime or a sentencing factor, since "[m]erely using the label 'sentence enhancement' . . . surely does not provide a principled basis for" distinction. (*Id.* at p. 476.) *Apprendi* also preserved "a narrow exception to the general rule" for the fact of a prior conviction but noted "it is arguable" that allowing the exception is "incorrect[]" based on *Apprendi*'s reasoning, at least "if the recidivist issue were contested." (*Apprendi*, at pp. 489–490; see *id.* at pp. 487–490 [declining to overrule *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, the source of the exception].)

A few years later, the high court clarified in *Blakely* "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any

additional findings." (*Blakely*, *supra*, 542 U.S. at pp. 303–304.) This is so because "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.' " (*Id.* at p. 304.) *Blakely* found a Sixth Amendment violation because the defendant "was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with 'deliberate cruelty,' " and the judge "could not have imposed" that "sentence solely on the basis of the facts admitted in the guilty plea." (*Id.* at pp. 303–304.)

In *Booker*, the Supreme Court applied *Apprendi* to the federal sentencing guidelines, holding that the trial judge's additional factfinding violated the Sixth Amendment when it resulted in "an enhanced sentence of 15 or 16 years [under the guidelines] instead of the 5 or 6 years authorized by the jury verdict alone." (*Booker*, *supra*, 543 U.S. at p. 228; see *id.* at pp. 233–235.)

In *Cunningham*, the high court considered California's determinate sentencing law, which "assign[ed] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham*, *supra*, 549 U.S. at p. 274.) The scheme specified three precise terms (lower, middle, and upper) and directed the trial court "to start with the middle term, and to move from that term only when the court itself finds and places on the record facts — whether related to the offense or the offender — beyond the elements of the charged offense" and " 'established by a preponderance of the evidence.' " (*Id.* at pp. 277, 279.) Because "[t]he facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a

reasonable doubt," the high court held that this scheme violated the Sixth and Fourteenth Amendments. (*Id.* at p. 274.)

The Supreme Court has also applied the *Apprendi* rule to capital sentencing. In *Ring*, the high court considered Arizona's scheme, in which a defendant "could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made." (*Ring*, *supra*, 536 U.S. at p. 592.) State law required the trial judge "to 'conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed' " and permitted "the judge to sentence the defendant to death only if there [wa]s at least one aggravating circumstance and . . . 'no mitigating circumstances sufficiently substantial to call for leniency.' " (*Id.* at pp. 592–593.) The high court, before *Apprendi*, had upheld Arizona's scheme under the Sixth and Eighth Amendments (*Walton v. Arizona* (1990) 497 U.S. 639 (*Walton*)), and the high court in *Apprendi* left *Walton*'s Sixth Amendment holding undisturbed (*Apprendi*, *supra*, 530 U.S. at pp. 496–497). "The key distinction, according to the *Apprendi* Court, was that a conviction of first-degree murder in Arizona carried a maximum sentence of death. 'Once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.' " (*Ring*, at p. 602.) But two years after *Apprendi*, the high court reversed itself, holding in *Ring* that this distinction was untenable and inconsistent with the Arizona Supreme Court's own construction of the state's capital sentencing law. (*Id.* at p. 603.) *Ring* thus overruled *Walton*'s Sixth Amendment holding. (*Id.* at p. 609.)

In *Ring*, the state argued that because "Arizona law specifies 'death or life imprisonment' as the only sentencing options" for a first degree murder conviction, "Ring was therefore sentenced within the range of punishment authorized by the jury verdict." (*Ring*, *supra*, 536 U.S. at pp. 603–604.) The high court rejected this argument, explaining that it "overlook[ed] *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' " (*Id.* at p. 604.) The "first-degree murder statute 'authorize[d] a maximum penalty of death only in a formal sense,' " *Ring* explained, because the finding of at least one aggravating circumstance at the sentencing phase is required for a death sentence. (*Ibid.*) "In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict' " alone. (*Ibid.*) *Ring* thus made clear that if "a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Id.* at p. 602.) Further, "[a]ggravators 'operate as statutory "elements" of capital murder . . . [when,] in their absence, [the death] sentence is unavailable.' " (*Id.* at p. 599, quoting *Walton*, *supra*, 497 U.S. at p. 709, fn.1 (dis. opn. of Stevens, J.).) *Ring* also recognized that *Walton*'s distinction "between elements of an offense and sentencing factors" was "untenable" in light of *Apprendi*. (*Ring*, at p. 604.)

More recently, in *Hurst*, the high court applied *Apprendi* and its progeny to a state capital sentencing scheme it had twice upheld under the Sixth Amendment. (*Hurst*, *supra*, 577 U.S. at p. 101, overruling *Hildwin v. Florida* (1989) 490 U.S. 638 (*Hildwin*) and *Spaziano v. Florida* (1984) 468 U.S. 447 (*Spaziano*).) Under Florida's death penalty scheme at the time,

a defendant convicted of a capital felony could receive a maximum sentence of life imprisonment based on the conviction alone. (*Hurst*, at p. 95.) A sentence of death required "an additional sentencing proceeding 'result[ing] in findings by the court that such person shall be punished by death.' " (*Ibid.*) Florida used a "hybrid" model " 'in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.' " (*Ibid.*, quoting *Ring*, *supra*, 536 U.S. at p. 608, fn. 6.) The high court found *Ring*'s analysis to "appl[y] equally to Florida's" scheme because, "[l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty" — instead "requir[ing] a judge to find these facts" — and "the maximum punishment [the defendant] could have received without any judge-made findings was life in prison without parole." (*Hurst*, at pp. 98–99.) Focusing again on function over form, the high court found Florida's "advisory jury verdict" to be "immaterial" for purposes of satisfying the Sixth Amendment because the jury " 'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.' " (*Hurst*, at pp. 98–99.)

Just last year, in an Eighth Amendment case, the high court again confirmed that "[u]nder *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible." (*McKinney v. Arizona* (2020) 589 U.S. __, __ [140 S.Ct. 702, 707] (*McKinney*).) At the same time, the court reaffirmed its prior decisions holding that the Constitution does not require "a jury (as opposed to a judge) . . . to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision" in a capital proceeding. (*Ibid.*)

McKinney also rejected the claim that it was error for the trial judge in that case, as opposed to a jury, to find the aggravating circumstance that raised the statutory maximum penalty to death; that claim could not succeed because the "case became final . . . long before *Ring* and *Hurst*" and those decisions "do not apply retroactively on collateral review." (*Id.* at p. __ [at p. 708].)

In sum, under *Apprendi* and its progeny, the Sixth Amendment requires any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the statutory maximum to be found by a unanimous jury and proved beyond a reasonable doubt. The statutory maximum means the maximum sentence permissible based solely on the facts reflected in the jury's verdict or admitted by the defendant, without any additional factfinding. (*Blakely*, *supra*, 542 U.S. at p. 303.) It does not matter if the additional fact to be found is termed an "aggravating circumstance," a "sentencing factor," or a "sentencing enhancement"; the high court has emphasized that " 'the relevant inquiry is one not of form, but of effect.' " (*Ring*, *supra*, 536 U.S. at p. 604.)

II.

True to its word, the high court has consistently elevated function over form in applying *Apprendi*. (*Apprendi*, *supra*, 530 U.S. at p. 494; see also *Ring*, *supra*, 539 U.S. at p. 602; *id.* at p. 610 (conc. opn. of Scalia, J.) ["[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt."]; *Southern Union Co. v. U.S.* (2012) 567 U.S. 343, 358–359 ["*Apprendi* and its progeny

have uniformly rejected" the argument "that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor.' "].) The high court has repeatedly looked past statutory labels to determine the substantive role that a fact or factor plays in the sentencing decision.

As noted, this approach has led the high court to overrule several of its precedents. *Walton* upheld capital sentencing schemes that "requir[e] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." (*Apprendi*, *supra*, 530 U.S. at p. 496.) *Apprendi* reaffirmed *Walton*, but in *Ring*, the high court found *Walton* untenable in light of *Apprendi* and overruled it. (*Ring*, *supra*, 536 U.S. at pp. 604–605, 609.) In *Hurst*, the high court overruled *Spaziano* and *Hildwin* as inconsistent with *Apprendi*. (*Hurst*, *supra*, 577 U.S. at p. 102.) And in *Alleyne*, the high court held that any fact that increases the statutory minimum penalty must also be found by a jury beyond a reasonable doubt, overruling *Harris v. U.S.* (2002) 536 U.S. 545, 557 and *McMillan v. Pennsylvania* (1986) 477 U.S. 79. (*Alleyne*, *supra*, 570 U.S. at p. 103; see *United States v. Haymond* (2019) 588 U.S. __, __ [139 S.Ct. 2369, 2378].) These overrulings indicate the breadth and force of the *Apprendi* rule.

The high court's decisions have also made clear that the requirements of the Sixth and Eighth Amendments are distinct. After initially holding in *Walton* that Arizona's capital sentencing scheme complied with both the Sixth and Eighth Amendments, and then overruling *Walton*'s Sixth Amendment holding in *Ring*, the high court left intact *Walton*'s Eighth Amendment holding that "the challenged factor . . . furnishes

sufficient guidance to the sentencer" and thus did not violate the Eighth Amendment. (*Walton*, *supra*, 497 U.S. at p. 655; see *Kansas v. Marsh* (2006) 548 U.S. 163, 169.) The high court has understood the Eighth Amendment to be fundamentally concerned with narrowing a sentencer's discretion to ensure that punishment is commensurate and proportional to the offense. (See *Graham v. Florida* (2010) 560 U.S. 48, 59; *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) The Sixth Amendment, by contrast, ensures that the facts necessary for a criminal punishment are found by a unanimous jury and proved beyond a reasonable doubt. In light of these different inquiries under the Sixth and Eighth Amendments, a scheme that satisfies one does not necessarily satisfy the other. (See *Ring*, *supra*, 539 U.S. at p. 606 ["The notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.' "].)

The high court's evolving jurisprudence has also caused state courts to reexamine earlier decisions. "Following *Apprendi*," the Hawaii Supreme Court "repeatedly considered whether Hawaii's extended term sentencing scheme comported with *Apprendi*. Until 2007, [the court] concluded that it did so, on the ground that Hawaii's scheme only required the judge to determine 'extrinsic' facts, rather than facts that were 'intrinsic' to the offense. [Citations.] It was not until *Maugaotega II*, that th[e] court acknowledged that the United States Supreme Court, in *Cunningham*, rejected the validity of [Hawaii's] intrinsic/extrinsic distinction, which formed the basis of these decisions. [*State v. Maugaotega* (Hawaii 2007) 168 P.3d 562,

572–577]." (*Flubacher v. State* (Hawaii 2018) 414 P.3d 161, 167.)

The Delaware Supreme Court had repeatedly held that the state's death penalty scheme complied with *Apprendi* and its progeny. (See *McCoy v. State* (Del. 2015) 112 A.3d 239, 269–271; *Swan v. State* (Del. 2011) 28 A.3d 362, 390–391; *Brice v. State* (Del. 2003) 815 A.2d 314, 321–322.) After *Hurst*, the court changed course and held that Delaware's law violates the Sixth Amendment's requirement that "the existence of 'any aggravating circumstance,' statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding must be made by a jury, . . . unanimously and beyond a reasonable doubt." (*Rauf v. State* (Del. 2016) 145 A.3d 430, 433–434; see *id.* at p. 487, fn. omitted (conc. opn. of Holland, J.) [*Hurst* squarely "invalidated a judicial determination of aggravating circumstances" and "also stated unequivocally that the jury trial right recognized in *Ring* now applies to *all* factual findings *necessary* to impose a death sentence under a state statute"].)

The Florida Supreme Court, on remand after *Hurst*, concluded that the Sixth Amendment requires the jury to "be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." (*Hurst v. State* (Fla. 2016) 202 So.3d 40, 53.) "These necessary facts include . . . find[ing] the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Ibid.*, fn. omitted.) Noting that "Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed," the court "reject[ed] the State's

argument that *Hurst v. Florida* only requires that the jury unanimously find the existence of one aggravating factor and nothing more." (*Id.* at p. 53, fn. 7.) The court "also conclude[d] that, just as elements of a crime must be found unanimously by a Florida jury, all these findings . . . are also elements that must be found unanimously by the jury." (*Id.* at pp. 53–54.)

More recently, the Florida Supreme Court "partially recede[d]" from its holding on remand from *Hurst*. (*State v. Poole* (Fla. 2020) 297 So.3d 487, 501 (*Poole*).) In *Poole*, the court distinguished between the two findings required during the state's sentencing phase: (a) "[t]he eligibility finding . . . '[t]hat sufficient aggravating circumstances exist' "; and (b) "[t]he selection finding . . . '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' " (*Id.* at p. 502, quoting Fla. Stat. § 921.141.) The court determined that the selection or weighing finding " 'is mostly a question of mercy' " and " 'is not a finding of fact [to which the jury trial right attaches], but a moral judgment.' " (*Poole*, at p. 503; cf. *McKinney*, *supra*, 589 U.S. at pp. __–__ [140 S.Ct. at pp. 707–708].) However, and most relevant here, the court did not disturb its prior holding that the jury must find "one or more statutory aggravating circumstances" unanimously and beyond a reasonable doubt. (*Ibid.*)

Moreover, many state legislatures have responded to *Apprendi* and its progeny in the capital context and, especially after *Blakely*, more broadly in criminal sentencing. (See Stemen & Wilhelm, Finding the Jury: State Legislative Responses to *Blakely v. Washington* (2005) 18 Fed. Sentencing Rep. 7 [providing an overview of state reforms].) Immediately after *Ring*, Arizona enacted statutory changes conforming its death penalty scheme to *Ring*'s requirements. Arizona law now

provides for two phases of the capital sentencing proceeding: (1) the aggravation phase, in which "the trier of fact . . . determine[s] whether one or more alleged aggravating circumstances have been proven" (Ariz. Rev. Stat., § 13-752(C)); and (2) the penalty phase, in which "the trier of fact . . . determine[s] whether the death penalty should be imposed" (*id.*, subd. (D)). In the aggravation phase, the jury must "make a special finding on whether each alleged aggravating circumstance has been proven" (*id.*, subd. (E)); "a unanimous verdict is required to find that the aggravating circumstance has been proven" (*ibid.*); and "[t]he prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt" (*id.* § 13-751(B)). Then, in the penalty phase, the jury considers "any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency" (*id.* § 13-752(G)), and the defendant has the burden of "prov[ing] the existence of the mitigating circumstances by a preponderance of the evidence" (*id.* § 13-751(C)). Jurors "do not have to agree unanimously that a mitigating circumstance has been proven to exist"; "[e]ach juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty." (*Ibid.*)

Likewise, Florida enacted statutory reforms to its capital sentencing regime following *Hurst*. Florida law now requires that the jury find, "beyond a reasonable doubt, the existence of at least one aggravating factor" in order for the defendant to be eligible for the death penalty. (Fla. Stat., § 921.141(2)(a); see *id.*, subd. (2)(b)1.) The jury must also "unanimous[ly]" "return findings identifying each aggravating factor found to exist" (*id.*, subd. (2)(b)) and "[u]nanimously" recommend a sentence of either life without parole or death "based on a weighing of . . .

[¶] . . . [w]hether sufficient aggravating factors exist[,] . . . [¶] [w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist[,] . . . [¶] [and, based on that], whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death" (*id.*, subd. (2)(b)2.; see *id.*, subd. (c)). Only if the jury unanimously recommends a sentence of death can the court then decide whether to "impose a sentence of life imprisonment without the possibility of parole or a sentence of death" (*id.*, subd. (3)(a)(2)) "after considering each aggravating factor found by the jury and all mitigating circumstances" (*id.*, subd. (3)(b)).

In sum, the high court's *Apprendi* jurisprudence has prompted significant reexamination and reform of capital sentencing schemes in many states. Yet California is not among them, and our precedent is in conflict with decisions from other states. (See *Poole*, *supra*, 297 So.3d at pp. 501–503 [recognizing that the state law requirement of at least one aggravating factor in order to impose death is subject to the *Apprendi* rule]; *Rauf v. State*, *supra*, 145 A.3d at pp. 433–434 [any aggravating circumstance used in a capital sentencing proceeding must be found by a unanimous jury beyond a reasonable doubt].)

III.

We first confronted the impact of *Apprendi* on California's death penalty scheme in *Anderson*, *supra*, 25 Cal.4th 543. In a footnote, we found *Apprendi* inapplicable to the penalty phase because "under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life

imprisonment without possibility of parole." (*Id.* at pp. 589–590, fn. 14.)

We elaborated on this distinction in *Ochoa*, reasoning that "*Apprendi* itself excluded from its scope 'state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.' " (*Ochoa*, *supra*, 26 Cal.4th at p. 453, quoting *Apprendi*, *supra*, 530 U.S. at p. 496.) In *Ochoa*, we specifically relied on *Apprendi*'s reaffirmation of *Walton* and noted similarities between the California and then-current Arizona schemes. (*Ochoa*, at pp. 453–454.)

But our reliance on *Walton* was soon undercut by *Ring*. After *Ring* overruled *Walton* and found Arizona's scheme unconstitutional, we reverted to rejecting the argument that *Apprendi* "mandates that aggravating circumstances necessary for the jury's imposition of the death penalty be found beyond a reasonable doubt . . . for the reason given in *People v. Anderson, supra,* 25 Cal.4th at pages 589–590, footnote 14" (quoted above). (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.) We concluded that *Ring* "does not change this analysis" because "[u]nder California's scheme, in contrast [to Arizona's], each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist" since "[t]he final step . . . is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Ibid.*) We insisted that "[n]othing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt." (*Ibid.*)

In *People v. Prieto* (2003) 30 Cal.4th 226, we further explained that because the penalty "jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence . . .' [citation] [n]o single factor therefore determines which penalty — death or life without the possibility of parole — is appropriate. [¶] . . . [And] [b]ecause any finding of aggravating factors during the penalty phase does not 'increase[ ] the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*Id.* at p. 263.)

We reaffirmed this reasoning after *Blakely* (see *People v. Morrison* (2004) 34 Cal.4th 698, 731 (*Morrison*)), *Booker* (see *People v. Lancaster* (2007) 41 Cal.4th 50, 106), *Cunningham* (see *People v. Prince* (2007) 40 Cal.4th 1179, 1297 (*Prince*)), and *Hurst* (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235). But in each instance, our analysis was brief, ranging from a few sentences to a short paragraph or two. And we relied more on grounds for distinguishing the sentencing schemes at issue in the high court's opinions than on any thorough examination of the analytical underpinnings of the *Apprendi* line of decisions.

For instance, despite *Blakely*'s clarification of what "the 'statutory maximum' for *Apprendi* purposes" means — i.e., "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Blakely*, *supra*, 542 U.S. at p. 303) — we concluded that *Blakely* "d[id] not undermine our analysis" because it "simply relied on *Apprendi* and *Ring* to conclude that a state noncapital criminal defendant's Sixth Amendment right to trial by jury was violated where the facts supporting his sentence, which was above the

standard range for the crime he committed, were neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt" (*Morrison*, *supra*, 34 Cal.4th at p. 731). We distinguished *Cunningham* on the ground that it "involve[d] merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to the state's capital sentencing scheme." (*Prince*, *supra*, 40 Cal.4th at p. 1297.)

And we distinguished *Hurst* on the ground that under California's sentencing scheme, unlike Florida's, "a jury weighs the aggravating and mitigating circumstances and reaches a unanimous penalty verdict" and "this verdict is not merely 'advisory.' " (*Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16, quoting *Hurst*, *supra*, 577 U.S. at p. 98.) We explained that "[i]f the jury reaches a verdict of death, our system provides for an automatic motion to modify or reduce this verdict to that of life imprisonment without the possibility of parole," but the trial court "rules on this motion . . . simply [to] determine[] 'whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.' " (*Rangel*, at p. 1235, fn. 16, quoting § 190.4; see *People v. Capers* (2019) 7 Cal.5th 989, 1014 [reaffirming this same reasoning to distinguish *Hurst*].)

These analyses in our case law appear to rest on the observation that under California's capital sentencing scheme, "the jury as a whole need not find any one aggravating factor to exist." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.) Thus, when the prosecution offers evidence of multiple instances of prior criminal conduct as aggravating evidence in support of a death verdict, the jury need not agree on which prior crimes, if any,

have been proven beyond a reasonable doubt. Two jurors may find the existence of one prior crime, while three other jurors may focus on another prior crime, a single juror may fixate on still another or none at all, and so on. Yet our case law deems the jury as a whole to have found the existence of at least one aggravating factor so long as each juror finds one (*any* one) prior crime proven beyond a reasonable doubt — or none at all so long as the juror finds another section 190.3 factor to be aggravating.

The observation that this is how California's sentencing scheme works is not an argument for its constitutionality under *Apprendi*. Under section 190.3, the penalty jury may not return a death verdict unless it has found at least one aggravating circumstance. It is not clear why that finding is not governed by the *Apprendi* rule. We have compared the jury's "free weighing" of aggravating and mitigating circumstances in the penalty determination to "a sentencing court's traditionally discretionary decision." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.) But it is precisely the sentencing court's traditional discretion that the *Apprendi* rule upends, cabining it to a prescribed statutory range supported by proper jury findings. (See *Cunningham*, *supra*, 549 U.S. at p. 292; *McKinney*, *supra*, 589 U.S. at pp. __–__ [140 S.Ct. at pp. 707–708].) To say that California law does not require the jury to agree on any one aggravating factor does not answer the *Apprendi* claim; it simply states the problem.

Our repeated insistence that death is no more than the statutory maximum upon a first degree murder conviction and a true finding of a special circumstance also cannot carry the day. The same argument — made by this court in the analogous context of determinate sentencing — was considered and rejected in *Cunningham*. Before *Cunningham*, we upheld

California's determinate sentencing law under *Apprendi*, *Blakely*, and *Booker*. (See *People v. Black* (2005) 35 Cal.4th 1238, 1254 (*Black*), judg. vacated and cause remanded for further consideration in light of *Cunningham*, *supra*, 549 U.S. 270, *sub nom. Black v. California* (2007) 549 U.S. 1190.) In *Black*, we rejected the argument that "a jury trial [wa]s required on the aggravating factors on which an upper term sentence is based, because the middle term is the 'maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict . . . .' " (*Black*, at p. 1254, italics omitted, quoting *Blakely*, *supra*, 542 U.S. at p. 303.) We explained that "the California determinate sentence law simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Ibid.*) We held that the "the upper term is the 'statutory maximum' " and viewed the statutory "requirement that the middle term be imposed unless an aggravating factor is found" as "merely a requirement that the decision to impose the upper term be *reasonable*," "preserv[ing] the traditional broad range of judicial sentencing discretion." (*Id.* at pp. 1254–1255, fn. omitted.) We also analogized the determinate sentencing law to "the post-*Booker* federal sentencing system." (*Id.* at p. 1261.)

Notwithstanding our understanding of California's determinate sentencing law, the high court in *Cunningham* rejected our reasoning in *Black*. The high court concluded that "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Cunningham*, *supra*, 549 U.S. at p. 290.) *Cunningham* also rejected *Black*'s comparison to the advisory

federal sentencing guidelines because under California's sentencing scheme "judges are not free to exercise their 'discretion to select a specific sentence within a defined range.' " (*Id.* at p. 292, quoting *Booker*, *supra*, 543 U.S. at p. 233.) Rather, by "adopt[ing] sentencing triads, three fixed sentences with no ranges between them," judges have "no discretion to select a sentence within a range." (*Cunningham*, at p. 292.) Instead, a judge must impose the middle term absent "[f]actfinding to elevate a sentence," and *Cunningham* concluded that the high court's "decisions make plain" that such factfinding "falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." (*Ibid.*)

Our reasoning distinguishing *Apprendi* and its progeny in the capital context appears analogous to the reasoning in *Black* that *Cunningham* rejected. We have said that "death *is* no more than the prescribed statutory maximum" upon a special circumstance first degree murder conviction (*Anderson*, *supra*, 25 Cal.4th at pp. 589–590, fn. 14), and we have emphasized the jury's "free weighing" penalty determination to conclude that it is equivalent to "a sentencing court's traditionally discretionary decision" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32). But just as the determinate sentencing law in *Cunningham* prescribed "sentencing triads" with three discrete options as opposed to allowing a judge to select " 'within a defined range' " (*Cunningham*, *supra*, 549 U.S. at p. 292), California's capital sentencing scheme similarly provides for two discrete options in the case of a conviction for first degree murder with a special circumstance finding — "death or imprisonment in the state prison for life without the possibility of parole" (§ 190.2,

subd. (a)). And like the requirement to impose the middle term absent factfinding in aggravation, in the capital context "a sentence of confinement in state prison for a term of life without the possibility of parole" is required unless the jury finds one or more aggravating circumstances and "concludes that the aggravating circumstances outweigh the mitigating circumstances." (§ 190.3.)

After the high court vacated *Black* and remanded for further consideration in light of *Cunningham*, we decided *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). We rejected the argument that there is a "right to jury trial on all aggravating circumstances that may be considered by the trial court, even if one aggravating circumstance has been established in accordance with *Blakely*." (*Id.* at p. 814.) Instead, we held that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Id.* at p. 812.)

We reasoned that "*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense. Although the [determinate sentencing law] does not distinguish between these two functions, in light of *Cunningham* it is now clear that

we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function. It follows that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II*, *supra*, 41 Cal.4th at pp. 815–816.)

The continued applicability of this part of *Black II* is not clear in light of statutory changes to the determinate sentencing law made in response to *Cunningham*. (See Stats. 2007, ch. 3, § 2; § 1170, subd. (b).) Even so, and despite our conclusion that *Cunningham* "has no apparent application to the state's capital sentencing scheme" (*Prince*, *supra*, 40 Cal.4th at p. 1297), there is an argument for extending *Black II*'s reasoning to the jury's consideration of aggravating and mitigating circumstances in the capital context under section 190.3. But, as I explain, the argument is not convincing.

Under *Black II*, one could argue that our death penalty scheme comports with *Apprendi* as follows: A jury must find at least one special circumstance under section 190.2 for the defendant to be death-eligible and for the proceeding to continue into a penalty phase, and that special circumstance must be found unanimously and beyond a reasonable doubt. (§ 190.1.) Then, any such special circumstance found true by the guilt phase jury automatically becomes a consideration for the

penalty phase jury under section 190.3, factor (a), since that factor includes "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." Thus, in light of the guilt phase jury's special circumstance finding(s), the structure of our death penalty scheme arguably ensures at least "one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II*, *supra*, 41 Cal.4th at p. 816.)

However, nothing in our case law has applied *Black II*'s reasoning in this manner, and we have not characterized a special circumstance finding as an aggravating factor or specifically cited section 190.3, factor (a) in this context. Instead, we have reasoned (unpersuasively in my view) that the special circumstance finding means "death is no more than the prescribed statutory maximum for the offense" upon conviction at the guilt phase, and "[h]ence, facts which bear upon, but do not necessarily determine, which of the[] two alternative penalties [i.e., death or life imprisonment without the possibility of parole] is appropriate do not come within the holding of *Apprendi*." (*Anderson*, *supra*, 25 Cal.4th at pp. 589–590, fn. 14, italics omitted; see *Ochoa*, *supra*, 26 Cal.4th at p. 454.) We have also observed that "[t]he literal language of [factor] (a) presents a theoretical problem . . . , since it tells the penalty jury to consider the 'circumstances' of the capital crime *and* any attendant statutory 'special circumstances[,]' . . . [and] the latter are a subset of the former, [so] a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' " (*People v. Melton* (1988)

44 Cal.3d 713, 768.) In *Melton*, we held that when requested "the trial court should admonish the jury not to do so." (*Ibid.*; see *People v. Monterroso* (2004) 34 Cal.4th 743, 789–790.) Applying *Black II*'s rationale in the manner described above would conceive of the special circumstance finding as serving multiple functions, in tension with our holding in *Melton*.

Moreover, the structure of our death penalty statute presents a problem for extending *Black II* in the manner above. Whereas states like Arizona and Florida statutorily enumerate a specific list of factors that, if found to exist by the jury, have been deemed per se aggravating, section 190.3 takes a different approach: It enumerates a *combined* list of *potentially* relevant factors and leaves it to the penalty phase jury to determine whether, in a given case, each individual factor is aggravating, mitigating, or irrelevant for sentencing selection. (See § 190.3 [the penalty jury "shall take into account any of the following factors *if relevant*" (italics added)].) Nothing in our death penalty scheme deems a special circumstance to be per se aggravating. Instead, section 190.3 leaves it to the penalty jury to determine whether "the existence of any special circumstances found to be true" is an aggravating factor "relevant" to the penalty determination. (§ 190.3, factor (a).)

The penalty jury's finding in this regard — i.e., whether the existence of a special circumstance is aggravating and thus "relevant" to the penalty determination (§ 190.3) — is not dissimilar from other determinations that, though arguably normative or moral in nature as opposed to purely factual, are nonetheless governed by the *Apprendi* rule. For example, *Blakely* involved a finding in aggravation of " 'deliberate cruelty' " to support the more severe sentence that was imposed. (*Blakely*, *supra*, 542 U.S. at p. 303.) The high court concluded

that "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here [in *Hurst*]), it remains the case that the jury's verdict alone does not authorize the sentence." (*Id.* at p. 305.) *Hurst* likewise applied the *Apprendi* rule to an aggravating circumstance finding that the capital crime was " 'heinous, atrocious, or cruel' " (*Hurst, supra*, 577 U.S. at p. 96) — a common aggravating factor in many state statutes (see, e.g., *Clemons v. Mississippi* (1990) 494 U.S. 738, 743, fn. 1; Ala. Code, § 13A-5-49(8); N.C. Gen. Stat. Ann., § 15A-2000(e)(9); Okla. Stat. Ann., tit. 21, § 701.12(4)).

Thus, in contrast to the statutory regimes in other states, a special circumstance finding under our scheme does not mean the jury has found the existence of the special circumstance to be aggravating — and that is the crucial determination needed at the penalty phase. By expressly leaving this determination to the penalty jury, our statutory scheme does not treat a special circumstance found true at the guilt phase to be a per se aggravating factor relevant to the sentencing decision. If the existence of a special circumstance forms no part of the jury's calculus in weighing aggravating and mitigating circumstances, then it cannot satisfy *Black II*'s requirement that at least "one legally sufficient aggravating circumstance has been found to exist by the jury." (*Black II, supra*, 41 Cal.4th at p. 816; see *Ring, supra*, 536 U.S. at p. 604 [" 'the relevant inquiry is one not of form, but of effect' "].)

This concern is hardly speculative. The list of special circumstances in section 190.2 is broad and includes a number of circumstances, such as commission of murder during a burglary or robbery, that do not seem necessarily aggravating

in every case. As just one example, consider *People v. Yeoman, supra*, 31 Cal.4th 93, which involved a first degree murder conviction and a robbery-murder special circumstance true finding arising from the robbery and killing of an elderly female motorist whose car had broken down. At the penalty phase, the prosecution's "evidence in aggravation consisted of the circumstances of the capital offense (§ 190.3, factor (a)), three prior felony convictions (*id.*, factor (c)) and five incidents of criminal activity involving violence or a threat of violence (*id.*, factor (b))." (*Yeoman*, at p. 108.) The defendant contested some of this aggravating evidence, including an earlier robbery and attempted kidnapping of another female motorist, which the prosecution also introduced at the guilt phase under Evidence Code section 1101, subdivision (b) to show intent, as well as another killing not charged in the proceeding and used only as factor (b) evidence. Can it be said that the special circumstance finding comprised the "one legally sufficient aggravating circumstance . . . found to exist by the jury" that the *Apprendi* rule requires? (*Black II, supra*, 41 Cal.4th at p. 816.) Or did the jury instead predicate its sentencing decision on findings with regard to contested evidence under factors (b) and (c)?

There are many other cases involving robbery-murder or burglary-murder special circumstance findings where the prosecution relied on extensive evidence of prior criminal activity to show aggravation at the penalty phase. (See, e.g., *People v. Grimes* (2016) 1 Cal.5th 698; *People v. Jackson* (2014) 58 Cal.4th 724; *People v. Abel* (2012) 53 Cal.4th 891; *People v. Friend* (2009) 47 Cal.4th 1.) In such cases, it is hardly clear — because our death penalty scheme does not require clarity — that the jury found the existence of a special circumstance to be a "relevant" aggravating factor. (§ 190.3.) If the jury made no

such finding, then it is quite possible that individual jurors seized on different items in the prosecution's proffered menu of aggravating circumstances and that no single aggravating circumstance was found beyond a reasonable doubt by a unanimous jury. The *Apprendi* rule appears to foreclose a death judgment in such cases because life imprisonment without the possibility of parole is "the maximum sentence" authorized under California law at the penalty phase absent a jury finding of at least one aggravating circumstance. (*Blakely*, *supra*, 542 U.S. at p. 303.)

* * *

In sum, the 20-year arc of the high court's Sixth Amendment jurisprudence raises serious questions about the constitutionality of California's death penalty scheme. There is a world of difference between a unanimous jury finding of an aggravating circumstance and the smorgasbord approach that our capital sentencing scheme allows. Given the stakes for capital defendants, the prosecution, and the justice system, I urge this court, as well as other responsible officials sworn to uphold the Constitution, to revisit this issue at an appropriate time.

LIU, J.

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

Name of Opinion People v. McDaniel

Procedural Posture (see XX below)
Original Appeal XX
Original Proceeding
Review Granted (published)
Review Granted (unpublished)
Rehearing Granted

Opinion No. S171393
Date Filed: August 26, 2021

Court: Superior
County: Los Angeles
Judge: Robert J. Perry

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APPENDIX B

***People v. McDaniel*, No. S171393**

California Supreme Court

Petition for Rehearing

September 10, 2021

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DON'TE LAMONT McDANIEL Defendant and Appellant.	No. S171393 (Los Angeles County Superior Court TA074274) **DEATH PENALTY CASE**

APPELLANT'S PETITION FOR REHEARING

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to rules 8.268 and 8.536 of the California Rules of Court, appellant Don'te Lamont McDaniel respectfully request that this Court grant rehearing of its decision rendered on August 26, 2021, affirming the judgment entered against him.

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Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory* (1996) 29 U. Mich. J. L. Reform 981 7

I. REHEARING SHOULD BE GRANTED BECAUSE THIS COURT FAILS TO ADEQUATELY ADDRESS DIRECT EVIDENCE OF DISCRIMINATION

The *Batson/Wheeler* claim in this case is a remarkable one. There is direct evidence in the record that the prosecutor acted with discriminatory intent in jury selection: the trial court found—correctly—that the prosecutor had discriminated on the basis of race in his strike against Prospective Juror No. 46. This was not a one-time occurrence. In the co-defendant's trial, the prosecutor (despite having recently been sanctioned for discriminating on the basis of race in Mr. McDaniel's case) continued apace, striking *ten minority jurors in a row* before the trial court sustained a *Batson/Wheeler* objection and ordered a mistrial.[1]

The ramifications of the discriminatory strike against Prospective Juror No. 46 should be powerful in this Court's analysis of the strike against Prospective Juror No. 28. After all, the prosecutor provided a pretextual justification for Prospective Juror

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[1] (See Appellant's Motion for Judicial Notice (filed August 6, 2015) and attached Exhibits.) This Court exercised its discretion to deny the judicial notice motion "without prejudice to Mr. McDaniel presenting such information on a fuller record in connection with a petition for habeas corpus if he so chooses." (Slip Opn. at 32.) As this Court is aware, the dysfunction of the California death penalty system has created a decades-long backlog in the appointment of habeas counsel and it is 1) impossible for Mr. McDaniel to file a habeas corpus petition; 2) will remain impossible for the indefinite future, and 3) may remain impossible forever. Mr. McDaniel therefore, in an appeal to basic fairness, also requests that the Court reconsider its discretionary ruling on the judicial notice motion.

No. 46 *nearly identical to that deployed against Prospective Juror No. 28*. (Compare Slip. Opn. at 18 [prosecutor's "primary problem with [Prospective Juror No. 28] was the fact that he, along with many others, . . . indicated that life without parole is a more severe sentence, which I don't think is a good instinct to have on a death penalty jury"] with 5 RT 1081 [prosecutor's first reason for excusing Prospective Juror No. 46: "He believed that life without parole and death are essentially the same"].) This Court's decision, however, simply "assum[es] without deciding" that the trial court properly found that the prosecutor in this case discriminated on the basis of race in its strike against Prospective Juror No. 46. (Slip Opn. at 24; cf. *People v. Jackson* (2014) 58 Cal.4th 724, 777 (dis. opn. of Liu, J.) ["By tiptoeing around the issue, today's opinion fails to confront the seriousness of the error and may be read to suggest that there is some question as to whether error occurred at all"].)[2] But the opinion's assumption, well-grounded in the record though it was, fails to properly account for the ramifications of a finding of race-discrimination on the analysis of a *Batson/Wheeler* claim.

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[2] Because of the seriousness of the misconduct which occurred below, and the purposes of *Batson* and *Wheeler* to express the judiciary's concern with and willingness to confront racial discrimination, Mr. McDaniel strongly urges this to modify its opinion to remove any suggestion that the trial court may have applied the incorrect standard, an argument of the Attorney General's which is ultimately unsupported by the record. (See generally ARB at 8-16.)

Anti-Black race discrimination by prosecutors in jury selection in criminal cases occurs in two, straightforward stages. First, some (perhaps many) prosecutors hold a belief—at least as a purely statistical matter and not specific to any individual juror—that Black jurors will be less favorable to the prosecution at guilt or penalty. (See Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. Mich. J. L. Reform 981, 1001-1002 & fn. 7 (1996) [describing self-reporting survey of San Diego criminal practitioners and noting that "[p]rosecutors were more likely to say that peremptory challenges had more value pre-*Batson* and pre-*Wheeler*" on bases such as the "obvious[] tendency for people to sympathize with those from the same race"].) Particularly in death penalty cases, there may be at least a grain of truth to such stereotypical assumptions. For instance, one of the amicus curiae briefs in this case indicates that Black Americans express significantly lower support for the death penalty than their White counterparts. (See Brief of the Honorable Gavin Newsom at 43 ["Almost every public opinion poll and social scientific survey conducted in the United States in the last fifty years found a substantial difference between African Americans' and White Americans' support for the death penalty"].)

In a criminal case, exercising a strike based simply on such a stereotype—even if the stereotype is partially accurate—is constitutionally prohibited. However, merely *holding* a belief about statistical proclivities of various groups is not unlawful. No doubt

the overwhelming majority of prosecutors who entertain such beliefs regarding Black jurors (for instance, regarding the aggregate disfavor of the death penalty) nonetheless refrain from exercising peremptories on individual Black jurors without first confirming a bias particular to a given juror in a given case.

Only prosecutors who proceed to the *second* stage—those who willfully *act* on personally held racial stereotypes to gain (perceived) strategic advantage—violate *Batson/Wheeler*. In cases such as this one, in which the prosecutor has succumbed to the urge to embrace racial stereotypes, *and to act upon them*, stricter scrutiny of the claim is required than this Court's decision provides.

The trial court, of course, made no mention of the discriminatory strike of Prospective Juror No. 46 in its acceptance of the strike of Prospective Juror No. 28. Indeed, the trial court gave no analysis of its rejection of the strike against this juror at all. Surely, if anything requires significant attention from the trial court in analyzing a *Batson/Wheeler* claim with respect to an individual juror, it is direct evidence of discrimination by the prosecutor in the case. Yet, in response to Mr. McDaniel's argument that the trial court overlooked this powerful evidence, this opinion states that "the trial court here was well aware of the [*Batson*] violation when it ruled on all five strikes at the same time." (Slip. Opn. at 24.) Yet the record is contrary. The trial court had not even found a *Batson* violation "when it ruled on all five strikes at the same time." (See AOB at 59 ["the trial court accepted the prosecutor's reasons regarding Prospective Juror No. 28 *before* it reversed course on

Prospective Juror No. 46" and found that the prosecutor had discriminated], italics in original.)

Equally important, the opinion fails to address why the prosecutor would have stricken one juror on the basis of race but not another. After all, at the very heart of the deference accorded prosecutor's and trial courts in review of *Batson/Wheeler* claims is the presumption that prosecutors exercise challenges in a constitutional manner. (*People v. Wheeler* (1978) 22 Cal.3d 258, 278 ["We begin with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground"].) The opinion provides no explanation for why the prosecutor, when striking Prospective Juror No. 28, would have been completely unaffected by the discriminatory stereotypes that infected his strike against Prospective Juror No. 46. Indeed, it is hard to imagine how *any* prosecutor would be able to completely cabin his discriminatory stereotypes and motivations in a strike against one juror without them spilling over to strikes against others.

In this case, such a theoretical—perfectly discrete—act of discrimination is particularly unlikely. One of the most powerful facts supporting a finding of discrimination in this case is the troubling parallel between the challenges of Prospective Juror No. 28 and Prospective Juror No. 46. They were both stricken for the same sham reason: their views on the comparative severity of death and life without the possibility of parole (LWOP). Yet the opinion

doesn't acknowledge the striking similarity between the strikes of these two jurors.

To reiterate and underscore the relevant facts, the very first pretextual excuse deployed as pretext for striking Prospective Juror No. 46 (his belief that death and LWOP were equivalent punishments)—was virtually identical to the "primary" justification for striking Prospective Juror 28 (his belief that LWOP was a more severe punishment). (Slip Opn. at 18; 5 RT 1081.) Troublingly, the opinion not only fails to acknowledge the disturbing similarity between these justifications but obscures it altogether. In laying out the facts detailing why Prospective Juror No. 46 was excused, the opinion omits the prosecutor's incredibly important first justification—that related to LWOP. (See Slip Opn. at 19 [listing only two of the three reasons given by the prosecutor for excusing Juror No. 46 and omitting any mention of the similar justification: Juror No. 46's opinions about the comparative severity of LWOP and death].)

In short, the opinion fails to sufficiently grapple with the discriminatory excusal of Prospective Juror No. 46 and its impact on the analysis of this claim. For this reason alone, rehearing should be granted.

II. REHEARING SHOULD BE GRANTED BECAUSE THIS COURT FAILED TO ACKNOWLEDGE ITS OWN CASELAW INDICATING THAT THE JUSTIFICATIONS RELIED ON BY THE PROSECUTOR IN THIS CASE WERE WEAK

Very recently, this Court wrestled with a case involving nearly identical justifications to those used to justify elimination of Prospective Juror No. 28. (*People v. Hardy* (2018) 5 Cal.5th 56 (*Hardy*); see also McDaniel Supplemental Authority Letter (filed May 19, 2021) [explaining the relevance of the *Hardy* decision].) In *Hardy*, a juror's exclusion was justified using, among others, two of the three reasons presented by the prosecutor below: the fact that 1) the juror (Frank G.) "'did not want to sit on this case'"; and 2) Frank G. "'…also indicated that LWOP [life without the possibility of parole] was worse for a defendant." (*Hardy*, *supra*, 5 Cal.5th at p. 79; compare 5 RT 1078-1079 [Prospective Juror No. 28 excused because "he, along with many others . . . indicated that life without parole is a more severe sentence" and "he did not want to serve on the jury because he felt like the trial would be too long"].) In *Hardy*, there were several other, much stronger, justifications for exclusion of Frank G. (*Id.* at p. 83 ["Three are especially strong: the jurors distrust of police . . . the juror's close and daily professional relationship with lawyers and the court system, and the juror's false arrest"].) In their totality, these reasons convinced the majority of the Court that the strike against Frank G. was non-discriminatory. (See *id.* at p. 79-84; but see also *id.* at 108-124 (dis. opn. of Liu, J.).)

The import of *Hardy*—which has many facts and justifications that differ from this case—is that the majority recognized that the two reasons that overlapped with those provided in this case are simply not very persuasive. That a prospective juror does not want to sit on a lengthy capital case or that a juror with no capital experience writes on a questionnaire that he believes LWOP to be a worse punishment than death are weak justifications. (*Hardy*, *supra*, 5 Cal.5th at p. 82 ["that the juror did not want to sit in the case was a legitimate race-neutral reason" but "it was also a rather weak reason. Many prospective jurors do not want to sit on a jury in a death penalty case, including some in this case the prosecutor did not challenge."]; see also *ibid.* [that juror "said he believed life without the possibility of parole to be a worse punishment than death. . . is another legitimate race-neutral reason to exercise a peremptory challenge" but "might also be considered a weak reason"].)

That this Court failed to acknowledge its own holding that the "primary" reason for striking Prospective Juror No. 28 (and one of the other justifications) was "weak" warrants rehearing. This analytic flaw is particularly important when combined with the conclusion—which the Court's opinion accepts—that the prosecutor below discriminatorily eliminated a Black juror during jury selection.

As detailed above, discriminatory stereotypes about Black jurors that are not only held, but acted upon, by a prosecutor are extremely likely to influence not just one, but all strikes against

Black prospective jurors. A discriminatory strike against a Black juror indicates that 1) the prosecutor believes as a general matter that Black jurors are unfavorable to his case and 2) the prosecutor, at a minimum, will not always refrain from acting on that belief to gain strategic advantage in the case. Holding otherwise requires accepting the conclusion that the prosecutor is wholly unaffected by his existing motivation to discriminate, and for some reason constrains (but only intermittently) his strong impulse to act on those motivations notwithstanding clear rules prohibiting it.

Perhaps one could imagine a prosecutor able and willing to discriminate who nonetheless acts differently towards two different jurors because those two jurors are remarkably different in character. A strike against a juror who is relatively middle-of-the-road might be motivated by race, whereas a strike against another juror who is clearly and obviously unfavorable to the prosecution might be, at least theoretically, entirely unmotivated by race. In other words, if the prosecutor's justification for striking juror A was extremely strong, whereas his strike against juror B was relatively weak, a court could conclude that the prosecutor's act of discrimination against juror A was untainted by the discrimination that infected the strike of juror B.

The opposite is true in this case, as *Hardy* attests. Not only is the "primary" justification for striking Prospective Juror No. 28 nearly identical to the first (pretextual) justification given for striking Prospective Juror No. 46, but this Court's own caselaw indicates that two of the three justifications provided by the

prosecutor for striking Prospective Juror No. 28 were "weak." (*Hardy*, *supra*, 5 Cal.5th at p. 82.) In other words, there is no evidence that Prospective Juror No. 28 was so undesirable from a prosecution perspective that the prosecutor would not be tempted to rely on his preexisting inclination to strike Black jurors. To the contrary, the prosecutor provided milquetoast justifications applicable—by the prosecution's own admission—to many other prospective jurors. Because this Court failed to properly acknowledge its own holding to that effect, rehearing should be granted.

III. REHEARING SHOULD BE GRANTED BECAUSE THE OPINION MISCHARACTERIZES AN ARGUMENT FOR DE NOVO REVIEW OF THE *BATSON/WHEELER* CLAIM AND THEREFORE REJECTS IT ON GROUNDS UNRELATED TO THE ARGUMENT

In the opening brief, Mr. McDaniel presented two arguments for why the trial court's decision should be reviewed de novo, despite the customary deference afforded trial courts in *Batson/Wheeler* cases. In the first argument, addressed above, Mr. McDaniel asserted that the trial court overlooked its own finding of discrimination in assessing the prior claim against Prospective Juror No. 28. (See AOB at p. 57-60.) A second argument for de novo review was premised on the fact that defense counsel actually urged a comparative analysis in the trial court, but the trial court failed to conduct any explicit comparative analysis with respect to Prospective Juror No. 28. (See AOB at pp. 61-66; ARB at 22-26.)

This argument was relatively detailed, proceeding under the following heading and subheadings, below-excerpted from the table of contents:

3. The Impact of a Request for Comparative Analysis of the Relevant Juror in the Trial Court……61

a. Comparative Analysis Was Requested in the Trial Court, but the Trial Court Provided no Comparative Analysis in its Decision with Respect to Prospective Juror No. 28……63

b. No Deference Is Owed to the Trial Court in Light of its Failure to Engage in the Requested Comparative Analysis When Accepting the Prosecutor's Justification for the Exclusion of Prospective Juror……64

(AOB at ii-iii; see also AOB at 61-66.)

Although the argument is laid out in full in the brief, Mr. McDaniel briefly summarizes it here. In light of numerous contrary United States Supreme Court cases, this Court in *People v. Lenix* (2008) 44 Cal.4th 602 (*Lenix*) reversed its past decisions rejecting comparative analysis raised for the first time on appeal. Nonetheless, the *Lenix* Court expressed a strong skepticism of such analysis. (*Id.* at 622–624; AOB at 61-63.) This Court's concern was that the comparisons raised for the first time on appeal, while relevant, lost force where the prosecution had not had the opportunity in the trial court to rebut any of the proposed similarities. (*Ibid.*)

As detailed in the briefing, however, defense counsel in this case *did* present a general comparison of seated and stricken jurors

below, informing the trial court, and the prosecutor, that all of the "particular reasons" that had been articulated by the prosecution with respect to Prospective Juror No. 28 ("education, LWOP is more severe, . . . [and] the time issue with regard to the jury") were characteristics held by multiple jurors. (See 5 RT 1079-1080; AOB at 63-64.) Nonetheless, the trial court, despite being urged to conduct a comparative analysis with respect to Prospective Juror No. 28, did not do so expressly. (AOB at 63-64.) Perhaps more importantly, despite being given the opportunity, the prosecutor did not attempt to distinguish any of the similarly situated jurors.

Importantly, when comparative analysis is requested of the trial court, this Court has held that the "trial court *must consider* [comparative analysis] in making its determination." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1323, overruled on other grounds by *Johnson v. California* (2005) 545 U.S. 162, italics added.) Furthermore, this Court has held that the fact that comparative analysis, when undertaken, shows that seated and stricken jurors share common characteristics "demand[s] further inquiry on the part of the trial court." (*People v. Hall* (1983) 35 Cal.3d 161, 169; ARB at 26.) Given the time constraints on the trial court below reviewing this motion in real time and without a recess, Mr. McDaniel argued that it was extremely unlikely that the trial court made all of the relevant comparisons with respect to Prospective Juror No. 28. The trial court most certainly did not "demand[] further inquiry." (*Hall*, *supra*, 35 Cal.3d at p. 169.) As a result, appellant argued that de novo review was warranted. (AOB at 64-

67.) This failure to conduct adequate comparison is particularly acute in this case, where, as noted above, the discriminatory strike of Prospective Juror No. 46 and the strike of Prospective Juror No. 28 at issue were extremely similar—both were grounded on virtually identical (and at least one, pretextual) grounds. It is virtually certain that the trial court below failed to make this critical comparison.

During this argument for de novo review, Mr. McDaniel made a passing reference to the fact that—instead of engaging in the requisite comparative analysis with respect to Prospective Juror No. 28—the trial court simply noted a potential justification that the prosecutor did not adopt. (AOB at 64.) The purpose of these two sentences was simply to reflect that nowhere in the trial court's discussion of the strike of Prospective Juror No. 28 did it engage in on-the-record comparative analysis.

Nonetheless, the opinion appears to rely on these sentences to reject an argument that Mr. McDaniel never made: "McDaniel also suggests that deference is inappropriate here because the court denied the motion regarding Prospective Juror No. 28 based on a reason not offered by the prosecution." (Slip Opn. at 25.) Mr. McDaniel agrees with the Court's ultimate conclusion—that "it is not apparent that the trial court relied on [this justification] in denying the motion." (*Ibid.*) However, this entire paragraph is incorrect and unresponsive to the argument that was made in the briefing. Mr. McDaniel did not argue that deference was inappropriate because the trial court adopted a justification not

given by the prosecutor. Instead, he argued that no deference should be accorded because, despite the prosecutor having the opportunity to differentiate any similarly situated jurors, he did not do so. Nor is it reasonable to presume that the trial court made all the critical comparisons. Because of this apparent mistake, the Court's opinion does not address Mr. McDaniel's argument for de novo review. (AOB at pp. 61-66; ARB at 22-26.) For this reason, too, rehearing should be granted.

IV. REHEARING SHOULD BE GRANTED BECAUSE THE COURT RELIES HEAVILY ON THE FINAL COMPOSITION OF THE JURY, A FACT WHICH IS THE RESULT OF A SUSPICIOUS PATTERN OF STRIKES WHICH *SUPPORTS* A FINDING OF DISCRIMINATION AND DOES NOTHING TO DISPELL IT

The ultimate composition of the jury is usually not a fact that is before the trial court when ruling on a *Batson/Wheeler* motion. Considering final jury composition, a fact based on "events that occurred *after* the trial court ruled on the *Batson* motion" as dispelling the suspicion of discrimination is an awkward conceptual practice "in tension with" several of this Court's cases suggesting that post-ruling information cannot backwardly inform or detract from the correctness of the trial court's original ruling. (See *People v. Reed* (2018) 4 Cal.5th 989, 1021 (dis. opn. of Liu, J) [citing *People v. Chism* (2014) 58 Cal.4th 1266, 1319 and *People v. Scott* (2015) 61 Cal.4th 363, 384].) Whatever the merit of relying on the ultimate composition of the jury as demonstrating the prosecutor's good faith,

the relevance of this evidence is vastly reduced when the prosecutor is "in effect warned" by the trial court that his conduct is suspicious. (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078 [fact that trial court stated that it would find a prima facie case if more Latino jurors were stricken resulted in reviewing court discounting prosecutor's later acceptance of Latino jurors].) Here, where the prosecutor was not only "warned," but sanctioned for misconduct, the relevance of seating Black jurors should be minimal, at best. And in fact, the pattern before the Court actually *supports* the conclusion that the prosecutor discriminated on the basis of race.

As the opinion acknowledges, the prosecution struck Black prospective jurors at alarming rate prior to the second *Batson/Wheeler* motion. (Slip Opn. at 25 [the prosecutor "used five of twelve peremptory challenges to strike Black jurors. . . . this strike rate is significantly higher than the share of prospective jurors who were Black and higher than the percentage of prospective jurors then seated in the jury box who were Black"].) However, after being called to task by the trial court for improperly engaging in a discriminatory strike against a Black prospective juror, the prosecution stopped striking Black jurors altogether. (See ARB at 27 [after being caught violating *Batson/Wheeler* "[f]or the remainder of voir dire . . . the prosecutor refrained from challenging any more Black prospective jurors, despite the fact that at all times there were at least one (and almost always several) black prospective jurors seated in the box"].)

As a result, the pattern of strikes in this case is distinctive and unusual: 1) an initial, highly disproportionate targeting of Black jurors prior to the *Batson/Wheeler* motion, followed by 2) an apparently conscious effort to *avoid* Black jurors and (as a consequence) disproportionate targeting of non-Black jurors. In other words, the pattern of strikes after the motion suggests that prosecutor *intentionally discriminated on the basis of race* (largely against Latino and White prospective jurors) in order to avoid risking a further *Batson/Wheeler* challenge with respect to Black jurors. As a consequence of this pattern (which itself is extremely suspicious and strongly reinforces the trial court's initial finding of discrimination), several Black jurors were ultimately seated.

The opinion, however, accords good faith to the prosecutor by relying on the final composition of the jury. The opinion states that the "fact that the prosecution accepted a panel with three Black jurors when it had enough remaining peremptory challenges to strike them suggests that the prosecutor did not harbor bias against Black jurors." (Slip Opn. at 26.) Similarly, the opinion indicates that "the fact that Black jurors . . . comprised a disproportionate share (33 percent) of the empaneled jury compared to the Black percentage among jurors who reached the box tends to weigh against a finding of purposeful discrimination." (*Ibid.*) This analysis is incorrect.

As noted above, the ultimate composition of the jury appears to be the result of conscious discrimination, both before and after the *Batson/Wheeler* challenge—first conscious targeting of Black jurors

and then conscious targeting of non-Black jurors. At best, what looks strongly like an attempt by the prosecutor to "make up" for his *Batson/Wheeler* violation by discriminating against non-Black jurors should not be held to dispel the inferences from an otherwise suspicious pattern. (See *Fernandez v. Roe*, *supra*, 286 .3d at p. 1078; see also *People v. Trevino* (1985) 39 Cal.3d 667, 688 reversed on other grounds by *People v. Johnson* (1989) 47 Cal.3d 1194 [discounting the fact that prosecution left a Spanish surnamed juror on the panel because this occurred only "after the defense advised the court that it intended to make the *Wheeler* motion."].) Because the Court's opinion explains away otherwise strong evidence of discrimination by pointing to the final composition of the jury—a composition resulting from a pattern of strikes that likely supports a finding of discrimination, and at best is minimally relevant—rehearing should be granted.

CONCLUSION

For the reasons outlined above, this Court should grant rehearing.

Dated: September 10, 2021 Respectfully submitted,

MARY K. McCOMB
State Public Defender

/s/ Elias Batchelder
ELIAS BATCHELDER
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CERTIFICATE OF COUNSEL

I am ELIAS BATCHELDER, the Supervising Deputy State Public Defender assigned to represent appellant, DON'TE LAMONT McDANIEL, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer generated word count, I certify that this brief, excluding tables and certificates, is 4,211 words in length.

DATED: September 10, 2021

/s/ Elias Batchelder
ELIAS BATCHELDER
Supervising Deputy State Public Defender
Attorney for Appellant

EXHIBIT A

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
DON'TE LAMONT MCDANIEL,
Defendant and Appellant.

S171393

Los Angeles County Superior Court
No. TA074274-01

August 26, 2021

Justice Liu authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Corrigan, Cuéllar, Kruger, Groban, and Jenkins concurred.

Justice Liu filed a concurring opinion.

PEOPLE v. McDANIEL

S171393

Opinion of the Court by Liu, J.

Defendant Don'te Lamont McDaniel was convicted of two counts of first degree murder for the shootings of Annette Anderson and George Brooks, two counts of attempted murder for the shootings of Janice Williams and Debra Johnson, and possession of a firearm by a felon. (Pen. Code, §§ 187, subd. (a), 664 & 187, subd. (a), former 12021, subd. (a)(1); all undesignated statutory references are to the Penal Code.) The jury found true the special circumstance of multiple murder. (§ 190.2, subd. (a)(3).) The jury also found true the allegations of intentional discharge and use of a firearm, intentional discharge resulting in great bodily injury and death, and commission of the offense for the benefit of, at the direction of, and in association with a criminal street gang. (§§ 12022.53, subd. (d), 122022.53, subds. (d) & (e)(1), 186.22, subd. (b)(l).) After the first penalty phase jury deadlocked, a second jury delivered a verdict of death on December 22, 2008. This appeal is automatic. (§ 1239, subd. (b).) We affirm.

I. FACTS

A. Guilt Phase

1. Prosecution Case

The events occurred in and around Nickerson Gardens, a large public housing complex in Southeast Los Angeles. In 2004, the Bounty Hunter Bloods gang was active in Nickerson Gardens, with about 600 members registered in law

enforcement databases. McDaniel and Kai Harris were members of the Bounty Hunter Bloods, as was one of the victims, Brooks.

On April 6, 2004, at 3:30 a.m., officers responded to reports of gunshots at Anderson's apartment in Nickerson Gardens. Entering through the back door, they observed the bodies of Anderson and Williams. Williams appeared to be alive. Brooks's body was slumped against the refrigerator. In the living room, an officer observed Johnson, who had a gunshot wound to the mouth and was trying to stand up.

Anderson died at the scene from multiple gunshot wounds. Stippling indicated that the wound to her face was inflicted at close range. Cocaine and alcohol were present in Anderson's body at the time of her death. Brooks also died at the scene from multiple gunshot wounds; he suffered five wounds to the face, and stippling indicated they were fired at close range. Williams survived gunshot wounds to her mouth, arms, and legs, and she spent three to four months in the hospital. Johnson also survived gunshots to the face and chest and underwent multiple surgeries.

Physical evidence collected at the scene included ten nine-millimeter and six Winchester .357 magnum cartridge cases. Investigators found one nine-millimeter cartridge case on Brooks's stomach and two .357 magnum cartridge cases on his neck. Two nine-millimeter cartridge cases were found near Anderson's hands. Investigators also recovered drug paraphernalia, including a metal wire commonly used with a crack pipe near Anderson's hand, a glass vial containing a crystal-like substance, and a plastic bag containing a rock-like substance in Brooks's pants.

Five days later, during a traffic stop, Deputy Sheriff Marcus Turner recovered a loaded Ruger nine-millimeter gun and associated ammunition from McDaniel. McDaniel identified himself as Mitchell Reed. About one month later, Officer Freddie Piro arrested a member of the Black P-Stone gang in Baldwin Hills, an area 13 miles away from Nickerson Gardens. During the arrest, Officer Piro recovered a .375 magnum Desert Eagle handgun.

Ten of the cartridges recovered from the scene matched the nine-millimeter Ruger recovered from McDaniel. Six of the cartridges found at the scene matched the .357 magnum Desert Eagle. The examiner also analyzed projectile evidence recovered at the scene and concluded that none was fired by the nine-millimeter gun. The source of other ballistics evidence was inconclusive.

In addition to this physical evidence, the prosecution introduced testimony from the survivors of the shooting and other witnesses who placed McDaniel and Harris at or near the crime scene. The defense case consisted primarily of exploiting inconsistencies in these witnesses' statements and the fact that many of the witnesses were intoxicated at the time of the shooting.

Williams testified that she was sitting at the table with Anderson on the evening of the shooting. Williams heard a whistle and then a knock on the back door. Elois Garner was at the backdoor and identified herself. Anderson opened the door, and Williams saw McDaniel enter the apartment shooting. After Williams was shot, she fell on the floor and lost consciousness. Williams had known McDaniel for about 10 years.

Although Williams had a history of drug use, she denied using drugs that night, but she testified that she had been drinking. She did not see Anderson or Brooks doing cocaine, nor did she see any other drug paraphernalia in the apartment. Williams did not realize that Johnson was in the living room and thought Johnson was in jail at the time. At the preliminary hearing, Williams testified that she had "nodded off" immediately before the shooting. When confronted with this prior testimony, she admitted to being "in and out" that night and that her head was down on the table at the time of the knock on the back door. Williams first identified McDaniel as the shooter on April 12, 2004, when officers showed her a six-pack photo lineup in the hospital.

Johnson died of unrelated causes before trial, so the prosecutor read her testimony from the preliminary hearing. At 3:00 a.m. on April 6, 2004, Johnson was sleeping on the living room floor at Anderson's home. She awoke to the sound of multiple gunshots coming from the kitchen. Johnson saw McDaniel enter through the back door then exit the kitchen and head toward the hallway. She looked up and saw McDaniel in dark clothes standing over her. He shot her and then crouched down and moved toward the front door. She heard two male voices during the shooting, neither of which was Brooks's. McDaniel was the only person she saw in the living room.

When Detective Mark Hahn interviewed Johnson at the hospital on April 9, 2004, she initially said she did not see the shooter because she was asleep when she was shot. During the preliminary hearing, she explained that she did not identify McDaniel because she was afraid. On April 12, the detectives showed her a six-pack photo lineup. Johnson circled McDaniel's photograph but did not tell the police his name; instead, she

wrote "shorter black boy." The court attempted to clarify whom she was comparing McDaniel to since she only saw one shooter in the house. She explained that Williams had told her at the hospital a second man was involved: "a tall, light-skinned dude at the backdoor."

The prosecution also introduced testimony from various witnesses recounting the events immediately before and after the shooting. On the night leading up to the shooting, Derrick Dillard was with Brooks at Anderson's apartment in Nickerson Gardens. Dillard and Brooks left Anderson's apartment to go to Harris's house a half-block away. After 15 minutes, they left to return to Anderson's apartment. On the way, Brooks, Harris, and Dillard ran into McDaniel. Brooks and McDaniel spoke briefly, and McDaniel asked Brooks "where have he been" and said that "Billy Pooh's looking for him." Detective Kenneth Schmidt testified that William Carey went by the name "Billy Pooh."

Dillard and Brooks proceeded to Anderson's house along with Prentice Mills. They went into Anderson's bedroom and used cocaine. Dillard testified that Anderson called out that someone was at the door for Brooks, and Brooks left the room. Dillard heard the back door open, followed by female screams and gunshots. After the gunshots stopped, Dillard did not hear anything and remained under the bed. After 10 minutes, he and Prentice left the room. Prentice left the house. Dillard called 911 and then left.

That night, Garner was drinking Olde English and walking in the vicinity of Anderson's apartment. She was approached by McDaniel and someone named "Taco," whom she later identified as Harris. She had seen both men before in the

neighborhood. McDaniel put a gun to her head and ordered her to knock on Anderson's back door. Both men were wearing black.

Garner's testimony diverged from the testimony of Dillard, Williams, and Johnson in several respects. Garner testified that she knocked at the back door but did not say anything. After knocking, she ran to a nearby parking lot. About five minutes later, she heard two gunshots and then two more, which conflicted with other witnesses' testimony that they heard immediate gunfire. She saw McDaniel and Harris run out of the back of Anderson's apartment toward the gym. After the shooting had ended, she returned to the apartment and looked inside. She saw Anderson on the ground.

During her first interview on April 15, 2004, Garner said she had heard the shots, but she did not identify the shooters or tell the police about knocking on Anderson's door. During an interview on May 26, she identified McDaniel and Harris, and she told police that McDaniel had held a gun to her head.

Angel Hill was Harris's girlfriend and lived with him at Dollie Sims's house a half-block away from Anderson's apartment. On April 6, Hill saw McDaniel and Harris sitting on Sims's porch. Hill left the house and went to a nearby parking lot. She heard gunshots. She was supposed to pick up Dillard from Anderson's apartment, so she got in her car and drove over. No one came to the back door when she knocked. After that, she returned to Sims's house where she saw McDaniel and Harris smoking on the porch. Hill, Harris, and McDaniel then went to the home of Tiffany Hawes, McDaniel's girlfriend.

Hill testified that at Hawes's home, McDaniel was "bragging about" the shooting like it was "a big joke." They

watched a news report about the shooting, and McDaniel explained what had happened in Anderson's apartment. He said to Harris, "You disappointed me, man." At some point, Carey arrived. McDaniel and Carey discussed what had happened, and McDaniel again bragged about the shooting.

The defense emphasized that Hill had provided conflicting testimony throughout the investigation. While Harris was in jail awaiting trial, he asked Hill to tell the police he had never left the house that night. Hill wrote Harris a letter saying she would do anything for him. In her first police interview on April 13, 2004, Hill said she was home with Harris the entire night. She was using PCP, crystal meth, cocaine, marijuana, and liquor on the night before the shooting.

Shirley Richardson also lived in Sims's house. Richardson testified that on the night of the shooting, she, Hill, and Harris were home getting high on PCP, crystal meth, and cocaine. McDaniel came over that night wearing black. He had a long gun and asked Harris to leave the house with him. Harris did not want to leave but eventually left. Richardson saw Harris with a Desert Eagle handgun that night. A few minutes after Harris left, Richardson heard gunshots. When McDaniel and Harris returned to Sims's house, Harris appeared upset.

On the night of the shootings, Sims returned home from work at 12:30 a.m. and saw Harris, Hill, Richardson, and Kathryn Washington in Harris's bedroom. Sims fell asleep for about 30 minutes and awoke to McDaniel banging on her back door and asking for Harris. Harris told her not to open the door and to go back to her room. From inside her room, she heard McDaniel tell Harris that someone in the projects had been robbing the places where he "hustled," and he wanted Harris to

help him "to go handle this." Fifteen minutes after McDaniel, Harris, Richardson, Hill, and Washington left the house, Sims heard gunshots. Ten minutes after the gunshots, Hill, Richardson, and Washington returned to the house. Five minutes later, Harris returned. When McDaniel returned, he talked about buying tickets for all of them to go to Atlanta, saying, "We can all take this trip and stuff and everything be cool. Just everything, keep it under the rock and we keep pushing."

On the morning of April 6, 2004, McDaniel asked Hawes to pick him up near 112th Street and Compton Avenue. She picked him up first, then picked up Harris and Hill at Sims's house. They went back to her house where they watched news coverage of the shooting. Contrary to Hill's testimony, Hawes testified that McDaniel did not say anything while watching the news and that she did not see Billy Pooh at her house that night.

When police searched Hawes's house in December 2004, they found a newspaper article about the shooting at Anderson's apartment and an obituary for William Carey (Billy Pooh), who was killed sometime after the shooting. The police also found bus tickets to Atlanta in Mitchell Reed's name.

Myesha Hall lived three doors down from Anderson in a second-story Nickerson Gardens apartment. Around 3:00 a.m. on April 6, 2004, she was standing at her window when she heard four single gunshots. She saw a short Black man wearing a white T-shirt run out of the back door of Anderson's apartment. After that, she heard "a lot of shots, like automatic." She then saw two tall Black men wearing dark-colored clothes run out of Anderson's back door. She did not hear any more gunshots after that.

2. Defense Case

The defense presented one witness, Dr. Ronald Markman, a psychiatrist familiar with the effects of PCP, methamphetamine, cocaine, marijuana, and alcohol. He testified to the effects of each drug on perception when used individually and the effects when used together. The "slowing" or "depressant qualities" of marijuana could possibly be neutralized by the stimulating effect of methamphetamine or cocaine. The symptoms that are common to the drugs would be accentuated when those drugs are taken together.

B. Penalty Phase

1. Prosecution Case

After the first jury hung in the penalty phase, the prosecutor presented the guilt phase evidence described above concerning the circumstances of the capital offense. The remainder of the prosecution's case focused on McDaniel's prior bad acts (section 190.3, factors (b), (c)) and victim impact evidence (section 190.3, factor (a)).

a. Prior Bad Acts

A little after midnight on April 6, 1995, Javier Guerrero's car broke down on the 105 freeway. He was given a ride to a payphone at 112th Street and Central Street in Los Angeles. While he was calling his family, three men approached him. One put a gun to his head. All three demanded money. The three men searched him, took his watch, then ran away. Guerrero identified a suspect that night in a field lineup but did not see that suspect in the courtroom. That night, Officer Hill saw the robbery and apprehended one of the participants, whom he identified as McDaniel.

On February 29, 1996, Thomas Tolliver was working as a campus security aide at Markman Middle School. At noon, Tolliver encountered McDaniel and two other individuals on the campus. Tolliver asked them to leave. McDaniel asked Tolliver if he was strapped. Tolliver again told McDaniel to leave. McDaniel said, "I'm going to come back and shoot your mother fucking ass." The three individuals then ran away.

On December 8, 2001, Officer Shear saw McDaniel and tried to detain him. As McDaniel ran away, Shear noticed a large stainless steel handgun in McDaniel's waistband. McDaniel fled into the upstairs bedroom of a nearby apartment. Shear obtained consent to search the apartment. McDaniel came outside and was handcuffed. Inside the upstairs bedroom, officers found a .357-caliber handgun containing five hollow point bullets.

On January 18, 2002, Officer Moreno was on patrol near Nickerson Gardens. When he observed McDaniel, he got out of the patrol car. McDaniel ran, and Moreno noticed that McDaniel had a handgun in his left hand. McDaniel fled into a nearby apartment. Inside that apartment, officers found McDaniel. In the stovetop, they found the unloaded TEC-9 handgun that they had previously seen in McDaniel's possession. Officer Shear was also pursuing McDaniel that day and searched the apartment. In an upstairs bedroom, Shear found an Uzi assault rifle and ammunition. The prosecutor presented evidence of McDaniel's conviction on June 27, 2002, for possession of an assault weapon.

On April 21, 2002, Ronnie Chapman was in his mother's backyard in Nickerson Gardens. Chapman's cousin Jeanette Geter saw McDaniel and his brother Tyrone approach

Chapman. She testified that she saw McDaniel shoot Chapman. Police officers saw McDaniel running less than a block away wearing a royal blue silk shirt. At trial, an officer testified that he found "the same blue shirt" at McDaniel's house in an unrelated incident.

On January 23, 2004, around midnight, officers responded to reports of gunfire at an address on East 111th Place. Officer Davilla secured the area by setting up a perimeter. McDaniel walked by and sat on the hood of a nearby car. Davilla ordered McDaniel to leave. McDaniel looked in Davilla's direction and said, "Fuck that shit." Davilla approached McDaniel, grabbed him, and escorted him away from the secured area. Davilla released McDaniel and told him he would be arrested if he did not leave. McDaniel raised his fists and walked toward Davilla, who pushed McDaniel backward. McDaniel then threw a punch at the top of Davilla's head. Davilla hit McDaniel in the face, and the two fell on the ground. Another officer hit McDaniel in the legs with a baton.

The defense called Joshua Smith, who witnessed this incident. Smith testified that this was a case of "police brutality" and that he had not heard McDaniel yell at the officer and had not seen him challenge the officer to a fight.

Kathryn Washington testified about the murder of Akkeli Holley, which occurred on July 4, 2003. Washington denied witnessing the murder, and the prosecution played a tape of a previous interview where she discussed witnessing the shooting. In her taped interview, she discussed seeing a shootout among Holley, a man named Roebell, and "R-Kelley" (McDaniel's moniker). Washington could not tell whether Roebell or R-Kelley was shooting. She testified that around the time Holley

was shot, she was using drugs daily, including PCP, cocaine, marijuana, alcohol, and methamphetamine. The defense again called Dr. Markman, who discussed the effects of these drugs on perception, as he had testified in the guilt phase.

On June 27, 2004, officers at the Men's Central Jail conducted a search of the cell that McDaniel shared with two other inmates. The search revealed several shanks that were concealed from view. Two shanks were found under one inmate's mattress. A single shank was found in a mattress that had McDaniel's property on top of it. The officer did not know how long McDaniel had been in that cell and acknowledged it was a transitional cell.

On June 21, 2006, McDaniel was using one of the phones in a cell in the Compton Courthouse lockup. A sheriff's deputy asked him to move cells, and McDaniel attempted to hit him with his right hand. The officer hit McDaniel twice in the face. McDaniel suffered bruising and swelling to his face, and the officer fractured his own hand.

On November 21, 2006, a sheriff's deputy was escorting an inmate from the law library back to his cell at the Men's Central Jail. As they passed the cell block, McDaniel and his cellmate threw several small cartons filled with excrement at the inmate.

b. Victim Impact Evidence

Anderson's brother testified about the impact of her death on their family. Anderson was the "backbone of the family" and "the life of the party. She just kept everybody's spirits up." She was a role model and lived in Nickerson Gardens "pretty much her whole life." Their mother took Anderson's death "real hard. . . . [H]er health just went down."

Anderson's only child, Neisha Sanford, testified about the impact of her mother's death. She described their close relationship and her mother's bond with her grandsons. Sanford discussed her mother's battle with cancer and the fact that "she wanted to start spending more time with [her grandsons] because she was sick." Anderson was the "core of the family." Since her mother's death, Sanford "[didn't] have a life anymore. My life ended four years ago. Him taking my mother's life, that was the end of my life."

Sanford's son also testified about the impact of his grandmother's death. He talked about spending "everyday" at his "little granny's home" and holidays like birthdays and Christmas. Her death "affect [*sic*] me a lot because me and my Grandma, we were really close. . . . [I]t make [*sic*] me sad all the time."

2. Defense Case

The defense case in mitigation focused on McDaniel's childhood, the pressures of living in Nickerson Gardens, his cognitive impairment from fetal alcohol syndrome, and his positive contributions to family members and friends.

McDaniel's mother testified that she drank while pregnant with McDaniel. McDaniel's father, who lived across the street with another woman, beat McDaniel's mother once in front of McDaniel and his brother. His early life was chaotic, and they frequently moved. At one point when McDaniel was about seven or eight, they lived on Skid Row. His mother started using cocaine at this time. She beat McDaniel with a belt to make him strong. Her brother Timothy was a father figure to McDaniel. Timothy sold drugs and was killed when McDaniel was about 12. His death affected McDaniel and made

him "angry and hostile, he really got involved with the gangs and stuff."

McDaniel's father testified that he and McDaniel's mother drank while she was pregnant with McDaniel. He never lived with McDaniel's mother and their children. He moved to Sacramento when McDaniel was two or three and did not return until he was 11 or 12. By that time, McDaniel had joined a gang. McDaniel's father testified that if you don't join a gang, you had problems and that Nickerson Gardens was a place people go to die.

The mother of McDaniel's two children described how McDaniel maintains a close relationship with them by sending cards and calling. She confirmed that McDaniel did "good things" for her and their children like buying diapers and being present at the hospital when they were born.

Two of McDaniel's cousins described Nickerson Gardens and the impact of Timothy's death on McDaniel. One explained, "Growing up in the projects as a young adult, especially a male, is a hard task. When you stay in it, you are bound to get caught up. And when I say caught up, that means either you are gonna die or you're going to go to jail for a long time."

McDaniel's friend testified that she wrote McDaniel from prison to tell him she was thinking about suicide, and he contacted the people in charge of the mental health unit to get her help. She credited McDaniel with saving her life.

Father Boyle is a Jesuit priest and the founder of Homeboy Industries, the largest gang intervention program in the country. Father Boyle did not know McDaniel but discussed the reasons that kids join gangs: "[T]hough the prevailing culture myth is that kids are seeking something when they join a

gang, . . . in fact they're fleeing something always. They're fleeing trauma. . . . They're fleeing sexual, emotional, physical abuse." He emphasized the need "to examine with some compassion the degree of difficulty there is in being free enough to choose" to join a gang.

Dr. Fred Brookstein is a professor of statistics and a professor of psychiatry and behavioral sciences. He directs a research unit that studies fetal alcohol and drug impacts on children. After analyzing a scan of McDaniel's brain, Dr. Brookstein found signs of brain damage caused by prenatal exposure to alcohol. He testified that people with this kind of damage have "problems with moral decisions."

Dr. Nancy Cowardin has a Ph.D. in educational philosophy and special education and runs a program called Educational Diagnostics. Based on her assessment of McDaniel in 2005 and a review of his school records, she opined that McDaniel has learning disabilities that predate his behavioral problems. McDaniel had a verbal IQ of 73 and a nonverbal IQ of 100. This "lopsidedness is what accounts for his learning disability."

II. PRETRIAL ISSUES

A. *Batson/Wheeler* Motion

McDaniel first claims that the prosecutor's use of a peremptory strike during jury selection prior to the guilt phase violated *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

1. Facts

During voir dire, the judge conducted a first round of questioning to elicit prospective jurors' views on the death penalty. The judge asked jurors to rate themselves on a scale of

one to four based on their ability to impose the death penalty. Category one jurors "would never ever vote for death regardless of what the evidence was." Category two jurors are "proponents of the death penalty. . . . If he killed someone, he should die." A category three juror is "the person who says I'm okay with the death penalty. . . . But not me. I can't vote to put somebody to death." A category four juror is "comfortable with the fact that [he or she] can go either way."

After the court and parties resolved for-cause challenges based on prospective jurors' death penalty views, a second round of questioning on the non-capital portion of the questionnaire began. Before beginning, the trial court emphasized to counsel that this round of questioning was to be a "very limited voir dire to back up the questionnaires if there are responses on, oh, things, that somebody writes his occupation and you don't know what it is that he does and you want some information." Not every juror was questioned, and at times the judge interjected to remind counsel of the limited nature of the questioning. The prosecutor questioned jurors on their beliefs that police officers lie, experiences with gangs, law enforcement experience, prior jury experience, familiarity with Nickerson Gardens, drug history, and religious beliefs.

After additional for-cause challenges, the parties began exercising peremptory strikes. After the prosecutor struck Prospective Juror No. 28, defense counsel made a *Batson/Wheeler* motion. At that time, the prosecutor had used three of his eight peremptory strikes to excuse Prospective Jurors Nos. 7, 13, and 28, all of whom were Black. Four other Black jurors were seated in the box.

In support of his motion, defense counsel noted that Prospective Juror No. 28 "seemed fairly strong on the death penalty. There was nothing obvious in his questionnaire that I could see. . . ." The trial court noted that "[h]e is a 73-year-old man. He is a retired electrician. His nephew was arrested and charged with a crime that was not specified." The court found no prima facie case: "There are a lot of African Americans on this panel. There are a number that are seated in the box as we speak. I will be mindful of it but I am not going to find a prima facie case at this time."

The prosecutor later used his 11th and 12th peremptory strikes to remove Prospective Jurors Nos. 40 and 46, both of whom were Black. At that time, three other Black jurors were seated in the box. Defense counsel made a *Batson/Wheeler* motion. The court noted the prosecutor's three previous strikes against Black jurors, then found "a prima facie case of excusals based on race," and excused the jury for a hearing on the motion. The court told the prosecutor: "I am concerned about the fact that of the twelve peremptory challenges the People have exercised, five have been to African Americans." The court asked the prosecutor to explain his reasons for the strikes.

As to Prospective Juror No. 7, the prosecutor explained that her responses that she would always vote against death were such that "[he] had initially hoped to actually dismiss [her] for cause. . . ." The court agreed with this justification: "My notes reflect she said she would not always vote for death penalty. Always vote for life. Death would not bring back the victims. That she thought life without parole was more severe."

The prosecutor gave three reasons to excuse Prospective Juror No. 13. First, he was concerned that Prospective Juror

No. 13's response that "police officers lie . . . if it suits the needed outcome . . . indicated an anti-police bias." Her questionnaire suggested "concern about the effectiveness of the death penalty" and that "the death penalty is appropriate for a child victim," but the case did not involve child victims. Her husband was also a criminal defense attorney. The court made no comments about this juror and asked the prosecutor to continue to Prospective Juror No. 28.

The prosecutor offered three reasons to excuse Prospective Juror No. 28. "My primary problem with this juror was the fact that he, along with many others, . . . indicated that life without parole is a more severe sentence, which I don't think is a good instinct to have on a death penalty jury." The prosecutor offered additional reasons for the strike. Prospective Juror No. 28 also stated in his questionnaire that he did not want to serve on the trial because it would be too long. "I try not to have jurors on death penalty cases that don't want to be here. . . ." Finally, the prosecutor explained that he was "also trying, to the extent possible with the jurors available to me, to have a jury with as much formal education as possible. And this juror I think just completed 12th grade. . . ."

Defense counsel responded: "There were many jurors — those particular reasons, the education, L-WOP is more severe, the uncomfortable — you know, the time issue with regard to the jury, there are a lot of people on this panel that have reflected — and you corrected them in your opening remarks and they all backed off of any problem in that regard. As far as education goes, I haven't gone through it particularly but there are lots of jurors —."

The court interjected to confirm whether Prospective Juror No. 28 answered "no" to the question about whether he could impose the death penalty if he thought it was appropriate. Defense counsel confirmed that Prospective Juror No. 28 responded no, but that during voir dire he said he had made a mistake. "Yeah I don't remember that one way or the other. I just have a blank on that," the court said. "All right, let me hear your next excuse number."

As to Prospective Juror No. 40, the prosecutor explained that he challenged her due to her response that "[she didn't] want the responsibility of deciding anyone's guilt or innocence and possibly being wrong." The court did not comment on this justification and asked, "What about 46?"

The prosecutor explained that Prospective Juror No. 46 did not believe the death penalty was a deterrent, "which is not an attitude that I considered to be a fair attitude." He was also concerned that Prospective Juror No. 46 listened to a "very liberal political radio station where they frequently have specials and guest speakers and interviews that are anti-death penalty advocates."

Turning to the merits of the defense motion, the court said: "I have a great deal of respect for the attorney in this case, Mr. Dhanidina. And I hold him in high regard. He has tried many cases before me. I have always found him to be an utmost professional. I have never thought that he was trying to do anything underhanded. I believe peremptory challenges should have some flexibility in the way the judge looks at them. I am accepting of the articulated reasons that have been advanced here. I suppose the defense is arguing that we should — that this court should not allow 46 to be excused or are you arguing

that this — that Mr. Dhanidina is making false representations to the court and that this panel should be dismissed and we should start all over again? I would just like to know what the defense is saying."

Defense counsel replied that he was "not asking that the panel be dismissed and start all over. I am just asking that Juror Number 46 not be excused." After a pause in the proceedings, the court granted the request. "I am going to strike the peremptory. I feel that the radio station that somebody listens to is not a valid reason."

The prosecutor emphasized that the radio station was only one of the justifications that he offered. "And the juror works for a nonprofit. Volunteers. Works for an organization of urban possibilities. Just throughout the questionnaire there are a number of race-neutral reasons." He asked for a brief recess to "consult with [his] supervisors about what to do in this situation. Because this is highly unusual."

"I don't like the *Wheeler* law," the court said. "I am trying to apply it the best I can. I think that he looked like an acceptable juror. . . . I am not going to give you more time to research it. We're going to seat him and let's go on with it." After the prosecutor exercised an additional five peremptory strikes, both sides accepted the jury. The final jury contained four Black, three Hispanic, three White, and two Asian jurors.

On April 29, 2008, the jury hung in the penalty phase of deliberations, and the court declared a mistrial. On May 28, the prosecutor filed a motion for reconsideration of the *Batson/Wheeler* ruling on the ground that the court improperly applied the for-cause standard for dismissal. Specifically, the motion argued that the court's stated acceptance of "the reasons

articulated here" should have been enough to shift the burden back to McDaniel, and that the court's follow-up comment that "the radio station that somebody listens to is not a valid reason" showed that the court was applying the standard "reserved for for-cause challenges, when a judge is to determine whether or not actual bias has been shown."

The court heard the motion in July 2008, before beginning jury selection for the second penalty trial. The court asked defense counsel whether he felt the court erred. Defense counsel replied, "I have talked to Mr. Dhanidina and I have seen how the jury came out racial-wise and in terms of how many African Americans there were on the jury at the end of it. And I told Mr. Dhanidina that I would submit it to the court."

Denying the motion, the court said, "[T]his is a motion brought that really has nothing to do with this trial. It has something to do with the prosecutor's perception of his record as a prosecutor. . . . And I am a little reluctant to get into this because I just feel that this is something we shouldn't be doing." The court continued, "I don't think that I was wrong and I stand by my ruling. . . . I still don't think they [the prosecutor's reasons for striking Prospective Juror No. 46] were valid under the circumstances because I think there were other jurors who said similar statements as this juror. I just felt that in an abundance of caution and since this was a capital case that I had to do what I did."

2. Analysis

The Attorney General argues that in accepting the reseating of Prospective Juror No. 46, McDaniel waived his right to a new trial, which is the remedy he seeks in this appeal. McDaniel argues that because the court never found a

Batson/Wheeler violation as to Prospective Juror No. 28, it follows that he never waived a remedy for that violation. We need not decide this issue because, as we explain, McDaniel's claim fails on the merits.

The Fourteenth Amendment to the United States Constitution prohibits a party from using peremptory challenges to strike a prospective juror because of his or her race. (See *Batson*, *supra*, 476 U.S. at p. 89.) The high court set forth a three-step framework in *Batson* to determine whether a litigant has violated this right. First, the moving party must establish a prima facie case of discrimination "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Id.* at p. 94.) Second, once the moving party "makes a prima facie showing, the burden shifts to the [striking party] to come forward with a neutral explanation for challenging" the prospective juror in question. (*Id.* at p. 97.) Third, if the proffered justification is race-neutral, then the court must consider whether the movant has proved it was more likely than not that the peremptory challenge was based on impermissible discrimination. (*Id.* at p. 98.)

The present case involves *Batson*'s third-stage requirement that the opponent of the strike prove purposeful discrimination. Beginning our review at the third stage is appropriate in the circumstances presented here. (See *People v. Scott* (2015) 61 Cal.4th 363, 392 (*Scott*).) After the trial court found no prima facie case with respect to Prospective Juror No. 28, the court later asked the prosecutor to explain his reasons for the strikes — including the strike of Prospective Juror No. 28 — in connection with McDaniel's subsequent *Batson/Wheeler* motion following the strike of Prospective Juror No. 46. McDaniel thus renewed his challenge to the excusal of

Prospective Juror No. 28 at that time, and the court rejected this renewed motion before discussing the requested remedy for the violation found regarding Prospective Juror No. 46.

At step three, courts look to all relevant circumstances bearing on the issue of discrimination. (See *Snyder v. Louisiana* (2008) 552 U.S. 472, 478.) Relevant circumstances may include the race of the defendant, the ultimate racial composition of the jury, the pattern of strikes, and the extent or pattern of questioning by the prosecutor during voir dire. (See *Miller-El v. Cockrell* (2003) 537 U.S. 322, 240–241, 245 (*Miller-El*); *Batson, supra*, 476 U.S. at p. 97; *Wheeler, supra*, 22 Cal.3d at p. 281.) A court may also consider the fact that the prosecutor impermissibly struck other jurors "for the bearing it might have upon the strike" of the challenged juror. (*Snyder*, at p. 478.) The high court has also held that comparative juror analysis may be probative of purposeful discrimination at *Batson*'s third stage. (*Miller-El*, at p. 241.) We defer to a trial court's ruling only if the court has made a " 'sincere and reasoned effort to evaluate the nondiscriminatory justifications offered' " by the prosecutor. (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1159 (*Gutierrez*).)

Here we find that the trial court made a sincere and reasoned attempt to evaluate the prosecutor's justifications based on the court's observations regarding the circumstances of the strike and its active participation in voir dire. In evaluating the justifications, the court asked the prosecutor questions and referred to its own notes, at times interjecting its own observations that confirmed the prosecutor's justifications. The record from the motion to reconsider the *Batson/Wheeler* ruling reveals that the court was also testing the applicability of the prosecutor's justifications against other jurors. In rejecting the prosecutor's reasons for striking Prospective Juror No. 46,

the court said: "I still don't think they were valid under the circumstances because I think there were other jurors who said similar statements as this juror." Throughout the process, the court made clear that it was cognizant of the prosecutor's rate of strikes and the current composition of the jury, which shows that the court considered the circumstances of the strikes.

Nor did the trial court overlook "powerful evidence of pretext," as McDaniel's briefing suggests, in declining to find a *Batson/Wheeler* violation as to Prospective Juror No. 28 when it granted McDaniel's *Batson/Wheeler* motion as to Prospective Juror No. 46. The parties dispute whether the court applied the correct standard in ruling on Prospective Juror No. 46. (See *People v. Baker* (2021) 10 Cal.5th 1044, 1076–1077 [focus is on the " 'genuineness' " of the proffered reasons, not their "analytical strength," though the latter may shed light on the former]; *People v. Cruz* (2008) 44 Cal.4th 636, 660; see also *Miller-El*, *supra*, 537 U.S. at pp. 338–339.) We can assume, without deciding, that it did. Although a prior *Batson* violation is a relevant circumstance for a court to consider in determining whether there was purposeful discrimination (see *Snyder*, *supra*, 552 U.S. at p. 478), the trial court here was well aware of the violation when it ruled on all five strikes at the same time.

McDaniel argues that under *Gutierrez*, a trial court is obligated to make specific findings "when the circumstances are so suspicious that follow-up and individualized analysis is the only way to create a record of 'solid value.' " In *Gutierrez*, we distinguished "neutral reasons for a challenge [that] are sufficiently self-evident, if honestly held, such that they require little additional explanation" from situations where "it is not self-evident why an advocate would harbor a concern." (*Gutierrez*, *supra*, 2 Cal.5th at p. 1171.) In the latter instances,

particularly where "an advocate uses a considerable number of challenges to exclude a large proportion of members of a cognizable group," the court must "clarif[y] why it accepted the . . . reason as an honest one." (*Id.* at p. 1171.) But unlike in *Gutierrez*, the prosecutor's justifications here did not require additional explanation. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 111 ["It is reasonable to desire jurors with sufficient education and intellectual capacity"]; *People v. Cash* (2002) 28 Cal.4th 703, 725 ["possible reluctance to vote for death" and "seeming reluctance to serve" are race-neutral justifications].)

McDaniel also suggests that deference is inappropriate here because the court denied the motion regarding Prospective Juror No. 28 based on a reason not offered by the prosecution. But we do not agree with McDaniel's reading of the record in this regard. Even though, as McDaniel notes, the trial court brought up a potential reason from Prospective Juror No. 28's questionnaire, it is not apparent that the trial court relied on it in denying the motion. Applying deference to the trial court's ruling, we conclude that substantial evidence supports the race-neutral reasons given by the prosecutor for his strike of Prospective Juror No. 28.

McDaniel is Black, and at the time of the second *Batson* motion, the prosecutor had used five of twelve peremptory challenges to strike Black jurors. As discussed below, this strike rate is significantly higher than the share of prospective jurors who were Black and higher than the percentage of prospective jurors then seated in the jury box who were Black. However, at the time the prosecutor struck Prospective Juror No. 46, three other Black jurors were seated in the box who would eventually serve on the jury. Juror Nos. 8 and 10 had been sitting in the

box since the beginning of jury selection. The prosecutor had also declined three times to strike Juror No. 7, who was seated in the box at that time.

Despite the relatively high rate of strikes against Black jurors at the time of the motion, the final racial composition of the jury was diverse and contained more Black jurors than jurors of any other race. Comparing the final composition of the jury to the overall pool reveals that Black jurors were overrepresented on the jury, even factoring in the disallowed strike of Prospective Juror No. 46. Black jurors comprised 16 percent of the total juror pool. The final jury was 33 percent Black. Even without Prospective Juror No. 46, Black jurors would have comprised 25 percent of the empaneled jury. To be sure, the fact that the final jury contained four Black jurors is not conclusive since the "[e]xclusion of even one prospective juror for reasons impermissible under *Batson* and *Wheeler* constitutes structural error." (*People v. Krebs* (2019) 8 Cal.5th 265, 292.) But the fact that the prosecution accepted a panel with three Black jurors when it had enough remaining peremptory challenges to strike them suggests that the prosecutor did not harbor bias against Black jurors. (See *id.* at p. 293.)

The same trend holds true when we compare the final jury to the composition of jurors who reached the box. Among the jurors who reached the box, 19 percent were Black. Although Black jurors comprised 42 percent of the prosecutor's strikes at the time of the *Batson/Wheeler* motion, the fact that Black jurors also comprised a disproportionate share (33 percent) of the empaneled jury compared to the Black percentage among jurors who reached the box tends to weigh against a finding of purposeful discrimination. (Cf. *People v Fuentes* (1991)

54 Cal.3d 707, 711–712 [finding *Batson* violation where prosecutor used 14 of 19 peremptory challenges to strike Black jurors and the sworn jury contained three Black jurors and three Black alternates].) At the same time, the fact that the trial court found the prosecutor violated *Batson/Wheeler* in striking Prospective Juror No. 46 is also a relevant consideration. (See *Snyder*, *supra*, 552 U.S. at p. 478.)

Although Prospective Juror Nos. 7, 13, and 40 were also the subject of peremptory challenges, McDaniel only challenges the strike of Prospective Juror No. 28. McDaniel urges us to find pretext in the fact that the prosecutor's voir dire of Prospective Juror No. 28 consisted of only one question, which was unrelated to his primary reason for the strike. In this case, after resolving the parties' challenges to prospective jurors for cause, the trial court urged both sides to limit voir dire. We have said that "trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions." (*People v. Lenix* (2008) 44 Cal.4th 602, 625.) Given the limitations on voir dire imposed by the trial court, as well as the fact that the prosecutor struck five non-Black jurors without asking them a single question, the observation that the prosecutor asked Prospective Juror No. 28 only one question is not by itself evidence of pretext.

McDaniel next argues that the prosecutor's education justification itself is a circumstance of pretext in that it disproportionately excluded Black jurors. " ' "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the

[classification] bears more heavily on one race than another." [Citation.] If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.' " (*People v. Melendez* (2016) 2 Cal.5th 1, 17–18, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 363 (*Hernandez*).) Educational disparities in the seated jurors fell across racial lines. None of the Black seated jurors had attended college. Of the three White jurors who served, two had graduate degrees and one was pursuing a graduate degree. But the fact that the jury ultimately included four Black jurors lessens the inference that the prosecutor used this criterion to exclude Black jurors.

Nor do we infer pretext from the fact that other Black jurors served who had comparable education levels to Prospective Juror No. 28. The prosecutor did not couch the education criterion in categorical terms; he explained that he was trying "to the extent possible with the jurors available to me, to have a jury with as much formal education as possible." In addition to these qualified terms, the education justification was, by the prosecutor's own account, not the primary reason for striking Prospective Juror No. 28. Finding pretext because the prosecutor did not uniformly deploy this criterion to exclude Black jurors would perversely incentivize litigants to use "subjective criterion [that] hav[e] a disproportionate impact" to uniformly exclude jurors of certain racial groups. (*Hernandez*, *supra*, 500 U.S. at p. 370.)

We next compare Prospective Juror No. 28 with similarly situated non-Black panelists whom the prosecutor did not strike. (See *Miller-El*, *supra*, 545 U.S. at p. 241.) The

individuals compared need not be identical in every respect aside from ethnicity: "A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." (*Id.* at p. 247, fn. 6.)

Prospective Juror No. 28 was a 73-year-old Black man. Before retiring, he was an electrician at an aircraft company. He had served in the military. He marked his education level as "12 years." He believed that LWOP was a more severe penalty than death. He indicated that he would not be open to considering evidence of mitigation in the penalty phase. He answered "no" to the question of whether regardless of his views, he would be able to vote for death if he believed, after hearing all the evidence, that the death penalty was appropriate. He said he would not like to serve on a jury because it was "to [*sic*] long." During voir dire, Prospective Juror No. 28 put himself in category 4, and the court asked no other questions except to remark that "you don't want to serve because this case is going to be too long. I appreciate you being here." The prosecutor's "primary concern" about Prospective Juror No. 28 was his views on the severity of life without the possibility of parole. One non-Black seated juror, Juror No. 4, expressed the same view on the questionnaire, as did three alternate jurors.

Juror No. 4 was a 30-year-old Hispanic man who worked as an office services coordinator. Like Prospective Juror No. 28, he answered that life without the possibility of parole was a more severe penalty because "in prison you have someone telling you when to sleep; wake; etc. In death you are done. So in prison it makes you like a kid again and no grown person likes that." During voir dire, he clarified that he saw himself as belonging to category 4. During voir dire, Juror No. 4 indicated that he

understood that death was the more severe penalty. Because Juror No. 4 clarified that he understood death was the more severe penalty, he was materially different from Prospective Juror No. 28.

McDaniel urges us not to consider Juror No. 4's rehabilitation because neither the prosecutor nor the judge questioned Prospective Juror No. 28 on this point. As described above, the judge encouraged the parties to limit voir dire; many prospective jurors were not asked any questions. The prosecutor's practice of asking jurors to raise their hands in response to questions also impeded the development of a full record on this point. But in a *Batson/Wheeler* motion, the burden is on the defendant to prove purposeful discrimination. (*Batson*, *supra*, 476 U.S. at p. 90.) Faced with a record that is silent in this way, we have no basis to infer that Prospective Juror No. 28, upon questioning, would have given an answer similar to Juror No. 4's.

Three alternate jurors also thought LWOP was the more severe penalty. Alternate Juror No. 2, a 48-year-old White man, believed LWOP was a more severe penalty because "[t]here's a long time to think about what you have done and pay for it every day." Alternate Juror No. 4, a 53-year-old Hispanic woman believed that LWOP was the more severe penalty because "[t]hey need to think about what they did for the rest of their life." Alternate Juror No. 5, a 32-year-old Hispanic woman, believed that LWOP was the more severe penalty because "[y]ou live the rest of your life in prison without freedom." During voir dire, these jurors confirmed they were category 4 jurors but were not asked any other questions about their death penalty views.

It is significant that these alternate jurors shared the same LWOP views as Prospective Juror No. 28 and that the prosecutor said his "primary concern" about Prospective Juror No. 28 was his views on LWOP compared to the death penalty. As discussed, however, there are circumstances here that dispel suspicion. McDaniel relies on *Snyder* to contend that once the prosecution's LWOP justification fails comparative analysis, the inquiry into discriminatory intent must end. But in *Snyder*, the high court's finding of a *Batson* violation flowed not simply from comparative analysis, but also from the fact that the prosecutor's justification was "highly speculative" and untethered to the record. (*Snyder*, *supra*, 552 U.S. at p. 482; see *id.* at pp. 482–483.) That is not the case here. All of the prosecutor's stated reasons were supported by the record. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 924.) Moreover, in *Snyder*, the prosecutor struck all the Black jurors on the panel. (*Synder,* at p. 476.) At the time of the second *Batson/Wheeler* motion in this case, two Black jurors — Juror Nos. 8 and 10 — had been sitting in the box since the beginning of jury selection. The prosecutor had also declined three times to strike Juror No. 7, another Black juror who was seated in the box at that time. Finally, even excluding Prospective Juror No. 46, the jury would have contained the same number of Black jurors as it did White and Hispanic jurors, despite the fact that Black jurors comprised a lower percentage of both the overall jury pool and the prospective jurors who reached the jury box.

Ultimately, having considered the totality of the circumstances, including the fact that the judge found a *Batson/Wheeler* violation for Prospective Juror No. 46, we conclude that the trial court's ruling was supported by substantial evidence.

3. Motion for Judicial Notice

McDaniel urges us to take judicial notice of the *Batson/Wheeler* proceedings in his codefendant Kai Harris's trial. A reviewing court may take judicial notice of records of "any court of this state" provided that the moving party provides the adverse party notice of the request. (Evid. Code, § 452, subd. (d)(1); see also Evid. Code, §§ 459, 453.) Yet even when these criteria are met, the reviewing court retains some discretion to deny judicial notice. Without deciding whether such information is generally relevant to an appellate court's review of a trial court's *Batson/Wheeler* ruling on direct review, we exercise our discretion to deny the request here. We do so without prejudice to McDaniel presenting such information on a fuller record in connection with a petition for habeas corpus if he so chooses. (See *Foster v. Chatman* (2016) 578 U.S. __ [136 S.Ct. 1737]; *Miller-El, supra*, 537 U.S. 322.)

B. Denial of Motion to Suppress Firearm

McDaniel next challenges the trial court's denial of his motion to suppress the gun discovered during the April 11, 2004, traffic stop. McDaniel argues that because the officer lacked reasonable suspicion of criminal activity, he could not order McDaniel to remain in the car against his will. Because the gun would not have been discovered if he had been permitted to leave the scene, it should have been suppressed. McDaniel argues its admission was prejudicial error under the state and federal Constitutions.

1. Facts

Five days after the shooting, Los Angeles County Sheriff's Deputies Marcus Turner and Eric Sorenson were on vehicle patrol at 120th Street and Central Avenue near Nickerson

Gardens. Deputy Turner noticed a blue Toyota without a license plate and activated the lights to pull the car over. The car continued driving for about 10 seconds. Deputy Turner noticed the passenger's head moving back and forth "like he was conversating [*sic*] with the driver" but did not notice other suspicious movements. A few seconds after Deputy Turner activated the sirens, the car pulled over.

As soon as the car stopped, the passenger door opened, and a man later identified as McDaniel began to exit the vehicle. Deputy Sorenson had just begun to exit the police car. Deputy Turner, who was still in the driver's seat, testified on direct examination that "the passenger door came open and the passenger at the door stepped out and made a motion and tried to run out of the vehicle." On cross-examination, Deputy Turner acknowledged that McDaniel was standing up in the door well but had not stepped beyond the door. He acknowledged that it was not unusual for passengers to exit vehicles during traffic stops. Deputy Turner testified that his partner yelled, " 'Get back in the car,' " and McDaniel complied.

Deputy Turner arrested the driver of the Toyota for not having a driver's license and placed him in the police car. Because the driver had no driver's license, the deputies decided to impound the vehicle. Deputy Turner returned to the car to pull out the passenger so that he could inventory the car. As he extended his hand to McDaniel, he noticed a bulge in McDaniel's right pocket that resembled a gun. Deputy Turner patted him down and retrieved a loaded Ruger semiautomatic handgun and a separate loaded magazine.

After argument, the judge denied McDaniel's motion to suppress, saying, "I think the officer had every right to do what

he did under the circumstances and I was particularly persuaded by the fact that he had decided to inventory the car once he determined that the driver did not have a license. And I found his testimony to be credible."

2. Analysis

The Attorney General argues that McDaniel's claim is forfeited because defense counsel never explicitly stated that "the deputies violated his Fourth Amendment rights when they ordered him to return to the car" and did not cite any of the authorities relied on in this appeal. Because we can resolve McDaniel's claim on the merits, we need not decide whether it was forfeited.

For purposes of the Fourth Amendment, both the driver and passenger are seized when an officer pulls over a vehicle for a traffic infraction. (*Brendlin v. California* (2007) 551 U.S. 249, 251 (*Brendlin*).) Following a lawful traffic stop, a police officer may order the driver out of the vehicle pending completion of the stop. (*Pennsylvania v. Mimms* (1997) 434 U.S. 106, 111 (*Mimms*).) In *Maryland v. Wilson* (1997) 519 U.S. 408, 410 (*Wilson*), the high court extended the *Mimms* rule to the passengers of legally stopped vehicles. The high court observed that "traffic stops may be dangerous encounters," and the "same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger." (*Wilson*, at p. 413.) The court reasoned that the " 'risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.' " (*Id.* at p. 414, quoting *Michigan v. Summers* (1981) 452 U.S. 692, 702–703.) The case for the passenger's personal liberty is "stronger than that for the driver," but as a practical

matter, since the passenger is already stopped, "[t]he only change in their circumstances which will result . . . is that they will be outside of, rather than inside of, the stopped car." (*Wilson*, at p. 414.) The court characterized this additional intrusion as "minimal" given that the presence of "more than one occupant of the vehicle increases the possible sources of harm to the officer." (*Id.* at pp. 413, 415.)

Wilson left open whether an officer may order a passenger of a legally stopped vehicle to remain in the car after the passenger has attempted to exit. (*Wilson*, *supra*, 519 U.S. 408, 415, fn. 3.) McDaniel argues that *Terry v. Ohio* (1968) 392 U.S. 1 governs, requiring "articulable suspicion" to detain the passenger of a lawfully stopped vehicle. (*Id.* at p. 31; see also *id.* at p. 21, fn. omitted [officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop].) Yet the high court in *Arizona v. Johnson* (2009) 555 U.S. 323 (*Johnson*) observed that *Mimms*, *Wilson*, and *Brendlin* "cumulatively portray *Terry*'s application in a traffic-stop setting" and "confirm[ed]" that "the combined thrust" of those three decisions is "that officers who conduct 'routine traffic stop[s]' may 'perform a "patdown" of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.' " (*Johnson*, at pp. 331–332.)

Johnson further elaborated that "[a] lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. [Citation.] An officer's

inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." (*Johnson, supra*, 555 U.S. at p. 333.) Indeed, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' — to address the traffic violation that warranted the stop, [citation] and attend to related safety concerns." (*Rodriguez v. United States* (2015) 575 U.S. 348, 354.) Although "certain unrelated checks" by an officer may be tolerated, absent reasonable suspicion a traffic stop " 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission.' " (*Id.* at p. 354; see *id.* at pp. 354–355.)

McDaniel's detention here complied with high court precedent. Under *Johnson*, his temporary seizure was reasonable for the duration of the stop, and Deputy Sorenson "surely was not constitutionally required to give [McDaniel] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, [the officer] was not permitting a dangerous person to get behind [him]." (*Johnson, supra*, 555 U.S. at p. 334, fn. omitted.) There is no indication that the officers did anything more than that or otherwise prolonged the stop beyond the time reasonably required to complete the mission. Deputy Turner processed the driver for the Vehicle Code violation while Deputy Sorenson stood next to the passenger side of the vehicle with his gun drawn. Because the driver had no license, the deputies decided to impound and inventory the vehicle. The officers then promptly investigated whether McDaniel posed a threat. When Deputy Turner directed his attention to McDaniel, who was still sitting in the

passenger seat, he observed a bulge in his pocket that resembled the shape of a gun. A reasonable officer observing the outline of a gun in a passenger's pocket would perceive an ongoing safety threat that justifies a pat down search. Under these circumstances, admission of the gun was not error.

C. Admission of Kanisha Garner's Hearsay

McDaniel argues that the trial court improperly admitted hearsay evidence that was the basis for the gang enhancement under section 186.22, subdivision (b)(1). He claims that the admission of the hearsay evidence, in addition to being error under the Evidence Code, also violated his rights under the state and federal Constitutions to a fair and reliable capital sentencing hearing and due process.

1. Facts

Before trial, the prosecutor filed a motion in limine to introduce hearsay statements made by George Brooks to his sister Kanisha Garner concerning how he obtained the drugs he sold as a declaration against interest. In support he attached Kanisha's testimony from the trial of Kai Harris. (We refer to the witness by first name to avoid confusion with Elois Garner.) The court held a brief hearing during which defense counsel objected to the admission of the statements on federal constitutional grounds. The court asked whether Brooks's statement was testimonial, and defense counsel conceded that it was "probably not testimonial." The court admitted the statement "over objection."

The Attorney General urges us to find the argument forfeited because defense counsel did not object to Kanisha's testimony at trial. The Attorney General points to our decisions holding that a motion in limine does not always preserve the

issue if the party fails to object once the evidence is offered. (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Because we can resolve McDaniel's claim on the merits, however, we need not decide whether it was forfeited.

The parties also dispute which version of the hearsay statements should be considered: Kanisha's statements from Kai Harris's trial that the prosecutor proffered during the pre-trial motion or the statements that she actually made at trial. We need not decide which statements are the proper focus of review. Although cross-examination of Kanisha at McDaniel's trial yielded a more forceful declaration that Brooks did not intentionally steal the drugs, Kanisha's statements at Harris's trial were substantially similar. Both statements contain the admission that Brooks was dealing drugs. Both statements recount how he obtained the drugs, who gave him the drugs, as well as the fact that he did not pay for them and that Billy Pooh was looking for him.

2. Analysis

A declaration against interest is an exception to the general rule that hearsay statements are inadmissible under California law. (Evid. Code, §§ 1200, subd. (b), 1230.) "Evidence Code section 1230 provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was so far against the declarant's interests, penal or otherwise, that a reasonable person would not have made the statement unless he or she believed it to be true." (*People v. Westerfield* (2019) 6 Cal.5th 632, 704.) The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. (*People v.*

Frierson (1991) 53 Cal.3d 730, 745.) " ' "In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." ' " (*People v. Masters* (2016) 62 Cal.4th 1019, 1055–1056.) We review a trial court's decision whether a statement is admissible under Evidence Code section 1230 for abuse of discretion. (*People v. Grimes* (2016) 1 Cal.5th 698, 711 (*Grimes*).)

McDaniel does not dispute that Brooks's admission that he was dealing drugs was a declaration against his penal interest. He argues that the statements detailing how he obtained the drugs and from whom should be excluded as a collateral statement because they were not against his penal or social interest, and they lack indicia of trustworthiness.

The Attorney General argues that the collateral statements were sufficiently against Brooks's social interest because "Brooks's statement regarding whom he had stolen the drugs from and the circumstances surrounding the theft would most certainly subject Brooks to retaliation by Carey and appellant, and possibly the Bounty Hunters." McDaniel in turn argues that the statements were designed to enhance Brooks's social status because claiming "that he had obtained a few ounces of cocaine from a top level distributor in the projects . . . is clearly suggestive of 'an exercise designed to enhance his prestige.' " (See *People v. Lawley* (2002) 27 Cal.4th 102, 155 (*Lawley*) [a hearsay declarant seeking admission in Aryan Brotherhood who claims to be carrying out the organization's

will in killing victim might have been an exercise designed to enhance prestige].)

Unlike in *Lawley*, where the declarant was seeking full membership in the Aryan Brotherhood, the record does not suggest that Brooks, who was already a Bounty Hunter Blood, was seeking a higher social status in that gang. To the contrary, Kanisha testified that Brooks had recently been released from prison, and Carey "was trying to give him some stuff to make money with out of jail." Her responses to his description of the "incident" in which he did not pay for the drugs indicate that she feared for him and that she expected he would face retaliation from Carey and his associates who had "status in the projects." In light of this evidence, we conclude that the trial court did not abuse its discretion in admitting the statements as a declaration against social interest.

D. *Pitchess* Motion

McDaniel requests that we independently review the sealed record of the trial court discovery rulings pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) in order to determine whether the in camera review process complied with the law.

Before trial, McDaniel filed several *Pitchess* motions seeking to discover documents related to incidents that the prosecution planned to use in the penalty phase. McDaniel initially sought discovery into "complaints of dishonesty, lying, falsifying or fabricating evidence, committing perjury, and the like" for two Los Angeles County Sheriff's Department deputies. The trial court ruled McDaniel had not made a sufficient showing for an in camera hearing.

McDaniel subsequently sought discovery into "incidents of fabrication, lying, assaultive conduct, and excessive force" and "harassment" on the part of 14 Los Angeles Police Department officers. He additionally sought discovery into "assaultive behavior, mistreatment of people in custody, [and] dishonesty" for four Los Angeles County Sheriff's Department deputies. The judge found good cause and, due to the volume of the requests, conducted four in camera hearings.

" 'When a defendant shows good cause for the discovery of information in an officer's personnel records, the trial court must examine the records in camera to determine if any information should be disclosed. [Citation.] The court may not disclose complaints over five years old, conclusions drawn during an investigation, or facts so remote or irrelevant that their disclosure would be of little benefit. [Citations.] *Pitchess* rulings are reviewed for abuse of discretion.' " (*People v. Rivera* (2019) 7 Cal.5th 306, 338 (*Rivera*).) Although Evidence Code section 1045, subdivision (b)(1) excludes from disclosure "[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought," disclosure of such information may still be required under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). (See *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 13–15 & fn. 3.)

In this case, the record includes sealed transcripts of the in camera hearings and copies of all the documents that the trial court reviewed. With respect to Los Angeles County Sheriff's Department records, the custodian of records made all potentially relevant documents available to the trial court for review, was placed under oath at the in camera hearing, and

stated for the record " 'what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion.' " (*Rivera, supra*, 7 Cal.5th at p. 339.) The trial court found information for two deputies that it deemed discoverable. However, because the trial was about to start, the court, instead of disclosing this information to the defense, ruled that the prosecution could not use the incidents that involved these deputies.

With respect to the Los Angeles Police Department records, the custodian of records made available to the trial court for review all potentially relevant information from the relevant *Pitchess* periods and the time since. The record in this case also shows that defense counsel waived any right to have the custodian or the court review any older records that might have been available. Accordingly, this is not an appropriate case to further consider the handling of confidential records more than five years old. (*City of Los Angeles, supra*, 29 Cal.4th at p. 15, fn. 3; see *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696, 715–722 [resolving issue regarding prosecutors' *Brady* obligations based on the premise that defendants can ensure production of *Brady* material through the *Pitchess* process]; see also *Association for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 55 [discussing *Johnson*'s reasoning].)

In sum, based on our review of these records, we conclude that the trial court examined all the relevant information and otherwise complied with applicable law.

III. GUILT PHASE ISSUE

Sufficiency of the Evidence for Gang Enhancement

McDaniel argues that there was insufficient evidence of collaborative activities or collective organizational structure to support the gang enhancement conviction under section 186.22, subdivision (b)(1).

To prove the existence of a criminal street gang, we explained in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*) that section 186.22, subdivision (f) requires: an " 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses." (*Prunty*, at p. 66.) McDaniel challenges the sufficiency of the prosecution's evidence connecting the predicate offenses to the Bounty Hunter Bloods and the evidence connecting himself to the Bounty Hunter Bloods.

Detective Kenneth Schmidt testified that between 1998 and 2006 he worked as a gang detective in Nickerson Gardens gathering intelligence on the Bounty Hunter Bloods. He described the signs and symbols particular to the Bounty Hunter Bloods, like hats and hand signs with the letter "B" and red clothing. Their turf was "predominately in and around Nickerson Gardens." Primary activities of the gang included "narcotics, street robberies and a lot of crimes involving shootings and murder."

Schmidt identified McDaniel in court and described his gang tattoos: a tattoo across his back that read "Nickerson," and the letters "B" and "H" on the back of his arms that stood for

"Bounty Hunter." McDaniel also had tattoos of "A" and "L" for Ace Line, "C" and "K" for Crip Killer, "BIP" for Blood in Peace, and "BHIP" for Bounty Hunter in Peace.

Schmidt also described a tattoo of "111," which stood for 111th Street, "the north end of the Nickerson Gardens, also known as Ace Line." Ace Line refers to "one of the clicks [*sic*] inside Bounty Hunters itself." Schmidt described the various cliques within the Bounty Hunters in Nickerson Gardens and the lack of "structured hierarchy other than O.G., old gangsters that have been around longer." The cliques "all grow up together. They live together. It could be at anyone [*sic*] point in time, they'll say they're Ace Line or Five Line." Sometimes there was "inner gang fighting" over turf for drug sales. He testified that he had seen William Carey (Billy Pooh), a known narcotics trafficker, with McDaniel on fewer than 10 occasions. He identified Carey, George Brooks, Derek Dillard, Prentice Mills, and Kai Harris as Bounty Hunter Bloods.

Schmidt described predicate crimes committed by Ravon Baylor, who "admitted to [him] that he was a Bounty Hunter Blood," and Lamont Sanchez, whom he "knew as a Bounty Hunter Blood also." This knowledge was based on statements and wiretaps overheard during an investigation for murder and attempted murder. The prosecutor introduced the certified records of Baylor and Sanchez's convictions.

" 'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction.' [Citation.] 'We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted

simply because the circumstances might also reasonably be reconciled with a contrary finding.' " (*Rivera*, *supra*, 7 Cal.5th at p. 331.)

McDaniel argues that under *Prunty*, the prosecution had to prove that McDaniel knew Baylor and Sanchez because these two gang members belonged to "an unidentified clique of the umbrella gang the Bounty Hunter Bloods." *Prunty* held that a showing of an associational or organizational connection is required when the prosecution, in seeking to prove that a defendant committed a felony to benefit a given gang, establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets. (*Prunty*, *supra*, 62 Cal.4th at p. 67.)

In this case, there were no allegations that Baylor and Sanchez were members of a subset of the Bounty Hunter Bloods. The prosecution relied on McDaniel's membership in the umbrella organization of the Bounty Hunter Bloods to prove the organizational nexus with the predicate offenses committed by two documented Bounty Hunter Bloods. In closing, the prosecutor argued that the shooting "benefitted the Bounty Hunters because it sent the message of what happens to you when you mess with one of the higher members of the gang." Defense counsel was free to cross-examine the gang expert as to the basis of his classification of the predicate offenders and establish their allegiance to a particular subset of the umbrella organization. McDaniel did not do so. Moreover, Schmidt's testimony established that, whatever their cliques, the Bounty Hunter Bloods gang members "all grow up together," "live together," and "at anyone [*sic*] point in time, they'll say they're Ace Line or Five Line," thus evidencing "fluid or shared membership among the subset or affiliate gangs" (*Prunty*,

supra, 62 Cal.4th at p. 78). And although McDaniel contends that the different cliques of the Bounty Hunter Bloods "feuded" like "Hatfields and McCoys," *Prunty* also observed that "evidence that subset gangs have periodically been at odds does not necessarily preclude treating those gangs collectively under the STEP Act [California Street Terrorism Enforcement and Prevention Act of 1988]." (*Prunty*, at p. 80.) We conclude that substantial evidence supports the enhancements.

To the extent we construe McDaniel's claims to challenge the sufficiency of an organizational nexus between himself and the Bounty Hunter Bloods, we find this claim unpersuasive. Unlike *Prunty*, where the defendant admitted he was a " 'Norte' and a 'Northerner' " but claimed identification with the Detroit Boulevard subset (*Prunty*, *supra*, 62 Cal.4th at p. 68), the evidence that McDaniel was a Bounty Hunter Blood includes more than the fact that he had Bounty Hunter Bloods tattoos. While the Norteños' gang turf encompassed the "broad geographic area" of Sacramento (*Prunty*, at p. 79), the Bounty Hunter Bloods' turf was limited to the area in and around Nickerson Gardens. Schmidt's testimony also revealed an association between McDaniel and Carey, a Bounty Hunter Blood. (See *Prunty*, at p. 73, ["long-term relationships among members of different subsets" and "behavior demonstrating a shared identity with one another or with a larger organization"].) And Schmidt testified that Kai Harris was a Bounty Hunter Blood, and six witnesses placed McDaniel and Harris together on the night of the murders. Angel Hill testified that McDaniel told Harris, "You disappointed me, man," and bragged about the shooting to Carey. From these facts, the jury could have inferred relationships, "shared goals," and the fact that these Bounty Hunter Bloods members " 'back up each

other.' " (*Prunty*, at p. 78.) These facts are sufficient to establish an organizational link between McDaniel and the Bounty Hunter Bloods.

IV. PENALTY PHASE ISSUES

A. Anderson's Cancer Diagnosis

McDaniel contends that the court erred in admitting evidence of Anderson's cancer diagnosis during the penalty phase, in violation of his rights to a fair penalty trial and a reliable penalty determination.

At the penalty trial, Anderson's daughter, Neisha Sanford, testified that her mother was diagnosed with cancer in 1989 and, from that point on, was "back and forth" in treatments like chemotherapy that caused her to lose her hair. Sanford testified that the treatments made her mother ill and "affected her a lot." "She drank, you know, she had on and off ongoing problems with drugs and stuff. Yeah. She dealt with it pretty rough," Sanford said. Anderson had a recurrence of cancer prior to her death and wanted to spend more time with her grandchildren.

Before the start of the penalty retrial, the trial court held an Evidence Code section 402 hearing to determine the admissibility of this evidence and to reconsider its prior ruling that the defense could not introduce evidence that Anderson had drugs in her system at the time of her death. The prosecutor argued that the cancer evidence was relevant to show Anderson was a vulnerable victim, which was a circumstance of the crime under section 190.3, subdivision (a). He argued that the evidence also contextualized the other victim impact testimony and mitigated evidence that Anderson had drugs in her system at the time of her death. The court noted that the cancer evidence and the toxicology report "kind of tie together" and

admitted both, reasoning that "[o]ne approach to take, is throw up my hands and let it all come in and let the jury there sort it out, which will probably be the safest way from an appellate review standpoint."

Under the Eighth Amendment to the federal Constitution, evidence relating to a murder victim's personal characteristics and the impact of the crime on the victim's family is relevant to show the victim's " 'uniqueness as an individual human being' " and thereby "the specific harm caused by the defendant." (*Payne v. Tennessee* (1991) 501 U.S. 808, 823, 825.) The federal Constitution bars this evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair. (*Ibid.*) In California, such evidence is generally admissible as a circumstance of the crime pursuant to section 190.3, subdivision (a). " 'On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.' " (*People v. Edwards* (1991) 54 Cal.3d 787, 836 (*Edwards*), overruled on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176.)

In *People v. Clair* (1992) 2 Cal.4th 629, 671, evidence of a victim's cerebral palsy was a relevant circumstance of the crime because it "could tend to show that defendant mounted and executed his fatal attack without significant resistance — and therefore with unnecessary brutality." Here, by contrast, the shooting occurred moments after Anderson opened the door, and the prosecution did not introduce evidence that linked her cancer with her vulnerability to this type of attack.

The Attorney General argues that this evidence was properly admitted and showed Anderson's uniqueness and the

impact of her death on family members. Yet we need not resolve the issue because even assuming admission of the cancer evidence was error, we find no prejudice. The mere reference to the fact that Anderson was ill at the time of her death was not likely to "divert[] the jury's attention from its proper role or invite[] an irrational, purely subjective response." (*Edwards*, *supra*, 54 Cal.3d at p. 836.) The court had already ruled that the prosecution could not use more inflammatory evidence of Anderson's cancer, such as photos of her undergoing chemotherapy. In light of other circumstances of the murders — such as the fact that Anderson was shot multiple times at close range — and the other acts of violence adduced during the penalty phase, there is no reasonable possibility that the cancer testimony affected the penalty phase verdict. (*People v. Abel* (2012) 53 Cal.4th 891, 939 ["[I]n light of the nature of the crime and the other aggravating factors, including defendant's criminal history, there is no reasonable possibility [victim's mother's testimony] affected the penalty verdict."])

B. Lingering Doubt Instruction

McDaniel next argues that the trial court erred in refusing to instruct the penalty phase jury on lingering doubt. He urges us to reconsider our holdings that a lingering doubt instruction is not constitutionally required. (*People v. Streeter* (2012) 54 Cal.4th 205, 265 (*Streeter*); *People v. Hamilton* (2009) 45 Cal.4th 863, 948 (*Hamilton*).) Even if not constitutionally required in all cases, McDaniel argues that the circumstances warrant an instruction.

During the penalty-phase instructional conference, the trial court considered defense counsel's request for an instruction that the jury "may, however, consider any lingering

doubt you have about the evidence in deciding penalty." The trial court denied the request, explaining "I am not going to give a lingering doubt instruction since this a retrial of the penalty phase. I don't want the jury speculating about the crime." After closing argument, defense counsel proposed two slightly different instructions related to lingering doubt. The trial court again rejected the instruction, explaining that "the problems I have with that is, that this jury did not hear the evidence in the guilt phase and I think it would be inappropriate. [¶] I allowed Mr. Brewer to make somewhat [*sic*] I thought was far ranging comments about the crime. . . ."

McDaniel argues that specific circumstances in this case warranted a lingering doubt instruction. The first circumstance is that he had requested a lingering doubt instruction. But an objection alone does not warrant an instruction. (E.g., *Streeter*, *supra*, 45 Cal.4th at p. 265 [trial court properly refused request for lingering doubt instruction]; *People v. Brown* (2003) 31 Cal.4th 518, 567 [same].)

McDaniel also argues that a lingering doubt instruction is warranted where the penalty phase jury is not the jury that had rendered the guilt verdicts. We have repeatedly held that a lingering doubt instruction for a second penalty-phase jury is not required where that jury is " 'steeped' " in the nuances of the capital crimes. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 326; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1239–1240.) In the penalty phase, the prosecution and defense introduced the guilt-phase eye-witness testimony and ballistics evidence that McDaniel asserts is relevant to lingering doubt. In closing argument, defense counsel emphasized the ballistics evidence from the gun linked to Harris to suggest that McDaniel did not cause the "mayhem" alone. Defense counsel also referenced

inconsistencies and gaps in the testimony of Angel Hill and Derrick Dillard to argue there was insufficient evidence that McDaniel himself created all the "carnage."

Next, McDaniel argues that the trial court repeatedly instructed the jury that it "must accept" the guilt phase jury's finding that McDaniel had personally killed Anderson, which left no room for them to consider lingering doubt. Compounding the error of this instruction, he claims, was the prosecutor's argument that McDaniel had personally killed Anderson, which relied heavily on an appeal to the findings of the prior jury. McDaniel's reliance on *People v. Gay* (2008) 42 Cal.4th 1195, 1224, where the trial court instructed the jury that the defendant's responsibility had been "conclusively proven and that there would be no evidence presented in this case to the contrary," is inapposite. In *Gay*, the error that the trial court's statements compounded was the trial court's limitation of evidence related to lingering doubt in the penalty phase. (*Ibid.*) As discussed above, ample evidence of this lingering doubt was introduced. Moreover, a statement that the jury "must" accept the guilt-phase findings is qualitatively different than a statement that the defendant's guilt has been "conclusively proven" and that no evidence would be introduced to the contrary. (*Ibid.*) Nor did the prosecutor's statements that "the verdicts have significance in this case, ladies and gentleman," preclude the jury from considering lingering doubt. These comments merely conveyed the fact that the prior jury found McDaniel to be the actual shooter.

In sum, the circumstances of this case do not warrant departure from our precedent holding that the lingering doubt instruction is not constitutionally required. (*Streeter*, *supra*, 54 Cal.4th at p. 265; *Hamilton*, *supra*, 45 Cal.4th at p. 948.)

C. California Jury Trial Right

McDaniel contends that Penal Code section 1042 and article I, section 16 of the California Constitution require the penalty phase jury to unanimously determine all "issues of fact," including factually disputed aggravating circumstances. He further contends that these provisions require the penalty phase jury to determine the ultimate penalty verdict beyond a reasonable doubt. Because numerous instances of aggravating evidence, including ten instances of past crimes, were introduced in the penalty phase, McDaniel contends that the failure to instruct on unanimity was prejudicial. McDaniel also argues that the failure to instruct on the reasonable doubt standard requires reversal. We asked the Attorney General for supplemental briefing to address these issues in greater detail, as well as a reply from McDaniel.

In light of our request for supplemental briefing, a number of amici curiae also sought leave to file briefs informing the court of their positions. These amici present a range of perspectives on the relevant issues before us. Some amici focus on the historical understanding of the California Constitution's jury trial right. Others argue that there is no binding precedent because this case presents issues that our cases have not carefully considered. Many amici focus on issues and arguments adjacent to the core questions posed by our briefing order, which specifically concerned Penal Code section 1042 and California Constitution article I, section 16. For example, some arguments are grounded principally in the federal jury trial right, including *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. These arguments are distinct from the state law issues before us, and we address McDaniel's arguments related to the federal jury trial right separately below. Several amici,

including Governor Gavin Newsom, advance views of history and social context that link capital punishment with racism. These claims sound in equal protection, due process, or the Eighth Amendment's prohibition on cruel and unusual punishment, and do not bear directly on the specific state law questions before us. Finally, two amici support respondent and argue that neither the California Constitution nor the Penal Code requires unanimity or a reasonable doubt standard at the penalty phase.

With these perspectives before us, we examine (1) whether unanimity is required for factually disputed aggravating circumstances during the penalty phase and (2) whether reasonable doubt applies to the jury's ultimate penalty determination. At oral argument, the Attorney General acknowledged that McDaniel and amici advance "persuasive arguments . . . that imposing" the requirements "that the jury unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict . . . would improve our system of capital punishment and make it even more reliable." The Attorney General also noted that "statutory reforms to impose those requirements deserve serious consideration, particularly in light of the important policy concerns that McDaniel and his amici have raised." Nevertheless, the Attorney General contends, state law as it stands does not require jury unanimity on factually disputed aggravating circumstances or application of the reasonable doubt standard to the ultimate penalty determination. Having carefully considered these claims, we conclude that the Attorney General is correct.

1. Unanimity

Article I, section 16 provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., art. I, § 16.) Penal Code section 1042 provides: "Issues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state." Together these provisions codify a right to juror unanimity on issues of fact in criminal trials.

We have previously held that jury unanimity on the existence of aggravating circumstances is not required under the state Constitution. (See, e.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 515.) McDaniel urges us to reconsider this precedent because those cases rested on " 'uncritical' analysis" of the state jury trial right and did not discuss the applicability of section 1042. Various amici likewise suggest that there is no binding precedent on this issue or that we should depart from any such precedent. McDaniel appears correct that these decisions, while speaking generally of California constitutional provisions, did not rest on any considered analysis of our state constitutional or statutory guarantee. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 598 [summarily rejecting challenges under "the Sixth Amendment's jury trial clause, the Eighth Amendment's cruel and unusual punishment clause, the Fourteenth Amendment's due process and equal protection clauses, and the analogous provisions of, apparently, article I, sections 7, 15, 16, and 17"], disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758.) McDaniel also observes that although our decisions have primarily considered

application of the federal Sixth Amendment jury trial right to our capital punishment scheme (see, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16), the federal right is not coextensive with the state jury trial right (see *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1241).

We are mindful that McDaniel's "state constitutional . . . claim cannot be resolved by a mechanical invocation of current federal precedent." (*People v. Chavez* (1980) 26 Cal.3d 334, 352; see also *People v. Ramos* (1984) 37 Cal.3d 136, 153 [death penalty instruction was "incompatible with this [state constitutional] guarantee of 'fundamental fairness' " although it did not violate federal due process principles]; *People v. Engert* (1982) 31 Cal.3d 797, 805 (*Engert*) [former death penalty statute violates state due process clause although it likely did not violate Eighth Amendment].) As we explain, however, McDaniel does not persuade us that there is an independent state law principle grounded in Article I, Section 16 requiring unanimity among the penalty jury in order to find the existence of aggravating circumstances in the face of disputed evidence.

As an initial matter, we note that although McDaniel raises a question of state constitutional and statutory law with applicability to a wide range of factual determinations beyond the context of capital sentencing, his arguments also rest to a significant degree on the analytical underpinnings of the United States Supreme Court's Sixth Amendment jurisprudence. *Apprendi* and its progeny fundamentally concern sentencing and require any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be found by a unanimous jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at

p. 490.) The statutory maximum in this context means the maximum sentence permissible based solely on the facts reflected in the jury's verdict or admitted by the defendant. (*Blakely v. Washington* (2004) 542 U.S. 296, 303.)

We have rejected arguments that the Sixth Amendment requires unanimity with respect to aggravating circumstances because "the jury as a whole need not find any one aggravating factor to exist" under the statute and the penalty determination "is a free weighing of all the factors relating to the defendant's culpability." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; see *People v. Capers* (2019) 7 Cal.5th 989, 1014; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235.) Even if we were to revisit that conclusion, it is a discrete Sixth Amendment issue, not a general issue concerning the scope of the jury trial right with implications beyond the sentencing context. (See, e.g., Evid. Code, §§ 1101, subds. (b) & (c), 1108, subds. (a) & (b).) And we have not adopted *Apprendi*'s reasoning as our own independent understanding of article I, section 16 of the California Constitution, nor has McDaniel asked us to.

Separate and apart from Sixth Amendment principles, McDaniel argues that aggravating factors — in particular, factually disputed evidence of past criminal acts under factor (b) or factor (c) of section 190.3 — are "issues of fact" within the meaning of section 1042. Courts have described the state constitutional guarantee as attaching to "the trial of issues that are made by the pleadings." (*Dale v. City Court of City of Merced* (1951) 105 Cal.App.2d 602, 607; see also *Koppikus v. State Capitol Commissioners* (1860) 16 Cal. 249, 254 [state jury trial right is a "right . . . which can only be claimed in actions at law, or criminal actions, where an issue of fact is made by the pleadings"].) Section 1041 specifies that an "issue of fact" arises

"[u]pon a plea of not guilty." McDaniel relies on section 190.3, which states that "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." He argues that "[t]o the extent that aggravating factors and the punishment of death are required to be raised in pleadings," the aggravating evidence is an "issue of fact" within the meaning of section 1042. In response, the Attorney General argues that because a defendant cannot plead to a particular sentence during the penalty phase, the notice of aggravating circumstances is not within the scope of sections 1041 and 1042.

The focus of a capital penalty proceeding differs from the guilt trial. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1136 ["Choosing between the death penalty and life imprisonment without possibility of parole is not akin to 'the usual fact-finding process' "].) In the guilt trial, the statutory special circumstance establishes a factual predicate of the capital offense. We have characterized the statutory special circumstance as the eligibility factor that "narrow[s] the class of death-eligible first degree murderers." (*People v. Sapp* (2003) 31 Cal.4th 240, 287.) The "fact or set of facts" that undergird the special circumstance must be "found beyond a reasonable doubt by a unanimous verdict" in order to "change[] the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or life imprisonment without possibility of parole." (*Engert*, *supra*, 31 Cal.3d at p. 803, fn. omitted; see § 190.4, subd. (a).)

In the penalty trial, aggravating and mitigating circumstances aid the jury in selecting the appropriate penalty. After a true finding on the special circumstance, the penalty

phase jury must determine "whether the aggravating circumstances, as defined by California's death penalty law (§ 190.3), so substantially outweigh those in mitigation as to call for the penalty of death, rather than life without parole." (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) Aggravating circumstances, such as section 190.3, factor (b) or factor (c) evidence, "enable the jury to make an individualized assessment of the character and history of a defendant to determine the nature of the punishment to be imposed." (*People v. Grant* (1988) 45 Cal.3d 829, 851.)

Although section 190.3 requires notice of aggravating circumstances, this notice does not establish that an aggravating circumstance comes within the meaning of section 1041 or 1042. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 799 [contrasting notice requirement of section 190.3 with offenses charged in an information], abrogated on other grounds in *Scott, supra*, 61 Cal.4th 363.) As a matter of state law, the factual assessments for aggravating circumstances at the penalty phase are akin to the determinations jurors make in considering prior uncharged crimes in the guilt phase of a trial. (Evid. Code, § 1101, subd. (b) [evidence of prior misconduct relevant in determining motive, opportunity, and intent]; *id.*, subd. (c) [prior misconduct relevant for impeachment].) In some circumstances, admission of these prior acts also requires notice. For example, when a criminal defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense may be admissible under certain circumstances provided that notice is served on the defendant before trial. (Evid. Code, § 1108, subds. (a) & (b); see also § 1054.7.) Jury unanimity has not been held to be a prerequisite to individual jurors considering this evidence (see CALCRIM No. 1191A); the

mere requirement of notice, without more, does not transform these prior criminal acts into "issues of fact" within the meaning of sections 1041 and 1042.

Moreover, jury unanimity does not normally extend to subsidiary or foundational factual issues in other contexts. As McDaniel observes, the jury in a typical guilt trial must be unanimous in its verdict and must agree on the specific crime of which the defendant is guilty. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*); *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) But the jury need not unanimously agree on subsidiary factual issues, such as specific details of the act. (See *Russo*, at p. 1132 ["[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or . . . the 'theory' whereby the defendant is guilty."]; *People v. Mickle* (1991) 54 Cal.3d 140, 178, fn. omitted ["[T]he unanimity rule does not extend to the minute details of how a single, agreed-upon act was committed."].) We have said that aggravating factors for purposes of section 190.3 are such "foundational" matters that do not require jury unanimity. (*People v. Miranda* (1987) 44 Cal.3d 57, 99 ["Generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding."], disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; *People v. Hines* (1997) 15 Cal.4th 997, 1067 ["Jury unanimity on such 'foundational' matters is not required."].) We see no basis in section 1042 or article I, section 16 for the unanimity rule that McDaniel urges here.

McDaniel focuses specifically on factor (b) and factor (c) evidence and, relying on *Russo*, argues that because these

factors require consideration of multiple discrete crimes, they implicate section 1042. We explained in *Russo* that in a standard criminal guilt trial, "when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Russo, supra*, 25 Cal.4th at p. 1132.) To hold otherwise would create a " 'danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' " (*Ibid.*) But the jury's consideration of factor (b) or factor (c) evidence in a capital penalty trial does not present the same concern. The finding of a prior offense under factor (b) or factor (c) alone is not sufficient under the statute for the jury to return a death verdict, nor does it automatically lead to such a result. Accordingly, neither factor (b) nor factor (c) evidence implicates section 1042.

This is not to say there are no limits on the introduction of aggravating evidence. The creation in 1957 of a bifurcated guilt and penalty trial in capital cases "broaden[ed] the scope of relevant evidence admissible on the issue of penalty," including evidence of other crimes, provided that its admission was consistent with other evidentiary rules. (*People v. Purvis* (1959) 52 Cal.2d 871, 883, disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2, 648–649 (*Morse*); see *Purvis*, at pp. 883–884 [evidence of other crimes cannot be proven with hearsay]; *People v. Hamilton* (1963) 60 Cal.2d 105, 134, disapproved on another ground in *Morse*, at pp. 637, fn. 2, 648–649 and *People v. Daniels* (1991) 52 Cal.3d 815, 866 ["flimsy, speculative testimony should not have been admitted" in penalty trial].) As evidence of past crimes became increasingly integrated into the penalty phase, this court has

expressed concerns that "in the penalty trial the same safeguards should be accorded a defendant as those which protect him in the trial in which guilt is established." (*People v. Terry* (1964) 61 Cal.2d 137, 149, fn. 8.) Evidence of prior criminal acts "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk* (1965) 63 Cal.2d 443, 450 (*Polk*).)

Recognizing the need for safeguards in the capital sentencing context, our cases have departed from the rule, applicable at guilt trials, that the preponderance of the evidence standard generally applies to proof of prior crimes before the jury may consider them. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 381; see also, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 1346 [in a guilt trial (1) the jury cannot "consider the evidence of defendant's prior crimes unless it found those crimes proven by a preponderance of the evidence; (2) it [can]not find defendant guilty unless the prosecution proved the charged offenses beyond a reasonable doubt; and (3) if the evidence of prior crimes was necessary to prove an essential fact, the jury [can]not rely upon that evidence unless the prosecution proved the prior crimes beyond a reasonable doubt"].) At capital penalty trials, before jurors can consider evidence of past crimes as an aggravating factor, "they must be convinced beyond a reasonable doubt" that the defendant committed the crime. (*Polk*, *supra*, 63 Cal.2d at p. 451; see *People v. McClellan* (1969) 71 Cal.2d 793, 804–806.) Relying on this precedent, we have read the same requirement into subsequent iterations of the death penalty statute. (See *People v. Robertson* (1982) 33 Cal.3d 21, 53–55 [applying this rule to the 1977 death penalty statute]; *Miranda*, *supra*, 44 Cal.3d at p. 97 [current death penalty statute]; see also *People v. Williams*

(2010) 49 Cal.4th 405, 458–459 [applying rule to factor (b) evidence].) We have since emphasized that "the rule is an evidentiary one and is not constitutionally mandated." (*Miranda*, at p. 98.)

McDaniel does not press a due process justification for the unanimity requirement, nor does he offer an evidentiary justification that would require unanimity on aggravating evidence. When trial courts have given a unanimity instruction on aggravating circumstances, we have said that requiring "a unanimous special finding in that regard actually provided greater protection than that to which defendant was entitled under the statute." (*People v. Caro* (1988) 46 Cal.3d 1035, 1057.) "As to the possibility that jurors who were not convinced of defendant's guilt in the uncharged crimes might have been influenced by the prejudicial effect of the evidence, such a risk is inherent in the introduction of any evidence of prior criminal activity under factor (b), and . . . 'the reasonable doubt standard ensures reliability.' " (*Ibid.*)

To the extent some amici argue that a constitutional right to unanimity also attaches to the ultimate penalty determination, we express no view on that issue as McDaniel does not advance this argument and the statute already contains such a requirement. (§ 190.4, subd. (b).)

In sum, while this court has previously imposed additional reliability requirements on the jury's consideration of aggravating evidence in the penalty phase, we hold that neither article I, section 16 of the California Constitution nor Penal Code section 1042 provides a basis to require unanimity in the jury's determination of factually disputed aggravating circumstances.

2. Reasonable Doubt

McDaniel also asks us to reconsider our prior holding that the state Constitution does not require the degree of certainty attached to the jury's ultimate decision to impose the death penalty to be " 'beyond a reasonable doubt.' " (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 515.) His arguments also seem to require the jury to be instructed that in order to choose a death verdict, it must find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt; various amici explicitly argue as much. McDaniel is correct that our prior decisions have not fully considered the state jury trial right or section 1042 in this context.

Pointing to *People v. Hall* (1926) 199 Cal. 451, McDaniel and various amici argue that the state jury trial right was historically understood to apply to the capital sentencing decision as a constitutional matter. *Hall* said: "Under the law the verdict in such a case must be the result of the unanimous agreement of the jurors and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements; first, a finding that the accused is guilty of murder in the first degree, and, secondly, legal evidence that the jury has fixed the penalty in the exercise of its discretion." (*Id.* at p. 456.) There, the jury returned a guilty verdict but made no penalty determination and specifically disclosed in its verdict that it could not reach a "unanimous agreement as to degree of punishment." (*Id.* at p. 453.) The trial court nonetheless entered judgment and imposed the death penalty. We viewed this as error and reasoned that "[i]n legal effect th[e jury trial] right was denied to the defendant in the case at bar," rejecting the government's argument that "the defect in the form of the

verdict constitute[d] no more than 'matter of procedure.' " (*Id.* at pp. 457–458.)

For further support, McDaniel points to *People v. Green* (1956) 47 Cal.2d 209 (*Green*), which overruled a line of our cases beginning with *People v. Welch* (1874) 49 Cal. 174 (*Welch*), and to Justice Schauer's dissenting opinion in *People v. Williams* (1948) 32 Cal.2d 78, 89–100, 101–104 (dis. opn. of Schauer, J.)). In *Welch*, a case predating *Hall*, this court interpreted the language in section 190 "as if it read" that a defendant convicted of first degree murder " '[s]hall suffer death, or (in the discretion of the jury) imprisonment in the State prison for life.' " (*Welch*, at p. 180.) *Welch* understood the jury's discretion to be "restricted" such that it "is to be employed only where the jury is satisfied that the lighter penalty should be imposed," and thus the lesser punishment of life imprisonment could be imposed only where the jury unanimously found it appropriate. (*Id.* at p. 179.) Under *Welch*, jury unanimity as to a judgment of death was not required, and a jury verdict of first degree murder that was silent as to punishment would result in a sentence of death.

After *Welch*, a line of our cases criticized its holding yet refused to find error in jury instructions following it. (*Green*, *supra*, 47 Cal.2d at pp. 227–229 [collecting cases].) In some cases, however, we adopted a different construction of section 190, holding that "the Legislature 'confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect.' " (*Id.* at p. 229, quoting *People v. Leary* (1895), 105 Cal. 486, 496). *Hall* partially receded from *Welch*'s holding and required jury unanimity for a sentence of death to be imposed, at least where the verdict was not completely silent on the matter. (*Hall*, *supra*, 199 Cal. at

pp. 456–458.) Yet it was not until 1956 that this court formally overruled *Welch* and its progeny by holding in *Green* that section 190 "indicates no preference whatsoever as between the two equally fixed alternatives of penalty" and that it would be "error to instruct contrary to the terms of the statute." (*Green*, at pp. 231–232.)

McDaniel points out that *Green* stated "it is for the *jury* — not the law — to fix the penalty" (*Green*, *supra*, 47 Cal.2d at p. 224) and cited with approval language from the high court's opinion in *Andres v. United States* (1948) 333 U.S. 740 that the Sixth Amendment's "requirement of unanimity extends to all issues — character or degree of the crime, guilt and punishment — which are left to the jury." (*Green*, at p. 220, quoting *Andres*, at p. 748.) Moreover, Justice Schauer's dissent in *Williams* explained his view that the state jury trial right "and the statutes (Pen. Code, §§ 190, 1042, 1157) give to a defendant charged with murder the right, where he does not waive a jury trial, to have the jury determine not only the question of his guilt or innocence and the question of the class and degree of the offense, but also, if the offense be murder of the first degree, the penalty to be imposed. The law does not give any preference to either penalty but leaves such selection solely to the jury, and it requires that the jury be unanimous in its determination of the penalty as it must be unanimous on the questions of guilt and class or degree of the crime." (*Williams*, *supra*, 32 Cal.2d at p. 102 (dis. opn. of Schauer, J.).)

Yet none of these authorities specifically discuss a reasonable doubt standard for the capital penalty determination; at most, they could support the conclusion that a defendant has the right to a determination by a unanimous jury. Because section 190.4, subdivision (b) already contains

such a requirement, we need not reach this question as a constitutional matter. If anything, the authorities cited by McDaniel and amici suggest that the ultimate penalty determination is entirely within the discretion of the jury, without any preference for either of the two available punishments, not necessarily that the jury may choose the death penalty only if it believes the punishment is warranted beyond a reasonable doubt.

The crux of McDaniel's argument is that article I, section 16 encompasses the protections of the common law right to a jury trial, including the right to factual findings by a jury beyond a reasonable doubt, and that article I, section 16 applies to the capital penalty determination, thereby requiring the jury to select the appropriate punishment using a reasonable doubt standard. For present purposes, we assume without deciding that McDaniel's foundational premise is correct — i.e., that the right to a reasonable doubt standard governing factfinding by a jury in criminal cases is secured by article I, section 16 and not solely grounded in due process (see *In re Winship* (1970) 397 U.S. 358, 364; *People v. Flood* (1998) 18 Cal.4th 470, 481). Even so, we conclude that the jury's ultimate decision selecting the penalty in a capital case does not constitute "factfinding" in any relevant sense.

We have consistently described the penalty jury's sentencing selection in terms that eschew a traditional factual inquiry. We have emphasized that the penalty verdict " 'constitute[s] a single fundamentally normative assessment' " (*People v. Duff* (2014) 58 Cal.4th 527, 569) and "is inherently normative, not factual" (*People v. Lightsey* (2012) 54 Cal.4th 668, 731). Indeed, we have rejected applying the harmlessness standard under *People v. Watson* (1956) 46 Cal.2d 818 because

a "capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also — and most important — to render an individualized, *normative* determination about the penalty appropriate for the particular defendant — i.e., whether he should live or die." (*People v. Brown* (1988) 46 Cal.3d 432, 448; see also *Watson*, at p. 836.)

We also have cited *Kansas v. Carr* (2016) 577 U.S. 108 to support our conclusion that capital "sentencing is an inherently moral and normative function." (*People v. Winbush* (2017) 2 Cal.5th 402, 489.) *Carr* considered whether "the Eighth Amendment requires capital-sentencing courts . . . 'to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.' " (*Carr* at pp. 118–119.) In rejecting such a requirement, the high court explained that whereas the statutory "facts justifying death . . . either did or did not exist[,] . . . [w]hether mitigation exists . . . is largely a judgment call (or perhaps a value call)" and "what one juror might consider mitigating another might not." (*Ibid.*)

As *Carr* and our precedent explain, the jury's selection of the penalty in a capital case under existing law is not a traditional factfinding inquiry. Even if the jury trial right under article I, section 16 is applicable to the penalty phase of a capital trial and encompasses the right to factual findings beyond a reasonable doubt, we do not understand it to require the penalty phase jury to select the appropriate punishment beyond a reasonable doubt.

As McDaniel and various amici note, at one time during the era of unitary guilt and penalty trials, our court expressed a preference for a reasonable doubt standard for the penalty

verdict. In *People v. Cancino* (1937) 10 Cal.2d 223 (*Cancino*), the court reasoned that "it would be more satisfactory in death penalty cases if the court would instruct the jurors that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser." (*Id.* at p. 230.) *Cancino* nevertheless upheld an instruction that omitted a burden of proof for the penalty verdict; the court found dispositive the fact that the instructions "fully informed" the jury "as to its discretion." (*Ibid.*)

In *People v. Perry* (1925) 195 Cal. 623 (*Perry*), the trial court apparently gave the jury three instructions related to the penalty determination. The defendant challenged one instruction that, consistent with *Welch*, said (1) "while the law vests [the jury] with a discretion as to whether a defendant shall suffer death or confinement in the state prison for life, this discretion is not an arbitrary one, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed." (*Id.* at p. 640.) This was given alongside two other instructions: (2) " '[i]f the jury should be in doubt as to the proper penalty to inflict the jury should resolve that doubt in favor of the defendant and fix the lesser penalty, that is, confinement in the state prison for life,' " and (3) "[i]n the exercise of your discretion as to which punishment shall be inflicted, you are entirely free to act according to your own judgment." (*Ibid.*) We stated the law as follows: "It is the jury's right and duty to consider and weigh all the facts and circumstances attending the commission of the offense, and from these and such reasons as may appear to it upon a consideration of the whole situation, determine whether or not in the exercise of its discretion, life imprisonment should be imposed rather than the infliction of the death penalty." (*Ibid.*)

We ultimately held in *Perry* that there was no error with the challenged instruction and that if "there was any vice . . . it was rendered harmless" by the third instruction quoted above. (*Ibid.*)

As McDaniel notes, *People v. Coleman* (1942) 20 Cal.2d 399 characterized *Perry* as having "held" that "if any doubt be engendered as to the punishment to be imposed, the jury should not impose the extreme penalty." (*Id.* at p. 406.) But this was not *Perry*'s holding, and we have instead cited *Perry* repeatedly for the proposition that it is the jury's "duty to consider and weigh all the facts and circumstances" and then to "exercise . . . its discretion" in selecting the penalty. (*Perry*, *supra*, 195 Cal. at p. 640; see *Hall*, *supra*, 199 Cal. at p. 455; *People v. Leong Fook* (1928) 206 Cal. 64, 69; *People v. Pantages* (1931) 212 Cal. 237, 271; see also *Green*, *supra*, 47 Cal.2d at p. 227 [describing *Perry* as a case where we "affirmed judgments imposing the death sentence where instructions based on the *Welch* decision . . . were given" but "disapproved the giving of such instructions"].) Today CALCRIM No. 766 and CALJIC No. 8.88 apprise the jury of its sentencing discretion. (See CALCRIM No. 766 ["Determine which penalty is appropriate and justified by considering all the evidence and the totality of any aggravating and mitigating circumstances."]; CALJIC No. 8.88 ["To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."]; *People v. Leon* (2020) 8 Cal.5th 831, 849–850.)

Contrary to McDaniel's contention, *Cancino* and *Perry* neither hold nor suggest there is a constitutional requirement that a jury make the capital penalty determination using a

reasonable doubt standard. Those cases, decided in the context of unitary capital trials, found that giving such an instruction was not error under the statutes then in force when accompanied by an instruction explaining the jury's ultimate discretion in selecting the appropriate penalty. It is not clear that decisions like *Cancino* and *Perry* have any further significance to the constitutional question at hand. Rather, we think those cases must be understood in the context of this court's conflicting decisions regarding the jury's role in capital sentencing under section 190 following *Welch* and before that decision was finally overruled in *Green*. *Green* made clear that "[t]he law . . . indicates no preference whatsoever as between the two equally fixed alternatives of penalty." (*Green*, *supra*, 47 Cal.2d at p. 231.) And following *Green*, this court repeatedly rejected the argument that a reasonable doubt instruction as to punishment is required. (See, e.g., *People v. Purvis* (1961) 56 Cal.2d 93, 96 (*Purvis*), disapproved on another ground in *Morse*, *supra*, 60 Cal.2d at pp. 637, fn. 2, 648–649.)

McDaniel and amici also point to language in the 1957 death penalty statute, which bifurcated the guilt and penalty trials for the first time. That statute provided that "determination of the penalty . . . shall be in the discretion of the . . . jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict." (Stats. 1957, ch. 1968, § 2, p. 3510.) They argue that this statutory language treats the "determination of the penalty" as an "issue of fact" within the meaning of section 1042 and thus the reasonable doubt standard, as required by article I, section 16, applies.

But, as explained, the penalty jury's ultimate sentencing decision is not a traditional factual determination in any

relevant sense. Moreover, whatever the Legislature understood "issue of fact" to mean within the context of the 1957 death penalty statute does not control the meaning of "issue of fact" in section 1042, which far predates the 1957 law. Section 1042 was first enacted in 1872, when the death penalty was hardly an obscure or hidden feature for felony convictions. As amicus curiae Criminal Justice Legal Foundation noted in its brief, "Nearly all felonies were nominally capital offenses at common law. (See 4 W. Blackstone, [Commentaries (1st ed. 1769)] p. 98.)" (See *Tennessee v. Garner* (1985) 471 U.S. 1, 13 & fn. 11.) Section 1042's companion provision, section 1041, was also enacted in 1872 and specifies circumstances that give rise to an issue of fact under section 1042: "An issue of fact arises: [¶] 1. Upon a plea of not guilty. [¶] 2. Upon a plea of a former conviction or acquittal of the same offense. [¶] 3. Upon a plea of once in jeopardy. [¶] 4. Upon a plea of not guilty by reason of insanity." (§ 1041.) Even if section 1041 does not provide an exhaustive list, it is notable that the penalty determination is not an enumerated "issue of fact." Indeed, when section 1041 was last amended by the Legislature in 1949, California law specified the death penalty as an appropriate punishment for six separate crimes, ranging from first degree murder to perjury in a capital case and kidnapping for ransom. (See Subcom. of the Judiciary Com., Rep. on Problems of the Death Penalty and its Administration in California (Jan. 18, 1957) Assembly Interim Committee Reports 1955–1957, Vol. 20, no. 3, p. 22.)

Our early construction of the 1957 statute further confirms that the penalty determination is not an "issue of fact" under section 1042. The 1957 law set forth three phases of a capital trial with separate determinations: guilt, penalty, and sanity at the time of the commission of the offense. Consistent

with then-existing law, the penalty phase included an exemption from the death penalty for "any person who was under the age of 18 years at the time of the commission of the crime" (Stats. 1957, ch. 1968, § 2, p. 3510), which previously had been construed to "impose[] the burden of proof by a preponderance of evidence on the defendant . . . on the issue of under-age" (*People v. Ellis* (1929) 206 Cal. 353, 358). This structure appeared to recognize that burdens of proof can apply to certain determinations in the post-guilt phases, such as minority or insanity. But the statute did not specify a burden of proof for the penalty determination itself. To the contrary, the statute, consistent with *Green*, *Perry*, and *Hall*, entrusted the penalty determination entirely to "the discretion of the court or jury." (Stats. 1957, ch. 1968, § 2, p. 3510.) And, for whatever reason, the Legislature and the electorate chose not to retain this reference to "issue of fact" in subsequent iterations of the death penalty scheme.

Shortly after enactment of the 1957 statute, Justice Traynor, writing for the court, reiterated that "the jury has absolute discretion in fixing the penalty and is not required to prefer one penalty over another" and upheld the trial court's rejection of an instruction "that if [the jury] entertained a reasonable doubt as to which of the penalties to impose, the lesser penalty should be given." (*Purvis*, *supra*, 56 Cal.2d at p. 96, fn. omitted.) Despite the language in the 1957 statute now relied on by McDaniel and amici, *Purvis* rejected the argument that a reasonable doubt standard applies to the penalty determination and gave no indication that section 1042 had any bearing on the matter. Instead, *Purvis* construed the 1957 statute in a manner consistent with *Green*'s holding that the prior version of section 190 "indicate[d] no preference

whatsoever as between the two equally fixed alternatives of penalty." (*Green*, *supra*, 47 Cal.2d at p. 231.) Although *Purvis*'s discussion of this issue was brief, this court reaffirmed and applied *Purvis*'s holding in several cases. (See *In re Anderson* (1968) 69 Cal.2d 613, 622–623; *People v. Smith* (1966) 63 Cal.2d 779, 795; *People v. Hines* (1964) 61 Cal.2d 164, 173, disapproved of on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40; *People v. Hamilton*, *supra*, 60 Cal.2d at p. 134; *People v. Harrison* (1963) 59 Cal.2d 622, 633–634; *People v. Howk* (1961) 56 Cal.2d 687, 699.) We see no basis in section 1042 or in the 1957 statute or its legislative history to revisit *Purvis*'s holding, and we have rejected arguments that the current capital punishment scheme statutorily requires a reasonable doubt standard at the penalty phase. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1278.)

McDaniel also notes that Colorado, New Jersey, Nebraska, and Utah have read the reasonable doubt standard into their death penalty statutes based in part on concerns grounded in due process, the Eighth Amendment, and fundamental fairness. As the New Jersey Supreme Court explained, "[i]f anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt." (*State v. Biegenwald* (N.J. 1987) 524 A.2d 130, 156; see also *People v. Tenneson* (Colo. 1990) 788 P.2d 786, 797 ["[T]he jury still must be convinced beyond a reasonable doubt that the defendant should be sentenced to death."]; *State v. Wood* (Utah 1982) 648 P.2d 71, 83 ["Furthermore, in our view, the reasonable doubt standard also strikes the best balance between the

interests of the state and of the individual for most of the reasons stated in *In re Winship* [(1970)] 397 U.S. 358"]; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888, disapproved on another ground in *State v. Reeves* (Neb. 1990) 453 N.W.2d 359 [reading reasonable doubt burden into silent statute].) At least one state has imposed this requirement for the penalty verdict by statute. (Ark. Code Ann. § 5-4-603, subd. (a)(3).)

To the extent the Attorney General argues that implementation of the reasonable doubt standard and jury unanimity with regard to the ultimate penalty verdict would be unworkable, practice from other states suggests otherwise. Moreover, as noted, the Attorney General has acknowledged that requiring the penalty jury to "unanimously determine beyond a reasonable doubt factually disputed aggravating evidence and the ultimate penalty verdict . . . would improve our system of capital punishment and make it even more reliable," and that statutory reforms "deserve serious consideration." Nevertheless, to date our Legislature and electorate have not imposed such requirements by statute, and the out-of-state holdings above are based at least in part on due process or Eighth Amendment grounds. McDaniel does not ask us to reconsider our precedent that has concluded otherwise as a matter of due process.

In sum, having examined our case law and relevant history, we are unable to infer from the jury trial guarantee in article I, section 16 of the California Constitution or Penal Code section 1042 a requirement of certainty beyond a reasonable doubt for the ultimate penalty verdict.

D. Additional Challenges to the Death Penalty

McDaniel raises a number of challenges to the constitutionality of California's death penalty statute that we have previously rejected, and we decline to revisit those holdings in this case.

"Penal Code sections 190.2 and 190.3 are not impermissibly broad, and factor (a) of Penal Code section 190.3 does not make imposition of the death penalty arbitrary and capricious." (*People v. Sánchez* (2016) 63 Cal.4th 411, 487 (*Sánchez*).)

As described above, " '[e]xcept for evidence of other crimes and prior convictions, jurors need not find aggravating factors true beyond a reasonable doubt; no instruction on burden of proof is needed; the jury need not achieve unanimity except for the verdict itself; and written findings are not required.' " (*Sánchez*, *supra*, 63 Cal.4th at p. 487.)

Likewise, we have held that the high court's decision in *Hurst v. Florida* (2016) 577 U.S. 92 does not alter our conclusion under the federal Constitution or under the Sixth Amendment about the burden of proof or unanimity regarding aggravating circumstances, the weighing of aggravating and mitigating circumstances, or the ultimate penalty determination. (*People v. Capers*, *supra*, 7 Cal.5th at p. 1014; *People v. Rangel*, *supra*, 62 Cal.4th at p. 1235.) And we have concluded that *Hurst* does not cause us to reconsider our holdings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi*, *supra*, 530 U.S. 466, or that the imposition of the death penalty does not require factual findings within the meaning of *Ring v. Arizona* (2002) 536 U.S. 584. (*People v. Henriquez* (2017) 4 Cal.5th 1, 46.) As McDaniel

acknowledges, neither *Ring* nor *Hurst* decided the standard of proof that applies to the ultimate weighing consideration.

"Use in the sentencing factors of such adjectives as 'extreme' (§ 190.3, factors (d), (g)) and 'substantial' (*id.*, factor (g)) does not act as a barrier to the consideration of mitigating evidence in violation of the federal Constitution." (*People v. Avila* (2006) 38 Cal.4th 491, 614–615.) "By advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' " CALJIC No. 8.88 "clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias* (1996) 13 Cal.4th 92, 171.) "[T]he phrase ' "so substantial" ' in CALJIC No. 8.88 is not unconstitutionally vague." (*People v. Henriquez, supra*, 4 Cal.5th at p. 46.)

A trial court need not delete inapplicable statutory sentencing factors in CAJIC No. 8.85 from the jury instructions (*People v. Cook* (2006) 39 Cal.4th 566, 610) or instruct that the jury can consider certain statutory factors only in mitigation. (*People v. Beck and Cruz* (2019) 8 Cal.5th 548, 671 (*Beck and Cruz*).)

CALJIC 8.88 "clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse . . . ." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.)

We decline to reconsider our precedent holding that a jury cannot consider sympathy for a defendant's family in mitigation. (*People v. Rices* (2017) 4 Cal.5th 49, 88; *People v. Ochoa* (1998) 19 Cal.4th 353, 456.) The trial court need not instruct that there

is a presumption of life. (*Beck and Cruz, supra*, 8 Cal.5th at p. 670.)

"The absence of a requirement of intercase proportionality review does not violate the Eighth Amendment." (*People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 929.) "The California sentencing scheme does not violate the equal protection clause of the Fourteenth Amendment by denying capital defendants certain procedural safeguards afforded to noncapital defendants." (*Ibid.*) "California law does not violate international norms, and thus contravene the Eighth and Fourteenth Amendments, by imposing the death penalty as regular punishment for substantial numbers of crimes." (*Ibid.*)

E. Cumulative Error

McDaniel contends that the cumulative effect of errors at the guilt and penalty phase requires reversal. While we assumed that admission of Anderson's cancer was error, we concluded there was no reasonable possibility that the victim impact testimony affected the verdict. There are no other errors to cumulate.

CONCLUSION

We affirm the judgment.

LIU, J.

We Concur:

CANTIL-SAKAUYE, C. J.
CORRIGAN, J.
CUÉLLAR, J.
KRUGER, J.
GROBAN, J.
JENKINS, J.

PEOPLE v. McDANIEL

S171393

Concurring Opinion by Justice Liu

Over the years, this court has repeatedly rejected the claim that California's death penalty scheme violates the jury trial right guaranteed by the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and related cases. We do so again today, adhering to precedent. (Maj. opn., *ante*, at pp. 76–77.) I write separately, however, to express doubts about the way our case law has resolved a key facet of this claim. There is a serious question whether our capital sentencing scheme is unconstitutional in light of *Apprendi*, and I have come to believe the issue merits reexamination by this court and other responsible officials.

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) This holding spawned a major shift in Sixth Amendment jurisprudence, and the high court has been continually elaborating its far-reaching ramifications over the past 20 years. (See *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*); *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *U.S. v. Booker* (2005) 543 U.S. 220 (*Booker*); *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*); *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*); *Hurst v. Florida* (2016) 577 U.S. 92

(*Hurst*).) Many decisions, including several of the high court's own precedents, have been overruled in *Apprendi*'s wake.

Our case law has held that the *Apprendi* rule does not disturb California's death penalty scheme. Yet our decisions in this area consist of brief analyses that have largely addressed high court opinions one by one as they have appeared on the books. In my view, we have not fully grappled with the analytical underpinnings of the *Apprendi* rule and the totality of the high court's 20-year line of decisions.

The high court has made clear that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 542 U.S. at p. 303, italics in original.) Our precedent has repeatedly asserted that a defendant becomes eligible for the death penalty upon a conviction for first degree murder and a jury's true finding of one or more special circumstances. (See, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 589–590, fn. 14 (*Anderson*) ["[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense . . . ."]; *People v. Ochoa* (2001) 26 Cal.4th 398, 454 (*Ochoa*) ["[O]nce a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death. . . . Accordingly, *Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder."].)

But this assertion, in the context of *Apprendi*, appears incorrect. Under our death penalty scheme, "the maximum

sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Blakely*, *supra*, 542 U.S. at p. 303) upon a conviction for first degree murder and special circumstance true finding — with nothing more — is life imprisonment without parole. A death verdict is authorized only when the penalty jury has unanimously determined that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3; see *People v. Brown* (1985) 40 Cal.3d 512, 541–542, fn. 13, revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538) — which necessarily presupposes that the penalty jury has found at least one section 190.3 circumstance to be aggravating. (All undesignated statutory references are to the Penal Code.) Our cases have not satisfactorily explained why this additional finding of at least one aggravating factor, which is a necessary precursor to the weighing determination and is thus required for the imposition of a death sentence, is not governed by the *Apprendi* rule.

This issue is not a mere technicality. The *Apprendi* rule states what the Constitution requires in the context of criminal sentencing, and it has particular significance in cases where the special circumstance findings by the guilt jury are not necessarily aggravating. In such cases, the prosecution may rely on a bevy of prior criminal conduct under section 190.3, factors (b) and (c), some of which may be disputed, to show aggravation during the penalty trial. For example, the prosecution here introduced evidence of 10 prior criminal acts by McDaniel under factor (b), ranging from threatening a school official and instances of weapon possession to battery of peace officers and prior instances of robbery, shooting, and killing. Some of the evidence was vigorously contested by McDaniel, and

only one prior act — possession of an assault weapon — was accompanied by documentary evidence of a conviction under factor (c).

Especially where it is not clear that any special circumstance findings by the guilt jury are aggravating at the penalty phase, section 190.3, factor (b) or (c) evidence may prove critical to the sentencing decision. It is true that each penalty juror may consider evidence of prior criminal activity as an aggravating factor only if the juror is "convinced beyond a reasonable doubt" that the defendant committed the prior crime. (*People v. Polk* (1965) 63 Cal.2d 443, 451; see *People v. McClellan* (1969) 71 Cal.2d 793, 804–806.) Yet the penalty jury "as a whole need not find any one aggravating factor to exist." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32 (*Snow*).)

To illustrate: Suppose the prosecution introduces evidence of three prior criminal acts (A, B, and C). Some jurors may find that A was proven beyond a reasonable doubt, but not B and C; other jurors may find B proven, but not A and C; others may find C proven, but not A and B; and still others may find none proven at all and instead find some other circumstance to be aggravating. Or the jurors may find various prior crimes proven beyond a reasonable doubt but differ as to which one or ones are aggravating. There is little downside for the prosecution to provide a broad menu of aggravating evidence for the penalty jury to consider, since we presume on appeal that "any hypothetical juror whom the prosecution's evidence might not have convinced beyond a reasonable doubt . . . followed the court's instruction to disregard the evidence." (*People v. Yeoman* (2003) 31 Cal.4th 93, 132–133.) Our capital sentencing scheme allows the penalty jury to render a death verdict in these circumstances. But I am doubtful the Sixth Amendment does.

In the case before us, McDaniel raises some Sixth Amendment and *Apprendi* arguments, but this portion of his briefing focuses primarily on his state law claims. His *Apprendi* arguments mostly mirror his state law arguments or emphasize that the penalty jury's weighing determination is a factual issue subject to *Apprendi*. Those arguments are different from my focus here: the finding by the penalty jury of at least one aggravating factor relevant to the sentencing determination. Although today's decision does not revisit this issue, I believe the issue should be reexamined in a case where it is more fully developed. The constitutionality of our death penalty scheme in light of two decades of evolving Sixth Amendment jurisprudence deserves careful and thorough reconsideration.

I.

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." (*Alleyne*, *supra*, 570 U.S. at p. 104.) To convict a defendant of a serious offense, the jury's verdict must be unanimous. (See *Ramos v. Louisiana* (2020) 590 U.S. __, __ [140 S.Ct. 1390, 1397].)

In the 20 years since *Apprendi*, the high court's precedents in this area, individually and as a whole, have underscored how robust and far-reaching the *Apprendi* rule is. As noted, *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490.) *Apprendi* involved a plea agreement for multiple felonies arising from the defendant's "fir[ing of] several

.22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood." (*Id.* at p. 469.) To evaluate a hate crime sentencing enhancement that carried an extended term of imprisonment, the trial judge held an evidentiary hearing on the defendant's intent and "concluded that the evidence supported a finding 'that the crime was motivated by racial bias.' " (*Id.* at p. 471.) Because this subsequent factfinding by the judge under a preponderance of the evidence standard increased the maximum sentence, the high court held that this scheme violated the Sixth Amendment. (*Id.* at p. 491.) The high court's inquiry into whether a particular fact increases the penalty for a crime beyond the prescribed statutory maximum was functional in nature; it disregarded whether the fact is formally considered an element of the crime or a sentencing factor, since "[m]erely using the label 'sentence enhancement' . . . surely does not provide a principled basis for" distinction. (*Id.* at p. 476.) *Apprendi* also preserved "a narrow exception to the general rule" for the fact of a prior conviction but noted "it is arguable" that allowing the exception is "incorrect[]" based on *Apprendi*'s reasoning, at least "if the recidivist issue were contested." (*Apprendi*, at pp. 489–490; see *id.* at pp. 487–490 [declining to overrule *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, the source of the exception].)

A few years later, the high court clarified in *Blakely* "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any

additional findings." (*Blakely*, *supra*, 542 U.S. at pp. 303–304.) This is so because "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.' " (*Id.* at p. 304.) *Blakely* found a Sixth Amendment violation because the defendant "was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with 'deliberate cruelty,' " and the judge "could not have imposed" that "sentence solely on the basis of the facts admitted in the guilty plea." (*Id.* at pp. 303–304.)

In *Booker*, the Supreme Court applied *Apprendi* to the federal sentencing guidelines, holding that the trial judge's additional factfinding violated the Sixth Amendment when it resulted in "an enhanced sentence of 15 or 16 years [under the guidelines] instead of the 5 or 6 years authorized by the jury verdict alone." (*Booker*, *supra*, 543 U.S. at p. 228; see *id.* at pp. 233–235.)

In *Cunningham*, the high court considered California's determinate sentencing law, which "assign[ed] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham*, *supra*, 549 U.S. at p. 274.) The scheme specified three precise terms (lower, middle, and upper) and directed the trial court "to start with the middle term, and to move from that term only when the court itself finds and places on the record facts — whether related to the offense or the offender — beyond the elements of the charged offense" and " 'established by a preponderance of the evidence.' " (*Id.* at pp. 277, 279.) Because "[t]he facts so found are neither inherent in the jury's verdict nor embraced by the defendant's plea, and they need only be established by a preponderance of the evidence, not beyond a

reasonable doubt," the high court held that this scheme violated the Sixth and Fourteenth Amendments. (*Id.* at p. 274.)

The Supreme Court has also applied the *Apprendi* rule to capital sentencing. In *Ring*, the high court considered Arizona's scheme, in which a defendant "could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made." (*Ring*, *supra*, 536 U.S. at p. 592.) State law required the trial judge "to 'conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed' " and permitted "the judge to sentence the defendant to death only if there [wa]s at least one aggravating circumstance and . . . 'no mitigating circumstances sufficiently substantial to call for leniency.' " (*Id.* at pp. 592–593.) The high court, before *Apprendi*, had upheld Arizona's scheme under the Sixth and Eighth Amendments (*Walton v. Arizona* (1990) 497 U.S. 639 (*Walton*)), and the high court in *Apprendi* left *Walton*'s Sixth Amendment holding undisturbed (*Apprendi*, *supra*, 530 U.S. at pp. 496–497). "The key distinction, according to the *Apprendi* Court, was that a conviction of first-degree murder in Arizona carried a maximum sentence of death. 'Once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.' " (*Ring*, at p. 602.) But two years after *Apprendi*, the high court reversed itself, holding in *Ring* that this distinction was untenable and inconsistent with the Arizona Supreme Court's own construction of the state's capital sentencing law. (*Id.* at p. 603.) *Ring* thus overruled *Walton*'s Sixth Amendment holding. (*Id.* at p. 609.)

In *Ring*, the state argued that because "Arizona law specifies 'death or life imprisonment' as the only sentencing options" for a first degree murder conviction, "Ring was therefore sentenced within the range of punishment authorized by the jury verdict." (*Ring*, *supra*, 536 U.S. at pp. 603–604.) The high court rejected this argument, explaining that it "overlook[ed] *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' " (*Id.* at p. 604.) The "first-degree murder statute 'authorize[d] a maximum penalty of death only in a formal sense,' " *Ring* explained, because the finding of at least one aggravating circumstance at the sentencing phase is required for a death sentence. (*Ibid.*) "In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict' " alone. (*Ibid.*) *Ring* thus made clear that if "a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Id.* at p. 602.) Further, "[a]ggravators 'operate as statutory "elements" of capital murder . . . [when,] in their absence, [the death] sentence is unavailable.' " (*Id.* at p. 599, quoting *Walton*, *supra*, 497 U.S. at p. 709, fn.1 (dis. opn. of Stevens, J.).) *Ring* also recognized that *Walton*'s distinction "between elements of an offense and sentencing factors" was "untenable" in light of *Apprendi*. (*Ring*, at p. 604.)

More recently, in *Hurst*, the high court applied *Apprendi* and its progeny to a state capital sentencing scheme it had twice upheld under the Sixth Amendment. (*Hurst*, *supra*, 577 U.S. at p. 101, overruling *Hildwin v. Florida* (1989) 490 U.S. 638 (*Hildwin*) and *Spaziano v. Florida* (1984) 468 U.S. 447 (*Spaziano*).) Under Florida's death penalty scheme at the time,

a defendant convicted of a capital felony could receive a maximum sentence of life imprisonment based on the conviction alone. (*Hurst*, at p. 95.) A sentence of death required "an additional sentencing proceeding 'result[ing] in findings by the court that such person shall be punished by death.' " (*Ibid.*) Florida used a "hybrid" model " 'in which [a] jury renders an advisory verdict but the judge makes the ultimate sentencing determinations.' " (*Ibid.*, quoting *Ring*, *supra*, 536 U.S. at p. 608, fn. 6.) The high court found *Ring*'s analysis to "appl[y] equally to Florida's" scheme because, "[l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty" — instead "requir[ing] a judge to find these facts" — and "the maximum punishment [the defendant] could have received without any judge-made findings was life in prison without parole." (*Hurst*, at pp. 98–99.) Focusing again on function over form, the high court found Florida's "advisory jury verdict" to be "immaterial" for purposes of satisfying the Sixth Amendment because the jury " 'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge.' " (*Hurst*, at pp. 98–99.)

Just last year, in an Eighth Amendment case, the high court again confirmed that "[u]nder *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible." (*McKinney v. Arizona* (2020) 589 U.S. __, __ [140 S.Ct. 702, 707] (*McKinney*).) At the same time, the court reaffirmed its prior decisions holding that the Constitution does not require "a jury (as opposed to a judge) . . . to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision" in a capital proceeding. (*Ibid.*)

McKinney also rejected the claim that it was error for the trial judge in that case, as opposed to a jury, to find the aggravating circumstance that raised the statutory maximum penalty to death; that claim could not succeed because the "case became final . . . long before *Ring* and *Hurst*" and those decisions "do not apply retroactively on collateral review." (*Id.* at p. __ [at p. 708].)

In sum, under *Apprendi* and its progeny, the Sixth Amendment requires any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the statutory maximum to be found by a unanimous jury and proved beyond a reasonable doubt. The statutory maximum means the maximum sentence permissible based solely on the facts reflected in the jury's verdict or admitted by the defendant, without any additional factfinding. (*Blakely*, *supra*, 542 U.S. at p. 303.) It does not matter if the additional fact to be found is termed an "aggravating circumstance," a "sentencing factor," or a "sentencing enhancement"; the high court has emphasized that " 'the relevant inquiry is one not of form, but of effect.' " (*Ring*, *supra*, 536 U.S. at p. 604.)

II.

True to its word, the high court has consistently elevated function over form in applying *Apprendi*. (*Apprendi*, *supra*, 530 U.S. at p. 494; see also *Ring*, *supra*, 539 U.S. at p. 602; *id.* at p. 610 (conc. opn. of Scalia, J.) ["[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt."]; *Southern Union Co. v. U.S.* (2012) 567 U.S. 343, 358–359 ["*Apprendi* and its progeny

have uniformly rejected" the argument "that in determining the maximum punishment for an offense, there is a constitutionally significant difference between a fact that is an 'element' of the offense and one that is a 'sentencing factor.' "].) The high court has repeatedly looked past statutory labels to determine the substantive role that a fact or factor plays in the sentencing decision.

As noted, this approach has led the high court to overrule several of its precedents. *Walton* upheld capital sentencing schemes that "requir[e] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." (*Apprendi*, *supra*, 530 U.S. at p. 496.) *Apprendi* reaffirmed *Walton*, but in *Ring*, the high court found *Walton* untenable in light of *Apprendi* and overruled it. (*Ring*, *supra*, 536 U.S. at pp. 604–605, 609.) In *Hurst*, the high court overruled *Spaziano* and *Hildwin* as inconsistent with *Apprendi*. (*Hurst*, *supra*, 577 U.S. at p. 102.) And in *Alleyne*, the high court held that any fact that increases the statutory minimum penalty must also be found by a jury beyond a reasonable doubt, overruling *Harris v. U.S.* (2002) 536 U.S. 545, 557 and *McMillan v. Pennsylvania* (1986) 477 U.S. 79. (*Alleyne*, *supra*, 570 U.S. at p. 103; see *United States v. Haymond* (2019) 588 U.S. __, __ [139 S.Ct. 2369, 2378].) These overrulings indicate the breadth and force of the *Apprendi* rule.

The high court's decisions have also made clear that the requirements of the Sixth and Eighth Amendments are distinct. After initially holding in *Walton* that Arizona's capital sentencing scheme complied with both the Sixth and Eighth Amendments, and then overruling *Walton*'s Sixth Amendment holding in *Ring*, the high court left intact *Walton*'s Eighth Amendment holding that "the challenged factor . . . furnishes

sufficient guidance to the sentencer" and thus did not violate the Eighth Amendment. (*Walton*, *supra*, 497 U.S. at p. 655; see *Kansas v. Marsh* (2006) 548 U.S. 163, 169.) The high court has understood the Eighth Amendment to be fundamentally concerned with narrowing a sentencer's discretion to ensure that punishment is commensurate and proportional to the offense. (See *Graham v. Florida* (2010) 560 U.S. 48, 59; *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) The Sixth Amendment, by contrast, ensures that the facts necessary for a criminal punishment are found by a unanimous jury and proved beyond a reasonable doubt. In light of these different inquiries under the Sixth and Eighth Amendments, a scheme that satisfies one does not necessarily satisfy the other. (See *Ring*, *supra*, 539 U.S. at p. 606 ["The notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.' "].)

The high court's evolving jurisprudence has also caused state courts to reexamine earlier decisions. "Following *Apprendi*," the Hawaii Supreme Court "repeatedly considered whether Hawaii's extended term sentencing scheme comported with *Apprendi*. Until 2007, [the court] concluded that it did so, on the ground that Hawaii's scheme only required the judge to determine 'extrinsic' facts, rather than facts that were 'intrinsic' to the offense. [Citations.] It was not until *Maugaotega II*, that th[e] court acknowledged that the United States Supreme Court, in *Cunningham*, rejected the validity of [Hawaii's] intrinsic/extrinsic distinction, which formed the basis of these decisions. [*State v. Maugaotega* (Hawaii 2007) 168 P.3d 562,

572–577]." (*Flubacher v. State* (Hawaii 2018) 414 P.3d 161, 167.)

The Delaware Supreme Court had repeatedly held that the state's death penalty scheme complied with *Apprendi* and its progeny. (See *McCoy v. State* (Del. 2015) 112 A.3d 239, 269–271; *Swan v. State* (Del. 2011) 28 A.3d 362, 390–391; *Brice v. State* (Del. 2003) 815 A.2d 314, 321–322.) After *Hurst*, the court changed course and held that Delaware's law violates the Sixth Amendment's requirement that "the existence of 'any aggravating circumstance,' statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding must be made by a jury, . . . unanimously and beyond a reasonable doubt." (*Rauf v. State* (Del. 2016) 145 A.3d 430, 433–434; see *id.* at p. 487, fn. omitted (conc. opn. of Holland, J.) [*Hurst* squarely "invalidated a judicial determination of aggravating circumstances" and "also stated unequivocally that the jury trial right recognized in *Ring* now applies to *all* factual findings *necessary* to impose a death sentence under a state statute"].)

The Florida Supreme Court, on remand after *Hurst*, concluded that the Sixth Amendment requires the jury to "be the finder of every fact, and thus every element, necessary for the imposition of the death penalty." (*Hurst v. State* (Fla. 2016) 202 So.3d 40, 53.) "These necessary facts include . . . find[ing] the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." (*Ibid.*, fn. omitted.) Noting that "Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed," the court "reject[ed] the State's

argument that *Hurst v. Florida* only requires that the jury unanimously find the existence of one aggravating factor and nothing more." (*Id.* at p. 53, fn. 7.) The court "also conclude[d] that, just as elements of a crime must be found unanimously by a Florida jury, all these findings . . . are also elements that must be found unanimously by the jury." (*Id.* at pp. 53–54.)

More recently, the Florida Supreme Court "partially recede[d]" from its holding on remand from *Hurst*. (*State v. Poole* (Fla. 2020) 297 So.3d 487, 501 (*Poole*).) In *Poole*, the court distinguished between the two findings required during the state's sentencing phase: (a) "[t]he eligibility finding . . . '[t]hat sufficient aggravating circumstances exist' "; and (b) "[t]he selection finding . . . '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' " (*Id.* at p. 502, quoting Fla. Stat. § 921.141.) The court determined that the selection or weighing finding " 'is mostly a question of mercy' " and " 'is not a finding of fact [to which the jury trial right attaches], but a moral judgment.' " (*Poole*, at p. 503; cf. *McKinney*, *supra*, 589 U.S. at pp. __–__ [140 S.Ct. at pp. 707–708].) However, and most relevant here, the court did not disturb its prior holding that the jury must find "one or more statutory aggravating circumstances" unanimously and beyond a reasonable doubt. (*Ibid.*)

Moreover, many state legislatures have responded to *Apprendi* and its progeny in the capital context and, especially after *Blakely*, more broadly in criminal sentencing. (See Stemen & Wilhelm, Finding the Jury: State Legislative Responses to *Blakely v. Washington* (2005) 18 Fed. Sentencing Rep. 7 [providing an overview of state reforms].) Immediately after *Ring*, Arizona enacted statutory changes conforming its death penalty scheme to *Ring*'s requirements. Arizona law now

provides for two phases of the capital sentencing proceeding: (1) the aggravation phase, in which "the trier of fact . . . determine[s] whether one or more alleged aggravating circumstances have been proven" (Ariz. Rev. Stat., § 13-752(C)); and (2) the penalty phase, in which "the trier of fact . . . determine[s] whether the death penalty should be imposed" (*id.*, subd. (D)). In the aggravation phase, the jury must "make a special finding on whether each alleged aggravating circumstance has been proven" (*id.*, subd. (E)); "a unanimous verdict is required to find that the aggravating circumstance has been proven" (*ibid.*); and "[t]he prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt" (*id.* § 13-751(B)). Then, in the penalty phase, the jury considers "any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency" (*id.* § 13-752(G)), and the defendant has the burden of "prov[ing] the existence of the mitigating circumstances by a preponderance of the evidence" (*id.* § 13-751(C)). Jurors "do not have to agree unanimously that a mitigating circumstance has been proven to exist"; "[e]ach juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty." (*Ibid.*)

Likewise, Florida enacted statutory reforms to its capital sentencing regime following *Hurst*. Florida law now requires that the jury find, "beyond a reasonable doubt, the existence of at least one aggravating factor" in order for the defendant to be eligible for the death penalty. (Fla. Stat., § 921.141(2)(a); see *id.*, subd. (2)(b)1.) The jury must also "unanimous[ly]" "return findings identifying each aggravating factor found to exist" (*id.*, subd. (2)(b)) and "[u]nanimously" recommend a sentence of either life without parole or death "based on a weighing of . . .

[¶] . . . [w]hether sufficient aggravating factors exist[,] . . . [¶] [w]hether aggravating factors exist which outweigh the mitigating circumstances found to exist[,] . . . [¶] [and, based on that], whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death" (*id.*, subd. (2)(b)2.; see *id.*, subd. (c)). Only if the jury unanimously recommends a sentence of death can the court then decide whether to "impose a sentence of life imprisonment without the possibility of parole or a sentence of death" (*id.*, subd. (3)(a)(2)) "after considering each aggravating factor found by the jury and all mitigating circumstances" (*id.*, subd. (3)(b)).

In sum, the high court's *Apprendi* jurisprudence has prompted significant reexamination and reform of capital sentencing schemes in many states. Yet California is not among them, and our precedent is in conflict with decisions from other states. (See *Poole*, *supra*, 297 So.3d at pp. 501–503 [recognizing that the state law requirement of at least one aggravating factor in order to impose death is subject to the *Apprendi* rule]; *Rauf v. State*, *supra*, 145 A.3d at pp. 433–434 [any aggravating circumstance used in a capital sentencing proceeding must be found by a unanimous jury beyond a reasonable doubt].)

III.

We first confronted the impact of *Apprendi* on California's death penalty scheme in *Anderson*, *supra*, 25 Cal.4th 543. In a footnote, we found *Apprendi* inapplicable to the penalty phase because "under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life

imprisonment without possibility of parole." (*Id.* at pp. 589–590, fn. 14.)

We elaborated on this distinction in *Ochoa*, reasoning that "*Apprendi* itself excluded from its scope 'state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.' " (*Ochoa*, *supra*, 26 Cal.4th at p. 453, quoting *Apprendi*, *supra*, 530 U.S. at p. 496.) In *Ochoa*, we specifically relied on *Apprendi*'s reaffirmation of *Walton* and noted similarities between the California and then-current Arizona schemes. (*Ochoa*, at pp. 453–454.)

But our reliance on *Walton* was soon undercut by *Ring*. After *Ring* overruled *Walton* and found Arizona's scheme unconstitutional, we reverted to rejecting the argument that *Apprendi* "mandates that aggravating circumstances necessary for the jury's imposition of the death penalty be found beyond a reasonable doubt . . . for the reason given in *People v. Anderson, supra,* 25 Cal.4th at pages 589–590, footnote 14" (quoted above). (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.) We concluded that *Ring* "does not change this analysis" because "[u]nder California's scheme, in contrast [to Arizona's], each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist" since "[t]he final step . . . is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Ibid.*) We insisted that "[n]othing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt." (*Ibid.*)

In *People v. Prieto* (2003) 30 Cal.4th 226, we further explained that because the penalty "jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence . . .' [citation] [n]o single factor therefore determines which penalty — death or life without the possibility of parole — is appropriate. [¶] . . . [And] [b]ecause any finding of aggravating factors during the penalty phase does not 'increase[ ] the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*Id.* at p. 263.)

We reaffirmed this reasoning after *Blakely* (see *People v. Morrison* (2004) 34 Cal.4th 698, 731 (*Morrison*)), *Booker* (see *People v. Lancaster* (2007) 41 Cal.4th 50, 106), *Cunningham* (see *People v. Prince* (2007) 40 Cal.4th 1179, 1297 (*Prince*)), and *Hurst* (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235). But in each instance, our analysis was brief, ranging from a few sentences to a short paragraph or two. And we relied more on grounds for distinguishing the sentencing schemes at issue in the high court's opinions than on any thorough examination of the analytical underpinnings of the *Apprendi* line of decisions.

For instance, despite *Blakely*'s clarification of what "the 'statutory maximum' for *Apprendi* purposes" means — i.e., "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Blakely*, *supra*, 542 U.S. at p. 303) — we concluded that *Blakely* "d[id] not undermine our analysis" because it "simply relied on *Apprendi* and *Ring* to conclude that a state noncapital criminal defendant's Sixth Amendment right to trial by jury was violated where the facts supporting his sentence, which was above the

standard range for the crime he committed, were neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt" (*Morrison*, *supra*, 34 Cal.4th at p. 731). We distinguished *Cunningham* on the ground that it "involve[d] merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to the state's capital sentencing scheme." (*Prince*, *supra*, 40 Cal.4th at p. 1297.)

And we distinguished *Hurst* on the ground that under California's sentencing scheme, unlike Florida's, "a jury weighs the aggravating and mitigating circumstances and reaches a unanimous penalty verdict" and "this verdict is not merely 'advisory.' " (*Rangel*, *supra*, 62 Cal.4th at p. 1235, fn. 16, quoting *Hurst*, *supra*, 577 U.S. at p. 98.) We explained that "[i]f the jury reaches a verdict of death, our system provides for an automatic motion to modify or reduce this verdict to that of life imprisonment without the possibility of parole," but the trial court "rules on this motion . . . simply [to] determine[] 'whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.' " (*Rangel*, at p. 1235, fn. 16, quoting § 190.4; see *People v. Capers* (2019) 7 Cal.5th 989, 1014 [reaffirming this same reasoning to distinguish *Hurst*].)

These analyses in our case law appear to rest on the observation that under California's capital sentencing scheme, "the jury as a whole need not find any one aggravating factor to exist." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.) Thus, when the prosecution offers evidence of multiple instances of prior criminal conduct as aggravating evidence in support of a death verdict, the jury need not agree on which prior crimes, if any,

have been proven beyond a reasonable doubt. Two jurors may find the existence of one prior crime, while three other jurors may focus on another prior crime, a single juror may fixate on still another or none at all, and so on. Yet our case law deems the jury as a whole to have found the existence of at least one aggravating factor so long as each juror finds one (*any* one) prior crime proven beyond a reasonable doubt — or none at all so long as the juror finds another section 190.3 factor to be aggravating.

The observation that this is how California's sentencing scheme works is not an argument for its constitutionality under *Apprendi*. Under section 190.3, the penalty jury may not return a death verdict unless it has found at least one aggravating circumstance. It is not clear why that finding is not governed by the *Apprendi* rule. We have compared the jury's "free weighing" of aggravating and mitigating circumstances in the penalty determination to "a sentencing court's traditionally discretionary decision." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.) But it is precisely the sentencing court's traditional discretion that the *Apprendi* rule upends, cabining it to a prescribed statutory range supported by proper jury findings. (See *Cunningham*, *supra*, 549 U.S. at p. 292; *McKinney*, *supra*, 589 U.S. at pp. __–__ [140 S.Ct. at pp. 707–708].) To say that California law does not require the jury to agree on any one aggravating factor does not answer the *Apprendi* claim; it simply states the problem.

Our repeated insistence that death is no more than the statutory maximum upon a first degree murder conviction and a true finding of a special circumstance also cannot carry the day. The same argument — made by this court in the analogous context of determinate sentencing — was considered and rejected in *Cunningham*. Before *Cunningham*, we upheld

California's determinate sentencing law under *Apprendi*, *Blakely*, and *Booker*. (See *People v. Black* (2005) 35 Cal.4th 1238, 1254 (*Black*), judg. vacated and cause remanded for further consideration in light of *Cunningham*, *supra*, 549 U.S. 270, *sub nom. Black v. California* (2007) 549 U.S. 1190.) In *Black*, we rejected the argument that "a jury trial [wa]s required on the aggravating factors on which an upper term sentence is based, because the middle term is the 'maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict . . . .' " (*Black*, at p. 1254, italics omitted, quoting *Blakely*, *supra*, 542 U.S. at p. 303.) We explained that "the California determinate sentence law simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Ibid.*) We held that the "the upper term is the 'statutory maximum' " and viewed the statutory "requirement that the middle term be imposed unless an aggravating factor is found" as "merely a requirement that the decision to impose the upper term be *reasonable*," "preserv[ing] the traditional broad range of judicial sentencing discretion." (*Id.* at pp. 1254–1255, fn. omitted.) We also analogized the determinate sentencing law to "the post-*Booker* federal sentencing system." (*Id.* at p. 1261.)

Notwithstanding our understanding of California's determinate sentencing law, the high court in *Cunningham* rejected our reasoning in *Black*. The high court concluded that "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Cunningham*, *supra*, 549 U.S. at p. 290.) *Cunningham* also rejected *Black*'s comparison to the advisory

federal sentencing guidelines because under California's sentencing scheme "judges are not free to exercise their 'discretion to select a specific sentence within a defined range.' " (*Id.* at p. 292, quoting *Booker*, *supra*, 543 U.S. at p. 233.) Rather, by "adopt[ing] sentencing triads, three fixed sentences with no ranges between them," judges have "no discretion to select a sentence within a range." (*Cunningham*, at p. 292.) Instead, a judge must impose the middle term absent "[f]actfinding to elevate a sentence," and *Cunningham* concluded that the high court's "decisions make plain" that such factfinding "falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." (*Ibid.*)

Our reasoning distinguishing *Apprendi* and its progeny in the capital context appears analogous to the reasoning in *Black* that *Cunningham* rejected. We have said that "death *is* no more than the prescribed statutory maximum" upon a special circumstance first degree murder conviction (*Anderson*, *supra*, 25 Cal.4th at pp. 589–590, fn. 14), and we have emphasized the jury's "free weighing" penalty determination to conclude that it is equivalent to "a sentencing court's traditionally discretionary decision" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32). But just as the determinate sentencing law in *Cunningham* prescribed "sentencing triads" with three discrete options as opposed to allowing a judge to select " 'within a defined range' " (*Cunningham*, *supra*, 549 U.S. at p. 292), California's capital sentencing scheme similarly provides for two discrete options in the case of a conviction for first degree murder with a special circumstance finding — "death or imprisonment in the state prison for life without the possibility of parole" (§ 190.2,

subd. (a)). And like the requirement to impose the middle term absent factfinding in aggravation, in the capital context "a sentence of confinement in state prison for a term of life without the possibility of parole" is required unless the jury finds one or more aggravating circumstances and "concludes that the aggravating circumstances outweigh the mitigating circumstances." (§ 190.3.)

After the high court vacated *Black* and remanded for further consideration in light of *Cunningham*, we decided *People v. Black* (2007) 41 Cal.4th 799 (*Black II*). We rejected the argument that there is a "right to jury trial on all aggravating circumstances that may be considered by the trial court, even if one aggravating circumstance has been established in accordance with *Blakely*." (*Id.* at p. 814.) Instead, we held that "as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Id.* at p. 812.)

We reasoned that "*Cunningham* requires us to recognize that aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme. One function is to raise the maximum permissible sentence from the middle term to the upper term. The other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense. Although the [determinate sentencing law] does not distinguish between these two functions, in light of *Cunningham* it is now clear that

we must view the federal Constitution as treating them differently. Federal constitutional principles provide a criminal defendant the right to a jury trial and require the prosecution to prove its case beyond a reasonable doubt as to factual determinations (other than prior convictions) that serve the first function, but leave the trial court free to make factual determinations that serve the second function. It follows that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II*, *supra*, 41 Cal.4th at pp. 815–816.)

The continued applicability of this part of *Black II* is not clear in light of statutory changes to the determinate sentencing law made in response to *Cunningham*. (See Stats. 2007, ch. 3, § 2; § 1170, subd. (b).) Even so, and despite our conclusion that *Cunningham* "has no apparent application to the state's capital sentencing scheme" (*Prince*, *supra*, 40 Cal.4th at p. 1297), there is an argument for extending *Black II*'s reasoning to the jury's consideration of aggravating and mitigating circumstances in the capital context under section 190.3. But, as I explain, the argument is not convincing.

Under *Black II*, one could argue that our death penalty scheme comports with *Apprendi* as follows: A jury must find at least one special circumstance under section 190.2 for the defendant to be death-eligible and for the proceeding to continue into a penalty phase, and that special circumstance must be found unanimously and beyond a reasonable doubt. (§ 190.1.) Then, any such special circumstance found true by the guilt phase jury automatically becomes a consideration for the

penalty phase jury under section 190.3, factor (a), since that factor includes "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." Thus, in light of the guilt phase jury's special circumstance finding(s), the structure of our death penalty scheme arguably ensures at least "one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black II*, *supra*, 41 Cal.4th at p. 816.)

However, nothing in our case law has applied *Black II*'s reasoning in this manner, and we have not characterized a special circumstance finding as an aggravating factor or specifically cited section 190.3, factor (a) in this context. Instead, we have reasoned (unpersuasively in my view) that the special circumstance finding means "death is no more than the prescribed statutory maximum for the offense" upon conviction at the guilt phase, and "[h]ence, facts which bear upon, but do not necessarily determine, which of the[] two alternative penalties [i.e., death or life imprisonment without the possibility of parole] is appropriate do not come within the holding of *Apprendi*." (*Anderson*, *supra*, 25 Cal.4th at pp. 589–590, fn. 14, italics omitted; see *Ochoa*, *supra*, 26 Cal.4th at p. 454.) We have also observed that "[t]he literal language of [factor] (a) presents a theoretical problem . . . , since it tells the penalty jury to consider the 'circumstances' of the capital crime *and* any attendant statutory 'special circumstances[,]' . . . [and] the latter are a subset of the former, [so] a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' " (*People v. Melton* (1988)

44 Cal.3d 713, 768.) In *Melton*, we held that when requested "the trial court should admonish the jury not to do so." (*Ibid.*; see *People v. Monterroso* (2004) 34 Cal.4th 743, 789–790.) Applying *Black II*'s rationale in the manner described above would conceive of the special circumstance finding as serving multiple functions, in tension with our holding in *Melton*.

Moreover, the structure of our death penalty statute presents a problem for extending *Black II* in the manner above. Whereas states like Arizona and Florida statutorily enumerate a specific list of factors that, if found to exist by the jury, have been deemed per se aggravating, section 190.3 takes a different approach: It enumerates a *combined* list of *potentially* relevant factors and leaves it to the penalty phase jury to determine whether, in a given case, each individual factor is aggravating, mitigating, or irrelevant for sentencing selection. (See § 190.3 [the penalty jury "shall take into account any of the following factors *if relevant*" (italics added)].) Nothing in our death penalty scheme deems a special circumstance to be per se aggravating. Instead, section 190.3 leaves it to the penalty jury to determine whether "the existence of any special circumstances found to be true" is an aggravating factor "relevant" to the penalty determination. (§ 190.3, factor (a).)

The penalty jury's finding in this regard — i.e., whether the existence of a special circumstance is aggravating and thus "relevant" to the penalty determination (§ 190.3) — is not dissimilar from other determinations that, though arguably normative or moral in nature as opposed to purely factual, are nonetheless governed by the *Apprendi* rule. For example, *Blakely* involved a finding in aggravation of " 'deliberate cruelty' " to support the more severe sentence that was imposed. (*Blakely*, *supra*, 542 U.S. at p. 303.) The high court concluded

that "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here [in *Hurst*]), it remains the case that the jury's verdict alone does not authorize the sentence." (*Id.* at p. 305.) *Hurst* likewise applied the *Apprendi* rule to an aggravating circumstance finding that the capital crime was " 'heinous, atrocious, or cruel' " (*Hurst, supra*, 577 U.S. at p. 96) — a common aggravating factor in many state statutes (see, e.g., *Clemons v. Mississippi* (1990) 494 U.S. 738, 743, fn. 1; Ala. Code, § 13A-5-49(8); N.C. Gen. Stat. Ann., § 15A-2000(e)(9); Okla. Stat. Ann., tit. 21, § 701.12(4)).

Thus, in contrast to the statutory regimes in other states, a special circumstance finding under our scheme does not mean the jury has found the existence of the special circumstance to be aggravating — and that is the crucial determination needed at the penalty phase. By expressly leaving this determination to the penalty jury, our statutory scheme does not treat a special circumstance found true at the guilt phase to be a per se aggravating factor relevant to the sentencing decision. If the existence of a special circumstance forms no part of the jury's calculus in weighing aggravating and mitigating circumstances, then it cannot satisfy *Black II*'s requirement that at least "one legally sufficient aggravating circumstance has been found to exist by the jury." (*Black II, supra*, 41 Cal.4th at p. 816; see *Ring, supra*, 536 U.S. at p. 604 [" 'the relevant inquiry is one not of form, but of effect' "].)

This concern is hardly speculative. The list of special circumstances in section 190.2 is broad and includes a number of circumstances, such as commission of murder during a burglary or robbery, that do not seem necessarily aggravating

in every case. As just one example, consider *People v. Yeoman, supra*, 31 Cal.4th 93, which involved a first degree murder conviction and a robbery-murder special circumstance true finding arising from the robbery and killing of an elderly female motorist whose car had broken down. At the penalty phase, the prosecution's "evidence in aggravation consisted of the circumstances of the capital offense (§ 190.3, factor (a)), three prior felony convictions (*id.*, factor (c)) and five incidents of criminal activity involving violence or a threat of violence (*id.*, factor (b))." (*Yeoman*, at p. 108.) The defendant contested some of this aggravating evidence, including an earlier robbery and attempted kidnapping of another female motorist, which the prosecution also introduced at the guilt phase under Evidence Code section 1101, subdivision (b) to show intent, as well as another killing not charged in the proceeding and used only as factor (b) evidence. Can it be said that the special circumstance finding comprised the "one legally sufficient aggravating circumstance . . . found to exist by the jury" that the *Apprendi* rule requires? (*Black II, supra*, 41 Cal.4th at p. 816.) Or did the jury instead predicate its sentencing decision on findings with regard to contested evidence under factors (b) and (c)?

There are many other cases involving robbery-murder or burglary-murder special circumstance findings where the prosecution relied on extensive evidence of prior criminal activity to show aggravation at the penalty phase. (See, e.g., *People v. Grimes* (2016) 1 Cal.5th 698; *People v. Jackson* (2014) 58 Cal.4th 724; *People v. Abel* (2012) 53 Cal.4th 891; *People v. Friend* (2009) 47 Cal.4th 1.) In such cases, it is hardly clear — because our death penalty scheme does not require clarity — that the jury found the existence of a special circumstance to be a "relevant" aggravating factor. (§ 190.3.) If the jury made no

such finding, then it is quite possible that individual jurors seized on different items in the prosecution's proffered menu of aggravating circumstances and that no single aggravating circumstance was found beyond a reasonable doubt by a unanimous jury. The *Apprendi* rule appears to foreclose a death judgment in such cases because life imprisonment without the possibility of parole is "the maximum sentence" authorized under California law at the penalty phase absent a jury finding of at least one aggravating circumstance. (*Blakely*, *supra*, 542 U.S. at p. 303.)

* * *

In sum, the 20-year arc of the high court's Sixth Amendment jurisprudence raises serious questions about the constitutionality of California's death penalty scheme. There is a world of difference between a unanimous jury finding of an aggravating circumstance and the smorgasbord approach that our capital sentencing scheme allows. Given the stakes for capital defendants, the prosecution, and the justice system, I urge this court, as well as other responsible officials sworn to uphold the Constitution, to revisit this issue at an appropriate time.

LIU, J.

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

Name of Opinion People v. McDaniel

Procedural Posture (see XX below)
Original Appeal XX
Original Proceeding
Review Granted (published)
Review Granted (unpublished)
Rehearing Granted

Opinion No. S171393
Date Filed: August 26, 2021

Court: Superior
County: Los Angeles
Judge: Robert J. Perry

Counsel:

Michael J. Hersek and Mary K. McComb, State Public Defenders, under appointments by the Supreme Court, Peter R. Silten and Elias Batchelder, Deputy State Public Defenders, for Defendant and Appellant.

Molly O'Neal, Public Defender (Santa Clara), and Michael Ogul, Deputy Public Defender, for California Public Defenders Association and Santa Clara County Public Defender as Amici Curiae on behalf of Defendant and Appellant.

Phillips Black and John Mills for Hadar Aviram and Gerald Uelman as Amici Curiae on behalf of Defendant and Appellant.

Shilpi Agarwal, Summer Lacey and Brian W. Stull for American Civil Liberties Union, American Civil Liberties Union Foundation of Northern California, American Civil Liberties Union Foundation of

Southern California and American Civil Liberties Union Foundation as Amici Curiae on behalf of Defendant and Appellant.

U.C. Berkeley School of Law, Elisabeth Semel and Erwin Chemerinsky for Governor Gavin Newsom as Amicus Curiae on behalf of Defendant and Appellant.

Keker, Van Nest & Peters, Steven A. Hirsch, Jo W. Golub and Jason George for Vicente Benavides Figueroa and Manuel Lopez as Amici Curiae on behalf of Defendant and Appellant.

Arnold & Porter Kaye Scholer and Steven L. Mayer for George Gascón; Natasha Minsker for Gil Garcetti; Diana Becton, District Attorney (Contra Costa), Chesa Boudin, District Attorney (San Francisco), Jeffrey F. Rosen, District Attorney (Santa Clara), and Tori Verber Salazar, District Attorney (San Joaquin), as Amici Curiae on behalf of Defendant and Appellant.

Kamala D. Harris, Xavier Becerra and Rob Bonta, Attorneys General, Gerald A. Engler and Lance E. Winters, Chief Assistant Attorneys General, James William Bilderback II, Assistant Attorney General, Dana M. Ali, Jaime L. Fuster and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Kent S. Scheidegger and Kymberlee C. Stapleton for Criminal Justice Legal Foundation as Amicus Curiae on behalf of Plaintiff and Respondent.

Mark Zahner, Robert P. Brown, Chief Deputy District Attorney and Philip P. Stemler, Deputy District Attorney, for California District Attorneys Association as Amicus Curiae on behalf of Plaintiff and Respondent.

Hogan Lovells US, Christopher J. Cox, Gurtej Singh, Rupinder K. Garcha, William M. Regan, Allison M. Wuertz, Daniel J. Petrokas and Peter W. Bautz for Janet C. Hoeffel, Rory K. Little, Emad H. Atiq and James Q. Whitman as Amici Curiae.

Counsel who argued in Supreme Court (not intended for publication with opinion):

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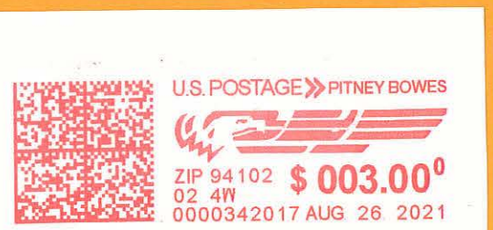

Supreme Court of California
Clerk of the Court
350 McAllister Street
San Francisco, CA 94102-4797

S171393
Office of the State Public Defender - OK
Elias Batchelder, Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607

DECLARATION OF SERVICE

Re: PEOPLE v. DON'TE McDANIEL Supreme Court No. S171393
(Superior Court No. TA074274)

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

APPELLANT'S PETITION FOR REHEARING

on each of the following, by placing same in an envelope with postage prepaid. The envelopes were addressed and mailed on **September 10, 2021** as follows:

Don'te Lamont McDaniel
#G-53365
CSP-SQ
4-EB-19
San Quentin, CA 94974

Superior Court of Los Angeles County
Honorable Robert J. Perry
c/o Capital Appeals Unit
210 West Temple St., Rm. M-3
Los Angeles, CA 90012

The following were served the aforementioned document(s) electronically via TrueFiling on **September 10, 2021**:

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DECLARATION OF SERVICE

Governor's Office
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Chief Deputy Legal
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kelli.evans@gov.ca.gov

California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105
filing@capsf.org

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **September 10, 2021,** at Sacramento, California.

/s/ Kecia Bailey
KECIA BAILEY

APPENDIX C

***People v. McDaniel*, No. S171393**

California Supreme Court

Order Modifying Opinion And Denying Petition For Rehearing

October 20, 2021

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,
v.
DON'TE LAMONT McDANIEL,
Defendant and Appellant.

S171393

Los Angeles County Superior Court
TA074274-01

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

THE COURT:

The majority opinion in this matter, filed on August 26, 2021, and appearing at 12 Cal.5th 97, is modified as follows:

1. The second paragraph on page 120, beginning "The prosecutor explained that," is deleted in its entirety and replaced with the following paragraph:

> The prosecutor noted that Prospective Juror No. 46 believed that life without parole and the death penalty "are essentially the same because life in prison is not a life." The prosecutor also explained that the prospective juror did not believe the death penalty was a deterrent, "which is not an attitude that I considered to be

a fair attitude." He was also concerned that Prospective Juror No. 46 listened to a "very liberal political radio station where they frequently have specials and guest speakers and interviews that are anti-death penalty advocates."

2. The second sentence of the second full paragraph on page 124, beginning "Comparing the final composition," is modified to add ", while not in itself decisive," after "pool" so that the sentence now reads:

> Comparing the final composition of the jury to the overall pool, while not in itself decisive, reveals that Black jurors were overrepresented on the jury, even factoring in the disallowed strike of Prospective Juror No. 46.

This modification does not affect the judgment.

The petition for rehearing is denied. Defendant's request for modification of the opinion is denied.

APPENDIX D

***McDaniel v. California*, Application No. 21A316**

United States Supreme Court

Order Granting Extension of Time to File Petition for Writ of Certiorari

January 12, 2022

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 12, 2022

Mr. Elias Paul Batchelder
Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94131

Re: Don'te Lamont McDaniel
v. California
Application No. 21A316

Dear Mr. Batchelder:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on January 12, 2022, extended the time to and including March 19, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Redmond K. Barnes
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Elias Paul Batchelder
Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94131

Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-3600

APPENDIX E

***People v. McDaniel*, No. S171393**

California Supreme Court

Motion for Judicial Notice

August 6, 2015

MICHAEL J. HERSEK
State Public Defender
PETER R. SILTEN
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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT MCDANIEL, Defendant and Appellant.	No. S171393 Los Angeles Superior Ct. No. TA074274

MOTION FOR JUDICIAL NOTICE

MICHAEL J. HERSEK
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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DONTE LAMONT MCDANIEL, Defendant and Appellant.	No. S171393 Los Angeles Superior Ct. No. TA074274

MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Donte Lamont McDaniel, through his attorney, the State Public Defender, requests that this Court take judicial notice pursuant to

Evidence Code sections 452, subdivision (d), and 459, subdivision (a) of the *Batson/Wheeler*[1] proceedings in co-defendant Kai Harris's separately tried capital case. (See *People v. Kai Harris*, Los Angeles County Superior Court Case No. TA74314 at 10 CT 2743-2744, 2754-2755, and 11 RT 1959-2172.)[2] The prosecutor who prosecuted both appellant and Mr. Harris was Los Angeles County Deputy District Attorney Halim Dhanidina. In both appellant's case and Harris's, Mr. Dhanidina was found to have violated *Batson/Wheeler*. In Mr. Harris's case, the court declared a mistrial and a new jury was empaneled. Following the retrial, Mr. Harris received the death penalty. Mr. Harris's automatic appeal is pending before this Court in *People v. Harris*, No. S178239.

The *Batson/Wheeler* proceedings in Mr. Harris's case are relevant to the Court's consideration of appellant's Argument I ("The Prosecutor Violated *Batson* and *Wheeler* in His Peremptory Challenge of Prospective Juror No. 28") in that they support appellant's argument that Mr. Dhanidina's decision to strike an African-American prospective juror from appellant's jury was improperly influenced by race.

---

[1] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

[2] "CT" refers to the Clerk's Transcript in Mr. Harris's case, and "RT" refers to the Reporter's transcript in Mr. Harris's case. Copies of the relevant CT and RT pages in Mr. Harris's case are attached to this motion as Exhibit A.

Appellant's request for judicial notice is based on the attached Memorandum of Points and Authorities and the files and records in this case.

Dated: August 6, 2015

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender
ELIAS BATCHELDER
Deputy State Public Defender

Attorneys for Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE TRANSCRIPTS AND MINUTE ORDER OF CO-DEFENDANT'S TRIAL ARE PROPER SUBJECTS FOR JUDICIAL NOTICE

Evidence Code section 459, subdivision (a) provides, in relevant part, that the "reviewing court . . . may take judicial notice of any matter specified in Section 452." Among the items set forth in Evidence Code section 452 which may be judicially noticed are: "(c) official acts of . . . judicial departments of . . . any state of the United States and (d) "records of (1) any court of this state . . . ." (Evid. Code, § 452, subds. (c) & (d)(1).) Evidence Code section 453 converts permissive judicial notice into mandatory judicial notice whenever a party seeking judicial notice has advised each adverse party of the items sought to be judicially noticed and provided them with sufficient information concerning the items sought to be judicially noticed.

Attached to this request is one volume of reporter's transcripts, and related minute orders, from the case of *People v. Kai Harris*, Los Angeles County Superior Court Case No. TA74314, an automatic appeal which is currently pending before this Court. (See attached Exh. A.)

The documents listed above are "records" of a court of the state of California, as defined by Evidence Code section 452, subdivision (d)(1). In addition, the minute orders appellant asks to be judicially noticed reflect "official acts" as defined by Evidence Code section 452, subdivision (c). A copy of this request has been served on each adverse party. Accordingly, appellant submits that the requested items may be judicially noticed by this court pursuant to section 459. (See *People v. Howard* (2010) 51 Cal.4th 15, 43, fn. 21 [granting motion for judicial notice transcripts in co-defendant's

trial].)

II. THE DOCUMENTS ARE RELEVANT TO APPELLANT'S CLAIM OF *BATSON/WHEELER* ERROR

Even if a matter is a proper subject of judicial notice, it must still be relevant. (See e.g., *People v. Payton* (1992) 3 Cal.4th 1050, 1073.) The documents at issue demonstrate that a mistrial due to a *Batson/Wheeler* violation was granted in the co-defendant's penalty phase retrial within months of the alleged *Batson/Wheeler* violation at issue in appellant's case. Because the records show that the same prosecutor violated *Batson/Wheeler* twice within the span of several months, these documents are unquestionably relevant.

Under *Batson*, pattern and practice evidence has always been admissible to assist in the showing of discrimination required to make out a claim. (See *Batson*, *supra*, 476 U.S. at p. 80 [inference of discrimination could be supported by showing that the prosecutor "in case after case . . . is responsible for the removal of Negroes who have been selected as qualified jurors"]; see also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 346-347 [historical evidence of discrimination by the prosecutor's office " is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case"].)

The evidence in Mr. Harris's case is probative even though it arose shortly after appellant's trial. (See *Williams v. Woodford* (9th Cir. 2005) 396 F.3d 1059, 1064 (Rawlinson, J., dis. from denial of rehg. en banc) [arguing that evidence that prosecutor "continued to engage in this reprehensible and unconstitutional practice [of *Batson* violations] after Williams' trial" should have been considered in support of claimed discrimination]; see also *U.S. v. Hughes* (8th Cir. 1988) 864 F.2d 78, 79

[judicial notice taken of the frequency of the charge of systematic exclusion of black jurors in the Eastern District of Missouri in criminal cases]; *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 280) [office's strikes in other cases "within one year" of trial relevant to *Batson* inquiry].)

As this Court has recently recognized, the issue in *Batson/Wheeler* cases is not simply whether the trial court erred in not finding discrimination, but whether the public's "confidence in the rule of law" suffers by an unduly rigid method of review that – by ignoring highly relevant evidence – permits discrimination to occur without consequence. (See *People v. Scott* (2015) 61 Cal.4th 363, 390 [allowing for consideration of discriminatory statements made by the prosecutor even if made subsequent to the trial court's non-erroneous denial of prima facie case].) To ensure that the interests of justice are served, this Court has not hesitated to take into account evidence that was not necessarily placed before the trial court by the parties. (See *People v. Lenix* (2008) 44 Cal.4th 602, 622 [comparative analysis must be undertaken by reviewing court for the first time on appeal even if not presented to the trial court].)

Looking to the Title VII context from which the *Batson/Wheeler* doctrine derives, courts frequently take into consideration discriminatory conduct that post-dates the alleged act at issue. (See, e.g, *Ryder v. Westinghouse Elec. Corp.* (3d Cir.1997) 128 F.3d 128, 132–133 [age-discriminatory comments made by CEO and other supervisors one year after plaintiff's termination were relevant to show managerial attitudes]; *Ansell v. Green Acres Contracting Co.* (3d Cir.2003) 347 F.3d 515, 524–525 [subsequent discriminatory conduct may be relevant to finding of discrimination].)

In appellant's case the prosecutor claimed that, because the victims

and many of the prosecution witnesses were black, he could have no motivation to excuse black jurors. (5 RT 1076-1077.) Obviously, there are invidious stereotypes other than the existence of shared racial identity which may tempt prosecutors to allow race to infect their decision-making. (See, e.g., *People v. Williams* (2013) 56 Cal.4th 630, 652 [trial court espoused stereotype that "[b]lack women are very reluctant to impose the death penalty"].) If nothing else, the fact that the same prosecutor – in case involving the same crimes, with the same African American victims and witnesses – was found to have violated the tenets of *Batson/Wheeler* undermines his protestations that race could not have possibly affected his decisions. In short, the instant documents subject to the request for judicial notice are relevant to appellant's claim. Therefore, the motion should be granted.

CONCLUSION

For each of the reasons set forth herein, this Court should grant appellant's motion for judicial notice.

Dated: August 6, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender
ELIAS BATCHELDER
Deputy State Public Defender

Attorneys for Appellant

Ex. A

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 02/23/09

CASE NO. TA074314

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 02: KAI HARRIS

INFORMATION FILED ON 08/02/04.

COUNT 01: 187(A) PC FEL - MURDER.
COUNT 02: 187(A) PC FEL - MURDER.
COUNT 03: 664-187(A) PC FEL - ATTEMPTED MURDER.
COUNT 04: 664-187(A) PC FEL - ATTEMPTED MURDER.
COUNT 05: 215(A) PC FEL - CARJACKING.

ON 02/23/09 AT 930 AM IN CENTRAL DISTRICT DEPT 108

CASE CALLED FOR JURY TRIAL IN PROGRESS

PARTIES: MICHAEL JOHNSON (JUDGE) DONNA PEALE (CLERK)
SABA MCKINLEY (REP) HALIM DHANIDINA (DA)
LORA JOHNSON (REP2)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY JOHN B SCHMOCKER BAR PANEL ATTORNEY

BAIL SET AT NO BAIL

MATTER IS CALLED FOR RE-TRIAL OF DEATH PENALTY PHASE.

VOIR DIRE COMMENCES WITH PANEL A.

OUT OF THE PRESENCE OF THE JURY:

DEFENSE WITNESSES ARTISIA PRICE, JAMEKA GLASPIE, CARL WILLIAMS JR. AND MARTELIS DAVIS ARE PLACED ON CALL TO THE DEFENSE.

IN THE PRESENCE OF THE JURY:

VOIR DIRE RESUMES.

DEFENSE REQUEST A WHEELER/BATTEN MOTION.

CASE NO. TA074314
DEF NO. 02

DATE PRINTED 02/23/09

JUROR NUMBER P9765 IS REQUESTED TO RETURN ON WEDNESDAY AT 9:00 A.M. WITH ALL REMAINING JURORS WHO ARE ADMONISHED.

.

PARTIES ARGUE THE WHEELER/BATTEN MOTION. THE COURT GRANTS THE MOTION. THE PEOPLE REQUEST THE COURT TO WITH HOLD THE RULING UNTIL TOMORROW AT 1:30 P.M. WHEN THE PEOPLE WILL SUBMIT CASE LAW AND FURTHER ARGUMENT.

COURT ORDERS AND FINDINGS:

-THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

NEXT SCHEDULED EVENT:

02/24/09 130 PM JURY TRIAL IN PROGRESS DIST CENTRAL DISTRICT DEPT 108

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 02/25/09

CASE NO. TA074314

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 02: KAI HARRIS

INFORMATION FILED ON 08/02/04.

COUNT 01: 187(A) PC FEL - MURDER.
COUNT 02: 187(A) PC FEL - MURDER.
COUNT 03: 664-187(A) PC FEL - ATTEMPTED MURDER.
COUNT 04: 664-187(A) PC FEL - ATTEMPTED MURDER.
COUNT 05: 215(A) PC FEL - CARJACKING.

ON 02/24/09 AT 130 PM IN CENTRAL DISTRICT DEPT 108

CASE CALLED FOR JURY TRIAL IN PROGRESS

PARTIES: MICHAEL JOHNSON (JUDGE) DONNA PEALE (CLERK)
LORA JOHNSON (REP) HALIM DHANIDINA (DA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY JOHN B SCHMOCKER BAR PANEL ATTORNEY

BAIL SET AT NO BAIL

-DDA HALIM DHANIDINA **DEATH PENALTY PHASE
MOTION IN LIMINE REGARDING AGGRAVATING FACTOR OF 3/22/94.

.
MARK THARP IS SWORN AND TESTIFIES ON BEHALF OF THE PEOPLE.

.
PARTIES ARGUE THE MOTION.

.
THE COURT RULES THE SEARCH MAY BE ADMITTED AS RELFECTED IN THE OFFICIAL NOTES OF THE COURT REPORTER.

.
THE PEOPLE ARGUE FOR THE COURT NOT TO DECLARE A MISTRIAL BASED UPON WHEELER/BATSON.
THE COURT AFTER REVIEWING THE PEOPLE'S MOTION AND HEARING FROM DEFENSE COUNSEL DECLARES A MISTRIAL.

.
MISTRIAL MOTION IS GRANTED BASED ON THE WAYING OF EVIDENCE.

CASE NO. TA074314
DEF NO. 02 DATE PRINTED 02/25/09

THE COURT DETERMINES THE DEFENSE SUSTAINED ITS BURDEN OF PROOF UNDER BATSON. THE COURT DOES NOT FIND ANY KIND OF INVIVIOUS CONDUCT OR OTHER MISCONDUCT BY THE PROSECUTION, IT'S SIMPLY A FACTOR OF WAYING THE EVIDENCE.

PARTIES ALL AGREE THAT ALL QUESTIONNAIRES AND SIGNATURE PAGES FROM THE QUESTIONNAIRES MAY BE DESTROYED.

PARTIES AGREE THAT TRIAL WILL START ON 8/17/09 AS 8 OF 10.

FURTHER TRIAL READINESS IS SET FOR 6/5/09.

JUROR INFORMATION SHEETS FROM PANEL A AND B ARE ORDERED

SEALED AND PLACED IN THE COURT FILE.

JURORS ORDERED TO RETURN ON 2/25/09 WILL BE RELEASED OFF THE RECORD WITHOUT THE DEFENDANT OR COUNSEL PRESENT.

COURT ORDERS AND FINDINGS:

-THE COURT DECLARES A MISTRIAL.

-THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

WAIVES STATUTORY TIME.

NEXT SCHEDULED EVENT:
06/05/09 830 AM JURY TRIAL (RE-TRIAL) DIST CENTRAL DISTRICT DEPT 108

CUSTODY STATUS: DEFENDANT REMANDED

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. KAI HARRIS, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. TA074314-02

DEC 15 2009

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE MICHAEL JOHNSON, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

FEBRUARY 23 & 24, 2009

APPEARANCES:

FOR THE RESPONDENT:

STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CALIFORNIA 90013

FOR THE APPELLANT: IN PROPRIA PERSONA

VOLUME 11 OF 16
PAGES 1958 THRU 2172, INCL.

SABA MC KINLEY, CSR NO. 9051
OFFICIAL REPORTER

CASE NUMBER: TA074314
CASE NAME: PEOPLE VS. KAI HARRIS
LOS ANGELES, CALIFORNIA MONDAY, FEBRUARY 23, 2009
DEPARTMENT NO. 108 HON. MICHAEL JOHNSON, JUDGE
REPORTER: SABA MC KINLEY, CSR NO. 9051
TIME: 9:55 A.M.

APPEARANCES:

DEFENDANT HARRIS, PRESENT WITH COUNSEL, JOHN SCHMOCKER, ATTORNEY AT LAW AND LYNDA VITALE, ATTORNEY AT LAW; HALIM DHANIDINA, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURORS:)

THE COURT: PEOPLE VS. HARRIS.
THE DEFENDANT AND COUNSEL PRESENT.
MR. SCHMOCKER, YOU HAVE SOME WITNESSES?
MR. SCHMOCKER: YES, I DO, YOUR HONOR.
THE FIRST ONE I'D LIKE ORDERED BACK WOULD BE ARTRISIA PRICE. SHE'S PRESENT HERE IN THE PINK SUIT. THIS IS JAMEKA GLASPIE STANDING BY HER.

THE COURT: WHEN WOULD YOU LIKE THEM -- WOULD YOU LIKE THEM ORDERED BACK OR TO BE PLACED ON CALL OR WHAT'S YOUR PLEASURE?

MR. SCHMOCKER: I'D LIKE THEM TO BE PLACED ON CALL -- ORDERED BACK ON CALL.

THE COURT: FOR YOUR CONVENIENCE, IT'S NOT NECESSARY FOR YOU TO WAIT IN THE COURTHOUSE UNTIL YOU'RE CALLED AS A WITNESS, BUT YOU WILL BE ON CALL, WHICH MEANS THAT ONCE MR. SCHMOCKER OR ANOTHER MEMBER OF THE DEFENSE TEAM CALLS YOU AND TELLS YOU TO COME TO THE COURTHOUSE, YOU MUST AGREE TO BE HERE AT THE TIME THEY TELL YOU.

DO YOU BOTH AGREE TO THAT?

MS. PRICE: YES.

MS. GLASPIE: YES.

THE COURT: THEN YOU'RE FREE TO GO SUBJECT TO THAT UNDERSTANDING.

MR. SCHMOCKER: I ALSO HAVE A NUMBER OF OTHER WITNESSES. ONE IS CARL WILLIAMS, JR.

MR. DAVIS: MARTELIS DAVIS.

MR. SCHMOCKER: IF THE REST OF THEM COULD BE ORDERED BACK, YOUR HONOR.

THE COURT: FOR THE -- FOR THOSE OF YOU WHO ARE NOT *(SIC)* IN THE COURTROOM, IT'S THE SAME UNDERSTANDING, THAT IT'S FOR YOUR CONVENIENCE. IT'S NOT NECESSARY FOR YOU TO WAIT OUT IN THE HALLWAY OR TO EVEN BE IN THE COURTHOUSE UNTIL YOU'RE CALLED AS A WITNESS, BUT YOU MUST AGREE THAT WHEN MR. SCHMOCKER OR ANOTHER MEMBER OF

THE DEFENSE TEAM CALLS YOU AND TELLS YOU TO COME BACK TO THIS COURTROOM, THEN YOU'LL BE HERE AT THE TIME THEY TELL YOU.

DO YOU EACH AGREE TO DO THAT?

AN UNIDENTIFIED WITNESS: YES.

AN UNIDENTIFIED WITNESS: YES.

AN UNIDENTIFIED WITNESS: YES.

THE COURT: THEN, YOU'RE FREE TO GO SUBJECT TO THAT UNDERSTANDING.

MR. SCHMOCKER: THANK YOU VERY MUCH, YOUR HONOR.

THE COURT: ARE WE READY TO ADDRESS THE STIPULATIONS?

MR. DHANIDINA: I THINK SO.

MR. SCHMOCKER: WE'RE READY, YOUR HONOR.

THE COURT: WHO'S GOING TO STATE THEM?

MR. DHANIDINA: I WILL.

THE COURT: LET THE RECORD REFLECT THAT BOTH SIDES EXCHANGED PROPOSED JURORS TO BE EXCUSED BASED UPON THE WRITTEN QUESTIONNAIRES, AND HAVING REVIEWED THEIR PROPOSALS, THE PARTIES ARE READY TO STIPULATE.

MR. DHANIDINA: THANK YOU. IS THE NUMBER OKAY OR YOU WANT THE INITIAL AND THE NUMBER?

THE COURT: IT WOULD BE EASIER WITH INITIAL.

MR. DHANIDINA: OKAY. THE FOLLOWING JURORS ARE JURORS THAT THE PEOPLE AND THE DEFENSE HAVE STIPULATED TO EXCUSING FOR CAUSE IN THIS CASE:

G-4661.

THE COURT: LET'S GO SLOWLY HERE.
MR. DHANIDINA: OKAY.
THE COURT: GO AHEAD.
MR. DHANIDINA: G-3083.
THE COURT: NEXT.
MR. DHANIDINA: 0-1355.
THE COURT: NEXT.
MR. DHANIDINA: Z-1993.
THE COURT: NEXT.
MR. DHANIDINA: H-2186.
THE COURT: NEXT.
MR. DHANIDINA: S-4222.
THE COURT: NEXT.
MR. DHANIDINA: V-3237.
THE COURT: NEXT.
MR. DHANIDINA: N-1951.
THE COURT: NEXT.
MR. DHANIDINA: T-0206.
THE COURT: I'M SORRY. JUST A SECOND HERE.
MR. DHANIDINA: THAT'S ALL RIGHT.
THE COURT: T-0206.
NEXT.
MR. DHANIDINA: YES.
MR. SCHMOCKER: IT'S ON THE FRONT PAGE OF THE -- FIRST PAGE, SECOND GROUP FROM THE BOTTOM. SECOND ONE.
THE COURT: I FOUND IT. I'M READY FOR THE NEXT.

MR. SCHMOCKER: I APOLOGIZE.
MR. DHANIDINA: M-6314.
THE COURT: YES.
MR. DHANIDINA: B-7054.
THE COURT: YES.
MR. DHANIDINA: G-7991.
THE COURT: YES.
MR. DHANIDINA: N-2217.
THE COURT: YES.
MR. DHANIDINA: S-6634.
THE COURT: YES.
MR. DHANIDINA: B-4817.
THE COURT: YES.
MR. DHANIDINA: P-0059.
THE COURT: YES.
MR. DHANIDINA: P-7436.
THE COURT: YES.
MR. DHANIDINA: R-0140.
THE COURT: YES.
MR. DHANIDINA: P-9597.
THE COURT: YES.
MR. DHANIDINA: B-8629.
THE COURT: YES.
MR. DHANIDINA: H-5246.
THE COURT: YES.
MR. DHANIDINA: D-3343.
THE COURT: YES.
MR. DHANIDINA: M-8295.

THE COURT: YES.

MR. DHANIDINA: AND V-3635.

THE COURT: BOTH SIDES AGREE TO THE EXCUSAL OF THESE JURORS FOR CAUSE?

MR. DHANIDINA: YES.

MR. SCHMOCKER: YES.

THE COURT: THERE WAS ONE OTHER JUROR THAT I HAD HAD AN ISSUE WITH, AND THAT'S S-8640, WHO WAS ON THE SECOND PAGE NEAR THE BOTTOM.

MR. DHANIDINA: DO I NEED TO READ THAT JUROR'S NAME?

THE COURT: SHE IS PREGNANT.

MR. DHANIDINA: YOU KNOW WHAT, THAT WAS A NAME I INTENDED TO READ. I MAY HAVE SKIPPED OVER IT.

THE COURT: I DIDN'T HEAR IT.

THE CLERK: I DIDN'T EITHER.

MR. DHANIDINA: THAT'S ONE WE AGREED TO ALSO.

MR. SCHMOCKER: I'M LOOKING FOR THAT ONE RIGHT NOW.

THE COURT: IT'S ON PAGE 2, THE SECOND GROUP FROM THE BOTTOM.

MR. DHANIDINA: THAT'S RIGHT.

THE COURT: IN THE MIDDLE, S-8640.

HER --

MR. SCHMOCKER: YES. WE HAVE THAT SCRATCHED OUT.

THE COURT: HER CONTENT IS NOT REMARKABLE, BUT SHE'S EIGHT-AND-A-HALF WEEKS *(SIC)* PREGNANT AND IS DUE

ON MARCH 28 AND HAS GREAT CONCERNS ABOUT HER ABILITY TO PARTICIPATE, AS WELL AS THE FACT THAT SHE HAS MANY DOCTOR APPOINTMENTS.

BOTH SIDES AGREE TO S-8640?

MR. DHANIDINA: YES. THANK YOU.

MR. SCHMOCKER: YES, YOUR HONOR.

THE CLERK: WAS M-8404 CALLED?

MR. DHANIDINA: M-8404?

THE CLERK: YES.

MR. DHANIDINA: I DON'T THINK SO.

THE COURT: NO.

THE CLERK: OKAY.

MR. SCHMOCKER: THERE WAS ONE OTHER THAT I WAS HAVING TROUBLE WITH. I THINK WE ADDRESSED IT. I THINK IT WAS 6208. THIS IS THE ONE THAT HAD THE DIFFERENT NUMBER.

MR. DHANIDINA: RIGHT.

MR. SCHMOCKER: I WILL SEE IF I CAN FIND IT AGAIN. I DON'T KNOW WHAT THAT NUMBER WAS.

MR. DHANIDINA: IT WAS ONE WHO WE BELIEVE IS 3458.

MS. VITALE: RIGHT.

MR. DHANIDINA: BUT SHE WROTE DOWN 6208.

THE COURT: THERE IS A JUROR THAT I NOTICED THE SAME THING FOR. SHE MARKED HER QUESTIONNAIRE AS M-6208.

MS. VITALE: YES.

THE COURT: HOWEVER, HER TRUE IDENTIFICATION NUMBER IS M-3458. SHE IS ON THE FIRST PAGE, FOURTH

GROUP.

MR. SCHMOCKER: VERY GOOD.

THE COURT: LET ME SEE IF THERE WERE ANY OTHERS.

(BRIEF PAUSE).

THE COURT: ONE THAT WAS SOMEWHAT ILLEGIBLE WAS THE JUROR WHO HAD WRITTEN SHE HAS A CAST, K-6804.

MR. SCHMOCKER: YES.

THE COURT: SHE WAS ACTUALLY PRETTY LEGIBLE I THOUGHT.

MR. DHANIDINA: I THOUGHT SO.

MR. SCHMOCKER: WHEN SHE HAD TROUBLE, SHE PUT IT DOWN MORE THAN ONCE.

THE COURT: THOSE WERE THE ONLY NUMBER ERRORS THAT I SAW OF THE JURORS WHO SURVIVED. THERE WERE SOME THAT WE STIPULATED WERE IN ERROR. I DID CORRECT THEM ON THE FACE OF THE QUESTIONNAIRE.

THOSE JURORS CAN BE EXCUSED IN THE HALLWAY.

THE RECORD SHOULD REFLECT THAT WE'RE WORKING OFF OF THE RANDOM LIST, WHICH INCLUDES THE FULL NAME OF THE JURORS, AS WELL AS THE IDENTIFICATION NUMBERS THAT WE'RE USING FOR CONVENIENCE.

THE PROCEDURE THAT I'D LIKE TO FOLLOW IS THE SAME AS WE DID IN THE FIRST TRIAL, AND JUST SO EVERYONE MAY REMEMBER, I'LL GIVE SOME BRIEF WELCOMING REMARKS, AND THEN CALL UP THE FIRST 27 JURORS INTO THE JURY SEATS

IN THE JURY BOX.

I WILL GO THROUGH SOME PRELIMINARY REMARKS. IF YOU HAVE ANY, YOU CAN SUGGEST THEM, BUT I THOUGHT THE ONES THAT WERE MOST PERTINENT WERE UNJOINED PERPETRATOR, JUST TO SIMPLY POINT OUT THAT THE NAME DONTE MC DANIEL WILL BE MENTIONED IN THE CASE. HE'S NOT HERE. THERE ARE MANY REASONS THAT HE'S NOT HERE. THEY'RE ALL IRRELEVANT. AND THEY'RE SIMPLY TO FOCUS ON THE ISSUES PRESENTED HERE.

I'LL ALSO MENTION GANGS, AS NOTED IN THE QUESTIONNAIRE. THERE WERE QUESTIONS ABOUT THE BOUNTY HUNTER BLOODS, AS WELL AS OTHER EXPERIENCES WITH GANGS THAT PEOPLE HAVE HAD. THAT THE EVENTS IN THIS CASE WERE IN A GANG NEIGHBORHOOD, SO MANY OF THE PEOPLE INVOLVED IN THE CASE MAY BE IDENTIFIED WITH GANGS, AS WELL AS THE PEOPLE THAT THEY HEAR ABOUT DIRECTLY, SUCH AS THE DEFENDANT, MR. BROOKS AND A NUMBER OF THE WITNESSES.

I'D LIKE TO POINT OUT THAT GANG INVOLVEMENT IS NOT A FACTOR IN AGGRAVATION OR MITIGATION. IT'S SIMPLY PART OF THE BACKGROUND OR BACKDROP FOR THE CASE. EVIDENCE MAY BE RELEVANT TO EXPLAIN WHY PEOPLE ACTED IN CERTAIN WAYS, AND WE'RE LOOKING FOR JURORS WHO CAN SIMPLY CONSIDER THE EVIDENCE REGARDING GANGS FOR VALID PURPOSES AND NOT JUST REACT BY SAYING THINGS LIKE, IF A WITNESS IS A GANG MEMBER, MUST BE A LIAR. IF BROOKS WAS A GANG MEMBER, WHO CARES IF HE WAS KILLED, OR IF THE DEFENDANT'S A GANG MEMBER, HE DESERVES SOME FORM OF PUNISHMENT.

AND THEN GO OVER AGAIN THE CRITERIA REGARDING THE DEATH PENALTY, MUCH AS I DID AT THE PRELIMINARY STAGE, JUST TO REFRESH THEIR MEMORY AS TO THE PROCEDURES AND THINGS OF THAT NATURE.

MR. DHANIDINA: ALL RIGHT.

THE COURT: THEN I WOULD GO THROUGH THE QUESTIONNAIRES WITH EACH JUROR. THERE ARE A COUPLE OF AREAS THAT I FLAGGED TO CLARIFY. I WOULD ALSO ASK THE JURORS IF THEY HAVE ANYTHING FURTHER TO ADD, AND THEN AT THAT POINT I WOULD TURN IT OVER TO THE ATTORNEYS WITH THIS GROUP OF 27. I'M LOOKING AT APPROXIMATELY 40, 45 MINUTES, SOMETHING ALONG THOSE LINES, PER SIDE, WITH THIS GROUP. YOU NEED MORE, YOU CAN CERTAINLY TELL ME THAT, BUT THAT'S SORT OF A TARGET.

ONCE WE'VE COMPLETED YOUR QUESTIONS, I'LL RECEIVE ANY MOTIONS FOR CAUSE AFTER THE JURY HAS LEFT. ONCE WE'VE RESOLVED MOTIONS FOR CAUSE, FOR THOSE JURORS THAT REMAIN, WE'LL EXERCISE PEREMPTORY CHALLENGES, AND ONCE WE'VE DONE THAT, WE DON'T HAVE A JURY, WE'LL CALL UP MORE JURORS AND GO THROUGH THE SAME KIND OF PROCEDURES.

DOES ANYONE HAVE ANY OBJECTION TO THAT?

MR. DHANIDINA: NO. THANK YOU.

MR. SCHMOCKER: THAT SOUNDS FINE, YOUR HONOR.

THE COURT: ARE THERE ANY AREAS THAT YOU WANT ME TO GO INTO PRELIMINARILY, BESIDES THOSE THAT I IDENTIFIED?

MR. DHANIDINA: I THINK THE ONLY OTHER THING

THAT'S WORTH BRINGING UP AT THIS POINT IS TO REMIND THE JURORS OF THEIR ROLE AS PENALTY PHASE JURORS, AS OPPOSED TO HAVING TO DETERMINE GUILT OR INNOCENCE.

THE COURT: YES.

MR. DHANIDINA: OKAY.

THE COURT: AS SOON AS WE'RE READY TO CALL THEM IN, WE'LL HAVE THEM COME IN.

(BRIEF PAUSE).

THE COURT: JUST FOR YOUR INFORMATION, A JUROR HAS SUBMITTED A NOTE. IT'S ON THE SECOND PAGE, FIRST NAME ON THE SECOND GROUP, R-3749. YOU'RE WELCOME TO LOOK AT THIS NOTE, BUT IT'S QUITE SHORT. HE BASICALLY SAYS:

> FIVE MONTHS AGO I WAS DIAGNOSED WITH PROSTATE CANCER AND UNDERWENT A RADICAL PROSTATECTOMY. SINCE THEN I HAVE HAD TO USE THE RESTROOM OFTEN, AND IT'S HARD FOR ME TO SIT FOR LONG PERIODS OF TIME.
>
> LAST WEEK IT WAS VERY DIFFICULT FOR ME TO SIT WITHOUT GOING TO THE RESTROOM. I WOULD LIKE TO ASK IF I CAN BE EXCUSED.

I'M PREPARED TO KEEP HIM HERE AND SEE HOW THINGS GO.

IF YOU BOTH HAVE ANY DIFFERENT THOUGHTS, YOU'RE WELCOME TO EXPRESS THEM.

MR. SCHMOCKER: MAY I JUST HAVE A MOMENT, YOUR HONOR? I'M LOOKING FOR HIS NUMBER.

THE COURT: YES.

MR. SCHMOCKER: 3749.

THE COURT: R-3749.

MR. SCHMOCKER: I'D AGREE TO STIPULATE TO HIS REMOVAL.

MR. DHANIDINA: I AGREE WITH THE COURT. MAYBE WE SHOULD SEE HOW IT GOES THIS MORNING. IF IT BECOMES UNBEARABLE FOR THE JUROR, WE CAN REASSESS.

THE COURT: ALL RIGHT. THERE'S NO STIPULATION. WE'LL KEEP HIM HERE.

THE CLERK: READY?

THE COURT: YES. WE'RE READY.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURORS:)

THE COURT: GOOD MORNING, EVERYONE.

WELCOME BACK TO DEPARTMENT 108.

YOU MAY REMEMBER. I'M JUDGE MICHAEL JOHNSON.

THIS IS THE CASE OF PEOPLE OF THE STATE OF CALIFORNIA VERSUS KAI HARRIS.

THE DISTRICT ATTORNEY IS HALIM DHANIDINA.

THE DEFENSE ATTORNEYS ARE JOHN SCHMOCKER AND

LYNDA VITALE. AND MR. HARRIS IS SEATED AT THE TABLE AS WELL.

FIRST OF ALL, I WANT TO THANK YOU ALL FOR FILLING OUT YOUR QUESTIONNAIRES. YOU, AS WELL AS SOME OF THE JURORS WHO HAVE BEEN EXCUSED, WE APPRECIATE IT. YOU WERE VERY COMPLETE. THAT HELPS US A GREAT DEAL.

WHAT WE'RE GOING TO DO TODAY IS ASK SOME FOLLOW-UP QUESTIONS. WE'RE GOING TO CALL JURORS UP INTO THE JURY BOX AND BEGIN THE PROCESS WHICH WILL BE THE SECOND PHASE OF JURY SELECTION.

WE WILL CALL YOU UP AT RANDOM. THERE ARE NUMBERS ON EACH SEAT, SO WE'LL ASSIGN YOU TO A PARTICULAR SEAT.

SEAT NUMBER 1 IS IN THE TOP ROW ALL THE WAY TO MY LEFT. SEAT NUMBER 2 IS NEXT TO THAT AND SO FORTH. A TOTAL OF 27 JURORS WILL BE CALLED UP TO THESE SEATS.

THEN I WILL ASK YOU SOME FOLLOW-UP QUESTIONS REGARDING YOUR QUESTIONNAIRES, SOME THINGS THAT OCCURRED TO ME AS I WENT THROUGH THEM.

YOU'RE ALSO WELCOME TO ADD ANY ADDITIONAL COMMENTS. IN OTHER WORDS, IF YOU'VE THOUGHT ABOUT THINGS A LITTLE BIT AND MAYBE YOU'VE NOW HAD SOME FIRMER IDEAS ABOUT SOME OF THE ISSUES, OR IF YOU FORGOT TO ADD SOMETHING TO THE QUESTIONNAIRE THAT YOU THOUGHT ABOUT AS YOU DROVE HOME OR THAT SORT OF THING, YOU'RE WELCOME TO ADD THOSE.

ONCE I'VE DONE THAT, THEN THE ATTORNEYS WILL HAVE THE OPPORTUNITY TO ASK FOLLOW-UP QUESTIONS, AND

THEY TOO WILL ASK VARIOUS JURORS SOME FOLLOW-UP QUESTIONS OR ASK ABOUT OTHER THINGS CONCERNING THE CASE.

PLEASE KEEP IN MIND THAT YOU ARE ALL UNDER OATH. YOU'RE UNDER THE SAME OATH THAT YOU TOOK THE FIRST DAY THAT YOU WERE HERE. YOU SHOULD MAKE SURE THAT ALL OF YOUR ANSWERS ARE TRUTHFUL AND COMPLETE.

IF THERE'S SOMETHING THAT YOU WOULD FIND EMBARRASSING OR DIFFICULT TO TALK ABOUT IN FRONT OF EVERYONE, IF THERE'S SOMETHING PERSONAL THAT YOU JUST DON'T WANT TO TALK ABOUT IN FRONT OF EVERYONE, PLEASE DON'T AVOID THE QUESTION, BUT JUST LET ME KNOW THAT YOU WOULD PREFER TO TALK ABOUT IT MORE PRIVATELY. THEN I'LL CALL JURORS OVER TO THE SIDE AND WE CAN TALK WITH THE LAWYERS ONLY ABOUT THOSE ISSUES THAT YOU REGARD AS SENSITIVE OR EMBARRASSING TO TALK ABOUT IN FRONT OF EVERYONE.

THAT ALL BEING SAID, WE WILL CALL YOU UP TO THE SEATS.

WE WILL USE THE FIRST LETTER OF YOUR LAST NAME, THE LAST FOUR NUMBERS OF YOUR JUROR BADGE.

PLEASE COME UP TO THE SEATS AS INDICATED.

THE CLERK: D-3563, YOU'LL BE SEAT NUMBER 1. IT'S IN THE TOP ROW.

S-3050, SEAT 2.

G-4450, SEAT 3.

G-4450.

(NO AUDIBLE RESPONSE).

THE COURT: G-4450. [NAME REDACTED].

JUROR [NAME REDACTED]. [NAME REDACTED].

THE CLERK: I WILL CHECK IN THE JURY ROOM AND SEE IF HE LEFT.

THE COURT: [NAME REDACTED].

NOT HERE?

(NO AUDIBLE RESPONSE).

THE COURT: DO THE PARTIES AGREE THAT THIS JUROR CAN GO TO THE END OF THE LIST, AND WE'LL CHECK ON HIS LOCATION?

MR. DHANIDINA: THAT'S FINE.

MR. SCHMOCKER: THAT'S AGREEABLE, YOUR HONOR.

THE COURT: B-7993, YOU'LL BE SEAT NUMBER 3.

R-5857, SEAT 4.

T-5208, SEAT 5.

P-9765, SEAT 6.

H-4884, SEAT 7.

V-4528, SEAT 8.

J-0750, YOU'LL BE SEAT NUMBER 9.

THE CLERK: R-6693, SEAT 10.

MR. SCHMOCKER: I'M SORRY. WHAT NUMBER WAS THAT?

THE CLERK: R-6693.

M-3458. SEAT 11.

M-3458.

(NO AUDIBLE RESPONSE).

THE COURT: M-3458. [NAME REDACTED].

MR. DHANIDINA: WANT TO TRY 6208?

THE WITNESS: OH, I'M SORRY.

THE COURT: I THINK YOU PUT DOWN 6208 ON YOUR QUESTIONNAIRE. IT'S M-3458.

PROSPECTIVE JUROR NO. M-3458: WHAT NUMBER?

THE COURT: SEAT 11.

THE CLERK: B-9815, SEAT 12.

D-5849, SEAT 13.

J-2466, SEAT 14.

M-7169, SEAT 15.

K-6084, SEAT 16.

J-9579, SEAT 17.

J-6556, SEAT 18.

B-7054, SEAT 19.

THE COURT: WAIT A MINUTE.

THE CLERK: I'M SORRY.

THE COURT: THAT JUROR'S EXCUSED.

THE CLERK: R-8493, SEAT 19.

A-1180, SEAT 20.

R-34 -- I'M SORRY. 3749, SEAT 21.

A-0298, SEAT 22.

G-6179, SEAT 23.

C-6782, SEAT 24.

R-9855, SEAT 25.

V-4099, SEAT 26.

G-6745, SEAT 27.

THE COURT: EVERYONE IS SEATED.

WELCOME.

LET ME GO OVER, FIRST OF ALL, SOME BROAD ISSUES THAT WERE RAISED IN A COUPLE -- OR MORE THAN A COUPLE --

A NUMBER OF QUESTIONNAIRES, AND JUST TO REITERATE A FEW THINGS.

FIRST OF ALL, THE QUESTIONNAIRE MENTIONED A PERSON WHO IS NOT HERE, THAT IS DONTE MC DANIEL, AS BEING INVOLVED IN CONDUCT THAT IS INVOLVED IN THIS CASE.

ALTHOUGH YOU'LL HEAR ABOUT HIM IN THE EVIDENCE, HE'S NOT A PARTY, AND HE'S NOT -- OBVIOUSLY NOT IN THE COURTROOM. THERE ARE MANY REASONS WHY A PERSON WHO IS ALLEGED TO HAVE BEEN INVOLVED IN CONDUCT THAT IS THE SUBJECT OF A CRIMINAL CASE MAY NOT BE INVOLVED IN THE TRIAL OF THE CASE. NONE OF THOSE REASONS ARE RELEVANT, AND WE'RE NOT GOING TO EXPLAIN ANY OF THEM BECAUSE IT JUST DOESN'T MATTER.

WE WANT YOU TO BE AWARE THAT YOUR JOB IS SIMPLY TO FOCUS ON THE ISSUES THAT RELATE TO THE DEFENDANT WHO IS HERE, KAI HARRIS. YOU OF COURSE WILL HEAR AND CONSIDER EVIDENCE REGARDING DONTE MC DANIEL, BUT HE'S NOT GOING TO BE INVOLVED IN THIS CASE, AND YOU SHOULD NOT BE CONCERNED ABOUT THAT.

ANOTHER BROAD ISSUE THAT CAME UP CONCERNS GANGS. AS WE TOLD YOU, WE EXPECT THAT THERE WILL BE GANG EVIDENCE CONCERNING THE GROUP CALLED THE BOUNTY HUNTER BLOODS IN NICKERSON GARDENS HOUSING AREA.

I EXPECT, ACTUALLY, THAT THERE WILL BE ARGUMENTS AND CONTENTIONS THAT MANY OF THE PEOPLE INVOLVED IN THIS CASE ARE INVOLVED IN THAT GANG. OBVIOUSLY THE PEOPLE CONTEND THAT THE DEFENDANT, KAI HARRIS, WAS INVOLVED IN THE GANG. THEY WILL CONTEND

THAT DONTE MC DANIEL WAS INVOLVED IN THE GANG. I THINK THERE WILL ALSO BE EVIDENCE THAT GEORGE BROOKS, ONE OF THE PEOPLE KILLED, WAS INVOLVED IN THE GANG. AND THERE MAY BE OTHER PEOPLE WHO COME IN AND TESTIFY OR WHOSE NAMES MAY BE MENTIONED IN THE CASE AS ALSO BEING INVOLVED IN THE GANG.

THE SIMPLE FACT IS THAT THE EVENTS IN THIS CASE OCCURRED IN A NEIGHBORHOOD WHERE MANY PEOPLE ARE IN SOME WAY INVOLVED WITH OR WHO ASSOCIATE WITH THIS PARTICULAR GANG OR OTHERS, AND THAT'S JUST PART OF THE BACKDROP OR FACTS OR BACKGROUND OF THIS CASE.

KEEP IN MIND, GANG INVOLVEMENT IS NOT A FACTOR IN AGGRAVATION OR MITIGATION AS IT CONCERNS THE ISSUES TO BE PRESENTED TO THE JURY. IT'S SIMPLY PART OF THE BACKDROP AND BACKGROUND OF THIS CASE.

EVIDENCE OF GANG MEMBERSHIP MAY BE RELEVANT IN VARIOUS WAYS. IT MAY BE HELPFUL TO UNDERSTAND WHY CERTAIN CONDUCT OCCURRED. IT MAY BE HELPFUL TO UNDERSTAND WHY CERTAIN WITNESSES TESTIFY IN THE WAY THAT THEY DO, BUT AGAIN, IT'S NOT A FACTOR IN AGGRAVATION OR MITIGATION. IT'S JUST PART OF THE OVERALL BACKGROUND OF THE CASE.

WHAT WE'RE LOOKING FOR ARE JURORS WHO CAN CAREFULLY CONSIDER THE EVIDENCE FOR THESE VALID PURPOSES AND NOT JURORS WHO JUST REACT AND WHO SAY, WELL, IF YOU TELL ME THAT A CERTAIN PERSON WAS INVOLVED IN A GANG, I'M GOING TO REACT IN A CERTAIN WAY. IF THE DEFENDANT WAS INVOLVED IN A GANG, THAT'S JUST GOING TO LEAD ME TO

A CERTAIN CONCLUSION ABOUT PUNISHMENT. IF A WITNESS SAYS THAT HE OR SHE IS INVOLVED IN A GANG, I'M NOT GOING TO BELIEVE ANYTHING THAT THAT PERSON HAS TO SAY. OR IF YOU HEAR THAT MR. BROOKS, ONE OF THE PEOPLE KILLED, WAS INVOLVED IN A GANG, WE DON'T WANT JURORS WHO SAY, WELL, THEN, YOU KNOW, HE DESERVED WHAT HE GOT, OR ANYTHING LIKE THAT.

WHAT WE WANT ARE JURORS WHO APPRECIATE THAT THE GANG ISSUES ARE PART OF THE CASE AND WHO LOOK AT THEM IN THE APPROPRIATE WAY TO EXPLAIN CONDUCT OR TO EXPLAIN WITNESSES.

THE LAST BIG ISSUE I WANT TO GO OVER WITH YOU AGAIN IS THE PENALTY PROCEDURE AND THE ISSUES RELATED TO THAT. WE TALKED ABOUT THAT A GOOD DEAL LAST WEEK WHEN YOU WERE HERE. THERE WERE SOME THINGS MENTIONED IN THE QUESTIONNAIRE, BUT I JUST WANT TO REFRESH YOUR MEMORIES AND SUMMARIZE SOME OF THE PROCEDURES AND THE ISSUES.

KEEP IN MIND THAT I AM GOING TO GIVE YOU DETAILED INSTRUCTIONS AT A LATER POINT IN TRIAL, AND THOSE WILL GOVERN YOUR DECISION MAKING. WHAT I WANT TO SAY NOW, AGAIN, IS TO HELP PUT THINGS IN CONTEXT SO THAT WHEN WE ASK YOU QUESTIONS ABOUT WHAT YOU SAID IN YOUR QUESTIONNAIRE, OR THE OTHER ISSUES, YOU'LL HAVE IN MIND THE PROCEDURES.

FIRST OF ALL, THIS IS ONLY A PENALTY TRIAL. THERE ARE NO ISSUES OF GUILT. THOSE HAVE BEEN DETERMINED EARLIER. THE ONLY ISSUE TO BE DETERMINED BY THE JURY IS THE APPROPRIATE PENALTY.

DURING THE TRIAL, THE PROSECUTION PUTS ON EVIDENCE OF WHAT WE CALL AGGRAVATING FACTORS. THOSE ARE BASICALLY BAD THINGS OR NEGATIVE THINGS ABOUT THE CIRCUMSTANCES OF THIS CASE OR THE DEFENDANT AND HIS BACKGROUND. THOSE ARE THINGS THAT THE PROSECUTION CONTENDS SHOULD PUSH THE JURY IN THE DIRECTION OF A DETERMINATION OF NEGATIVE THINGS ABOUT THE DEFENDANT.

THE DEFENSE CAN PUT ON EVIDENCE OF WHAT WE CALL MITIGATING FACTORS. THOSE ARE ESSENTIALLY GOOD THINGS OR POSITIVE THINGS ABOUT THE DEFENDANT AND HIS PAST, OR OTHER FACTORS WHICH THEY CONTEND SHOULD LEAD TOWARD A PENALTY DETERMINATION MORE FAVORABLE TO THE DEFENDANT.

IT'S THE JOB OF THE JURY TO CONSIDER ALL OF THESE PIECES OF EVIDENCE THAT ARE INTRODUCED, ALL OF THE FACTORS, AGGRAVATING AND MITIGATING, AND TO WEIGH THEM, TO CONSIDER ALL OF THESE CIRCUMSTANCES IN REACHING THE APPROPRIATE PENALTY.

ALTHOUGH WE USE THE TERM "WEIGHING," YOU SHOULD KEEP IN MIND THAT THE PROCESS IS ACTUALLY SOMEWHAT DIFFICULT TO DESCRIBE. IT'S NOT JUST TALLYING UP. IT'S NOT PUTTING TOGETHER A LIST AND SAYING, WELL, HERE ARE THE AGGRAVATING FACTORS, HERE ARE THE MITIGATING FACTORS, AND THEN PUTTING TOGETHER THE NUMBERS AND PICKING THE ONE WHICH HAS THE MOST NUMBERS. THAT'S NOT IT AT ALL.

IT IS A MATTER IN WHICH JURORS ARE FREE TO ASSIGN THEIR OWN VALUE TO EACH FACTOR BASED ON WHAT YOU THINK IS IMPORTANT. YOU CAN INCLUDE MORAL AND

SYMPATHETIC VALUE. WE'RE GOING TO GIVE INSTRUCTIONS THAT WILL DESIGNATE CERTAIN THINGS AS AGGRAVATING OR MITIGATING, BUT YOU SHOULD LOOK AT THEM IN YOUR OWN WAY, IN YOUR OWN PERSONAL PERSPECTIVE. THAT'S WHAT THE INSTRUCTIONS WILL TELL YOU.

THE INSTRUCTIONS WILL SAY THAT IF AT THE END OF THIS WEIGHING PROCESS, WHERE YOU LOOK AT ALL OF THE EVIDENCE AND ASSIGN VALUES TO IT, IF THE MITIGATING EVIDENCE OUTWEIGHS THE AGGRAVATING EVIDENCE, THEN THE JURORS ARE TOLD THAT THEY MUST VOTE FOR THE PENALTY OF LIFE IN PRISON WITHOUT PAROLE.

I SAY "MUST" BECAUSE THE JURORS HAVE NO CHOICE. IF THE FACTORS IN MITIGATION OUTWEIGH THE FACTORS IN AGGRAVATION, THEN THE PENALTY MUST BE LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE.

ONLY IF THE AGGRAVATING EVIDENCE SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE MAY THE JURORS VOTE FOR DEATH. I SAY "MAY" BECAUSE EVEN IN THAT CIRCUMSTANCE, THE JURORS HAVE A CHOICE. EVEN IF THEY DETERMINE THAT THE AGGRAVATING EVIDENCE SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE, THE JURORS, BASED UPON ALL THEIR EVALUATION OF THE CIRCUMSTANCES OF THE CASE, CAN, IF THEY CHOSE TO DO SO, SHOW MERCY AND VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE AS A PENALTY.

WHAT WE'RE LOOKING FOR, AS WE TOLD YOU LAST WEEK AND REITERATED IN THE QUESTIONNAIRE, ARE JURORS WHO HAVE THE ABILITY TO FAIRLY JUDGE THE EVIDENCE AND WHO WILL FOLLOW THE LAW, NOT THEIR OWN PREFERENCE, BUT

FOLLOW THE LAW, THE INSTRUCTIONS AND THE FRAMEWORK THAT I WILL TELL YOU AND WILL DETERMINE THE APPROPRIATE PENALTY.

NOW, I KNOW THAT IN FILLING OUT THESE QUESTIONNAIRES AND RESPONDING TO QUESTIONS IN COURT, IT'S SOMETIMES DIFFICULT BECAUSE WE ARE TALKING ABOUT ABSTRACT PRINCIPLES. WE OBVIOUSLY CAN'T FILL YOU IN ON ALL THE EVIDENCE. THAT'S WHAT THE TRIAL IS ALL ABOUT. WE'RE NOT ASKING ANY OF YOU TO PREDICT A RESULT. WE'RE NOT ASKING ANY OF YOU TO PREDICT, YES, FROM WHAT YOU'VE TOLD ME, I'M GOING TO VOTE THIS WAY OR I'M GOING TO VOTE THAT WAY. THAT'S NOT WHAT WE'RE ASKING ABOUT HERE.

WHAT WE ARE ASKING IS WHETHER YOU CAN ENGAGE IN THE PROCESS IN A FAIR AND OPEN-MINDED WAY. IN OTHER WORDS, WHETHER, BASED ON ALL THE THINGS THAT WE TELL YOU, YOU CAN SAY, YES, I'M UP FOR THIS JOB. I CAN FAIRLY JUDGE THESE FACTORS. I CAN WEIGH THE AGGRAVATING AND THE MITIGATING THINGS IN THE WAY THAT YOU'VE TOLD ME, AND I CAN FOLLOW THE LAW, AND I CAN CONSIDER A DECISION BETWEEN LIFE WITHOUT THE POSSIBILITY OF PAROLE AND THE DEATH PENALTY. I CAN DO THAT. I HAVE AN OPEN MIND, AND I CAN LOOK AT THOSE FACTORS AND WEIGH THEM IN THE WAY THAT YOU DESCRIBED.

AGAIN, I KNOW IT'S HARD BECAUSE IT'S SOMEWHAT ABSTRACT. WHAT WE'RE ASKING, BASICALLY, IS WHETHER YOU THINK FROM WHAT WE TELL YOU, YOU CAN APPROACH THIS WITH AN OPEN MIND. IF YOU CAN'T, NO ONE'S GOING TO CRITICIZE YOU. IF YOU SAY, YOU KNOW, I'VE THOUGHT ABOUT THIS AND

I REALLY DO BELIEVE THAT I CAN'T APPROACH THIS WITH AN OPEN MIND. I FEEL SO STRONGLY ABOUT THIS ISSUE OR I FEEL SO STRONGLY ABOUT THAT ISSUE THAT I CANNOT GIVE YOU MY ASSURANCE THAT I'LL APPROACH THIS IN AN OPEN-MINDED WAY, THEN TELL US. NO ONE'S GOING TO CRITICIZE YOU.

IF YOU'RE UP FOR THE TASK AND YOU CAN TELL US, YES, I KNOW I CAN DO THIS IN AN OBJECTIVE, OPEN-MINDED WAY, THEN THAT'S WHAT WE'RE INTERESTED IN.

I'VE SAID ENOUGH.

LET ME GO THROUGH THE QUESTIONNAIRE.

FIRST, I'LL START WITH THE JUROR IN SEAT 1.

HOW ARE YOU TODAY?

PROSPECTIVE JUROR NO. D-3563: GOOD. HOW ARE YOU?

THE COURT: FINE, THANK YOU.

I REVIEWED YOUR QUESTIONNAIRE. DID YOU HAVE ANYTHING TO ADD, ANY CHANGES OR ANY THOUGHTS THAT YOU DID NOT PUT IN YOUR ANSWERS TO THE QUESTIONNAIRE? ANYTHING NEW?

PROSPECTIVE JUROR NO. D-3563: AS OF NOW IT STAYS THE SAME.

THE COURT: OKAY. THANK YOU.

JUROR NUMBER 2, GOOD MORNING.

PROSPECTIVE JUROR NO. S-3050: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS?

PROSPECTIVE JUROR NO. S-3050: NO, I DID NOT.

THE COURT: YOU HAD SAID, IN RESPONSE TO SOME

OF THE QUESTIONS ABOUT ANY RELIGIOUS BELIEFS OR PERSONAL BELIEFS THAT COULD MAKE IT HARD FOR YOU TO JUDGE THE CASE, THAT IT WAS A LITTLE HARD FOR YOU TO DECIDE AND WRITE IT DOWN IN YOUR QUESTIONNAIRE.

HAVE YOU ANY FURTHER THOUGHTS ABOUT THAT?

PROSPECTIVE JUROR NO. S-3050: THE THOUGHTS THAT I HAVE, I GUESS, ARE WITHIN ME. IT'S HARD TO PUT THEM ON PAPER, BUT I BELIEVE I CAN BE FAIR.

THE COURT: IN OTHER WORDS, WHAT WE'RE SAYING IS IT'S FINE TO HAVE -- EVERYONE HAS THEIR OWN PERSONAL, RELIGIOUS AND PHILOSOPHICAL BELIEFS. NO ONE'S ASKING YOU OR ANYONE ELSE TO CHANGE THAT, BUT WHAT YOU HAVE TO DO IS FOLLOW THE LAW.

PROSPECTIVE JUROR NO. S-3050: YES. AND I UNDERSTAND THAT.

THE COURT: CAN YOU DO THAT?

PROSPECTIVE JUROR NO. S-3050: YES, I CAN.

THE COURT: THANK YOU.

JUROR NUMBER 3. GOOD MORNING.

PROSPECTIVE JUROR NO. B-7993: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. B-7993: NO.

THE COURT: I HAD A COUPLE OF AREAS.

YOU SAID THAT YOU HAD PERSONALLY TAKEN SOME CLASSES IN THE LAW ENFORCEMENT AREA, FORENSIC SCIENCE ACADEMY?

PROSPECTIVE JUROR NO. B-7993: CORRECT.

THE COURT: DO YOU HAVE ANY PLANS TO PURSUE A CAREER IN LAW ENFORCEMENT?

PROSPECTIVE JUROR NO. B-7993: NO, NOT AT THIS TIME. I TOOK IT BECAUSE I WAS ALWAYS INTERESTED IN IT.

THE COURT: INTERESTED IN IT?

PROSPECTIVE JUROR NO. B-7993: CORRECT.

THE COURT: SO THERE WASN'T ANYTHING --

WAS THERE ANYTHING ABOUT IT THAT LED YOU NOT TO PURSUE A CAREER IN LAW ENFORCEMENT?

PROSPECTIVE JUROR NO. B-7993: NO.

THE COURT: YOU JUST DECIDED ON ANOTHER AVENUE?

PROSPECTIVE JUROR NO. B-7993: YEAH. I'M FINE WHERE I'M AT. IT WAS JUST SOMETHING I WANTED TO DO.

THE COURT: ALL RIGHT. YOU DID SAY THAT IN REGARD TO PEOPLE CLOSE TO YOU WHO ARE VICTIM'S OF CRIME, THAT YOUR BEST FRIEND'S SON WAS SHOT?

PROSPECTIVE JUROR NO. B-7993: CORRECT.

THE COURT: AND WAS KILLED?

PROSPECTIVE JUROR NO. B-7993: CORRECT.

THE COURT: ABOUT HOW LONG AGO WAS THAT?

PROSPECTIVE JUROR NO. B-7993: 2002.

THE COURT: IS THIS -- THE YOUNG MAN SOMEONE THAT YOU HAD HAD CONTACT WITH YOURSELF?

PROSPECTIVE JUROR NO. B-7993: YES.

THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS AS A JUROR IF YOU WERE SELECTED IN THIS CASE?

PROSPECTIVE JUROR NO. B-7993: NO.

THE COURT: YOU UNDERSTAND IT'S YOUR OBLIGATION TO PUT IT ASIDE AND NOT LET IT AFFECT THE WAY YOU EXAMINE THE EVIDENCE HERE AS TO ONE SIDE OR THE OTHER?

PROSPECTIVE JUROR NO. B-7993: CORRECT.

THE COURT: JUST EXAMINE THE EVIDENCE THAT'S PRESENTED TO YOU. CAN YOU DO THAT?

PROSPECTIVE JUROR NO. B-7993: YES.

THE COURT: THANK YOU.

JUROR NUMBER 4, GOOD MORNING.

PROSPECTIVE JUROR NO. R-5857: GOOD MORNING, YOUR HONOR.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS?

PROSPECTIVE JUROR NO. R-5857: NOT AT THIS TIME, YOUR HONOR.

THE COURT: WHAT ARE YOUR VIEWS ABOUT THE PENALTY DETERMINATION IN THIS CASE?

PROSPECTIVE JUROR NO. R-5857: I'LL BE FAIR, LIKE YOU SAY. I'LL JUST STATE IT BY THE FACTS OF THE LAW AND --

THE COURT: DO YOU HAVE ANY OPINIONS ABOUT THE DEATH PENALTY WITHOUT REGARD TO THE TRIAL? IF YOU WERE HAVING A CUP OF COFFEE WITH YOUR FRIENDS AND SOMEBODY RAISED THE ISSUE OF THE DEATH PENALTY, WOULD YOU HAVE ANY OPINIONS ON THAT?

PROSPECTIVE JUROR NO. R-5857: WELL, I WOULD HAVE TO SEE THE FACTS FIRST. NOT REALLY, YOUR HONOR.

THE COURT: I'M TALKING JUST IN VERY GENERAL

TERMS, NOT ABOUT THE TRIAL, BUT IN TERMS OF WHAT'S GOOD FOR THE STATE OR GOOD FOR SOCIETY. WOULD YOU HAVE ANY VIEWS ONE WAY OR THE OTHER ABOUT THE DEATH PENALTY? SOME PEOPLE DON'T. AND I'M NOT SUGGESTING THAT YOU'RE DIFFERENT. A LOT OF PEOPLE DO. AND THAT'S WHAT I'M JUST TRYING TO UNDERSTAND A LITTLE.

PROSPECTIVE JUROR NO. R-5857: NO, I DON'T.

THE COURT: OKAY. THANK YOU.

JUROR NUMBER 5, GOOD MORNING.

PROSPECTIVE JUROR NO. T-5208: GOOD MORNING, SIR.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. T-5208: NO, NOT AT THIS TIME.

THE COURT: YOU ALSO SAID THAT SOME PEOPLE CLOSE TO YOU HAVE BEEN THE VICTIM OF HOMICIDE, A COUSIN AND --

PROSPECTIVE JUROR NO. T-5208: A CLOSE FRIEND OF THE FAMILY.

THE COURT: AND THEN A DAUGHTER'S EX-BOYFRIEND?

PROSPECTIVE JUROR NO. T-5208: YES, SIR.

THE COURT: ABOUT HOW LONG AGO DID THOSE HAPPEN?

PROSPECTIVE JUROR NO. T-5208: THAT WAS LAST YEAR.

THE COURT: WHICH ONE?

PROSPECTIVE JUROR NO. T-5208: PARDON?

THE COURT: WHICH ONE WAS THAT? THE FRIEND OR COUSIN?

PROSPECTIVE JUROR NO. T-5208: NO, A FRIEND.

THE COURT: A COUSIN?

PROSPECTIVE JUROR NO. T-5208: NO FRIEND.

THE COURT: AM I WRONG? DID I MISREAD THAT YOU HAD A COUSIN --

PROSPECTIVE JUROR NO. T-5208: NO. I THINK I PUT COUSIN FOR ANOTHER PART. I MAY HAVE DONE THAT BY MISTAKE. I HAD A FRIEND OF THE FAMILY.

THE COURT: I'M SORRY. YOU HAD A COUSIN WHO WAS ACCUSED?

PROSPECTIVE JUROR NO. T-5208: YES.

THE COURT: ABOUT HOW LONG AGO WAS THAT?

PROSPECTIVE JUROR NO. T-5208: I'D SAY A GOOD TEN YEARS.

THE COURT: IS THERE ANYTHING ABOUT EITHER OF THOSE CIRCUMSTANCES THAT WOULD AFFECT YOUR VIEWS AS A JUROR?

PROSPECTIVE JUROR NO. T-5208: NO, SIR.

THE COURT: THE SITUATION INVOLVING YOUR DAUGHTER'S EX-BOYFRIEND, IS THAT --

DID YOU KNOW HIM?

PROSPECTIVE JUROR NO. T-5208: YES.

THE COURT: SO WERE YOU CLOSE TO HIM?

PROSPECTIVE JUROR NO. T-5208: NOT REALLY. I MEAN, I KNEW OF HIM. HE HAD COME TO OUR HOUSE. HE BECAME -- BEFRIENDED THE FAMILY, BUT IT WASN'T SOMETHING

THAT WE WERE, YOU KNOW, REAL CLOSE.

THE COURT: CAN YOU GIVE ME SOME IDEA OF THE CIRCUMSTANCES OF WHAT HAPPENED TO HIM? IN OTHER WORDS, WAS IT A RANDOM STREET CRIME?

PROSPECTIVE JUROR NO. T-5208: YES, SIR.

THE COURT: WAS IT SOMEONE THAT HE KNEW?

PROSPECTIVE JUROR NO. T-5208: NO. IT WAS A RANDOM STREET CRIME.

THE COURT: ANY KIND OF GANG OVERTONES?

PROSPECTIVE JUROR NO. T-5208: I BELIEVE SO. IT'S STILL IN THE PROCESS OF BEING INVESTIGATED.

THE COURT: YOU THINK YOU CAN PUT THAT ASIDE AND JUDGE THIS CASE FROM THE EVIDENCE PRESENTED?

PROSPECTIVE JUROR NO. T-5208: YES, SIR. I CAN.

THE COURT: THANK YOU.

PROSPECTIVE JUROR NO. T-5208: YOU'RE WELCOME.

THE COURT: JUROR NUMBER 6, GOOD MORNING.

PROSPECTIVE JUROR NO. P-9765: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. P-9765: NOT AT THIS TIME, NO.

THE COURT: WELL, I DIDN'T HAVE ANY QUESTIONS FOR YOU.

YOU DID TELL US ABOUT AN APPOINTMENT THAT YOU HAVE, AND I TOOK A NOTE OF THAT.

PROSPECTIVE JUROR NO. P-9765: OKAY.

THE COURT: JUST AS I FAILED TO MENTION, JUROR 3, YOU TOLD US YOU HAVE AN OBLIGATION IN THE MIDDLE OF MARCH. I MADE NOTE OF THAT TOO. I DON'T THINK WE'RE GOING TO INTERFERE WITH THAT.

I KNOW EVERYTHING FOR JUROR 6.

JUROR 7, GOOD MORNING.

PROSPECTIVE JUROR NO. H-4884: MORNING.

THE COURT: HOW ARE YOU TODAY?

PROSPECTIVE JUROR NO. H-4884: FINE.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. H-4884: NO.

THE COURT: YOU HAVE ALSO SAID THAT YOU HAVE SOME RELIGIOUS BELIEFS.

PROSPECTIVE JUROR NO. H-4884: YEAH, I DO. I BELIEVE IN THE TEN COMMANDMENTS, THOU SHALL NOT KILL.

THE COURT: WOULD YOU BE ABLE TO FOLLOW THE LEGAL PRINCIPLES THAT WE GIVE IN THE INSTRUCTIONS IN THIS CASE, OR WOULD YOUR RELIGIOUS VIEWS HAVE SOME INFLUENCE?

PROSPECTIVE JUROR NO. H-4884: YES, IT WOULD, BECAUSE I SAID ALSO IN MY STATEMENT THAT I BELIEVE IN THE DEATH PENALTY. IF THE PERSON THAT WAS THE MURDERER THOUGHT OUT AND KILLED THAT PERSON AND KILLED THEM, THEN HE GETS THE DEATH PENALTY. IF HE ONLY SHOT HIM OR KILLED HIM ACCIDENTALLY, THEN MAYBE HE DOESN'T GET THE DEATH PENALTY. THAT'S MY VIEWPOINT. I DON'T KNOW.

THE COURT: OKAY. WELL, I BELIEVE THE

INSTRUCTIONS ARE GOING TO INDICATE THAT EVEN IN THE CASE OF SOMEONE WHO INTENTIONALLY KILLED ANOTHER HUMAN BEING, ALL OF THESE FACTORS THAT I TALKED ABOUT, AGGRAVATING AND MITIGATING, STILL COME INTO PLAY. SO IT WOULD BE POSSIBLE FOR A JUROR FOLLOWING THE LAW TO DETERMINE THAT THE DEATH PENALTY IS NOT WARRANTED FOR SOMEONE WHO WAS AN INTENTIONAL KILLER.

IF YOU WERE INSTRUCTED IN THAT WAY, WOULD YOU BE ABLE TO FOLLOW THAT INSTRUCTION, OR WOULD YOUR OWN PERSONAL VIEWS BE WHAT YOU WOULD FOLLOW?

PROSPECTIVE JUROR NO. H-4884: I HAVE RESPECT FOR THE LAW, AND I WOULD FOLLOW YOUR INSTRUCTIONS.

THE COURT: OKAY. THANK YOU.

JUROR NUMBER 8, GOOD MORNING.

PROSPECTIVE JUROR NO. V-4528: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. V-4528: JUST ONE TRIVIAL THING. I HAVE AN APPOINTMENT ON MARCH 10TH WITH A NEUROLOGIST IN THE MORNING.

THE COURT: ALL RIGHT. I MADE A NOTE OF THAT.

YOU EXPRESSED YOUR VIEWS ABOUT THE PENALTY ISSUES IN THE CASE. DO YOU HAVE ANY FURTHER -- ANYTHING FURTHER TO ADD ON THAT? ANY OTHER THOUGHTS OR THINGS THAT HAVE OCCURRED TO YOU?

PROSPECTIVE JUROR NO. V-4528: NO, I DON'T THINK SO. I SUPPORT THE DEATH PENALTY.

THE COURT: YOU SAID --

PARDON ME?

PROSPECTIVE JUROR NO. V-4528: I REALLY HAVEN'T GIVEN MITIGATING CIRCUMSTANCES ANY THOUGHT. I GUESS I'M NOT EVEN SURE WHAT IT MEANS. I WOULD HAVE TO WAIT AND LISTEN TO WHAT I HEAR IN COURT.

THE COURT: YOU SAID, AMONG OTHER THINGS, THAT "MY VIEWS ARE MORE COMPLEX THAN AN EYE FOR AN EYE."

WHAT DID YOU MEAN BY THAT?

PROSPECTIVE JUROR NO. V-4528: WELL, I CIRCLED THE NUMBER 1, FIRST OF ALL, BECAUSE THAT'S WHAT I THOUGHT MY FEELINGS WERE. THEN WHEN I BEGAN TO ANSWER THE QUESTION, I THOUGHT THIS REALLY DOESN'T FIT WHAT I THINK. I HAD ALREADY CIRCLED IT, SO I SAID I'M NOT GOING TO BEGIN AGAIN. THAT'S WHY I SAID WHAT I SAID.

THE COURT: THANK YOU.

JUROR NUMBER 9, GOOD MORNING.

PROSPECTIVE JUROR NO. J-0750: GOOD MORNING, SIR.

THE COURT: DID YOU HAVE ANYTHING TO ADD TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. J-0750: YES.

THE COURT: WHAT IS THAT?

PROSPECTIVE JUROR NO. J-0750: SIR, I DO NOT BELIEVE IN THE DEATH PENALTY.

THE COURT: THAT'S FINE.

AS I HOPE -- I'VE TRIED TO EXPLAIN TO OTHERS. EVERYONE CAN HAVE THEIR OWN PERSONAL VIEWS, BUT IT 'S THE JOB OF THE JURORS TO NOT REACT AUTOMATICALLY ONE WAY

OR THE OTHER BASED UPON THEIR PERSONAL VIEWS, BUT TO FOLLOW THE INSTRUCTIONS AND ENGAGE IN THE WEIGHING AND CONSIDERATION OF ALL THE EVIDENCE.

WOULD YOU BE ABLE TO DO THAT?

PROSPECTIVE JUROR NO. J-0750: YES.

THE COURT: I'M NOT TRYING TO TWIST YOUR ARM. I'M JUST TRYING TO UNDERSTAND. IN OTHER WORDS, DO YOU THINK YOU COULD DO THAT?

PROSPECTIVE JUROR NO. J-0750: YES.

THE COURT: YOU MENTIONED THAT YOU HAD A FRIEND WHO WAS SHOT, WHO WAS WORKING AS A GUARD AT A LIQUOR STORE?

PROSPECTIVE JUROR NO. J-0750: YES, SIR.

THE COURT: ABOUT HOW LONG AGO WAS THAT?

PROSPECTIVE JUROR NO. J-0750: THREE YEARS AGO.

THE COURT: YOU NEED TO PUT THAT ASIDE AND FOCUS ON THE EVIDENCE HERE. CAN YOU DO THAT?

PROSPECTIVE JUROR NO. J-0750: YES.

THE COURT: YOU INDICATED THAT YOU THINK IT MIGHT BE HARD FOR YOU TO JUDGE SOMEONE ELSE'S LIFE?

PROSPECTIVE JUROR NO. J-0750: YES, SIR. YOU HIT IT ON THE NOSE. THAT'S IT.

THE COURT: WE'RE NOT ASKING ANYONE TO DO THAT IN A DIRECT SENSE. IN OTHER WORDS, WE'RE -- NO ONE IS GOING TO BE SAYING, YOU KNOW, THIS IS A GOOD PERSON OR A BAD PERSON. IT'S CERTAINLY SOMETHING THAT'S INVOLVED IN WEIGHING THE EVIDENCE. IT'S OBVIOUSLY DETERMINING THE OUTCOME.

PROSPECTIVE JUROR NO. J-0750: WELL, SIR, I'M A VERY SENSITIVE PERSON. I DO NOT WANT TO JUDGE NOBODY'S LIFE LIKE THAT. I REALLY DON'T. I CAN'T REALLY HANDLE IT.

THE COURT: OKAY. IF YOU WERE PICKED ON THIS JURY, HOW DO YOU THINK YOU WOULD DEAL WITH THAT? WOULD YOU DO YOUR DUTY, OR WOULD YOU SAY, JUDGE, I CAN'T HANDLE THIS?

PROSPECTIVE JUROR NO. J-0750: NO. I WILL DO WHAT I'M SUPPOSED TO DO.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

WE'LL GO DOWN TO THE SECOND ROW.

JUROR IN SEAT 10, GOOD MORNING.

PROSPECTIVE JUROR NO. R-6693: GOOD MORNING.

THE COURT: HOW ARE YOU?

PROSPECTIVE JUROR NO. R-6693: GOOD, THANK YOU.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. R-6693: NO, SIR.

THE COURT: I DID NOT HAVE ANY FOLLOW-UP QUESTIONS.

JUROR 11, GOOD MORNING.

PROSPECTIVE JUROR NO. M-3458: GOOD MORNING.

THE COURT: DON'T FEEL BAD ABOUT PUTTING THE WRONG NUMBER DOWN. I KNOW IT'S CONFUSING, AND YOU'RE NOT THE ONLY ONE.

WE UNDERSTOOD.

I WAS JUST A LITTLE CURIOUS ABOUT YOUR ANSWER

ABOUT JURIES. HAVE YOU SERVED ON A JURY BEFORE?

PROSPECTIVE JUROR NO. M-3458: YES, SIR.

THE COURT: ABOUT HOW MANY TIMES?

PROSPECTIVE JUROR NO. M-3458: ONE TIME, SIR. IT WAS A CIVIL CASE.

THE COURT: ONE CIVIL CASE?

PROSPECTIVE JUROR NO. M-3458: YES. IN 2003.

THE COURT: HAVE YOU BEEN CALLED OTHER TIMES?

PROSPECTIVE JUROR NO. M-3458: YES, SIR. I'VE BEEN CALLED, BUT I WASN'T PICKED -- I WASN'T SELECTED.

THE COURT: THANK YOU.

JUROR IN SEAT 12, GOOD MORNING.

PROSPECTIVE JUROR NO. B-9815: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. B-9815: AFTER -- I'M NOT SURE I CAN BE IMPARTIAL, HAVING MY SON KILLED.

THE COURT: RIGHT.

PROSPECTIVE JUROR NO. B-9815: IT'S STILL TOO FRESH.

THE COURT: RIGHT. THAT WAS IN DECEMBER OF 2007?

PROSPECTIVE JUROR NO. B-9815: (NODS HEAD UP AND DOWN).

SO JUST OVER A YEAR AGO.

THE COURT: YOU DID INDICATE THAT IT MIGHT BE HARD FOR YOU TO DEAL WITH.

HAVE YOU GIVEN MORE THOUGHT TO THAT?

PROSPECTIVE JUROR NO. B-9815: YEAH. YEAH. IT'S STILL REALLY -- I'M NOT SURE I CAN BE IMPARTIAL. IT'S --

THE COURT: SURE.

I THINK --

WOULD IT BE --

WITHOUT REGARD TO WHETHER YOU WERE IMPARTIAL OR NOT, WOULD IT BRING BACK A LOT OF BAD MEMORIES THAT WOULD MAKE YOU EMOTIONAL?

PROSPECTIVE JUROR NO. B-9815: OH, YEAH.

THE COURT: IT KIND OF LOOKS THAT WAY. YOU'RE TEARING UP A LITTLE BIT.

THANK YOU.

JUROR IN SEAT 13, GOOD MORNING.

PROSPECTIVE JUROR NO. D-5849: GOOD MORNING, YOUR HONOR.

THE COURT: HOW ARE YOU?

PROSPECTIVE JUROR NO. D-5849? FINE, THANK YOU.

THE COURT: DID YOU HAVE ANY CHANGES?

PROSPECTIVE JUROR NO. D-5849: YES, I HAVE A CHANGE.

ON ONE OF THE QUESTIONS ABOUT ANY CLOSE FRIEND OR FAMILY MEMBERS, I'M NOT SURE IF THE QUESTION WAS HAVE THEY BEEN INVOLVED IN GANGS OR HAVE THEY BEEN A VICTIM OF A GANG INCIDENT. I HAVE A VERY CLOSE FRIEND WHOSE SON WAS SHOT AND KILLED BY A GANG MEMBER.

THE COURT: ABOUT HOW LONG AGO WAS THAT?

PROSPECTIVE JUROR NO. D-5849: APPROXIMATELY

NINE YEARS AGO.

THE COURT: YOU'VE HEARD MY DISCUSSION WITH SOME OF THE OTHER JURORS. YOU WOULD NEED TO PUT THAT ASIDE AND JUDGE THIS CASE ONLY FROM THE EVIDENCE PRESENTED.

CAN YOU DO THAT?

PROSPECTIVE JUROR NO. D-5849: ABSOLUTELY.

THE COURT: OKAY. WERE THERE ANY OTHER ISSUES THAT YOU WANTED TO ADD?

PROSPECTIVE JUROR NO. D-5849: NO, THANK YOU.

THE COURT: YOU WORK AS A PROSECUTOR FOR THE CITY ATTORNEY'S OFFICE?

PROSPECTIVE JUROR NO. D-5849: YES, I DO.

THE COURT: YOU ALSO HAVE SOME FAMILY AND FRIENDS INVOLVED IN THE COURTS AND LAW ENFORCEMENT, I THINK, FROM WHAT YOU INDICATED.

PROSPECTIVE JUROR NO. D-5849: THAT'S CORRECT.

THE COURT: IS THERE ANYTHING ABOUT THAT BACKGROUND THAT WOULD AFFECT YOUR VIEWS AS A JUROR?

PROSPECTIVE JUROR NO. D-5849: NO.

THE COURT: IN OTHER WORDS, YOU UNDERSTAND YOU'RE A PROSECUTOR IN YOUR JOB, BUT YOU'RE NOT A PROSECUTOR AS A JUROR?

PROSPECTIVE JUROR NO. D-5849: I UNDERSTAND.

THE COURT: YOU NEED TO DECIDE THIS CASE RIGHT DOWN THE MIDDLE.

PROSPECTIVE JUROR NO. D-5849: I UNDERSTAND.

THE COURT: CAN YOU DO THAT?

PROSPECTIVE JUROR NO. D-5849: YES, I CAN.

THE COURT: HOW MUCH OF YOUR WORK HAS INVOLVED STREET GANGS?

PROSPECTIVE JUROR NO. D-5849: A GREAT DEAL OF MY WORK HAS INVOLVED STREET GANGS AS I AM A NEIGHBORHOOD PROSECUTOR. SO I WORK IN A COMMUNITY. THAT COMMUNITY DOES HAVE GANG MEMBERS.

THE COURT: IN WHAT WAY DOES IT COME UP? IN OTHER WORDS, DO YOU GET INVOLVED WITH GANG INJUNCTIONS, OR IS IT JUST SORT OF, AS I WAS KIND OF DESCRIBING EARLIER, A BACKDROP AS TO OTHER KINDS OF CRIMES OR SOCIAL ISSUES THAT COME UP?

PROSPECTIVE JUROR NO. D-5849: I'M NOT ONE OF THE GANG INJUNCTION ATTORNEYS, BUT I DEAL WITH EDUCATING THE COMMUNITY ABOUT QUALITY OF LIFE CRIMES. MANY OF THE PEOPLE WHO CROSS MY PATH ARE GANG MEMBERS WHO I HAVE PROSECUTED, BUT MAINLY I'M WORKING WITH THE COMMUNITY ON ABATING CRIME AND DEALING WITH MISDEMEANOR CRIMES.

THE COURT: YOU INDICATED, IN RESPONSE TO A LATER QUESTION, THAT IN GENERAL, AS A MATTER OF POLICY, YOU'RE AGAINST THE DEATH PENALTY?

PROSPECTIVE JUROR NO. D-5849: IN GENERAL. AS I MENTIONED ALSO, DEPENDING ON THE CIRCUMSTANCES, YOU KNOW, I POSSIBLY COULD GO THE OTHER DIRECTION.

THE COURT: WOULD YOU BE ABLE TO LOOK AT AND CONSIDER ALL OF THE EVIDENCE IN REACHING THE APPROPRIATE PENALTY?

PROSPECTIVE JUROR NO. D-5849: YES. I BELIEVE

I COULD.

THE COURT: THANK YOU.

JUROR 14, GOOD MORNING.

PROSPECTIVE JUROR NO. J-2466: GOOD MORNING.

THE COURT: HOW ARE YOU TODAY?

PROSPECTIVE JUROR NO. J-2466: VERY WELL. THANK YOU. HOW ARE YOU?

THE COURT: I'M VERY WELL, THANK YOU.

PROSPECTIVE JUROR NO. J-2466: GOOD.

THE COURT: DO YOU HAVE ANY CHANGES OR ADDITIONS?

PROSPECTIVE JUROR NO. J-2466: I DO HAVE AN ADDITION. I RECALL A QUESTION WHEREBY IF YOU HAD A FAMILY MEMBER OR A FRIEND, SOMEONE CLOSE TO YOU IN -- SERVING TIME. I DO HAVE A FAMILY MEMBER CURRENTLY SERVING TIME.

THE COURT: COULD YOU TELL US ABOUT THAT.

PROSPECTIVE JUROR NO. J-2466: I KNOW VERY LITTLE ABOUT IT. A BROTHER. HE WAS SENTENCED TWO YEARS AGO FOR INAPPROPRIATE RELATIONSHIP WITH A FEMALE UNDER 18.

THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS AS A JUROR?

PROSPECTIVE JUROR NO. J-2466: NOT AT ALL.

THE COURT: OKAY. THANK YOU.

YOU INDICATED YOU HAVE A TRIP PLANNED, AND I'VE MADE A NOTE OF THAT.

YOU INDICATED, IN REGARD TO THE QUESTIONS ABOUT

PENALTY, THAT YOU'VE NEVER REALLY BEEN CONFRONTED WITH THIS BEFORE AND HADN'T GIVEN IT A LOT OF THOUGHT. DO YOU HAVE ANY FURTHER THOUGHTS, HAVING FILLED OUT THE QUESTIONNAIRE, COME BACK HERE TODAY, HEARD ME AND SOME OTHER PEOPLE TALK ABOUT THIS, DO YOU HAVE ANY FURTHER THOUGHTS ABOUT YOUR OWN VIEWS?

PROSPECTIVE JUROR NO. J-2466: NO, I DON'T.

THE COURT: IF YOU WERE SELECTED AS A JUROR, DO YOU THINK YOU'D BE ABLE TO ENGAGE IN THE WEIGHING OF EVIDENCE IN THE WAY THAT I DESCRIBED EARLIER?

PROSPECTIVE JUROR NO. J-2466: ABSOLUTELY.

THE COURT: THANK YOU.

PROSPECTIVE JUROR NO. J-2466: THANK YOU.

THE COURT: JUROR 15, GOOD MORNING.

PROSPECTIVE JUROR NO. M-7169: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. M-7169: THE ONLY THING IS I'VE BEEN TAPPED FOR MARCH 19TH MORNING FUNCTION, AND I'D LIKE TO PARTICIPATE.

THE COURT: I DON'T THINK WE'LL INTERFERE WITH THAT, BUT I'VE MADE A NOTE OF IT.

THANK YOU.

I DIDN'T HAVE ANY FOLLOW-UP QUESTIONS.

JUROR 16, GOOD MORNING.

PROSPECTIVE JUROR NO. K-6084: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS?

PROSPECTIVE JUROR NO. K-6084: YEAH. I -- THIS, *(INDICATING)*, THAT CREATES THE MICKEY MOUSE LIKE HANDWRITING YOU'RE LOOKING AT, I HAVE TWO APPOINTMENTS COMING UP LATE IN THE DAY TO HAVE THIS REMOVED AND REPLACED.

THE COURT: LATE TODAY?

PROSPECTIVE JUROR NO. K-6084: LATE IN THE DAY.

THE COURT: LATE IN DAYS IN THE FUTURE?

PROSPECTIVE JUROR NO. K-6084: RIGHT.

THE COURT: OKAY. DO YOU HAVE THE DATES?

PROSPECTIVE JUROR NO. K-6084: ONE WILL BE THIS THURSDAY.

THE COURT: OKAY.

PROSPECTIVE JUROR NO. K-6084: I HAVE A 3:50 APPOINTMENT. I'M GOING TO WORK WITH THE DOCTOR TO SEE IF I CAN GET A SATURDAY APPOINTMENT FOR THE SECOND ONE.

THE COURT: YOUR HANDWRITING ACTUALLY WASN'T ALL THAT BAD FOR SOMEWHERE WEARING A CAST.

PROSPECTIVE JUROR NO. K-6084: THANK YOU, YOUR HONOR.

THE COURT: I COULD UNDERSTAND WHAT YOU WROTE. DON'T FEEL BAD ABOUT IT.

PROSPECTIVE JUROR NO. K-6084: THAT'S QUITE SCARY.

THE COURT: IS THERE ANYTHING ABOUT HAVING A CAST THAT WOULD INTERFERE WITH YOUR ABILITY TO BE A JUROR? I KNOW YOU HAVE A LITTLE TROUBLE WRITING. ANY KIND OF PAIN OR SENSITIVITY?

PROSPECTIVE JUROR NO. K-6084: NOT ON DRUGS FOR THE PAIN, AND THE PAIN IS THERE, BUT IT'S NOT THAT BAD, NO. NOT AT ALL.

THE COURT: OKAY. GIVEN THE LIMITATIONS OF WHAT LITTLE YOU COULD WRITE, DO YOU HAVE ANY FURTHER THOUGHTS OR VIEWS ABOUT THE PENALTY OR ANY OF THE ISSUES IN THIS CASE THAT YOU WANT TO ADD?

PROSPECTIVE JUROR NO. K-6084: NO. I THINK I'M BY NATURE A VERY FAIR PERSON. I THINK I COULD LOOK AT ANY INFORMATION THAT COMES MY WAY FAIRLY AND IMPARTIALLY.

THE COURT: THANK YOU.

JUROR 17, GOOD MORNING.

PROSPECTIVE JUROR NO. J-9579: GOOD MORNING.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS?

PROSPECTIVE JUROR NO. J-9579: NO.

THE COURT: I DIDN'T HAVE ANY FOLLOW-UP QUESTIONS.

JUROR 18, GOOD MORNING.

PROSPECTIVE JUROR NO. J-6556: GOOD MORNING, SIR.

THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS?

PROSPECTIVE JUROR NO. J-6556: YES. I DO HAVE AN ADDITION. I FORGOT. ONE OF THE QUESTIONS STATING, DO WE HAVE A FAMILY MEMBER OR A FRIEND THAT HAS BEEN CONVICTED, I BELIEVE -- IT WAS SOMETHING LIKE THAT. I

FORGOT I HAVE A HALF-SISTER WHO'S MARRIED. MY BROTHER-IN-LAW IS IN JAIL. HE WAS CONVICTED. HE'S BEEN IN THERE ABOUT 25 YEARS. SHE MARRIED HIM IN THERE. I DON'T KNOW HIM PERSONALLY, BUT I DID FAIL TO PUT THAT ON THERE. I FORGOT.

THE COURT: IS THERE ANYTHING ABOUT THAT THAT WOULD AFFECT YOUR VIEWS?

PROSPECTIVE JUROR NO. J-6556: NO.

THE COURT: YOU HAVE ANY FEELINGS ABOUT HOW FAIRLY HE WAS TREATED IN HIS COURT PROCEEDINGS?

PROSPECTIVE JUROR NO. J-6556: NO. BECAUSE I DON'T KNOW THE DETAILS REALLY.

THE COURT: THANK YOU FOR ADDING THAT.

GO DOWN TO THE FIRST ROW.

JUROR IN SEAT 19, GOOD MORNING.

PROSPECTIVE JUROR NO. R-8493: GOOD MORNING.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR NO. R-8493: NO.

THE COURT: I DIDN'T HAVE ANY FOLLOW-UP.

JUROR IN SEAT 20, GOOD MORNING.

PROSPECTIVE JUROR NO. A-1180: GOOD MORNING.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR NO. A-1180: NO.

THE COURT: THEN I DIDN'T HAVE FOLLOW-UP FOR YOU.

JUROR IN SEAT 21, GOOD MORNING.

PROSPECTIVE JUROR NO. R-3749: GOOD MORNING, YOUR HONOR.

THE COURT: DID YOU HAVE ANYTHING?

PROSPECTIVE JUROR NO. R-3749: NO.

THE COURT: YOU WORK AT THE SHERIFF'S DEPARTMENT?

PROSPECTIVE JUROR NO. R-3749: YES, YOUR HONOR.

THE COURT: WHAT IS --

WHAT KIND OF WORK DO YOU DO THERE DAY TO DAY?

PROSPECTIVE JUROR NO. R-3749: COMPUTER. COMPUTER SPECIALIST. TROUBLESHOOTING.

THE COURT: ARE YOU ONE OF THE PEOPLE WHO MAKE SURE THAT THE COMPUTERS RUN PROPERLY?

PROSPECTIVE JUROR NO. R-3749: YES.

THE COURT: AS OPPOSED TO BEING INVOLVED IN A CERTAIN COMPUTER TYPE FUNCTION, LIKE PUTTING TOGETHER A DATABASE?

PROSPECTIVE JUROR NO. R-3749: NO.

THE COURT: YOU'RE ONE OF THE PEOPLE WHO KEEP IT RUNNING?

PROSPECTIVE JUROR NO. R-3749: YES.

THE COURT: IS THERE ANYTHING ABOUT YOUR EXPERIENCE WITH THE SHERIFF'S DEPARTMENT THAT WOULD AFFECT YOU ONE WAY OR THE OTHER?

PROSPECTIVE JUROR NO. R-3749: NO, YOUR HONOR.

THE COURT: WOULD YOU FEEL ANY PRESSURE TO DECIDE THIS CASE ONE WAY OR THE OTHER BASED UPON YOUR AFFILIATION WITH THE SHERIFF'S DEPARTMENT?

PROSPECTIVE JUROR NO. R-3749: NO.

THE COURT: ONE OF THE QUESTIONS ASKS JURORS TO

PUT THEMSELVES INTO ONE OF FOUR GROUPS:

THOSE WHO FEEL THEY WOULD AUTOMATICALLY VOTE FOR DEATH, THOSE WHO FEEL THEY WOULD AUTOMATICALLY VOTE FOR LIFE IN PRISON, THOSE WHO AGREE WITH THE DEATH PENALTY LAW BUT WHO THINK THAT THEY WOULD NEVER BE ABLE TO PERSONALLY VOTE FOR A DEATH VERDICT, AND THEN THE LAST GROUP BEING THOSE WHO ARE COMFORTABLE WITH THE PROCESS, WHO FEEL THE DEATH PENALTY MAY BE APPROPRIATE IN SOME CASES BUT NOT OTHERS, AND WHO WOULD FEEL THAT THEY HAVE THE ABILITY TO FAIRLY JUDGE ALL OF THE EVIDENCE AND WEIGH EVERYTHING IN AN OPEN-MINDED WAY.

DO YOU HAVE ANY IDEA AS TO WHICH OF THOSE GROUPS YOU WOULD FALL INTO?

PROSPECTIVE JUROR NO. R-3749: NOT.

THE COURT: YOU DON'T?

PROSPECTIVE JUROR NO. R-3749: NO.

THE COURT: DO YOU HAVE ANY PERSONAL VIEWS ABOUT THE DEATH PENALTY?

PROSPECTIVE JUROR NO. R-3749: NO.

THE COURT: AS I WAS SAYING WITH ONE OF THE OTHER JURORS, IF YOU WERE OUT FOR COFFEE WITH SOME FRIENDS AND ONE OF YOUR FRIENDS SAID, YOU KNOW, I WAS JUST READING THIS ARTICLE ABOUT THE DEATH PENALTY, AND HERE'S WHAT I THINK; WOULD YOU HAVE AN OPINION ABOUT THE ISSUE?

PROSPECTIVE JUROR NO. R-3749: NOTHING, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

JUROR IN SEAT 22, GOOD MORNING.

PROSPECTIVE JUROR NO. A-0298: GOOD MORNING, YOUR HONOR.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR NO. A-0298: I DO NOT, YOUR HONOR.

THE COURT: I DON'T HAVE ANY FOLLOW-UP EITHER. THANK YOU.

JUROR IN SEAT 23, GOOD MORNING.

PROSPECTIVE JUROR NO. G-6179: GOOD MORNING.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR NO. G-6179: YES, SIR. I DO BELIEVE IN THE DEATH PENALTY, BUT I WILL FIND IT HARD FOR ME MYSELF TO DETERMINE THAT FOR SOMEBODY ELSE.

THE COURT: IF YOU WERE SELECTED, WOULD YOU BE ABLE TO DO IT?

PROSPECTIVE JUROR NO. G-6179: I'M NOT SURE.

THE COURT: YOU'RE NOT SURE?

PROSPECTIVE JUROR NO. G-6179: NO.

THE COURT: YOU WORK FOR THE CUSTOMS AND BORDER AGENCY?

PROSPECTIVE JUROR NO. G-6179: CORRECT.

THE COURT: WHAT KIND OF THINGS DO YOU DO EACH DAY?

PROSPECTIVE JUROR NO. G-6179: IT VARIES. SOME DAYS I WORK IN THE CUSTOMS SIDE CHECKING FOR NARCOTICS OR OTHER PROHIBITIVE ITEMS. SOME DAYS I WORK IN IMMIGRATION. SOME DAYS I WORK FOR COUNTERTERRORISM.

THE COURT: DO YOU HAVE VARIOUS LOCATIONS WHERE YOU WORK?

PROSPECTIVE JUROR NO. G-6179: IT'S IN THE AIRPORT, LAX.

THE COURT: BASICALLY AT THE AIRPORT?

PROSPECTIVE JUROR NO. G-6179: YES.

THE COURT: YOU'VE BEEN DOING THAT ABOUT TWO YEARS?

PROSPECTIVE JUROR NO. G-6179: CORRECT.

THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS ONE WAY OR THE OTHER AS A JUROR?

PROSPECTIVE JUROR NO. G-6179: NO, SIR.

THE COURT: THANK YOU.

JUROR 24, GOOD MORNING.

PROSPECTIVE JUROR NO. C-6782: MORNING, YOUR HONOR.

THE COURT: HOW ARE YOU TODAY?

PROSPECTIVE JUROR NO. C-6782: VERY GOOD.

THE COURT: DID YOU HAVE ANY ADDITIONS OR CORRECTIONS TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR NO. C-6782: NO, SIR.

THE COURT: YOU'VE BEEN WORKING A NUMBER OF YEARS AS A COMMUNICATIONS SUPERVISOR AT A 911 CENTER?

PROSPECTIVE JUROR NO. C-6782: THAT'S CORRECT, SIR.

THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS AS A JUROR?

PROSPECTIVE JUROR NO. C-6782: NO, YOUR HONOR.
THE COURT: THANK YOU.
JUROR 25, GOOD MORNING.
PROSPECTIVE JUROR NO. R-9855: HI.
THE COURT: DID YOU HAVE ANY CHANGES OR ADDITIONS TO YOUR QUESTIONNAIRE?
PROSPECTIVE JUROR NO. R-9855: YEAH. I KNOW THIS SOUNDS REALLY SELFISH, BUT IT'S NOT THE DEATH PENALTY OR THE OTHER OPTION. I JUST LIKE DON'T KNOW -- I KNOW SOMEBODY HAS TO DECIDE WHAT'S RIGHT FOR THIS DEFENDANT, HIM, BUT LIKE I DON'T KNOW THAT I FEEL LIKE I COULD DECIDE FOR SOMEBODY ELSE WHAT'S RIGHT. IT GIVES ME ANXIETY JUST THINKING ABOUT IT IN DETERMINING HOW SOMEONE'S LIFE IS GOING TO END UP.
THE COURT: IF YOU WERE SELECTED IN THIS CASE, HOW DO YOU THINK YOU WOULD REACT?
PROSPECTIVE JUROR NO. R-9855: UM, I DON'T KNOW.
THE COURT: PARDON ME?
PROSPECTIVE JUROR NO. R-9855: I DON'T KNOW REALLY. I'VE NEVER DONE ANYTHING LIKE THIS BEFORE.
THE COURT: YOU'VE NEVER BEEN ON A JURY?
PROSPECTIVE JUROR NO. R-9855: NO.
THE COURT: I GUESS WHAT I'M GETTING AT IS SOMETIMES JURORS SAY, WELL, YOU KNOW, I'M UNCOMFORTABLE WITH THE PROCESS, BUT IF I'M SELECTED, I'LL DO IT. OTHERS WILL SAY, YOU KNOW, I JUST -- I DON'T THINK I COULD EVER DO THIS, NO MATTER WHAT YOU TELL ME. I'M

TRYING TO GET SOME SENSE WHERE YOU THINK YOU FALL INTO THAT.

PROSPECTIVE JUROR NO. R-9855: I MEAN, I THINK I COULD, YOU KNOW, FOLLOW INSTRUCTIONS AND TRY MY BEST.

THE COURT: WOULD YOU BE ABLE TO DISCUSS THE CASE WITH YOUR FELLOW JURORS?

PROSPECTIVE JUROR NO. R-9855: YEAH.

THE COURT: LISTEN TO WHAT THEY HAD TO SAY?

PROSPECTIVE JUROR NO. R-9855: UH-HUH.

THE COURT: AND ULTIMATELY MAKE A DECISION FOR YOURSELF? OR WOULD THAT BE THE STICKING POINT?

PROSPECTIVE JUROR NO. R-9855: I THINK I WOULD CONSIDER.

THE COURT: THANK YOU.

THE JUROR IN SEAT 26, GOOD MORNING.

PROSPECTIVE JUROR NO. V-4099: GOOD MORNING, YOUR HONOR.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR NO. V-4099: NOTHING WHATSOEVER, YOUR HONOR.

THE COURT: YOU ARE A COURT INTERPRETER?

PROSPECTIVE JUROR NO. V-4099: YES, I AM.

THE COURT: YOU'VE WORKED IN THE STATE COURTS?

PROSPECTIVE JUROR NO. V-4099: YES, I HAVE.

THE COURT: NOW, YOU'VE BEEN IN THE FEDERAL COURT FOR THE LAST EIGHT YEARS OR SO?

PROSPECTIVE JUROR NO. V-4099: YES.

THE COURT: IS THERE ANYTHING ABOUT THAT

EXPERIENCE THAT WOULD AFFECT YOUR VIEWS?

PROSPECTIVE JUROR NO. V-4099: NO.

THE COURT: HAVE YOU EVER --

DO YOU INTERPRET FOR WITNESSES AND FOR DEFENDANTS?

PROSPECTIVE JUROR NO. V-4099: I DO BOTH WITNESSES AND DEFENDANTS.

THE COURT: HAVE YOU EVER WORKED IN A CASE INVOLVING THE DEATH PENALTY?

PROSPECTIVE JUROR NO. V-4099: I BELIEVE I WORKED ON ONE CASE, BUT THAT WAS MANY YEARS AGO, AND I CANNOT REMEMBER THE DETAILS.

THE COURT: WAS IT A TRIAL WHEN WITNESSES CAME IN TO TESTIFY AS OPPOSED TO A PRETRIAL PROCEEDING?

PROSPECTIVE JUROR NO. V-4099: IT WAS -- I BELIEVE IT WAS AT THE PRETRIAL, PRELIM, PRELIMINARY HEARING.

THE COURT: SO I GUESS WHAT I'M REALLY GETTING AT IS DO YOU RECALL EVER PARTICIPATING THROUGH MOST OF A CAPITAL CASE?

PROSPECTIVE JUROR NO. V-4099: NO.

THE COURT: A TRIAL?

PROSPECTIVE JUROR NO. V-4099: I HAVE NEVER PARTICIPATED IN A WHOLE TRIAL.

THE COURT: LIKE SOME OF THE OTHER JURORS, YOU INDICATED PERSONALLY YOU HAVE RESERVATIONS ABOUT THE DEATH PENALTY AS AN APPROPRIATE POLICY FOR THE STATE; IS THAT ACCURATE?

PROSPECTIVE JUROR NO. V-4099: THAT IS CORRECT, YES.

THE COURT: AS I READ IT, YOU SAY THAT YOU THINK YOU CAN PUT THAT ASIDE AND FOLLOW THE ROLE AS INDICATED IN THE INSTRUCTIONS; IS THAT RIGHT?

PROSPECTIVE JUROR NO. V-4099: YES. THAT'S CORRECT.

THE COURT: DO YOU HAVE ANY THOUGHTS ON THAT?

PROSPECTIVE JUROR NO. V-4099: NO.

THE COURT: ANY RESERVATIONS?

PROSPECTIVE JUROR NO. V-4099: NONE WHATSOEVER.

THE COURT: THANK YOU.

JUROR 27, GOOD MORNING.

PROSPECTIVE JUROR NO. G-6745: GOOD MORNING, YOUR HONOR.

THE COURT: DID YOU HAVE ANY ADDITIONS OR CORRECTIONS?

PROSPECTIVE JUROR NO. G-6745: NO.

THE COURT: I DIDN'T HAVE ANY FOLLOW-UP QUESTIONS.

THAT COMPLETES ALL OF MY QUESTIONS.

WE PROBABLY SHOULD TAKE A SHORT BREAK SO PEOPLE CAN STRETCH THEIR LEGS AND USE THE RESTROOM AND SO FORTH.

LET'S RETURN AT 11:35. 11:35.

YOU'LL RETURN TO THE SAME SEATS WHERE YOU ARE NOW.

THOSE OF YOU IN THE AUDIENCE NEED TO RETURN AS

WELL. 11:35.

PLEASE DON'T DISCUSS THE CASE.

(A RECESS WAS TAKEN.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURORS:)

THE COURT: ARE WE READY?

MR. DHANIDINA: YES.

MR. SCHMOCKER: WE'RE READY.

THE COURT: LET'S BRING THEM IN.

THE CLERK: THAT JUROR DID LEAVE.

THE COURT: WHICH JUROR?

THE CLERK: B-7993.

THE COURT: ALL RIGHT. LEFT THE BUILDING?

THE CLERK: YES. HE ANSWERED YES, AND THEN HE -- I GUESS HE EXCUSED HIMSELF. HE WANTED TO GO FROM THE BEGINNING, THOUGH. I REMEMBER.

THE COURT: I'M PREPARED TO HAVE HIM CALLED AND DIRECTED TO COME BACK ON WEDNESDAY, UNLESS YOU ALL FEEL OTHERWISE.

MR. DHANIDINA: IT DOESN'T MAKE ANY DIFFERENCE TO ME.

MR. SCHMOCKER: I'M THINKING.

THE COURT: WE CAN DECIDE BY THE END OF THE

DAY.

MR. SCHMOCKER: OKAY. THANKS.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURORS:)

THE COURT: EVERYONE IS PRESENT.

NOW THE ATTORNEYS GET TO ASK FOLLOW-UP QUESTIONS, AND WE'LL START FIRST WITH THE DEFENSE.

MR. SCHMOCKER: THANK YOU, YOUR HONOR.

THE COURT: MR. SCHMOCKER.

MR. SCHMOCKER: GOOD MORNING, LADIES AND GENTLEMEN.

I HAVE A FEW QUESTIONS. I WON'T BE SPEAKING WITH EVERYONE, BUT I'M NOT TRYING TO -- I JUST TRY TO COVER THE THINGS THAT WE NEED TO COVER. I WILL TELL YOU THIS AS A PREFACE, IS ANYBODY NERVOUS?

GOOD.

I'M NERVOUS TOO. IT'S KIND OF THE WAY IT IS. WE'LL WORK IT THROUGH TOGETHER, I HOPE.

JUROR NUMBER 3.

PROSPECTIVE JUROR NO. B-7993: UH-HUH.

MR. SCHMOCKER: ARE YOU NERVOUS?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: I NOTICED WHEN YOU WERE TALKING TO THE JUDGE -- IT'S A REALLY NICE ATMOSPHERE IN THIS COURT FOR A COURTROOM; WOULDN'T YOU AGREE?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: I NOTICED WHEN YOU WERE SPEAKING TO THE JUDGE, YOUR ANSWERS WERE PRETTY SHORT. WAS THAT BECAUSE WERE YOU NERVOUS?

PROSPECTIVE JUROR NO. B-7993: PROBABLY.

MR. SCHMOCKER: DO YOU THINK THAT --

CAN YOU SEE YOURSELF --

YOU KNOW A LITTLE BIT ABOUT THE CASE. YOU KNOW MY CLIENT'S BEEN CONVICTED OF MURDER.

PROSPECTIVE JUROR NO. B-7993: CORRECT.

MR. SCHMOCKER: THERE ARE TWO PEOPLE MURDERED ACTUALLY, THE SAME EVENT. THAT INFORMATION WAS GIVEN TO YOU IN THE JURY QUESTIONNAIRE; YOU RECALL THAT?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: THAT JUST GIVES US A SPECIAL CIRCUMSTANCE. THAT SPECIAL CIRCUMSTANCE IS DOUBLE HOMICIDE. THAT MEANS HE'S ELIGIBLE FOR THE DEATH PENALTY.

DO YOU UNDERSTAND THAT?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: THAT MEANS -- THAT DOESN'T MEAN --

THAT MEANS THAT NO CASE IS GOING TO COME BEFORE -- COMES BEFORE A JURY ON THE ISSUE OF DEATH UNLESS THERE IS A SPECIAL CIRCUMSTANCE LIKE DOUBLE HOMICIDE.

YOU WITH ME?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: OKAY. CAN YOU IMAGINE A CIRCUMSTANCE WHERE YOU WOULD VOTE FOR LIFE -- FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE IN A CASE WHERE THERE WAS A DOUBLE HOMICIDE?

PROSPECTIVE JUROR NO. B-7993: I'VE NEVER BEEN ON A JURY, SO I WOULDN'T BE ABLE TO -- I DON'T KNOW. I'D HAVE TO LOOK AT ALL THE EVIDENCE OR KNOW WHAT'S GOING ON. I WOULDN'T KNOW ANYTHING OFF THE TOP OF MY HEAD.

MR. SCHMOCKER: WELL, THE JUDGE IS GOING TO INSTRUCT YOU ON THE CASE, RIGHT? YOU'LL FOLLOW HIS INSTRUCTIONS; IS THAT CORRECT?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: ONE OF THE THINGS HE PREINSTRUCTED YOU ON WAS ON A POINT OF AGGRAVATION WHERE HE SAID THAT AGGRAVATING FACTORS MUST SUBSTANTIALLY OUTWEIGH THE MITIGATING FACTORS.

UNDER THOSE CIRCUMSTANCES YOU COULD VOTE FOR DEATH; IS THAT FAIR?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: YOU THINK YOU COULD DO THAT?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: YOU THINK THAT IF THE CIRCUMSTANCES -- THE AGGRAVATING CIRCUMSTANCES AND MITIGATING CIRCUMSTANCES JUST WEIGH THE SAME, DO YOU THINK YOU COULD VOTE FOR LIFE UNDER THOSE CIRCUMSTANCES?

PROSPECTIVE JUROR NO. B-7993: YES.

MR. SCHMOCKER: GOOD.

THANK YOU VERY MUCH.

JUROR NUMBER 1, YOU DESCRIBED YOURSELF AS A FOLLOWER, IS THAT FAIR TO SAY, ON THE JURY QUESTIONNAIRE?

PROSPECTIVE JUROR NO. D-3563: YES.

MR. SCHMOCKER: YOU UNDERSTAND THAT MR. HARRIS ON THIS ISSUE OF PENALTY IS ENTITLED TO YOUR INDIVIDUAL OPINION, NOT JUST THE OPINION OF EVERYBODY ELSE? DOES THAT MAKE SENSE?

PROSPECTIVE JUROR NO. D-3563: YES. YES, IT WOULD BE MY OPINION.

MR. SCHMOCKER: SO YOU WILL OFFER YOUR OPINION TO THE JURY AND TO THE COURT IN REGARDS TO THIS MATTER, CORRECT?

PROSPECTIVE JUROR NO. D-3563: YES.

MR. SCHMOCKER: DO YOU THINK THAT UNDER THE RIGHT CIRCUMSTANCES -- UNDER THE RIGHT CIRCUMSTANCES THAT YOU WOULD BE ABLE TO VOTE FOR DEATH?

PROSPECTIVE JUROR NO. D-3563: IT DEPENDS ON THE MITIGATING FACTORS AND -- I'M SORRY. I'M JUST NERVOUS.

MR. SCHMOCKER: YOU WOULD CONSIDER DEATH IN REGARDS TO THIS CASE, WOULDN'T YOU?

PROSPECTIVE JUROR NO. D-3563: YEAH. I MEAN, IT CAN GO BOTH WAYS. I DON'T KNOW ANYTHING ABOUT THE CASE.

MR. SCHMOCKER: I GUESS THAT WOULD BE MY NEXT QUESTION. WOULD YOU INDEED CONSIDER LIFE AS A

POSSIBILITY IN REGARDS TO THIS CASE ALSO?

PROSPECTIVE JUROR NO. D-3563: YES.

MR. SCHMOCKER: YOU'RE EQUALLY ATTUNED TO EITHER ONE OF THOSE PENALTIES; IS THAT FAIR TO SAY?

PROSPECTIVE JUROR NO. D-3563: THAT'S CORRECT.

MR. SCHMOCKER: IS THERE ANYBODY IN THE JURY BOX, OR AMONG THE 27 CALLED SO FAR, WHO DISAGREE WITH JUROR NUMBER 1?

WOULD YOU RAISE YOUR HAND IF YOU DISAGREE WITH NUMBER 1.

OKAY. THERE'S NO HANDS.

EVERYBODY AGREES, THEN?

THANK YOU.

JUROR NUMBER 4, THERE IS ALSO SOME DOUBT IN MY MIND -- I DIDN'T QUITE UNDERSTAND. YOU THINK YOU COULD MAKE A DECISION ON THIS CASE; ISN'T THAT RIGHT?

PROSPECTIVE JUROR NO. R-5857: YES, I DO.

MR. SCHMOCKER: YOU'LL DO YOUR BEST TO MAKE A DECISION, RIGHT?

PROSPECTIVE JUROR NO. R-5857: YES.

MR. SCHMOCKER: CAN YOU IMAGINE A SITUATION -- HAVE YOU BEEN ON A JURY BEFORE?

PROSPECTIVE JUROR NO. R-5857: YES, I HAVE.

MR. SCHMOCKER: THAT JURY THAT YOU WERE ON, WAS THERE EVER ANY DISAGREEMENTS IN THE JURY ROOM ABOUT WHAT SHOULD BE DONE?

PROSPECTIVE JUROR NO. R-5857: YES, THERE WERE.

MR. SCHMOCKER: IT WAS A GROUP OF 12 OF YOU

THAT WERE MEETING, RIGHT.

PROSPECTIVE JUROR NO. R-5857: THAT'S CORRECT.

MR. SCHMOCKER: WAS THERE MORE THAN ONE OPINION? HOW MANY OPINIONS WERE THERE, LET'S SAY, AT THE BEGINNING?

PROSPECTIVE JUROR NO. R-5857: AT THE BEGINNING, SOMETIMES, IT WAS LIKE 6-4, 6-3, THAT DISAGREE AFTER THE CASE.

MR. SCHMOCKER: DURING THAT -- DURING THOSE DISAGREEMENTS, WERE YOU ABLE TO VOICE YOUR OPINION AS TO WHAT SHOULD HAPPEN?

PROSPECTIVE JUROR NO. R-5857: SOMETIMES I DID.

MR. SCHMOCKER: DID YOU CONSIDER THE OPINIONS OF THE OTHER JURORS?

PROSPECTIVE JUROR NO. R-5857: YES.

MR. SCHMOCKER: ULTIMATELY DID YOU REACH A DIFFERENT CONCLUSION THAN YOU STARTED WITH, OR NOT?

PROSPECTIVE JUROR NO. R-5857: NO, NOT REALLY. WE WERE TRYING TO NORMALLY -- SOMETIMES THE DISCUSSION WAS KIND OF A LITTLE BIT OFF OF OUR CASE. THE PEOPLE WERE NOT REALLY LISTENING TO THE CASE OF WHAT WAS GOING ON. THEY WERE TRYING TO PUT THEIR OWN OPINIONS TO IT. THAT WAS ONE OF THE DISCUSSIONS THAT WE WERE TRYING TO RESOLVE.

MR. SCHMOCKER: IN THIS CASE YOU'RE GOING TO OFFER YOUR INDIVIDUAL OPINION; IS THAT FAIR TO SAY?

PROSPECTIVE JUROR NO. R-5857: ON THE FACTS, YES.

MR. SCHMOCKER: YES. YOU UNDERSTAND THAT NOBODY'S EVER GOING TO TELL YOU TO VOTE FOR DEATH? NOBODY'S GOING TO ORDER YOU TO DO THAT; DO YOU UNDERSTAND THAT?

PROSPECTIVE JUROR NO. R-5857: THAT'S CORRECT.

MR. SCHMOCKER: JUROR NUMBER 5?

PROSPECTIVE JUROR NO. T-5208: YES, SIR.

MR. SCHMOCKER: HELLO.

PROSPECTIVE JUROR NO. T-5208: HI.

MR. SCHMOCKER: YOU WERE A VICTIM OF A CRIME; IS THAT RIGHT, OR WAS THAT SOMEBODY CLOSE TO YOU?

PROSPECTIVE JUROR NO. T-5208: SOMEONE CLOSE TO THE FAMILY, YES, SIR.

MR. SCHMOCKER: IS THAT GOING TO MAKE IT DIFFICULT FOR YOU TO BE A JUROR IN THIS CASE?

PROSPECTIVE JUROR NO. T-5208: NO.

MR. SCHMOCKER: YOU'VE BEEN A JUROR BEFORE?

PROSPECTIVE JUROR NO. T-5208: YES, I HAVE.

MR. SCHMOCKER: WERE YOU ABLE TO REACH A DECISION? WITHOUT TELLING ME WHAT, WERE YOU ABLE TO REACH A DECISION IN THAT CASE?

PROSPECTIVE JUROR NO. T-5208: YES.

MR. SCHMOCKER: YOU'RE GOING TO OFFER YOUR INDIVIDUAL OPINION IN REGARDS TO WHAT SHOULD HAPPEN, RIGHT?

PROSPECTIVE JUROR NO. T-5208: YES.

MR. SCHMOCKER: DO YOU THINK YOU CAN FAIRLY CONSIDER A VERDICT OF LIFE -- LIFE WITHOUT THE

POSSIBILITY OF PAROLE?

PROSPECTIVE JUROR NO. T-5208: I CAN CONSIDER BOTH, DEPENDING ON THE CIRCUMSTANCES AND THE EVIDENCE PRESENTED, YES, OF COURSE.

MR. SCHMOCKER: TELL ME THIS. THE JUDGE HAS TALKED -- THERE'S BEEN DISCUSSION ABOUT LIFE WITHOUT POSSIBILITY OF PAROLE. IS IT YOUR UNDERSTANDING THAT IF A PERSON RECEIVES THAT SENTENCE, THAT THEY WILL REMAIN IN PRISON FOR THE REST OF THEIR LIFE?

PROSPECTIVE JUROR NO. T-5208: I THINK THAT'S MY BASIC UNDERSTANDING. I DON'T UNDERSTAND ANYTHING DIFFERENT FROM THAT.

MR. SCHMOCKER: YOU DON'T UNDERSTAND ANYTHING DIFFERENT?

DOES ANYBODY ON THE JURY -- IS THERE ANYBODY WHO DISAGREES OR DOES NOT UNDERSTAND LIFE WITHOUT POSSIBILITY OF PAROLE TO MEAN LIFE IN PRISON?

WOULD YOU RAISE YOUR HANDS.

IT WOULD BE FAIR TO SAY THAT EVERYBODY AGREES THAT LIFE WITHOUT POSSIBILITY OF PAROLE MEANS LIFE?

JUROR NUMBER 8, DO YOU THINK YOU CAN FAIRLY CONSIDER LIFE AS AN OPTION IN THIS CASE?

PROSPECTIVE JUROR NO. V-4528: YES.

MR. SCHMOCKER: JUROR NUMBER 9, YOU HAVE SOME DIFFICULTIES WITH THE CONCEPT OF THE DEATH SENTENCE; IS THAT FAIR TO SAY?

PROSPECTIVE JUROR NO. J-0750: YES, SIR.

MR. SCHMOCKER: YOU'RE WILLING TO FOLLOW THE

LAW IN REGARDS TO THIS CASE?

PROSPECTIVE JUROR NO. J-0750: YES, SIR.

MR. SCHMOCKER: SO IF THE JUDGE WERE TO INSTRUCT YOU -- HE'S GOING TO INSTRUCT YOU, YOU'LL FOLLOW THE INSTRUCTIONS THAT HE GIVES YOU?

PROSPECTIVE JUROR NO. J-0750: YES, SIR.

MR. SCHMOCKER: EVEN IF YOU DON'T PERSONALLY LIKE IT?

PROSPECTIVE JUROR NO. J-0750: YES.

MR. SCHMOCKER: THANK YOU, MA'AM.

JUROR NUMBER 10, HELLO.

HAVE YOU BEEN ON A JURY BEFORE?

PROSPECTIVE JUROR NO. R-6693: NO, I HAVE NOT.

MR. SCHMOCKER: DO YOU EXPRESS YOUR OPINIONS WHEN ASKED?

PROSPECTIVE JUROR NO. R-6693: YES.

MR. SCHMOCKER: CAN YOU GIVE YOUR INDIVIDUAL OPINION IN REGARD TO THIS CASE AFTER YOU HEAR THE EVIDENCE?

PROSPECTIVE JUROR NO. R-6693: YES.

MR. SCHMOCKER: DO YOU THINK THAT THE -- THERE WERE FOUR DIFFERENT CATEGORIES THAT WERE GIVEN AS POSSIBILITIES FOR HOW PEOPLE FEEL ABOUT THE DEATH PENALTY.

CAN YOU TELL US A LITTLE BIT ABOUT HOW YOU FEEL ABOUT IT?

PROSPECTIVE JUROR NO. R-6693: I PICKED NUMBER 4, THAT BASED ON WHAT THE INSTRUCTIONS OF THE COURT ARE

AND WHAT THE EVIDENCE ARE, I COULD FAIRLY ASSESS THE SITUATION.

MR. SCHMOCKER: YOU CAN ENVISION A SITUATION WHERE YOU WOULD -- FOR EXAMPLE, IF WE WERE TO PROVE THAT THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES, COULD YOU -- CAN YOU SEE THAT AS A POSSIBILITY, THAT YOU WOULD VOTE -- PARDON ME -- WOULD YOU SEE THAT YOU WOULD VOTE FOR LIFE?

PROSPECTIVE JUROR NO. R-6693: YES.

MR. SCHMOCKER: THAT'S ONE OF THE OPTIONS THAT YOU COULD CERTAINLY ENTERTAIN?

PROSPECTIVE JUROR NO. R-6693: YES.

MR. SCHMOCKER: YOU REALIZE THAT YOU CAN ONLY VOTE FOR DEATH IF YOU FIND AGGRAVATING CIRCUMSTANCES TO SUBSTANTIALLY OUTWEIGH THE MITIGATING CIRCUMSTANCES?

PROSPECTIVE JUROR NO. R-6693: CORRECT.

MR. SCHMOCKER: YOU CAN SEE IN SOME CIRCUMSTANCES WHERE THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES, YOU'D STILL VOTE FOR LIFE?

PROSPECTIVE JUROR NO. R-6693: YES.

MR. SCHMOCKER: NOBODY'S EVER GOING TO MAKE YOU, RIGHT?

PROSPECTIVE JUROR NO. R-6693: NO. THAT'S RIGHT.

MR. SCHMOCKER: YOU THINK YOU'D BE A GOOD JUROR ON THIS CASE?

PROSPECTIVE JUROR NO. R-6693: YES, SIR.

MR. SCHMOCKER: THANK YOU, MA'AM.

JUROR NUMBER 11, YOU'VE BEEN ON A JURY BEFORE?

PROSPECTIVE JUROR NO. M-3458: YES, SIR.

MR. SCHMOCKER: IS THAT A CRIMINAL OR CIVIL JURY?

PROSPECTIVE JUROR NO. M-3458: CIVIL.

MR. SCHMOCKER: WITHOUT TELLING US WHAT THE RESULT WAS, DID YOU REACH A VERDICT?

PROSPECTIVE JUROR NO. M-3458: WAS IT A VERDICT?

MR. SCHMOCKER: DID YOU REACH A VERDICT?

PROSPECTIVE JUROR NO. M-3458: YES. IT WAS NOT GUILTY.

MR. SCHMOCKER: WELL, WE WEREN'T REALLY ASKING FOR THAT, BUT THANKS FOR THE INFORMATION.

YOU SAID THAT IT WAS A CIVIL CASE, THOUGH?

PROSPECTIVE JUROR NO. M-3458: YES.

MR. SCHMOCKER: DURING THE COURSE OF THAT JURY DELIBERATION, WERE THERE STRONG VIEWS EXPRESSED BY PEOPLE?

PROSPECTIVE JUROR NO. M-3458: THERE WAS EXPRESS OPINION, YEAH. WE BASICALLY ALL HAD THE SAME OPINION.

MR. SCHMOCKER: YOU -- WERE YOU POLITE WITH EACH OTHER?

PROSPECTIVE JUROR NO. M-3458: YES, WE WERE VERY CORDIAL.

MR. SCHMOCKER: ONE OF THE THINGS I THINK

THAT'S IMPORTANT FOR JURORS TO REALIZE IS THAT THEY HAVE CERTAIN RIGHTS. YOU HAVE THE RIGHT TO BE WELL TREATED, TREATED FAIRLY. IF SOMEBODY WERE TO TREAT YOU UNFAIRLY DURING THE COURSE OF A JURY DELIBERATION, WOULD YOU TELL THE FOREMAN OR TELL THE JUDGE?

PROSPECTIVE JUROR NO. M-3458: I WOULD DEFINITELY TRY TO LET THE PERSON KNOW, AND SAY WE GET ALONG THAT WAY, AS OPPOSED TO LETTING IT LINGER ON. I WOULD DEFINITELY TELL SOMEBODY IF I FELT WE COULDN'T RESOLVE THE SITUATION AT THAT TIME, IF I WERE BEING MISTREATED.

MR. SCHMOCKER: YOU WOULD TRY TO RESOLVE IT YOURSELF FIRST?

PROSPECTIVE JUROR NO. M-3458: ABSOLUTELY, YES.

MR. SCHMOCKER: WOULD YOU AGREE WITH ME THAT DURING A JURY DELIBERATION THAT SOMETIMES PEOPLE HAVE STRONG VIEWS?

PROSPECTIVE JUROR NO. M-3458: I WOULD THINK SO, YES.

MR. SCHMOCKER: SOMEBODY ELSE HAS A STRONG VIEW, ARE YOU WILLING TO -- ARE YOU GOING TO CHANGE YOUR VIEW JUST BECAUSE SOMEBODY ELSE DISAGREES WITH YOU?

PROSPECTIVE JUROR NO. M-3458: ABSOLUTELY NOT, NO.

MR. SCHMOCKER: THANK YOU, MA'AM.

MA'AM, WE'RE CERTAINLY ALL SORRY FOR YOUR LOSS.

PROSPECTIVE JUROR NO. B-9815: THANK YOU.

MR. SCHMOCKER: JUROR NUMBER 13, THE LAWYER?

YOU ARE?

PROSPECTIVE JUROR NO. D-5849: YES, I AM.

MR. SCHMOCKER: I THOUGHT THAT I HEARD THAT.

DO YOU TRY CASES, OR PRESENTLY DO YOU HAVE ANOTHER ASSIGNMENT?

PROSPECTIVE JUROR NO. D-5849: I DO TRY CASES.

MR. SCHMOCKER: IS THAT --

MAY I ASK WHAT JURISDICTION IS THAT?

PROSPECTIVE JUROR NO. D-5849: CITY OF LOS ANGELES.

MR. SCHMOCKER: IS THAT THE WHOLE CITY, OR DO YOU WORK AT A PARTICULAR COURTHOUSE?

PROSPECTIVE JUROR NO. D-5849: I WORK OUT OF DIFFERENT COURTHOUSES, DEPENDING ON HOW FULL. CCB.

MR. SCHMOCKER: THIS IS YOUR HOME COURT?

PROSPECTIVE JUROR NO. D-5849: THIS IS SORT OF MY HOME COURT.

MR. SCHMOCKER: THANK YOU.

JUROR 14?

PROSPECTIVE JUROR NO. J-2466: 14.

MR. SCHMOCKER: ARE YOU --

YOU DESCRIBED YOURSELF AS A LEADER; IS THAT RIGHT?

PROSPECTIVE JUROR NO. J-2466: YES, I AM.

MR. SCHMOCKER: CAN YOU TELL ME A LITTLE BIT ABOUT THAT. HAVE YOU ADOPTED LEADERSHIP ROLES?

PROSPECTIVE JUROR NO. J-2466: I'M CURRENTLY A BANK MANAGER FOR CITY BANK. BEING A BANK MANAGER, I

HAVE TO LEAD THE TEAM.

MR. SCHMOCKER: HOW LONG HAVE YOU BEEN A BANK MANAGER?

PROSPECTIVE JUROR NO. J-2466: I'VE BEEN IN THE INDUSTRY 30 YEARS, BEEN A BANK MANAGER FOR ABOUT 15.

MR. SCHMOCKER: YOU ARE WELL -- PARDON ME. YOU HAVE A LOT OF EXPERIENCE MAKING DECISIONS?

PROSPECTIVE JUROR NO. J-2466: YES.

MR. SCHMOCKER: YOU CAN MAKE A DECISION, YOU THINK, ONE WAY OR THE OTHER ON THIS CASE?

PROSPECTIVE JUROR NO. J-2466: YES.

MR. SCHMOCKER: YOU UNDERSTAND THIS IS KIND OF A HIRING PROCESS? WE'RE HIRING SOMEBODY TO FILL A JOB, 12 DIFFERENT PEOPLE TO FILL A JOB. MR. HARRIS IS THE PERSON WHO'S GOT SOME SKIN IN THE GAME. IF HE WAS --

YOU THINK YOU WOULD MAKE A GOOD JUROR IN A CASE WHERE HE WAS A DEFENDANT?

PROSPECTIVE JUROR NO. J-2466: YES, I WOULD.

MR. SCHMOCKER: YOU THINK YOU CAN BE FAIR TO BOTH SIDES?

PROSPECTIVE JUROR NO. J-2466: YES.

MR. SCHMOCKER: THANK YOU, MA'AM.

SIR, YOU'RE JUROR NUMBER 15?

PROSPECTIVE JUROR NO. M-7169: YES.

MR. SCHMOCKER: I SEE THAT YOU HAVE A VIEW ON THE DEATH PENALTY?

PROSPECTIVE JUROR NO. M-7169: (NODS HEAD UP AND DOWN).

MR. SCHMOCKER: ONE OF THE POSITIONS WAS THAT YOU SAW THE DEATH PENALTY AS A DETERRENT?

PROSPECTIVE JUROR NO. M-7169: (NODS HEAD UP AND DOWN).

MR. SCHMOCKER: WOULD YOU FAIRLY CONSIDER BOTH OPTIONS, LIFE WITHOUT POSSIBILITY OF PAROLE AND DEATH, IN THIS CASE?

PROSPECTIVE JUROR NO. M-7169: DEPENDING ON WHAT WE HEAR, YES.

MR. SCHMOCKER: IF THE AGGRAVATING FACTORS ARE A LITTLE BIT MORE THAN THE MITIGATING FACTORS, YOU'LL STILL VOTE FOR LIFE, WON'T YOU?

PROSPECTIVE JUROR NO. M-7169: I COULD, YES.

MR. SCHMOCKER: YOU COULD DO THAT?

PROSPECTIVE JUROR NO. M-7169: (NODS HEAD UP AND DOWN).

MR. SCHMOCKER: YOU'RE GOING TO --

THIS ISN'T JUST A PROCESS OF COUNTING UP THE FACTORS, YOU UNDERSTAND?

PROSPECTIVE JUROR NO. M-7169: (NODS HEAD UP AND DOWN).

AS THE JUDGE SAID, YOU HAVE TO WEIGH THEM.

MR. SCHMOCKER: RIGHT. IT -- SOME SORT OF MORAL DECISION HAS TO BE MADE. WOULD YOU AGREE WITH ME?

PROSPECTIVE JUROR NO. M-7169: YES.

MR. SCHMOCKER: ARE YOU WILLING TO DO THAT?

PROSPECTIVE JUROR NO. M-7169: YES, SIR.

MR. SCHMOCKER: THANK YOU.

MA'AM, WE ALL STRUGGLED THROUGH YOUR CAST. IT WAS JUST FUN. THE JUDGE WAS RIGHT. WE COULD READ IT. THANKS FOR GIVING US A TIP AS TO WHAT THE PROBLEM WAS.

THIS IS DIFFICULT MATERIAL WE'RE GOING TO BE DEALING WITH. WE'RE GOING TO BE DEALING WITH THE DEATH OF TWO PEOPLE, QUITE POSSIBLY A DEATH SENTENCE ON A THIRD. YOU THINK YOU WOULD BE AN APPROPRIATE JUROR FOR THIS CASE?

PROSPECTIVE JUROR NO. K-6084: ABSOLUTELY.

MR. SCHMOCKER: MY CLIENT, OF COURSE -- WELL -- HE'S LOOKING FOR A FAIR AND IMPARTIAL JUROR WHO ISN'T GOING TO VOTE AUTOMATICALLY ONE WAY OR THE OTHER. WILL YOU DO THAT?

PROSPECTIVE JUROR NO. K-6084: YES.

MR. SCHMOCKER: THANK YOU, MA'AM.

JUROR 17?

PROSPECTIVE JUROR NO. J-9579: YES.

MR. SCHMOCKER: JUROR 17, I DON'T HAVE ANY QUESTIONS. THANK YOU VERY MUCH.

JUROR NUMBER 18, YOU THINK THAT YOU CAN BE FAIR TO MR. HARRIS?

PROSPECTIVE JUROR NO. J-6556: YES.

MR. SCHMOCKER: AND FAIR MIGHT BE A DEATH SENTENCE; IS THAT RIGHT?

PROSPECTIVE JUROR NO. J-6556: YES, THAT'S RIGHT.

MR. SCHMOCKER: YOU'LL CONSIDER ALL THE EVIDENCE IN THE CASE?

PROSPECTIVE JUROR NO. J-6556: YES, OF COURSE.

MR. SCHMOCKER: YOU UNDERSTAND HOW IMPORTANT THIS IS, OF COURSE?

PROSPECTIVE JUROR NO. J-6556: YES, I DO.

MR. SCHMOCKER: THANK YOU, MA'AM.

THE COURT: MR. SCHMOCKER, IT'S JUST ABOUT NOON. IF YOU'VE FINISHED WITH THAT SECOND ROW, PERHAPS THIS WOULD BE A GOOD TIME TO BREAK FOR LUNCH.

MR. SCHMOCKER: IT IS.

THE COURT: THE TIMING'S BEEN A LITTLE BIT OFF KILTER THIS MORNING, BUT WE'LL GET IT SQUARED AWAY IN THE AFTERNOON.

WE'LL TAKE A BREAK FOR LUNCH, ASK EVERYONE TO RETURN AT 1:30.

PLEASE DON'T DISCUSS THE CASE.

HAVE A NICE LUNCH.

LEAVE THE CARDS ON THE CHAIR WHERE YOU ARE.

WE'LL SEE EVERYONE BACK AT 1:30.

(AT 12:01 P.M. THE NOON RECESS WAS TAKEN UNTIL 1:30 P.M. OF THE SAME DAY.)

CASE NUMBER: TA074314
CASE NAME: PEOPLE VS. KAI HARRIS
LOS ANGELES, CALIFORNIA MONDAY, FEBRUARY 23, 2009
DEPARTMENT NO. 108 HON. MICHAEL JOHNSON, JUDGE
REPORTER: LORA JOHNSON, CSR NO. 10119
TIME: 1:45 P.M.

APPEARANCES:

DEFENDANT, KAI HARRIS, PRESENT WITH COUNSEL, JOHN SCHMOCKER AND LYNDA VITALE, BAR PANEL; HALIM DHANIDINA, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(THE JURORS ENTERED THE COURTROOM.)

THE COURT: ALL RIGHT. EVERYONE IS PRESENT. WE WERE IN THE MIDST OF THE DEFENSE QUESTIONS, AND THAT IS WHERE WE WILL CONTINUE WITH MR. SCHMOCKER.

MR. SCHMOCKER: YES. THANK YOU, YOUR HONOR.

GOOD AFTERNOON, LADIES AND GENTLEMEN.

IT WON'T TAKE TOO LONG. I KNOW IT FEELS ANXIOUS SOMETIMES, WE ALL FEEL.

JUROR NO. 19.

PROSPECTIVE JUROR R-8493: YES.

MR. SCHMOCKER: YOU ARE A LETTER CARRIER?

PROSPECTIVE JUROR R-8493: YES.

MR. SCHMOCKER: AND YOU HAVE BEEN DOING THAT FOR SOME TIME?

PROSPECTIVE JUROR R-8493: YES.

MR. SCHMOCKER: DO YOU HAVE A SUPERVISOR ROLE OR --

PROSPECTIVE JUROR R-8493: NO, NO SUPERVISOR ROLE.

MR. SCHMOCKER: OKAY. YOU HAVE -- YOU BELIEVE THE DEATH PENALTY SHOULD BE USED IN CERTAIN CIRCUMSTANCES --

PROSPECTIVE JUROR R-8493: YES.

MR. SCHMOCKER: WOULD IT BE YOUR FIRST CHOICE ON THAT?

PROSPECTIVE JUROR R-8493: NO, IT DEPENDS ON THE CIRCUMSTANCES AND WHAT IT INVOLVES.

MR. SCHMOCKER: DO YOU THINK YOU CAN BE BALANCED IN REGARDS TO THIS MATTER?

PROSPECTIVE JUROR R-8493: YES.

MR. SCHMOCKER: YOU UNDERSTAND MR. HARRIS HAS ALREADY BEEN CONVICTED?

PROSPECTIVE JUROR R-8493: YES.

MR. SCHMOCKER: IT'S A SIMPLE HOMICIDE. WHEN YOU SAY IT, IT SOUNDS AWFUL, RIGHT?

PROSPECTIVE JUROR R-8493: YES, IT DOES.

MR. SCHMOCKER: BUT YOU WILL CONSIDER -- YOU WILL CONSIDER LIFE AS AN OPTION?

PROSPECTIVE JUROR R-8493: YES, I WOULD.

MR. SCHMOCKER: OKAY. THANK YOU, SIR.

PROSPECTIVE JUROR R-8493: YOU ARE WELCOMED.

MR. SCHMOCKER: JUROR NO. 20, WHAT IS YOUR OCCUPATION?

PROSPECTIVE JUROR A-1180: GRAPHIC DESIGNER.

MR. SCHMOCKER: HAVE YOU BEEN DOING THAT FOR SOME TIME?

PROSPECTIVE JUROR A-1180: YES.

MR. SCHMOCKER: HOW LONG?

PROSPECTIVE JUROR A-1180: 25 YEARS.

MR. SCHMOCKER: OKAY. NOT ALWAYS WITH THE SAME GROUP, THOUGH, I TAKE IT?

PROSPECTIVE JUROR A-1180: NO.

MR. SCHMOCKER: OKAY. WE ARE LOOKING FOR ANOTHER JUROR. WHAT DO YOU THINK? YOU ARE THE RIGHT JUROR FOR THIS CASE?

PROSPECTIVE JUROR A-1180: IF YOU ALL THINK I AM, THEN I WILL DO MY BEST.

MR. SCHMOCKER: DO YOU THINK -- YOU DON'T LEAN TO ONE SIDE OR THE OTHER, DO YOU?

PROSPECTIVE JUROR A-1180: REGARDING --

MR. SCHMOCKER: WELL, I MEAN YOU DON'T THINK THAT JUST BECAUSE MR. DHANIDINA IS A NICE GUY, YOU ARE NOT GOING TO VOTE FOR HIM?

PROSPECTIVE JUROR A-1180: NO, THAT REALLY HAS NOTHING TO DO IT.

MR. SCHMOCKER: RIGHT. YOU WILL LISTEN TO THE EVIDENCE?

PROSPECTIVE JUROR A-1180: SURE, YES.
MR. SCHMOCKER: ALL RIGHT. THANK YOU.
PROSPECTIVE JUROR A-1180: UH-HUH.
MR. SCHMOCKER: JUROR NO. 21?
PROSPECTIVE JUROR R-3749: YES.
MR. SCHMOCKER: I NOTED THAT YOU HAD A HEALTH PROBLEM. IS THAT GIVING YOU DIFFICULTY?
PROSPECTIVE JUROR R-3749: YEAH. IF I SIT DOWN AND JUST -- BUT IF I -- IF IT'S A PROBLEM.
MR. SCHMOCKER: OKAY. IF YOU WERE SELECTED ON THIS JURY, YOU WOULD COMMUNICATE WITH THE JUDGE IF YOU NEEDED SOME SPECIAL ACCOMMODATION?
PROSPECTIVE JUROR R-3749: DEPENDS. SOMETIMES I HAVE REALLY, REALLY PROBLEM.
MR. SCHMOCKER: I UNDERSTAND. OKAY.
THANK YOU, SIR.
JUROR NO. 21, HI.
PROSPECTIVE JUROR A-0298: 22.
MR. SCHMOCKER: I'M SORRY. YOU CERTAINLY ARE. I CAN SEE THAT THING YOU ARE HOLDING. THANK YOU.
YOU HAVE BEEN A -- HAVE YOU BEEN ON A JURY BEFORE?
PROSPECTIVE JUROR A-0298: NEVER BEFORE, SIR.
MR. SCHMOCKER: DO YOU THINK THAT WHAT THE JUDGE INSTRUCTS YOU TO DO YOU WILL DO?
PROSPECTIVE JUROR A-0298: I WILL.
MR. SCHMOCKER: YOU WILL FOLLOW HIS

INSTRUCTIONS?

PROSPECTIVE JUROR A-0298: YES, SIR.

MR. SCHMOCKER: YOU ARE RELATIVELY SOFT-SPOKEN, IT SEEMS. WOULD YOU MAKE SURE YOUR OPINION WOULD BE HEARD IN THE JURY?

PROSPECTIVE JUROR A-0298: CERTAINLY.

MR. SCHMOCKER: ALL RIGHT. IT'S IMPORTANT THAT EVERYBODY GETS -- AS TWELVE PEOPLE ON THE JURY, NOT ONE AND ELEVEN PEOPLE, RIGHT?

PROSPECTIVE JUROR A-0298: CORRECT.

MR. SCHMOCKER: ALL RIGHT. THANK YOU, SIR.

JUROR NO. 23, YOU ARE WITH ICE?

PROSPECTIVE JUROR G-6179: NO, CUSTOMS.

MR. SCHMOCKER: WHAT IS THE NATURE OF YOUR DUTIES?

PROSPECTIVE JUROR G-6179: IT DEPENDS. I WORK FOR THE CUSTOMS SIDE LOOKING FOR NARCOTICS, OTHER SUBSTANCES. ON THE IMMIGRATION SIDE, ON THE TERRORISM TEAM. IT DEPENDS -- INCOMING FLIGHTS.

MR. SCHMOCKER: OKAY. SO YOU DEAL WITH BRADLEY PRIMARILY?

PROSPECTIVE JUROR G-6179: YEAH.

MR. SCHMOCKER: OKAY. HAVE YOU BEEN A JUROR BEFORE?

PROSPECTIVE JUROR G-6179: NO, FIRST TIME.

MR. SCHMOCKER: ALL RIGHT. THANK YOU, SIR.

JUROR NO. 24.

PROSPECTIVE JUROR C-6782: YES, SIR.

MR. SCHMOCKER: IS THERE ANYTHING ABOUT THIS CASE THAT WOULD MAKE IT DIFFICULT FOR YOU TO BE A FAIR AND IMPARTIAL JUROR?

PROSPECTIVE JUROR C-6782: NO, SIR.

MR. SCHMOCKER: AND THE FACT THAT GANGS ARE INVOLVED IN THIS CASE DOESN'T MEAN ANYTHING IN PARTICULAR TO YOU, DOES IT.

PROSPECTIVE JUROR C-6782: NO.

MR. SCHMOCKER: ALL RIGHT. THANK YOU.

YOU EXPRESSED SOME DIFFICULTY, JUROR NO. 25, ON BEING A JUROR IN THIS CASE?

PROSPECTIVE JUROR R-9855: (NODS HEAD UP AND DOWN.)

MR. SCHMOCKER: BUT YOU WILL DO YOUR BEST; IS THAT RIGHT?

PROSPECTIVE JUROR R-9855: YES.

MR. SCHMOCKER: OKAY. IF THE JUDGE INSTRUCTS YOU AND GIVES YOU CERTAINLY INSTRUCTIONS, YOU WILL FOLLOW IT?

PROSPECTIVE JUROR R-9855: YES.

MR. SCHMOCKER: JUROR NO. 26.

PROSPECTIVE JUROR V-4099: YES.

MR. SCHMOCKER: GOOD AFTERNOON.

PROSPECTIVE JUROR V-4099: GOOD AFTERNOON.

MR. SCHMOCKER: CAN YOU IMAGINE THE CIRCUMSTANCES WHERE YOU WOULD VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE?

PROSPECTIVE JUROR V-4099: YES, I CAN.

MR. SCHMOCKER: WOULD THE CONVERSE BE TRUE? CAN YOU IMAGINE ANY CIRCUMSTANCE WHEREBY YOU WOULD VOTE FOR DEATH?

PROSPECTIVE JUROR V-4099: THE CONVERSE COULD BE TRUE, BUT IT WOULD HAVE TO BE SOMETHING VERY SERIOUS.

MR. SCHMOCKER: ALL RIGHT. WELL, THIS IS A SERIOUS MATTER. YOU WOULD AGREE, WOULDN'T YOU?

PROSPECTIVE JUROR V-4099: I DO AGREE.

MR. SCHMOCKER: OKAY. THANK YOU, SIR.

PROSPECTIVE JUROR V-4099: YOU'RE WELCOMED.

MR. SCHMOCKER: GOOD AFTERNOON.

PROSPECTIVE JUROR G-6745: GOOD AFTERNOON.

MR. SCHMOCKER: DO YOU FEEL THAT YOU COULD BE FAIR AND BALANCED IN REGARDS TO THIS CASE?

PROSPECTIVE JUROR G-6745: YES, I DO.

MR. SCHMOCKER: AND IF THE MITIGATING EVIDENCE OUTWEIGHS THE AGGRAVATING EVIDENCE, YOU WOULDN'T HAVE ANY TROUBLE VOTING FOR LIFE, WOULD YOU?

PROSPECTIVE JUROR G-6745: NO, I WOULDN'T.

MR. SCHMOCKER: NO TROUBLE?

PROSPECTIVE JUROR G-6745: NO, NO TROUBLE AT ALL.

MR. SCHMOCKER: ALL RIGHT. THANK YOU, MA'AM.

YOUR HONOR, I HAVE NO FURTHER QUESTIONS. THANK YOU.

THE COURT: THANK YOU.

MR. DHANIDINA.

MR. DHANIDINA: THANK YOU.

GOOD AFTERNOON, EVERYONE.

THE PANEL: GOOD AFTERNOON.

MR. DHANIDINA: I ALSO HAVE A FEW QUESTIONS, SOME FOR THE WHOLE GROUP AND SOME FOR PARTICULAR PROSPECTIVE JURORS.

BEFORE I START, THOUGH, LET ME JUST PREFACE MY QUESTIONS WITH A FEW COMMENTS.

I THINK, AND THE JUDGE HAS ALREADY SORT OF STATED THIS, WHAT WE ARE LOOKING FOR HERE IN YOU, THE JURORS, IS HONESTY AND SOME REFLECTION ON YOUR OWN FEELINGS AND YOUR OWN OPINIONS WHICH YOU HAVE ALREADY SORT OF LAID OUT A LITTLE BIT IN THE QUESTIONNAIRES.

I DON'T WANT THIS PROCESS TO LEAVE YOU WITH THE IDEA THAT HOLDING ONE OPINION IS BETTER THAN HOLDING ANOTHER OPINION WHEN IT COMES TO THE DEATH PENALTY. EVERY OPINION EXPRESSED REGARDING THIS PENALTY IS VALID, BUT NOT EVERY OPINION NECESSARILY WOULD MAKE YOU APPROPRIATE TO SIT ON A CASE LIKE THIS.

SO I THINK WHILE IT'S IMPORTANT FOR YOU TO UNDERSTAND THAT WE NEED TO HAVE JURORS WHO CAN APPROACH THE CASE FAIRLY TO BOTH SIDES, IT DOESN'T MEAN THAT IF YOU ARE NOT RIGHT FOR THIS CASE THERE IS SOMETHING WRONG WITH YOU.

WHAT I AM HEARING A LOT IS EVERYONE

WANTS TO SAY THAT THEY CAN BE FAIR, EVERYONE WANTS TO SAY THAT THEY CAN FOLLOW THE COURT'S INSTRUCTIONS, RIGHT, BECAUSE HE IS THE JUDGE AND WHEN HE GIVES INSTRUCTIONS IT IS THE LAW TO FOLLOW THEM. BUT YOU DON'T HAVE TO BE ON A DEATH PENALTY CASE IF YOU DON'T BELIEVE THAT YOUR MIND CAN BE OPEN TO BOTH PENALTIES, EQUALLY OPEN, FAIRLY OPEN.

SO THAT MEANS IF YOU ARE CATEGORY ONE AND YOU BELIEVE IN AN EYE FOR AN EYE, THAT IF SOMEONE COMMITS MURDER, THEY GET THE DEATH PENALTY NO MATTER WHAT THE MITIGATION IS, THAT IS A VALID OPINION, BUT IT'S NOT THE RIGHT POSITION TO HAVE IF YOU ARE GOING TO BE ON A CASE LIKE THIS.

IF YOU ARE CATEGORY TWO AND YOU THINK THE DEATH PENALTY IS NEVER APPROPRIATE, AGAIN, IT'S A VALID OPINION BUT NOT RIGHT FOR THIS CASE.

AND IN CATEGORY 3, WHICH I THINK IS THE REAL KIND OF WHERE THE RUBBER MEETS THE ROAD FOR A LOT OF YOU HERE WHERE YOU THINK THE DEATH PENALTY IS OKAY, BUT PERSONALLY KNOWING YOURSELVES, KNOWING YOUR OWN OPINIONS, IF IT CAME DOWN TO IT, YOU COULDN'T BE THE ONE TO HAVE THAT WEIGH ON YOUR CONSCIOUS I THINK IS THE WAY IT'S BEEN EXPRESSED, THAT IS A VALID OPINION BUT NOT RIGHT FOR THIS CASE. SO WHAT WE ARE LOOKING FOR, THEN, ARE PEOPLE WHO NOT ONLY AGREE THAT IT'S OKAY TO HAVE A DEATH PENALTY, BUT CAN KEEP THEIR MINDS OPEN AND WILL LISTEN TO AGGRAVATING EVIDENCE AND

MITIGATING EVIDENCE AND CAN ACTUALLY DECIDE ONE WAY OR ANOTHER AND BE OPEN TO BOTH.

SO WHEN I ASK THESE QUESTIONS, I'M GOING TO ASK SOME OF YOU PERSONALLY IN PARTICULAR JUST TO BE HONEST ABOUT THAT SO BOTH SIDES HERE CAN GET A FAIR SHAKE.

SPECIFICALLY, YOU KNOW, ONE OF THE QUESTIONS ON THE QUESTIONNAIRE WAS "DO YOU BELIEVE THAT CALIFORNIA SHOULD HAVE A DEATH PENALTY?" RIGHT? YOU GUYS REMEMBER GETTING THAT QUESTION. SOME OF YOU SAID YES, SOME OF YOU SAID NO.

BY A SHOW HANDS, IF YOU COULD JUST REMIND ME HOW MANY PEOPLE HERE BELIEVE THAT CALIFORNIA SHOULD NOT HAVE A DEATH PENALTY. IF YOU HAD TO VOTE TODAY, WOULD YOU VOTE AGAINST HAVING IT?

ANYBODY?

I'M SURE I READ IT IN SOME QUESTIONNAIRES. OKAY. WELL, I WILL APPROACH THAT SPECIFICALLY, THEN, AS I GET TO SOME JURORS.

HOW MANY PEOPLE HERE BELIEVE THAT CALIFORNIA, AS A STATE, SHOULD HAVE THE DEATH PENALTY IN PLACE FOR CERTAIN CRIMES?

(THERE WAS A SHOW OF HANDS.)

PROSPECTIVE JUROR R-9855: I GUESS I --

MR. DHANIDINA: THIS IS JUROR NO. 27.

PROSPECTIVE JUROR R-9855: 25.

MR. DHANIDINA: 25, PARDON ME. MAYBE, YOU'RE NOT SURE.

PROSPECTIVE JUROR R-9855: UH-HUH.

MR. DHANIDINA: JUROR NO. 26.

PROSPECTIVE JUROR V-4099: I BELIEVE IN CERTAIN CASES IT IS APPROPRIATE.

MR. DHANIDINA: OKAY. LET ME ASK SPECIFICALLY, THEN.

JUROR NO. 2, MA'AM, YOU INDICATED ON YOUR QUESTIONNAIRE WHEN YOU WERE ASKED TO TRY TO CATEGORIZE YOURSELF, THAT YOU WERE EITHER A 2 OR A 4. I THINK YOU CIRCLED BOTH NUMBERS.

DO YOU REMEMBER THAT?

PROSPECTIVE JUROR S-3050: VAGUELY, YES.

MR. DHANIDINA: OKAY. AND YOU INDICATED SOMETHING ABOUT HOW YOUR RELIGIOUS BELIEFS, BASED ON YOUR RELIGIOUS BELIEFS, YOU CAN'T REALLY DECIDE WHETHER YOU COULD VOTE FOR DEATH OR NOT.

IS THAT A FAIR SUMMARY OF WHAT YOU WERE SAYING?

PROSPECTIVE JUROR S-3050: WELL, ACTUALLY, IT HAS CHANGED, MY OPINION, OVER THE WEEKEND. I SPOKE WITH A LEADER OF MY CHURCH AND GOT GUIDANCE.

MR. DHANIDINA: OKAY. THAT'S AN INTERESTING TOPIC WHICH IS ACTUALLY RELEVANT TO SOMETHING ELSE I WAS GOING TO BRING UP.

WOULD YOU CONSIDER YOURSELF TO BE A

FAITHFUL PERSON WITH RESPECT TO YOUR RELIGION?

PROSPECTIVE JUROR S-3050: I TRY TO BE, YES.

MR. DHANIDINA: I MEAN YOU WOULD -- YOU ATTEND CHURCH REGULARLY?

PROSPECTIVE JUROR S-3050: YES, I DO.

MR. DHANIDINA: AND FROM TIME TO TIME, YOU CONSULT WITH SOME OF THE LEADERS IN THE CHURCH ABOUT IMPORTANT MATTERS? OR WAS THIS THE FIRST TIME THAT YOU DID THAT?

PROSPECTIVE JUROR S-3050: THIS IS ACTUALLY THE FIRST TIME MAYBE ON SOMETHING THAT REALLY DIDN'T PERTAIN TO WHAT GOES ON IN THE CHURCH, YOU KNOW. AND WITHOUT GIVING ANY DETAILS OF THE CASE, I WANTED TO KNOW -- BECAUSE I AM A CONVERT TO THIS RELIGION -- WHERE THE CHURCH, IF THEY HAD A STANCE ON IT.

MR. DHANIDINA: OKAY. AND I THINK THAT IS NORMAL. I MEAN, AGAIN, WE ARE NOT HERE TO JUDGE ANYONE'S PERSONAL BELIEFS. SOME PEOPLE GO TO CHURCH REGULARLY OR DIFFERENT KINDS OF CHURCHES HAVE DIFFERENT SORTS OF TEACHINGS. BUT IF YOU ARE SELECTED AS A JUROR IN THIS CASE, I THINK THE JUDGE IS GOING TO GIVE THIS INSTRUCTION. YOU CAN'T REALLY CONSULT OUTSIDE SOURCES FOR GUIDANCE ABOUT YOUR JOB AS A JUROR.

ARE YOU COMFORTABLE WITH THAT IDEA?

PROSPECTIVE JUROR S-3050: YES.

MR. DHANIDINA: IF --

PROSPECTIVE JUROR S-3050: I FEEL I'M A VERY OPEN-MINDED PERSON.

MR. DHANIDINA: OKAY. IF YOU WERE STRUGGLING WITH YOUR JOB IN THIS CASE -- SOME OF THE EVIDENCE YOU ARE GOING TO HEAR IS GOING TO BE VERY TROUBLING. I GUARANTEE IT -- AND YOU FELT LIKE YOU NEEDED SOME ASSISTANCE, WOULD YOU SEEK THE ASSISTANCE OF, SAY, A LEADER IN YOUR CHURCH OR EVEN PRAYER TO HELP YOU DECIDE WHAT YOUR DECISION SHOULD BE IN THIS CASE?

PROSPECTIVE JUROR S-3050: THAT'S KIND OF PERSONAL. PROBABLY PERSONALLY I WOULD PRAY FOR STRENGTH MAYBE, NOT TO GET A DIVINE ANSWER ON WHAT I SHOULD DO.

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR S-3050: IF THAT MAKES SENSE TO YOU.

MR. DHANIDINA: IT DOES. IT DOES.

I THINK THE REASON WHY THIS COMES UP, AND IT'S NOT MEANT TO BE AN INTRUSION IN YOUR PERSONAL BELIEFS BUT, YOU KNOW, BOTH SIDES, WHEN WE HAVE A JURY THAT WE HAVE AGREED ON, ARE HOPING AND RELYING ON THE FACT THAT THE JURY WILL BASE THEIR DECISION ON THE INFORMATION THAT COMES OUT IN COURT AND NOT SOME OUTSIDE SOURCE.

SO I GUESS MY QUESTION IS TO YOU, WOULD YOU FEEL, IF YOU WERE KIND OF STUCK IN A DIFFICULT POSITION IN YOUR OWN MIND REGARDING THIS

CASE, WOULD YOU FEEL LIKE CONSULTING ANY OUTSIDE SOURCE OR SOMETHING FROM YOUR CHURCH TO HELP YOU MAKE A DECISION?

PROSPECTIVE JUROR S-3050: NO.

MR. DHANIDINA: NOW, THE CLARIFICATION YOU RECEIVED OVER THE WEEKEND, WAS THAT -- I MEAN LET'S JUST BE, YOU KNOW, CLEAR ABOUT THIS. WAS IT THAT YOU AT FIRST DIDN'T THINK THE CHURCH WAS OKAY WITH THE DEATH PENALTY AND THEN AFTERWARDS YOU REALIZED THAT THE CHURCH IS OKAY WITH IT?

HOW DID THAT GO?

PROSPECTIVE JUROR S-3050: I'M TRYING TO PHRASE THIS CORRECTLY. LET'S JUST SAY THAT THE WAY I BELIEVE, THE CHURCH ALSO AGREES WITH IT.

MR. DHANIDINA: AND IS IT BASED ON ANYTHING IN PARTICULAR WITH RESPECT TO THE RELIGION OR, YOU KNOW --

PROSPECTIVE JUROR S-3050: NO. BECAUSE WE HAVE ARTICLES OF FAITH IN OUR CHURCH, AND IT STATES THAT WE UPHOLD THE LAWS OF THE LAND WHETHER IT BE THE PRESIDENT, A JUDGE, A MAGISTRATE AND SO FORTH.

MR. DHANIDINA: OKAY. SO FOR EXAMPLE, THEN, IN THIS COURT YOU ARE GOING TO BE INSTRUCTED ON THE LAW, AND THE LAW IS THAT IF THE CIRCUMSTANCES SURROUNDING THIS CRIME AND SURROUNDING THE DEFENDANT IN AGGRAVATION SUBSTANTIALLY OUTWEIGH THE MITIGATING EVIDENCE OR THE GOOD EVIDENCE ON

THE DEFENDANT'S BEHALF, THAT THE DEATH PENALTY COULD BE APPROPRIATE.

COULD YOU -- BECAUSE YOU SEEM LIKE A VERY REFLECTIVE PERSON TO ME -- AS YOU SIT HERE RIGHT NOW -- YOU KNOW, WE ARE GOING TO REMOVE OURSELVES FROM THE QUESTIONNAIRE FOR A MINUTE AND TALK ABOUT SPECIFICS.

IN THAT CIRCUMSTANCE, AT THE END OF THE CASE, IF YOU BELIEVE THE AGGRAVATION SUBSTANTIALLY OUT WEIGHS THE MITIGATION, CAN YOU COME BACK OUT HERE IN THIS COURTROOM IN FRONT OF WHOEVER ELSE IS GOING TO BE IN HERE -- IT COULD BE FAMILY MEMBERS FROM THE VICTIMS, FROM THE DEFENDANT, AND THE DEFENDANT IS GOING TO BE SITTING RIGHT THERE. CAN YOU COME BACK IN HERE AND RENDER A VERDICT THAT SAYS KAI HARRIS, AS YOU SIT HERE TODAY, I AM VOTING THAT YOU DESERVE TO BE EXECUTED FOR YOUR CRIMES.

CAN YOU DO THAT?

PROSPECTIVE JUROR S-3050: YES, I CAN.

MR. DHANIDINA: OKAY. WHILE WE ARE ON THE TOPIC, IS THERE ANYBODY ELSE HERE WHO FEELS THAT, YOU KNOW, IF THEY ARE SELECTED AS A JUROR, THEY WOULD WANT TO CONSULT OUTSIDE GUIDANCE ON HOW TO DO THE JOB, EITHER THROUGH PRAYER OR THROUGH ACTUALLY TALKING TO SPECIFIC INDIVIDUALS? IS THERE ANYONE ELSE HERE WHO FEELS LIKE THEY MIGHT DO THAT?

PROSPECTIVE JUROR NO. 12.

PROSPECTIVE JUROR B-9815: I WOULD DEFINITELY PRAY OR MEDITATE OVER CHOOSING THE APPROPRIATE PATH.

MR. DHANIDINA: ANYBODY ELSE?

PROSPECTIVE JUROR G-6179: SAME HERE, SOME PRAYER, JUST PERSONAL.

MR. DHANIDINA: NO. 23. OKAY.

ANYONE ELSE?

NO. 18.

PROSPECTIVE JUROR J-6556: IT DEPENDS ON HOW YOU SAID THERE ARE SOME DISTURBING THINGS. YOU KNOW, I MIGHT PERHAPS YOU KNOW NEED SOME PRAYER TO, YOU KNOW, BE ABLE TO DEAL WITH IT MYSELF.

MR. DHANIDINA: OKAY. AND JUST TO CLARIFY, YOU ARE NOT SAYING THAT YOU WOULD I GUESS THROUGH THE COURSE OF YOUR PRAYER ASK FOR SOME SORT OF A SIGN OR A MESSAGE?

PROSPECTIVE JUROR J-6556: NO. NO.

MR. DHANIDINA: OKAY. THERE WAS SOME OTHER HAND BACK HERE, NO. 5.

PROSPECTIVE JUROR T-5208: NO, I WOULD JUST PRAY FOR WISDOM. BASICALLY THAT IS WHAT I DO ON A DAY-TO-DAY BASIS. SO I MEAN IT IS A BIG DECISION, AND I WOULD JUST PRAY FOR DISCERNMENT.

MR. DHANIDINA: NO. 26.

PROSPECTIVE JUROR V-4099: I WOULD PRAY ALSO FOR WISDOM AND FOR STRENGTH TO COME TO SOME

DECISION.

MR. DHANIDINA: OKAY. ANYONE ELSE?

NO. 13.

PROSPECTIVE JUROR D-5649: I ALSO WOULD PRAY JUST FOR WISDOM AND THE STRENGTH TO MAKE THE RIGHT DECISION.

MR. DHANIDINA: OKAY. AGAIN, THIS IS A VERY WEIGHTY DECISION. ONCE YOU MAKE THIS DECISION, IT IS ONE THAT YOU HAVE TO LIVE WITH FOR A LONG TIME, AND IF YOUR DECISION IS TO EXECUTE SOMEBODY, THAT'S -- THAT'S GOING TO BE ON YOU, RIGHT? YOU ARE NOT GOING TO BE ABLE TO SAY SOMEONE ELSE DECIDED, IT WILL BE YOU IF THAT IS YOUR DECISION. SO THAT IS SOMETHING I WANT TO MAKE SURE WE ARE ALL THINKING ABOUT.

PROSPECTIVE JUROR NO. 3, YOU INDICATED THAT -- I DON'T WANT TO MIX UP THE FACTS, BUT ON YOUR QUESTIONNAIRE YOU INDICATED SOMETHING ABOUT YOUR CHILD'S FATHER BEING A FORMER GANG MEMBER; IS THAT RIGHT?

PROSPECTIVE JUROR B-7993: CORRECT.

MR. DHANIDINA: DO YOU HAVE A RELATIONSHIP WITH HIM STILL?

PROSPECTIVE JUROR B-7993: HE PAYS CHILD SUPPORT. THAT'S IT.

MR. DHANIDINA: OKAY. WAS HE A GANG MEMBER WHILE YOU WERE WITH HIM?

PROSPECTIVE JUROR B-7993: NO, BEFORE.

MR. DHANIDINA: OKAY. YOUR BEST FRIEND'S SON WAS ALSO SHOT IN SORT OF A RANDOM STREET VIOLENCE TYPE OF CRIME?

PROSPECTIVE JUROR B-7993: HE WAS SHOT BY A FRIEND, ACQUAINTANCE, YEAH.

MR. DHANIDINA: WAS IT -- WHAT WAS THE DISPUTE OVER? CAN YOU TELL US? DID YOU KNOW?

PROSPECTIVE JUROR B-7993: IT WAS OVER THE CAR. SUPPOSEDLY HE BORROWED THE CAR, AND THE CAR WAS RETURNED WITH BULLET HOLES, BUT HE DIDN'T DRIVE, SO --

MR. DHANIDINA: OKAY. AND THERE WAS ANOTHER INSTANCE THAT WE DON'T NEED TO TALK ABOUT SPECIFICALLY IN OPEN COURT RIGHT NOW WHERE YOU INDICATED YOU YOURSELF WERE ACCUSED OF A CRIME AND YOU WERE LATER EXONERATED, CORRECT?

PROSPECTIVE JUROR B-7993: CORRECT.

MR. DHANIDINA: DO YOU HARBOR ANY ILL FEELINGS ABOUT THAT WHOLE PROCESS THAT YOU FEEL LIKE YOU WERE WRONGLY ACCUSED AND CHARGES WERE ACTUALLY BROUGHT?

PROSPECTIVE JUROR B-7993: NO. IT WAS SO LONG AGO. NO.

MR. DHANIDINA: OKAY.

JUROR NO. 4, YOU SAID IN YOUR QUESTIONNAIRE THAT THE DEATH PENALTY IS A DECISION THAT YOU ARE GOING TO LEAVE TO THE LAWYERS.

DO YOU REMEMBER SAYING THAT?

PROSPECTIVE JUROR R-5857: I BELIEVE, YES.

MR. DHANIDINA: WHAT DID YOU MEAN BY THAT?

PROSPECTIVE JUROR R-5857: BUT -- WELL, I WAS TRYING TO WRITE DOWN THAT WHAT THE OUTCOME OF THE QUESTIONNAIRES COME OUT BETWEEN THE LAWYERS, THEN I WILL MAKE MY DECISION.

MR. DHANIDINA: OKAY. SO YOU FEEL LIKE YOU COULD ACTUALLY MAKE THE DECISION, YOU ARE NOT GOING TO LEAVE IT TO THE JUDGE OR THE ATTORNEYS TO TELL YOU WHAT DECISION TO MAKE?

PROSPECTIVE JUROR R-5857: NO, I'M GOING TO GO BY THE FACTS OF WHAT THE ATTORNEYS ARE SAYING --

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR R-5857: -- OF THE CASE.

MR. DHANIDINA: DO YOU FEEL, THEN, THAT IF AT THE END OF THIS CASE THE AGGRAVATING EVIDENCE SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE, DO YOU FEEL THAT YOU COULD CONSIDER TO ACTUALLY COME BACK OUT HERE IN COURT AND TELL KAI HARRIS THAT YOU ARE VOTING TO HAVE HIM EXECUTED?

PROSPECTIVE JUROR R-5857: YES.

MR. DHANIDINA: ARE YOU SURE ABOUT THAT?

PROSPECTIVE JUROR R-5857: YES.

MR. DHANIDINA: OKAY. PROSPECTIVE JUROR NO. 6, YOU INDICATED SOMETHING WITH RESPECT TO YOUR SON HAVING A SITUATION WHERE HE WAS ACCUSED OF SOMETHING AND THEN RELEASED; IS THAT RIGHT?

PROSPECTIVE JUROR P-9765: YES.

MR. DHANIDINA: DO YOU HAVE ANY NEGATIVE FEELINGS ABOUT THAT WHOLE EXPERIENCE, WHAT THAT WAS LIKE?

PROSPECTIVE JUROR P-9765: OH, NO NEGATIVE. IT WAS FUN TO ME BECAUSE I HAD NEVER EXPERIENCED ANYTHING LIKE THAT, SO -- AND I WAS TREATED VERY NICE. FOR THE FIRST TIME, YOU KNOW, I HAVE -- LIKE I SAID, I HAVE NEVER EXPERIENCED THAT. SO IT WAS OKAY.

MR. DHANIDINA: OKAY. DO YOU FEEL THAT IF YOU WERE SELECTED AS A JUROR ON THIS CASE, THAT IF THE CIRCUMSTANCES WERE APPROPRIATE, YOU COULD COME BACK OUT INTO COURT AND PUBLICLY RENDER A VOTE TO EXECUTE KAI HARRIS?

PROSPECTIVE JUROR P-9765: YES.

MR. DHANIDINA: OKAY. PROSPECTIVE JUROR NO. 9, YOU GOT A LITTLE BIT EMOTIONAL WHEN YOU WERE TALKING ABOUT THIS BEFORE.

PROSPECTIVE JUROR J-0705: YES.

MR. DHANIDINA: AND AGAIN, LET ME JUST REITERATE, THE GOAL OF US HERE IS NOT TO PUT YOU ON THE SPOT OR TO JUDGE YOUR OPINIONS ONE WAY OR ANOTHER, BUT YOU SEEM LIKE SOMEONE WHO HAS THOUGHT ABOUT THIS, YOU KNOW, THAT YOU HAVE REFLECTED A LITTLE BIT ON BEING ON A CASE LIKE THIS.

PROSPECTIVE JUROR J-0705: RIGHT.

MR. DHANIDINA: ONE OF THE FIRST THINGS YOU

SAID WHEN THE JUDGE WAS ASKING YOU WAS THAT YOU ARE OPPOSED TO THE DEATH PENALTY; IS THAT RIGHT?

PROSPECTIVE JUROR J-0705: YES, SIR.

MR. DHANIDINA: DO YOU FEEL THAT IT'S WRONG?

PROSPECTIVE JUROR J-0705: YES.

MR. DHANIDINA: DO YOU FEEL LIKE IT'S WRONG MORALLY?

PROSPECTIVE JUROR J-0705: WELL, THE THING ABOUT IT IS, YEAH. I'M JUST -- I'M JUST AGAINST IT, PERIOD.

MR. DHANIDINA: OKAY. SO IF THERE WERE A VOTE IN CALIFORNIA TO GET RID OF THE DEATH PENALTY, WOULD YOU VOTE TO GET RID OF IT?

PROSPECTIVE JUROR J-0705: I DON'T KNOW ABOUT -- THAT I CAN'T REALLY SAY.

MR. DHANIDINA: YOU WOULD VOTE FOR IT?

PROSPECTIVE JUROR J-0705: I DON'T KNOW RIGHT NOW AS FAR AS LIKE I WOULD VOTE -- I PROBABLY WOULDN'T EVEN VOTE.

MR. DHANIDINA: OKAY. BUT YOU FEEL THAT IT'S MORALLY WRONG TO HAVE THE STATE SANCTION TAKING SOMEBODY'S LIFE?

PROSPECTIVE JUROR J-0705: WELL, TO TELL YOU THE TRUTH, IT DEPENDS ON THE CIRCUMSTANCES, YOU KNOW, IF THEY REALLY -- IF THEY DESERVE TO HAVE THE DEATH PENALTY, BUT AS FAR AS ME CONCERNED, I'M AGAINST IT.

MR. DHANIDINA: OKAY. YOU SAID YOU DON'T

WANT TO BE IN A POSITION WHERE YOU HAVE TO JUDGE SOMEONE ELSE'S LIFE.

PROSPECTIVE JUROR J-0705: THAT'S CORRECT.

MR. DHANIDINA: YOU DON'T WANT TO BE THE PERSON WHO HAS TO COME INTO COURT AND TO PUBLICLY SAY, OKAY, YOU DESERVE TO DIE, OR YOU DESERVE LIFE EVEN THOUGH YOU KILLED SOME PEOPLE. YOU DON'T WANT TO BE PUT IN THAT POSITION?

PROSPECTIVE JUROR J-0705: THAT'S CORRECT.

MR. DHANIDINA: DO YOU FEEL, THEN, IF YOU WERE A JUROR ON THIS CASE, THAT SOME OF THESE PERSONAL FEELINGS THAT YOU HAVE WOULD AFFECT YOUR ABILITY TO REALLY GIVE A FAIR SHAKE TO BOTH SIDES?

PROSPECTIVE JUROR J-0705: TO BE HONEST, YES.

MR. DHANIDINA: OKAY. THANK YOU FOR YOUR HONESTY BECAUSE, AGAIN, WE ARE JUST TRYING TO FIGURE OUT WHAT IS GOING ON INSIDE YOUR MIND. NOBODY HAS TO DO ANYTHING THAT THEY DON'T WANT TO DO, RIGHT, IN A SITUATION.

PROSPECTIVE JUROR J-0705: THANK YOU.

MR. DHANIDINA: PROSPECTIVE JUROR NO. 13, YOU WORK FOR THE CITY ATTORNEY'S OFFICE?

PROSPECTIVE JUROR D-5649: CORRECT.

MR. DHANIDINA: AS A PROSECUTOR, YOU -- I DON'T WANT TO PUT WORDS IN YOUR MOUTH, BUT YOU KNOW, I MAY HAVE SOME INSIGHT ON THIS. PART OF THE REASON WHY YOU HAVE THIS JOB IS BECAUSE WHEN YOU GO INTO COURT, YOU TAKE POSITIONS THAT YOU

BELIEVE ARE THE RIGHT -- THE CORRECT DECISIONS TO TAKE; IS THAT RIGHT?

PROSPECTIVE JUROR D-5649: CORRECT. I LIKE TO SEE THAT JUSTICE IS SERVED.

MR. DHANIDINA: RIGHT. AND AS A JUROR, NOW, THE JUDGE SAYS, OKAY, YOU ARE NOT GOING TO BE A PROSECUTOR ANYMORE, YOU ARE GOING TO BE, YOU KNOW, UNBIASED IN THAT SENSE.

YOU INDICATED THAT YOU ARE OPPOSED TO THE DEATH PENALTY ALSO; IS THAT RIGHT?

PROSPECTIVE JUROR D-5649: NO. I SAID IN GENERAL. I'M ONE OF THESE TYPE OF PEOPLE THAT FEEL, AS I MENTIONED, THAT THERE ARE CASES WHERE IT IS APPROPRIATE. BUT JUST, I GUESS IF YOU JUST ASK ME, YOU KNOW, WOULD YOU BELIEVE OR DO YOU BELIEVE IN THE DEATH PENALTY, I'M KIND OF ON THE FENCE, AND IN GENERAL I DON'T BELIEVE IN THE DEATH PENALTY.

MR. DHANIDINA: OKAY. I GUESS WHAT I'M TRYING TO GET AT IS, WHEN YOU SAY YOU DON'T BELIEVE IN IT IN GENERAL, WHAT IS THAT BASED ON? IS THAT BECAUSE YOU DON'T THINK IT'S A GOOD PUBLIC POLICY, OR YOU DON'T THINK IT'S A MORAL PENALTY TO HAVE IN OUR SYSTEM? WHAT IS THAT BASED ON?

PROSPECTIVE JUROR D-5649: I GUESS IT'S BASED ON KNOWING THE CRIMINAL JUSTICE SYSTEM, KNOWING PENALTIES AND WHAT HAPPENS TO PEOPLE. I GUESS I KIND OF FEEL AS THOUGH IF SOMEONE IS PUT TO DEATH,

THEY ARE NOT REALLY GOING THROUGH THE PUNISHMENT PHASE AND GOING THROUGH -- THEY ARE BASICALLY BEING PUT TO DEATH AND THEY ARE NOT HAVING TO LIVE OUT AND DEAL WITH WHAT THEY HAVE DONE.

MR. DHANIDINA: OH, INTERESTING. OKAY.

AND THIS IS SOMETHING THAT COMES UP A LOT IN THESE CASES. AND CORRECT ME IF I'M PUTTING WORDS IN YOUR MOUTH. DO YOU THINK THAT IN SOME WAYS IF YOU ARE EXECUTED, YOU ARE ALMOST GETTING OFF EASY BECAUSE YOU ARE NOT SERVING OUT THE ENTIRETY OF A LIFE SENTENCE.

IS THAT WHAT YOU ARE SAYING?

PROSPECTIVE JUROR D-5649: IN SOME WAYS. BUT THEN AS I MENTIONED, ON THE OTHER HAND, THERE ARE CIRCUMSTANCES THAT YOU CAN TELL ME AND I WOULD SAY -- I WOULD FEEL DIFFERENTLY. I WOULD FEEL AS THOUGH, NO, THAT WOULD BE APPROPRIATE FOR THIS PERSON.

MR. DHANIDINA: DO YOU BELIEVE THAT A LIFE SENTENCE OR LIFE WITHOUT PAROLE IS IN SOME WAYS A MORE SEVERE SENTENCE THAN A DEATH SENTENCE?

PROSPECTIVE JUROR D-5649: IT DEPENDS ON THE CIRCUMSTANCES.

MR. DHANIDINA: THE CIRCUMSTANCES WITH RESPECT TO THE CRIME OR THE DEFENDANT?

PROSPECTIVE JUROR D-5649: CIRCUMSTANCES WITH REGARDS TO THE CRIME AND POSSIBLY THE DEFENDANT.

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR D-5649: IT'S HARD FOR ME TO SEPARATE, BUT I WOULD SAY DEPENDING ON THE CRIME AND WHAT HAS BEEN DONE.

MR. DHANIDINA: IS THERE ANYBODY HERE WHO BELIEVES THAT A LIFE SENTENCE -- SERVING LIFE IN PRISON WHERE YOU ARE LOCKED UP AND, YOU KNOW, YOU ARE BASICALLY IN A CELL FOR THE REST OF YOUR LIFE, THAT THAT IS ACTUALLY WORSE THAN BEING EXECUTED?

THERE IS A VARIETY OF HANDS. I WILL TRY TO GO IN ORDER.

OKAY. NO. 15.

PROSPECTIVE M-7163: YES.

MR. DHANIDINA: YOU BELIEVE THAT?

PROSPECTIVE M-7163: YES, I DO.

MR. DHANIDINA: WHY DO YOU THINK THAT'S TRUE?

PROSPECTIVE JUROR M-7163: BECAUSE THE PERSON HAS RUINED THEIR LIFE AND NOW THEY HAVE TO REFLECT ON IT FOR THE REST OF THEIR LIFE, WHAT THEY DID.

MR. DHANIDINA: OKAY. LET'S JUST SAY -- WELL, LET ME ASK SOME OF THE OTHER JURORS.

JUROR NO. 6, YOU ALSO RAISED YOUR HAND.

PROSPECTIVE JUROR P-9765: NO, NEVER MIND.

MR. DHANIDINA: OKAY. ONE OF THE JURORS IN FRONT HERE.

NO. 23.

PROSPECTIVE JUROR G-6179: I FEEL THE SAME THAT HE JUST MENTIONED, IT JUST FEELS LIKE A

COP-OUT.

MR. DHANIDINA: SO ACTUALLY YOU THINK IT WOULD BE MORE PUNISHMENT TO GIVE SOMEONE A LIFE SENTENCE VERSUS A DEATH SENTENCE?

PROSPECTIVE JUROR G-6179: YES.

MR. DHANIDINA: NO. 25, YOU THINK THAT IS TRUE ALSO?

PROSPECTIVE JUROR R-9855: YES.

MR. DHANIDINA: NOW, WHAT IF HYPOTHETICALLY -- WE WILL GET BACK TO YOU, JUROR 15.

LET'S SAY THE PERSON WHO COMMITTED THE CRIME ACTUALLY HAD POSITIVE FEELINGS ABOUT IT, ACTUALLY THOUGHT THAT IT WAS A GOOD THING. WOULD THAT PERSON SITTING IN A CELL FOR THE REST OF THEIR LIVES REFLECT IN A WAY THAT WOULD TORTURE THEM, OR DO YOU THINK IT'S POSSIBLE THAT SOME PEOPLE MIGHT BE ABLE TO LIVE OUT THE REST OF THEIR LIVES NOT BOTHERED AT ALL BY WHAT THEY HAVE DONE?

PROSPECTIVE JUROR M-7163: THAT'S POSSIBLE.

MR. DHANIDINA: SO YOU ARE SAYING BASICALLY IF THE PERSON HAS A CONSCIENCE ABOUT IT, THAT IT COULD BE TORTURE TO HAVE TO THINK ABOUT IT ALL THE TIME; IS THAT RIGHT?

PROSPECTIVE JUROR M-7163: YES, SIR.

MR. DHANIDINA: BUT IF THE PERSON DOESN'T HAVE A CONSCIENCE ABOUT IT, ACTUALLY THINKS IT'S A GOOD THING, THEN IT WOULDN'T NECESSARILY -- THEY

WOULDN'T FALL IN THAT SAME CATEGORY; IS THAT RIGHT?

PROSPECTIVE JUROR M-7163: NO, SIR.

MR. DHANIDINA: OKAY. BACK TO YOU JUROR NO. 13. SORRY FOR THE SEGUE.

PROSPECTIVE JUROR D-5649: THAT'S ALL RIGHT.

MR. DHANIDINA: IF YOU WERE SELECTED AS A JUROR ON THIS CASE, HAVE YOU ALREADY IN YOUR MIND THOUGHT OF TYPES OF CIRCUMSTANCES THAT YOU WOULD HAVE TO SEE IN ORDER TO RENDER ONE DECISION OR ANOTHER? FOR EXAMPLE, YOU KNOW, I KNOW IN ADVANCE I BETTER HEAR THAT, YOU KNOW, THIS MAY HAVE HAPPENED TO THE DEFENDANT IN HIS LIFE FOR ME TO GIVE HIM LIFE, OR I BETTER HEAR THAT HE KILLED A BUNCH OF LITTLE KIDS IN ORDER FOR ME TO GIVE HIM DEATH? HAVE YOU ALREADY THOUGHT OF THE TYPES OF CIRCUMSTANCES YOU ARE LOOKING FOR?

PROSPECTIVE JUROR D-5649: NO. AND I'M LISTENING TO YOU.

YOU KNOW, I UNDERSTAND FROM BEING INSTRUCTED OR JUST BEING INFORMED BY THE JUDGE THAT YOU HAVE TO HAVE SUBSTANTIAL AGGRAVATING FACTORS TO EVEN CONSIDER THE DEATH PENALTY. THAT DOESN'T MEAN THAT YOU HAVE TO VOTE THAT WAY. AND IF YOU HAVE SUBSTANTIAL MITIGATING FACTORS, THEN YOU HAVE TO FIND FOR LIFE IMPRISONMENT.

MR. DHANIDINA: THAT'S RIGHT.

PROSPECTIVE JUROR D-5649: SO THAT'S MY

POSITION RIGHT NOW.

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR D-5649: SO I'M NOT REALLY THINKING ABOUT CIRCUMSTANCES. I THINK THAT IS ONE OF THOSE THINGS THAT WHEN IT HITS YOU, AS FAR AS ALL THE AGGRAVATING CIRCUMSTANCES, THEN I WOULD HAVE TO MAKE THAT CHOICE. AND I HAVEN'T THOUGHT OF NECESSARILY WHAT WOULD CAUSE ME TO FEEL THAT SOMEONE SHOULD BE PUT TO DEATH.

MR. DHANIDINA: OKAY. THE ONLY REASON WHY I ASK IS THERE WERE SOME OTHER QUESTIONNAIRES WHERE PEOPLE WERE SAYING, YOU KNOW, THE DEATH PENALTY SHOULD BE RESERVED FOR SERIAL KILLERS OR CHILD PREDATORS OR THAT SORT OF THING. THAT IS THE ONLY REASON WHY I ASKED YOU THAT.

DO YOU FEEL THAT IF YOU ARE PUT IN A SITUATION WHERE THE AGGRAVATING EVIDENCE DOES SUBSTANTIALLY OUTWEIGH THE MITIGATING EVIDENCE THAT YOU CAN FAIRLY CONSIDER COMING INTO COURT AND TELLING KAI HARRIS AS HE SITS HERE ON THAT DAY THAT HE DESERVES TO DIE FOR HIS CRIMES?

PROSPECTIVE JUROR D-5649: I'M SORRY, ASK YOUR QUESTION AGAIN.

MR. DHANIDINA: YES.

IF YOU FEEL THAT THE AGGRAVATING EVIDENCE SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE, CAN YOU CONSIDER COMING BACK OUT, RENDERING YOUR VERDICT IN OPEN COURT AND TELLING

KAI HARRIS THAT HE DESERVES TO DIE FOR HIS CRIMES?

PROSPECTIVE JUROR D-5649: IF THAT WERE MY VERDICT. BUT ONCE AGAIN, IT WOULD BE SOMETHING -- I'M NOT REQUIRED TO COME BACK -- AND EVEN IF THE CIRCUMSTANCES ARE AGGRAVATING, I'M NOT REQUIRED TO FIND FOR THE DEATH PENALTY. BUT I WOULD DEFINITELY CONSIDER IT AMONGST AND SPEAK OVER THAT WITH MY FELLOW JURORS.

MR. DHANIDINA: THAT WAS THE QUESTION, IF YOU WOULD CONSIDER IT?

PROSPECTIVE JUROR D-5649: YES.

MR. DHANIDINA: THANK YOU.

JUROR NO. 14, YOU INDICATED A COUPLE OF THINGS THAT I WANTED TO ASK YOU ABOUT.

YOU HAVE BEEN ON JURY SERVICE BEFORE A COUPLE OF TIMES; IS THAT RIGHT?

PROSPECTIVE JUROR J-2466: YES. YES.

MR. DHANIDINA: AND IF I'M NOT MISTAKEN, TWO OF THE JURIES YOU WERE ON WERE CRIMINAL CASES?

PROSPECTIVE JUROR J-2466: YES.

MR. DHANIDINA: WERE THEY IN THIS BUILDING?

PROSPECTIVE JUROR J-2466: YES.

MR. DHANIDINA: BUT NOT IN THIS COURTROOM?

PROSPECTIVE JUROR J-2466: NO.

MR. DHANIDINA: OKAY. AND THOSE TWO CRIMINAL CASES THAT YOU WERE ON, BOTH OF THOSE JURIES REACHED VERDICTS; IS THAT RIGHT?

PROSPECTIVE JUROR J-2466: UH-HUH.

MR. DHANIDINA: IN THIS CASE, AS THE JUDGE HAS INSTRUCTED YOU, THE DETERMINATION OF GUILT OR INNOCENCE THAT YOU HAD TO MAKE IN THOSE OTHER CASES, THAT HAS ALREADY BEEN MADE, AND THE FACT THAT KAI HARRIS HAS BEEN CONVICTED OF TWO COUNTS OF MURDER, TWO COUNTS OF ATTEMPTED MURDER, THAT IS ALREADY SETTLED.

CAN YOU SORT OF PUT THAT ISSUE ASIDE AND FOCUS SIMPLY ON WHAT PENALTY YOU THINK KAI HARRIS DESERVES TO HAVE IN THIS CASE?

PROSPECTIVE JUROR J-2466: YES.

MR. DHANIDINA: AND IS PART OF YOU GOING TO BE A LITTLE BIT CURIOUS ABOUT, YOU KNOW, WHAT I'M HEARING ABOUT THIS OTHER GUY WHO MAY HAVE DONE THE CRIME WITH HIM, WHAT DID HIS JURY DO WITH HIS CASE? ARE YOU GOING TO LET THAT ENTER INTO YOUR MIND?

PROSPECTIVE JUROR J-2466: NO.

MR. DHANIDINA: YOU WON'T BE CURIOUS ABOUT THAT AT ALL?

PROSPECTIVE JUROR J-2466: NO.

MR. DHANIDINA: OKAY. AND AGAIN, I DON'T WANT TO PUT YOU ON THE SPOT, BUT YOU INDICATED YOU HAD A BROTHER THAT WAS IN SOME FORM OF CUSTODY FOR I GUESS IT'S A STATUTORY RAPE SITUATION?

PROSPECTIVE JUROR J-2466: NO. HE -- TWO YEARS AGO, MINOR WAS FEMALE UNDER 18, INAPPROPRIATE TOUCHING.

MR. DHANIDINA: INAPPROPRIATE TOUCHING?
PROSPECTIVE JUROR J-2466: UH-HUH.
MR. DHANIDINA: HOW OLD WAS HE AT THE TIME?
PROSPECTIVE JUROR J-2466: 40 SOMETHING.
MR. DHANIDINA: OKAY. DID HE -- WHERE DID HE DO HIS CUSTODY? IS IT HERE IN THE COUNTY, OR IS IT SOME OTHER PART OF THE STATE?
PROSPECTIVE JUROR J-2466: HE IS IN -- I DON'T KNOW WHERE THAT -- BLITHE CALIFORNIA.
MR. DHANIDINA: DID YOU KNOW WHO THE GIRL WAS?
PROSPECTIVE JUROR J-2466: I KNEW HER WHEN SHE WAS A CHILD, LIKE FIVE, SIX.
MR. DHANIDINA: SO SHE WAS AN ACQUAINTANCE OF THE FAMILY, I GUESS?
PROSPECTIVE JUROR J-2466: HE DATED THE MOTHER.
MR. DHANIDINA: HE DATED HER MOTHER?
PROSPECTIVE JUROR J-2466: HE DATED HER MOTHER.
MR. DHANIDINA: DID YOU EVER TALK TO YOUR BROTHER ABOUT THAT SITUATION?
PROSPECTIVE JUROR J-2466: NO. I NEVER KNEW ABOUT IT UNTIL IT CAME OUT.
MR. DHANIDINA: DID HE HAVE A TRIAL?
PROSPECTIVE JUROR J-2466: NO. HE ADMITTED TO IT AND AVOIDED THE TRIAL.
MR. DHANIDINA: SO YOU HAVEN'T TALKED TO HIM

ABOUT IT AT ALL?

PROSPECTIVE JUROR J-2466: I TALKED TO HIM ONCE WE FOUND OUT TWO YEARS AGO, BUT NOT WHEN SHE WAS A CHILD. SHE WAS A TEENAGER AT THAT TIME.

MR. DHANIDINA: AND DID HE GIVE YOU AN EXPLANATION ABOUT WHAT HAPPENED?

PROSPECTIVE JUROR J-2466: WELL, HE SORT OF WITHHELD THE TRUTH. I STILL DON'T KNOW THE DETAILS OF WHAT HAPPENED, JUST BITS AND PIECES FROM HIM AND HIM ONLY. THE MOTHER NEVER SAID ANYTHING. THERE WAS NO TRIAL, SO I DON'T KNOW WHAT THE TRUTH REALLY IS.

MR. DHANIDINA: YOU FEEL LIKE YOU WEREN'T GETTING THE FULL STORY?

PROSPECTIVE JUROR J-2466: YEAH. I KNOW I WASN'T.

MR. DHANIDINA: OKAY. IF YOU ARE ON A CASE LIKE THIS -- AND I KNOW YOU SERVED ON SOME PRETTY SERIOUS TRIALS IN THE PAST -- AND IF YOU WERE PERSUADED THAT THE AGGRAVATING EVIDENCE SUBSTANTIALLY OUTWEIGHS THE MITIGATING EVIDENCE TO THE POINT WHERE YOU BELIEVE THAT THE DEATH PENALTY IS THE APPROPRIATE AND FAIR PUNISHMENT IN THIS CASE, DO YOU FEEL THAT YOU HAVE IT IN YOU TO COME OUT INTO OPEN COURT AND TO RENDER THAT VERDICT IN FRONT OF EVERYBODY?

PROSPECTIVE JUROR J-2466: YES, I DO. YES.

MR. DHANIDINA: OKAY. THANK YOU.

I ONLY HAVE A FEW MORE TO GO.

JUROR NO. 23, YOU INDICATED I THINK WHEN THE JUDGE WAS QUESTIONING YOU, ALSO WHEN THE DEFENSE ATTORNEY WAS QUESTIONING YOU, THAT NOW YOU HAVE HAD SOME TIME TO THINK ABOUT IT SINCE YOU WROTE OUT THE QUESTIONNAIRE, THAT YOU ARE NOT SURE THAT YOU COULD RENDER A DEATH VERDICT IN THIS CASE?

PROSPECTIVE JUROR G-6179: IT WOULD BE VERY HARD FOR ME. I WOULD LIKE TO KEEP THE OPTION OPEN, BUT IT WOULD BE EXTREMELY DIFFICULT.

MR. DHANIDINA: OKAY. WELL, I THINK IT'S NOT A DECISION THAT ANYONE ON A CASE LIKE THIS WOULD EVER FIND EASY. WHAT I'M TRYING TO UNDERSTAND IS -- YOU KNOW YOURSELF BETTER THAN I DO OR ANYBODY ELSE. IF YOU FELT THAT IT WAS THE APPROPRIATE PENALTY BASED ON THE EVIDENCE THAT YOU HEARD, COULD YOU PERSONALLY MAKE YOURSELF RESPONSIBLE FOR VOTING TO EXECUTE KAI HARRIS IN THIS CASE?

PROSPECTIVE JUROR G-6179: THAT IS THE PART THAT I'M NOT SURE OF. I REALLY CAN'T TELL YOU YEAH OR NO BECAUSE IT COULD CHANGE.

MR. DHANIDINA: REALLY?

PROSPECTIVE JUROR G-6179: YEAH.

MR. DHANIDINA: SO YOU ARE SAYING THAT AS WE PROCEED ON THIS CASE, YOU ARE NOT IN A POSITION TO LET US KNOW ONE WAY OR THE OTHER THAT YOU CAN KEEP

AN OPEN MIND AS TO THE PENALTY?

PROSPECTIVE JUROR G-6179: I WOULD WANT TO KEEP AN OPEN MIND BUT I CAN'T TELL YOU HUNDRED PERCENT THAT I'M ABLE TO TELL SOMEBODY, YEAH, I WANT THEIR LIFE TAKEN WAY FOR WHATEVER REASON.

MR. DHANIDINA: OKAY. SO YOU FEEL AS YOU SIT HERE TODAY THAT YOU DON'T HAVE THE ABILITY INSIDE, KNOWING YOURSELF, AS WE SIT HERE TODAY, TO ASSURE US ALL THAT IN THE END YOU CAN BE OPEN EQUALLY TO BOTH POTENTIAL PENALTIES IN THIS CASE?

PROSPECTIVE JUROR G-6179: CORRECT.

JUROR NO. 25, SAME QUESTION FOR YOU. BECAUSE YOU HAVE EXPRESSED SOME RESERVATION ABOUT IT. KNOWING YOURSELF, YOU SAID THAT JUST THINKING ABOUT IT HAS CAUSED SOME ANXIETY FOR YOU. AND YOU KNOW, I THINK EVERYBODY HERE RESPECTS THAT. SO KNOWING WHAT IS GOING ON INSIDE OF YOUR OWN HEAD AND INSIDE OF YOUR OWN HEART ABOUT BEING A JUROR POSSIBLY ON A DEATH PENALTY CASE, DO YOU FEEL THAT YOU PERSONALLY, IF YOU ARE PERSUADED THAT DEATH IS THE APPROPRIATE SENTENCE, THAT YOU COULD MAKE YOURSELF RESPONSIBLE FOR THE EXECUTION OF THE DEFENDANT IN THIS CASE?

PROSPECTIVE JUROR R-9855: I DON'T KNOW. I FEEL LIKE COMPLETELY I UNDERSTAND HIS FEELINGS. I'M COMPLETELY OPEN RIGHT NOW, AND I FEEL LIKE THERE ARE TIMES WHEN THE DEATH PENALTY SEEMS APPROPRIATE IN THE ABSTRACT, AND THERE ARE TIMES

THAT IT FEELS APPROPRIATE, BUT I DON'T KNOW THAT I COULD COME OUT HERE AND SAY TO SOMEONE I DECIDE THAT YOU ARE DYING.

MR. DHANIDINA: RIGHT. AND THE ABSTRACT IS A COMPLETELY DIFFERENT SITUATION --

PROSPECTIVE JUROR R-9855: YEAH.

MR. DHANIDINA: -- FROM REAL LIFE.

I MEAN HERE YOU ARE POSSIBLY A JUROR ON A CASE WITH A JUDGE AND THE PROSECUTOR AND DEFENSE ATTORNEY AND THE ACTUAL DEFENDANT WHO HAS ALREADY BEEN DETERMINED IS GUILTY OF MURDER. SO NOW YOU ARE IN A SITUATION NOT OF DECIDING IF HE DID IT OR NOT BUT WHAT HAPPENS TO HIM. AND IF YOU VOTE FOR LIFE OR IF YOU VOTE FOR DEATH, THAT IS A VOTE THAT YOU WILL HAVE TO LIVE WITH AND YOU KNOW SLEEP AT NIGHT WITH INDEFINITELY. THAT'S THE REALITY OF IT.

YOU KNOW, THIS PODIUM WILL PROBABLY BE SITTING IN THE EXACT SAME SPOT AT THE END OF THE TRIAL WHEN I GET UP HERE AND THE DEFENSE ATTORNEY GETS UP HERE AND WE ASK YOU TO IMPOSE THE DEATH SENTENCE OR A LIFE SENTENCE, AND YOU WILL BE SITTING IN ONE OF THESE CHAIRS. DO YOU THINK THAT YOU HAVE IT INSIDE OF YOU AS YOU SIT HERE TODAY TO REALLY HONESTLY BE OPEN EQUALLY TO BOTH PENALTIES IN THIS CASE?

PROSPECTIVE JUROR R-9855: I FEEL LIKE THE MORE I THINK ABOUT IT, THE MORE I LEAN TOWARDS

JUST LIFE IN PRISON IN GENERAL, BUT -- AND I DON'T KNOW WHAT WOULD MEET -- I DON'T KNOW WHAT WOULD CONCRETELY BE LIKE REALLY, REALLY HORRIBLE, HORRIBLE LIKE AGGRAVATING FACTORS, BUT I GUESS IF I KNEW REALLY, LIKE, YOU KNOW, I GUESS IT JUST OCCURS TO YOU OR DOESN'T THAT SOMETHING IS REALLY, REALLY HORRIBLE AND THEN THE DEATH PENALTY IS BEING SERVED, AND IN THAT CASE I FEEL LIKE I WOULD BE ABLE TO.

MR. DHANIDINA: OKAY. WELL, THAT'S REALLY WHAT I'M GETTING AT HERE. NOT TO PREJUDGE THE EVIDENCE WHICH IS WHY WE ARE NOT TALKING ABOUT WHAT THE EVIDENCE IS GOING TO BE IN THIS CASE, BUT YOU FEEL AS YOU SIT HERE TODAY THAT THERE ARE CERTAIN CIRCUMSTANCES CONCEIVABLY THAT YOU COULD HEAR THAT UNDER WHICH YOU PERSONALLY COULD TELL THE DEFENDANT IN THIS CASE THAT THE APPROPRIATE SENTENCE IS FOR HIM TO DIE FOR THE CRIMES THAT HE HAS COMMITTED.

DO YOU THINK YOU CAN DO THAT?

PROSPECTIVE JUROR R-9855: I DON'T KNOW IF I COULD SAY THAT TO SOMEONE. I THINK I COULD POSSIBLY FEEL THAT WAY, BUT I DON'T KNOW IF I COULD LIKE MAKE A FINAL DECISION THAT'S THAT HEAVY.

MR. DHANIDINA: OKAY.

JUROR NO. 26, YOU INDICATED ON YOUR QUESTIONNAIRE A FEW THINGS KIND OF SIMILAR TO WHAT

SOME OTHER JURORS HAVE SAID, SPECIFICALLY I THINK I QUOTED HERE THAT YOU DON'T BELIEVE IN THE DEATH PENALTY.

IS THAT RIGHT?

PROSPECTIVE JUROR V-4099: THAT IS CORRECT.

MR. DHANIDINA: PART OF THAT IS BASED ON YOUR UPBRINGING AND SOME OF YOUR PERSONAL RELIGIOUS BELIEFS?

PROSPECTIVE JUROR V-4099: CORRECT.

MR. DHANIDINA: OKAY. DO YOU BELIEVE THAT IT'S IMMORAL TO HAVE A DEATH PENALTY?

PROSPECTIVE JUROR V-4099: I DON'T BELIEVE IT'S IMMORAL TO HAVE A DEATH PENALTY. I JUST DON'T BELIEVE THAT I COULD VOTE FOR DEATH PENALTY.

MR. DHANIDINA: UNDER ANY CIRCUMSTANCE?

PROSPECTIVE JUROR V-4099: ONCE AGAIN, I WOULD HAVE TO HEAR THE CIRCUMSTANCES TO BE ABLE TO GIVE YOU THAT ANSWER.

MR. DHANIDINA: YOU ALSO SAID IN YOUR QUESTIONNAIRE THAT YOU DIDN'T THINK CALIFORNIA SHOULD HAVE A DEATH PENALTY.

PROSPECTIVE JUROR V-4099: I DON'T BELIEVE PENALTIES SHOULD BE AROUND, PERIOD. I JUST DON'T AGREE WITH THE TAKING SOMEONE ELSE'S LIFE. AN EYE FOR AN EYE JUST LEAVES SOMEBODY BLIND.

MR. DHANIDINA: OKAY. YOU KNOW, AGAIN I THINK THAT IS A LEGITIMATE OPINION AS ANY OTHER THAT WE'VE HEARD IN COURT. SO I THINK WHAT I'M

TRYING TO GET AT IS, IF YOU DON'T THINK THE STATE HAS A RIGHT TO TAKE SOMEONE ELSE'S LIFE AND YOU PERSONALLY THINK THE DEATH PENALTY IS WRONG, DO YOU STILL FEEL THAT YOU CAN SERVE ON A JURY THAT ULTIMATELY COMES TO THE DECISION TO EXECUTE SOMEBODY?

PROSPECTIVE JUROR V-4099: NO, I DON'T.

MR. DHANIDINA: OKAY. THANKS AGAIN FOR YOUR HONESTY.

AND FINALLY JUROR NO. 27, YOU KNOW, NO SURPRISE HERE BECAUSE I HAVE BEEN ASKING THE SAME QUESTIONS.

DO YOU FEEL THAT YOU CAN SERVE ON A JURY THAT IF THE EVIDENCE INDICATES THAT DEATH IS THE APPROPRIATE PUNISHMENT, CAN YOU BE ON A JURY THAT RENDERS A VERDICT OF DEATH FOR THE DEFENDANT IN THIS CASE, KAI HARRIS?

PROSPECTIVE JUROR G-6745: YES.

MR. DHANIDINA: DO YOU FEEL YOU COULD DO THAT?

PROSPECTIVE JUROR G-6745: YES, I CAN DO THAT.

MR. DHANIDINA: YOU COULD SLEEP AT NIGHT?

PROSPECTIVE JUROR G-6745: I THINK EVERY CRIME DESERVES PUNISHMENT, AND WHEN YOU -- EVERYTHING THAT YOU DO IN YOUR LIFE YOU HAVE TO BE RESPONSIBLE AND ACCEPT THE CONSEQUENCES.

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR G-6745: AND IF WHAT YOU PRESENTED IS NOT ENOUGH, I DON'T SEE WHY NOT.

MR. DHANIDINA: OKAY. AND FINALLY JUST A FEW MORE QUESTIONS JUST FOR THE GROUP.

IS THERE ANYONE HERE WHO BELIEVES THAT THE DEATH PENALTY SHOULD BE RESERVED ONLY FOR CASES WHERE THERE ARE CERTAIN TYPES OF VICTIMS? AND BY THAT I MEAN ONLY IF THE VICTIM IS A CHILD OR ONLY IF THE VICTIM IS FROM A NICE NEIGHBORHOOD OR A WELL TO DO BACKGROUND? IS THERE ANYONE WHO FEELS THAT WAY AT ALL?

NO.

PROSPECTIVE JUROR NO. 6, YOU KIND OF SMIRKED AT THE PREPOSTEROUS IDEA THAT I STATED.

PROSPECTIVE JUROR P-9765: I'M SORRY.

MR. DHANIDINA: IT IS PREPOSTEROUS. BUT YOU KNOW, PEOPLE KIND OF FEEL SOMETIMES WHEN THEY ARE WEIGHING THE CASE THE CRIME IS NOT AS BAD IF A CERTAIN TYPE OF PERSON, SO TO SPEAK, IS KILLED, VERSUS ANOTHER TYPE OF PERSON.

DO YOU THINK THAT WOULD BE APPROPRIATE?

PROSPECTIVE JUROR P-9765: WHY SHOULD IT MATTER WHAT TYPE AND WHERE HE LIVED? I MEAN I DON'T UNDERSTAND THAT.

MR. DHANIDINA: OKAY. I UNDERSTAND THAT.

WHAT ABOUT IF ONE OF THE VICTIMS -- NOT AT THE TIME HE WAS KILLED, BUT LET'S SAY ONE

OF THE VICTIMS HAD A PAST WHERE HE WAS INVOLVED IN GANG-BANGING AND VIOLENCE HIMSELF. DO YOU THINK THAT KILLING THAT PERSON IS NOT AS BAD AS KILLING SOMEBODY ELSE?

PROSPECTIVE JUROR P-9765: SAY THAT AGAIN. I'M SORRY.

MR. DHANIDINA: WELL, YOU HAVE TWO VICTIMS IN THIS CASE.

PROSPECTIVE JUROR P-9765: YES.

MR. DHANIDINA: LET'S JUST SAY ONE OF THE VICTIMS HAD SORT OF A CHECKERED PAST, WAS INVOLVED IN CRIME AND GANGS HIMSELF.

THE COURT: I THINK THIS IS A LITTLE CLOSE TO PREJUDGING THE CASE.

MR. DHANIDINA: OKAY.

WELL, LET'S NOT TALK SPECIFICALLY ABOUT THIS CASE. BUT DO YOU THINK THAT WHEN YOU ASSESS THE PENALTY YOU FEEL THAT A CRIME WOULD BE NOT AS BAD IF A VICTIM HAD A CRIMINAL HISTORY VERSUS NO CRIMINAL HISTORY?

PROSPECTIVE JUROR P-9765: YOU LOST ME SOMEWHERE.

MR. DHANIDINA: YEAH, I KNOW. I'M LOSING MYSELF.

PROSPECTIVE JUROR P-9765: YOU LOST ME.

MR. DHANIDINA: WHAT I'M TRYING TO UNDERSTAND IS, AS A JUROR, YOU ARE GOING TO HAVE TO DETERMINE IN SOME RESPECT HOW BAD THE CRIME IS.

PROSPECTIVE JUROR P-9765: UH-HUH.

MR. DHANIDINA: ONE OF THE AGGRAVATING CIRCUMSTANCES YOU CAN CONSIDER IS REFERRED TO AS THE CIRCUMSTANCES OF THE CRIME. AND DO YOU THINK THAT AS A JUROR YOU WOULD LOOK AT THE PERSON WHO WAS KILLED AND SAY, YOU KNOW WHAT, NO BIG LOSS, THAT PERSON -- THIS CRIME IS NOT AS SERIOUS BECAUSE I DON'T LIKE SOMETHING ABOUT THAT PERSON THAT WAS KILLED.

PROSPECTIVE JUROR P-9765: NO, I COULDN'T DO THAT.

MR. DHANIDINA: YOU WOULD TREAT ALL VICTIMS EQUALLY?

PROSPECTIVE JUROR P-9765: EQUALLY. I COULDN'T SAY THAT.

MR. DHANIDINA: OKAY. IS THERE ANYBODY ELSE WHO FEELS DIFFERENTLY, THAT THEY THINK AS A JUROR THEY WOULD MAKE A PERSONAL DECISION OF WHETHER, YOU KNOW, THE VICTIM BEING KILLED WAS NOT SO BAD OR WORSE THAN ANOTHER VICTIM?

ANYONE THINK THAT IS APPROPRIATE?

EVERYONE WOULD TREAT ALL THE VICTIMS IN THE CASE EQUALLY REGARDLESS OF THEIR OWN BACKGROUND, WHERE THEY ARE FROM, AND THAT SORT OF THING? DOES EVERYONE AGREE WITH THAT?

I SEE A LOT OF NODDING HEADS. OKAY.

FINALLY, ONE LAST QUESTION JUST FOR EVERYBODY. IS THERE ANYONE, HERE BY A SHOW OF

HANDS, THAT REALLY WANTS TO SERVE ON THIS JURY?

OKAY. I SEE JUST A FEW HANDS HERE.

JUROR NO. 2, JUROR NO. 4 AND JUROR NO. 16.

NUMBER 2, DO YOU REALLY WANT TO BE ON THIS JURY?

PROSPECTIVE JUROR S-3050: I FEEL IF I WERE SITTING WHERE MR. HARRIS IS SITTING, I WOULD WANT SOMEONE LIKE ME ON THIS JURY.

MR. DHANIDINA: WHAT ABOUT IF YOU WERE SITTING WHERE THE VICTIM'S FAMILY WAS SITTING, WOULD YOU WANT SOMEONE LIKE YOU ON THE JURY ALSO?

PROSPECTIVE JUROR S-3050: YES.

MR. DHANIDINA: JUROR NO. 4, WHAT ABOUT YOU? WHY DO YOU WANT TO BE ON THIS JURY?

PROSPECTIVE JUROR R-5857: WELL, TO SERVE JUSTICE.

MR. DHANIDINA: JUROR NO. 16.

PROSPECTIVE JUROR K-6084: I NEVER SERVED ON A JURY BEFORE. I GET OFF OF WORK. AND -- WELL, YOU WANT HONESTY.

MR. DHANIDINA: ABSOLUTELY.

PROSPECTIVE JUROR K-6084: AND I JUST REALLY WANT TO DO IT.

MR. DHANIDINA: OKAY. ALL RIGHT. THANK YOU.

I HAVE NOTHING FURTHER.

THE COURT: ANY OTHER QUESTIONS?

MR. SCHMOCKER: NO OTHER QUESTIONS, YOUR

HONOR.

THE COURT: ALL RIGHT. THEN LET'S TAKE A BREAK. WE WILL TAKE ABOUT A 20-MINUTE BREAK. PLEASE DON'T DISCUSS THE CASE. WE WILL CALL YOU BACK IN ABOUT 20 MINUTES.

(THE JURORS LEFT THE COURTROOM.)

THE COURT: ALL RIGHT. THE JURORS HAVE LEFT. ARE THERE ANY MOTIONS FOR CAUSE BY THE DEFENSE?

MR. SCHMOCKER: YES, YOUR HONOR. WE WOULD ASK THE COURT TO CONSIDER A CAUSE REMOVAL OF JUROR NO. 2, S-3050. I GUESS MY GREATER CONCERN IS CONTACTING A SPIRITUAL VISOR.

MR. DHANIDINA: I'LL STIPULATE TO THAT.

THE COURT: WELL, LET ME HEAR IF THERE ARE ANY OTHERS.

MR. SCHMOCKER: MAY I JUST HAVE A MOMENT, YOUR HONOR.

NO OTHERS.

THE COURT: ALL RIGHT. WHAT IS THE PEOPLE'S POSITION AS TO NO. 2.

MR. DHANIDINA: I WILL AGREE FOR THE SAME REASON. I JUST THINK SHE IS A -- WOULD BE A WILD CARD TO BOTH SIDES IF SHE IS INCLINED TO ASK FOR OUTSIDE SUPERIOR AUTHORITY TO WHAT MIGHT HAPPEN IN

COURT.

THE COURT: ALL RIGHT. JUROR 2 IS EXCUSED.

ARE THERE ANY BY THE PEOPLE?

MR. DHANIDINA: YES.

THE FIRST -- I WILL JUST GO IN ORDER -- IS PROSPECTIVE JUROR NO. 9. DO YOU WANT JUST THE NUMBERS NOW OR THE ARGUMENT AT THE SAME TIME?

THE COURT: ARGUMENT.

MR. DHANIDINA: OKAY. WITH RESPECT TO THIS JUROR, SHE I THINK WAS QUITE DIRECT ON SEVERAL OCCASIONS DURING THE QUESTIONING THAT SHE DOESN'T BELIEVE IN THE DEATH PENALTY. SHE IS OPPOSED TO IT. SHE DOESN'T WANT TO JUDGE SOMEONE ELSE'S LIFE. I BELIEVE THESE VIEWS ARE SINCERE. SHE EVEN BROKE INTO TEARS AT ONE POINT WHILE ANSWERING THE QUESTIONS.

SHE INDICATED THAT ON HER QUESTIONNAIRE SOME OF THESE SAME IDEAS, AND SHE SAID MY OPINION -- QUOTE, MY OPINION IS THAT YOU GET TO LIVE. AND I THINK UPON ALL OF THE ANSWERS FROM THE COURT AND FROM THE DEFENSE AND MYSELF, SHE INDICATED A CLEAR OPPOSITION TO THE DEATH PENALTY TO THE POINT WHERE SHE SAID THAT SHE COULDN'T BE FAIR TO BOTH SIDES IN THIS CASE, AND SHE SAID THAT WHEN I WAS QUESTIONING HER. SO THAT IS WITH RESPECT TO JUROR NO. 9.

NEXT ONE IS PROSPECTIVE JUROR NO. 23.

HE INDICATED UPON QUESTIONING BOTH BY THE DEFENSE AND THE COURT AND MYSELF THAT WHEN IT CAME RIGHT DOWN TO IT, HE DIDN'T THINK THAT HE COULD BE THE PERSON RESPONSIBLE FOR IMPOSING A DEATH VERDICT. HE DIDN'T THINK THAT HE PERSONALLY COULD DO IT EVEN IF HE THOUGHT THAT IT WERE THE APPROPRIATE VERDICT TO RENDER AS HE SAT HERE TODAY. HE WAS UNABLE TO SAY THAT HE COULD BE FAIR TO BOTH SIDES AND KEEP AN OPEN MIND AS TO THE PENALTY.

NEXT JUROR IS PROSPECTIVE JUROR NO. 25. SHE INDICATED FROM THE VERY BEGINNING THAT SHE HAD ANXIETY ABOUT THE DECISION SHE WOULD HAVE TO MAKE. EVEN IN HER QUESTIONNAIRE SHE INDICATED THAT SHE WAS BOTH A 3 AND A 4, A 3 BEING SOMEONE WHO AGREED WITH THE DEATH PENALTY IN THEORY BUT COULDN'T PERSONALLY IMPOSE IT. SHE ALSO SEEMED TO GET QUITE EMOTIONAL DURING THE QUESTIONING AND INDICATED THAT AS SHE SAT HERE TODAY, SHE COULDN'T SAY THAT SHE COULD KEEP AN OPEN MIND AS TO RENDERING DEATH AS WELL AS A LIFE VERDICT IN THIS CASE.

AND FINALLY, JUROR NO. 26 SIMILARLY SAID THAT BECAUSE OF HIS BELIEFS, HE WOULD NOT BE ABLE TO BE FAIR. HE OPPOSES THE DEATH PENALTY. HE SAID THAT SPECIFICALLY IN HIS QUESTIONNAIRE AND DURING QUESTIONING. HE SAID THAT HE DOESN'T BELIEVE THE STATE HAS A RIGHT TO TAKE SOMEONE ELSE'S LIFE, TO HAVE STATE-SANCTIONED EXECUTION,

THAT IN THE END IF HE WERE SELECTED AS A JUROR IN THE CASE, THAT HE COULD NOT BE THE PERSON RESPONSIBLE FOR RENDERING A DEATH VERDICT.

SO BASED ON THOSE ANSWERS GIVEN AND THE QUESTIONNAIRES AND IN COURT THAT THOSE JURORS BE EXCUSED FOR CAUSE. THEIR ANSWERS SHOW THEY ARE SUBSTANTIALLY IMPAIRED IN THEIR ABILITY TO FOLLOW THE LAW IN THIS CASE.

THE COURT: WHAT IS THE DEFENSE POSITION ON EACH OF THESE, STARTING WITH NO. 9?

MR. SCHMOCKER: YOUR HONOR, IN REGARDS TO NO. 9, 14 AND 23 -- PARDON ME, NO. 9, NO. 23 AND NO. 25, I WOULD AGREE THAT THEY ARE SUBSTANTIALLY IMPAIRED. I DON'T BELIEVE 26 IS, AND WE WOULD OPPOSE HIS REMOVAL.

MR. DHANIDINA: THE MOTION IS GRANTED AS TO 9, GRANTED AS TO 23, GRANTED AS TO 25. DENIED AS TO 26.

JUROR 26 DID SAY HE WAS OPPOSED TO THE DEATH PENALTY. HE SAID THAT IN SOME OF HIS ANSWERS THAT HE LEANS TOWARDS LIFE IN PRISON, BUT HE DID SAY ON THE OTHER SIDE OF IT THAT HE CAN CONSIDER THE FACTORS, THAT HE CAN CONCEIVE OF A CIRCUMSTANCE IN WHICH HE WOULD VOTE FOR THE DEATH PENALTY. HIS RESPONSES WERE CERTAINLY WIDE-RANGING, BUT ON BALANCE I THINK THAT HE CAN FAIRLY PERFORM HIS DUTIES AND CONSIDER BOTH FORMS OF PUNISHMENT.

I WANT TO ADDRESS JUROR 12.

MR. SCHMOCKER: NUMBER 12?

THE COURT: SHE DOESN'T HAVE ANY REMARKABLE VIEWS ON THE DEATH PENALTY, BUT THIS IS THE WOMAN WHOSE SON WAS KILLED AND WAS QUITE EMOTIONAL ABOUT IT.

MR. SCHMOCKER: YOUR HONOR, I THINK SHE SHOULD BE REMOVED FOR CAUSE.

MR. DHANIDINA: I AGREE.

THE COURT: ALL RIGHT. YEAH, I JUST THINK THAT SHE APPEARED TO BE QUITE EMOTIONAL ALTHOUGH SHE KEPT HER EMOTIONS IN CHECK. THAT'S A LITTLE TOO CLOSE TO HOME.

ALL RIGHT. SO WE WILL EXCUSE 2, 9, 12, 23 AND 25 FOR CAUSE. AND THEN WE WILL REPLACE THOSE SEATS AND START WITH PEREMPTORY CHALLENGES.

MR. SCHMOCKER: YOUR HONOR, WHICH JUROR IS NEXT ON YOUR LIST?

THE COURT: I'M SORRY, IN WHAT SENSE?

MR. SCHMOCKER: ARE WE GOING -- PARDON ME. ARE WE GOING TO FILL BY MOVING UP THE CHAIRS OR --

THE COURT: CORRECT.

MR. SCHMOCKER: OR ARE WE GOING TO FILL FROM THE AUDIENCE?

THE COURT: NO, WE WILL MOVE THE CHAIRS UP AND DO PEREMPTORY CHALLENGES.

MR. SCHMOCKER: OKAY. VERY GOOD.

THE COURT: SO JUROR 13 WILL GO TO SEAT 2 AND

SO FORTH.

MR. SCHMOCKER: VERY GOOD. THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT. SO WE CAN TAKE A BREAK.

MR. SCHMOCKER: OH, YOUR HONOR, I'M GOING TO NEED A COUPLE OF MINUTES. I JUST GOT A CALL FROM FEDERAL COURT. THEY PICKED UP ONE OF MY CLIENTS. THEY DIDN'T TELL ME ABOUT THIS. BUT THEY ARE ASKING WHY I'M NOT THERE.

THE COURT: OH, WELL YOU CAN TAKE TIME.

MR. SCHMOCKER: THANK YOU. I WANT TO EXPLAIN IT TO THEM.

THE COURT: ALL RIGHT. THAT'S FINE.

(AT 2:46 P.M., A RECESS WAS TAKEN UNTIL 3:01 P.M.)

(THE FOLLOWING PROCEEDINGS WERE HELD OUTSIDE OF THE JURY'S PRESENCE:)

THE COURT: ALL RIGHT. THE DEFENDANT AND COUNSEL ARE HERE. BEFORE WE BRING THE JURORS HERE, MY COURT REPORTER HAS TOLD ME THAT SHE IS FAMILIAR WITH JUROR 13. THEY BELONG TO THE SAME CHURCH AND HAVE HAD SOME SOCIAL CONTACT IN CONNECTION WITH CHURCH.

DO YOU WANT ME TO QUIZ THE JUROR AS TO WHETHER THAT WOULD HAVE ANY AFFECT ON HER?

MR. SCHMOCKER: COULD WE SAY SOMETHING TO HER? I MEAN I DON'T KNOW ABOUT QUIZZING HER, BUT --

THE COURT: WELL, IT'S A TERM -- IT'S A TERM OF ART.

MR. SCHMOCKER: I WOULD ASK SOME INQUIRY.

THE COURT: I WOULD REITERATE THAT SHE CAN'T HAVE CONTACT WITH THE REPORTER DURING THE TRIAL AND ASK HER IF THAT WOULD MAKE HER UNCOMFORTABLE IN ANY WAY, THAT SORT OF THING.

MR. SCHMOCKER: THAT WORKS FOR ME, YOUR HONOR.

THE COURT: ALL RIGHT. FINE.

AND THEN I UNDERSTAND THAT THE JUROR WHO DISAPPEARED, G-4450, YOU HAVE ALL REACHED AN AGREEMENT ON.

MR. SCHMOCKER: YES, I BELIEVE WE HAVE.

THE COURT: WHAT IS THAT?

MR. SCHMOCKER: THAT WOULD BE TO EXCUSE HIM.

MR. DHANIDINA: THAT'S FINE.

THE COURT: ALL RIGHT. SO HE WILL BE RELEASED.

IF WE CAN BRING THE JURORS IN.

(THE JURORS ENTERED THE COURTROOM.)

THE COURT: ALL RIGHT. ALL JURORS ARE HERE.

WE APPRECIATE YOUR PATIENCE. I KNOW THAT WE TOOK A LONGER BREAK THAN I THOUGHT. WE HAVE A LOT GOING ON IN A CASE LIKE THIS, AND I APPRECIATE YOUR PATIENCE.

FIRST OF ALL, JUROR 13, I UNDERSTAND YOU ARE FAMILIAR WITH MY COURT REPORTER.

PROSPECTIVE JUROR D-5649: YES.

THE COURT: AS YOU KNOW, YOU CAN'T HAVE ANY CONTACT WITH HER ABOUT THE CASE IF YOU SERVE AS A JUROR.

PROSPECTIVE JUROR D-5649: I UNDERSTAND.

THE COURT: ARE YOU OKAY WITH THAT?

PROSPECTIVE JUROR D-5649: I'M FINE WITH THAT, YOUR HONOR.

THE COURT: AND YOU WOULDN'T FEEL UNCOMFORTABLE NOT -- YOU WAVE WAIVE, BUT YOU CAN'T TALK OR EXCHANGE VIEWS ABOUT THE CASE OR EVEN ABOUT ANYTHING ELSE WHILE YOU ARE SERVING AS A JUROR.

PROSPECTIVE JUROR D-5649: I UNDERSTAND.

THE COURT: ALL RIGHT. AND I KNOW YOU ARE NOT CLOSE FRIENDS BUT YOU DO SEE EACH OTHER IN A CONTEXT, BUT YOU CAN'T -- YOU HAVE TO SORT OF AVOID EACH OTHER IN THAT CONTEXT.

IS THAT OKAY?

PROSPECTIVE JUROR D-5649: YES, THAT'S FINE.

THE COURT: IS THERE ANYTHING ABOUT THAT THAT WOULD MAKE YOU UNCOMFORTABLE OR RELUCTANT TO SERVE AS A JUROR?

PROSPECTIVE JUROR D-5649: NO, THERE IS NOT ANYTHING ABOUT THAT.

THE COURT: OKAY. THANK YOU.

ALL RIGHT. I'M GOING TO ANNOUNCE JURORS WHO ARE EXCUSED. PLEASE WAIT UNTIL I FINISHED, AND THEN IF YOU ARE EXCUSED, YOU OF COURSE HAVE MY THANKS. YOU SHOULD RETURN TO THE JURY ROOM AND TELL THEM THAT YOU HAVE BEEN RELEASED.

JUROR IN SEAT 2, 9, 12, 23 AND 25.

THOSE JURORS ARE EXCUSED. THANK YOU FOR YOUR PARTICIPATION. YOU SHOULD GO BACK TO THE JURY ROOM. PLEASE LEAVE THE CARD ON THE CHAIR WHERE YOU ARE NOW.

AND WE WILL FILL IN THE EMPTY SEATS STARTING WITH THE JUROR IN SEAT 13. IF YOU COULD GO TO SEAT 2, PLEASE.

AND THE JUROR IN SEAT 14, IF YOU COULD GO TO SEAT NO. 9 UP ON THE SECOND ROW.

AND THE JUROR IN SEAT 15, IF YOU COULD MOVE OVER TO SEAT 12.

ALL RIGHT. NOW THE ATTORNEYS ARE GOING TO EXERCISE PEREMPTORY CHALLENGES. THEY ARE GOING TO ADDRESS THAT TO SEATS 1 THROUGH 12, AND THEN WE WILL FILL IN THE EMPTY SEATS AS WE JUST

DID WITH SEATS 16 ON.

IF YOU ARE EXCUSED, YOU HAVE MY THANKS. AND AGAIN, YOU SHOULD GO TO THE JURY ROOM AND TELL THEM THAT YOU HAVE BEEN RELEASED.

THE FIRST PEREMPTORY CHALLENGE IS WITH THE PEOPLE.

MR. DHANIDINA: THANK YOU, YOUR HONOR.

THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 3.

THE COURT: JUROR 3, MA'AM, YOU ARE EXCUSED.

AND JUROR 16, PLEASE GO TO SEAT NO. 3.

DEFENSE --

OOPS, YOU FORGOT SOMETHING? COULD WE HELP YOU? IS IT --

A JUROR: AN UMBRELLA.

SORRY.

THE COURT: THAT'S ALL RIGHT.

ALL RIGHT. THE DEFENSE IS NEXT.

MR. SCHMOCKER: YES, YOUR HONOR. WE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 8.

THE COURT: JUROR 8 IS EXCUSED.

JUROR IN SEAT 17, PLEASE GO TO SEAT 8.

PEOPLE.

MR. DHANIDINA: THANK YOU.

THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 9.

THE COURT: JUROR 9 IS EXCUSED.

JUROR 18, PLEASE GO TO SEAT 9.

DEFENSE.

MR. SCHMOCKER: I APOLOGIZE, YOUR HONOR. IT WILL JUST BE A MOMENT.

(DEFENSE COUNSEL CONFER.)

MR. SCHMOCKER: YOUR HONOR, WE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 3.

THE COURT: JUROR 3 IS EXCUSED.

JUROR 3.

PROSPECTIVE JUROR B-7993: OH, THAT'S ME.

THE COURT: YES, JUROR SEAT NO. 3. J-6084.

AND JUROR 19 GOES TO SEAT 3.

PEOPLE ARE NEXT.

MR. DHANIDINA: THANK YOU.

THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 2.

THE COURT: JUROR 2 IS EXCUSED.

JUROR 20 GOES TO SEAT NO. 2.

DEFENSE.

MR. SCHMOCKER: YOUR HONOR, WE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 3.

THE COURT: 3.

MR. SCHMOCKER: YES, PLEASE.

THE COURT: JUROR 3 IS EXCUSED.

AND JUROR 21 GOES TO SEAT NO. 3.

PEOPLE.

MR. DHANIDINA: PEOPLE ACCEPT THE PANEL AS

CONSTITUTED.

THE COURT: DEFENSE.

MR. SCHMOCKER: WE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 3.

THE COURT: JUROR NO. 3, SIR, YOU ARE EXCUSED.

JUROR 22, PLEASE TAKE SEAT NO. 3.

PEOPLE.

MR. DHANIDINA: THE PEOPLE ACCEPT THE PANEL AS CONSTITUTED.

THE COURT: DEFENSE.

MR. SCHMOCKER: YOUR HONOR, I WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 7.

THE COURT: JUROR IN SEAT 7, MA'AM, YOU ARE EXCUSED.

JUROR IN SEAT 24 GOES TO SEAT NO. 7.

MR. SCHMOCKER: I'M SORRY, YOUR HONOR, THAT WAS OLD NO. 22? 24?

THE COURT: THE JUROR IN SEAT 7 IS C-6782 WHO WAS FORMERLY IN SEAT 24.

MR. SCHMOCKER: VERY GOOD. THANK YOU.

PEOPLE.

MR. DHANIDINA: THANK YOU.

THE PEOPLE ACCEPT THE PANEL AS CONSTITUTED.

MR. SCHMOCKER: YOUR HONOR, I WOULD ASK --

THE COURT: DEFENSE.

MR. SCHMOCKER: I WOULD ASK THE COURT TO

THANK AND EXCUSE JUROR NO. 7.

THE COURT: JUROR 7 IS EXCUSED.

JUROR 26, PLEASE TAKE SEAT NO. 7.

PEOPLE.

MR. DHANIDINA: THANK YOU.

THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 7.

THE COURT: SIR, YOU ARE EXCUSED.

AND JUROR IN SEAT 27, SEAT 7, PLEASE.

THE DEFENSE IS NEXT.

MS. VITALE: MAY WE HAVE A MOMENT, YOUR HONOR?

(DEFENSE COUNSEL AND THE DEFENDANT CONFER.)

MR. SCHMOCKER: YOUR HONOR, WE ACCEPT THE JURY AS PRESENTLY CONSTITUTED.

THE COURT: PEOPLE.

MR. DHANIDINA: THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 4.

THE COURT: JUROR 4 IS EXCUSED.

ALL RIGHT. WE WILL CALL JURORS UP TO THE EMPTY SEATS BEGINNING FIRST WITH SEAT NO. 4 AND THEN 13 ON.

THE CLERK: B-4751, SEAT NO. 4.

N --

THE COURT: EXCUSE ME ONE SECOND.

GO AHEAD.

THE CLERK: N-1570 WOULD BE SEAT 13.

M-9028, SEAT 14.

L-0671, SEAT 15.

O-9824, SEAT 16.

B-8940, SEAT 17.

F-1438, SEAT 18.

Q-4527, SEAT 19.

S-4922, SEAT 20.

M-7882, SEAT 21.

M-8404, SEAT 22.

H-5638, SEAT 23.

C-5140, SEAT 24.

R-2988. R-2988.

DID WE EXCUSE THEM?

THE COURT: NO. CALL THE JURY ROOM, BUT WE WILL PROCEED WITH WHAT WE HAVE.

THE CLERK: OKAY.

ALL RIGHT. THE NEW JURORS ARE ALL SEATED.

AS BEFORE, I WILL GO THROUGH THE NEW JURORS AND DID YOU AND YOU HAVE ANYTHING TO ADD TO YOUR QUESTIONNAIRES, AND THEN I WILL ASK ANY QUESTION THAT I HAVE FROM YOUR ANSWERS.

JUROR NO. 4, GOOD AFTERNOON.

PROSPECTIVE JUROR B-4751: I WANT TO ADD I DIDN'T WRITE DOWN THAT I HAVE A FRIEND THAT IS A POLICE SERGEANT FOR L.A.P.D.

THE COURT: YOU DO?

PROSPECTIVE JUROR B-4751: YEAH.

THE COURT: AND DO YOU KNOW WHAT AREA OF THE CITY YOUR FRIEND WORKS IN?

PROSPECTIVE JUROR B-4751: VAN NUYS.

THE COURT: DO YOU EVER TALK TO YOUR FRIEND ABOUT WORK?

PROSPECTIVE JUROR B-4751: NO, BECAUSE I -- WE DON'T REALLY TALK ABOUT WORK. THAT'S WHY I FORGOT TO PUT IT DOWN.

THE COURT: OKAY.

ANY OTHER THINGS THAT YOU HAD TO -- WANTED TO ADD OR CLARIFY?

PROSPECTIVE JUROR B-4751: NO.

THE COURT: OKAY. IN THE QUESTIONS ABOUT GANGS, YOU -- IT WASN'T QUITE CLEAR. YOU MADE REFERENCE TO SOMEONE GROWING UP IN RAMONA GARDENS. WHO WAS THAT?

PROSPECTIVE JUROR B-4751: ME.

THE COURT: YOURSELF?

PROSPECTIVE JUROR B-4751: YEAH.

THE COURT: SO YOU GREW UP IN A HOUSING DEVELOPMENT?

PROSPECTIVE JUROR B-4751: YEAH.

THE COURT: AND I'M SURE HAD CONTACT WITH PEOPLE WHO BELONGED TO GANGS AND GROUPS LIKE THAT?

PROSPECTIVE JUROR B-4751: UH-HUH.

THE COURT: AND -- I'M SORRY, YOU HAVE TO

ANSWER WITH WORDS.

PROSPECTIVE JUROR B-4751: YES. YES.

THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS AS A JUROR IN THIS CASE?

PROSPECTIVE JUROR B-4751: NO.

THE COURT: IN OTHER WORDS, YOU -- IT'S OBVIOUSLY PART OF YOUR --

PROSPECTIVE JUROR B-4751: I WAS A FORMER GANG MEMBER.

THE COURT: YOUR BEING, YES. BUT YOU CAN'T LET THAT AFFECT YOUR JUDGEMENT.

PROSPECTIVE JUROR B-4751: RIGHT. RIGHT. I UNDERSTAND THAT.

THE COURT: CAN YOU DO THAT?

PROSPECTIVE JUROR B-4751: YES.

THE COURT: SO HAVE YOU EVER HEARD OF THE PARTICULAR GROUP THAT WE REFERRED TO IN THIS CASE, BOUNTY HUNTER?

PROSPECTIVE JUROR B-4751: I HAVE HEARD OF IT WHEN THEY HAD THAT HBO SPECIAL ABOUT THE CRIPS AND ALL THAT STUFF, BUT NO.

THE COURT: OKAY. ANYTHING ABOUT THAT HBO PROGRAM THAT WOULD AFFECT YOUR VIEWS?

PROSPECTIVE JUROR B-4751: NO.

THE COURT: YOU UNDERSTAND THAT THOSE ARE THINGS YOU CAN'T TAKE INTO ACCOUNT?

PROSPECTIVE JUROR B-4751: RIGHT.

THE COURT: IF YOU ARE A JUROR IN THIS CASE, YOU HAVE TO DEPEND UPON THE EVIDENCE PRESENTED IN COURT?

PROSPECTIVE JUROR B-4751: RIGHT.

THE COURT: CAN YOU DO THAT?

PROSPECTIVE JUROR B-4751: UH-HUH.

THE COURT: OKAY.

I'M SORRY. YOU HAVE TO ANSWER WITH CLEAR WORDS, YES OR NO.

PROSPECTIVE JUROR B-4751: YES. OR NO OR WHATEVER --

THE COURT: BUT YOU WOULD BE ABLE TO FOCUS ONLY ON THE EVIDENCE?

PROSPECTIVE JUROR B-4751: RIGHT, YES.

THE COURT: THANK YOU.

PROSPECTIVE JUROR B-4751: YOU'RE WELCOMED.

THE COURT: JUROR 13, GOOD AFTERNOON.

PROSPECTIVE JUROR N-1570: GOOD AFTERNOON.

THE COURT: DID YOU HAVE ANYTHING NEW?

PROSPECTIVE JUROR N-1570: NO.

THE COURT: YOU SAID IN -- YOU ARE A LEGAL SECRETARY?

PROSPECTIVE JUROR N-1570: CORRECT.

THE COURT: AND CURRENTLY YOU WORK FOR A PRIVATE LAW FIRM THAT DOESN'T HAVE ANYTHING TO DO WITH CRIMINAL LAW?

PROSPECTIVE JUROR N-1570: CORRECT.

THE COURT: IS IT LIKE BUSINESS LAW OR

LITIGATION OR --

PROSPECTIVE JUROR N-1570: IT'S BUSINESS LITIGATION.

THE COURT: OKAY. BUT IN THE PAST, YOU HAVE WORKED FOR BOTH THE DISTRICT ATTORNEY AND THE PUBLIC DEFENDER.

PROSPECTIVE JUROR N-1570: YES.

THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE OF WORKING FOR THE D.A. OR THE PUBLIC DEFENDER THAT WOULD AFFECT YOUR VIEWS?

PROSPECTIVE JUROR N-1570: NO. I THINK THAT WORKING ON BOTH SIDES WOULD MAKE ME HAVE A FAIR OPINION.

THE COURT: OKAY. AND WHICH DID YOU LIKE BEST?

PROSPECTIVE JUROR N-1570: I LIKED THEM BOTH. I WORKED ONLY A YEAR FOR THE DISTRICT ATTORNEY, AND I WORKED FOR FIVE YEARS FOR THE PUBLIC DEFENDER IN THIS BUILDING.

THE COURT: UH-HUH.

PROSPECTIVE JUROR N-1570: I WAS VERY BUSY, BUT I LEFT IN 1978, SO IT'S BEEN QUITE SOME TIME.

THE COURT: I KNOW. IT WENT BACK A WAYS.

PROSPECTIVE JUROR N-1570: UH-HUH.

THE COURT: BUT THERE WEREN'T ANY PARTICULARLY NEGATIVE OR POSITIVE EXPERIENCES THAT WOULD AFFECT YOUR VIEWS ABOUT THE LAWYERS IN THIS CASE OR THE ISSUES?

PROSPECTIVE JUROR N-1570: NOT AT ALL.
THE COURT: OKAY. THANK YOU.
JUROR 14, GOOD AFTERNOON.
PROSPECTIVE JUROR M-9028: GOOD AFTERNOON.
THE COURT: IS THERE ANYTHING YOU WANTED TO ADD TO YOUR QUESTIONNAIRE?
PROSPECTIVE JUROR M-9028: NO.
THE COURT: ALL RIGHT. AND I DID NOT HAVE ANY FOLLOW-UP.
JUROR 15, GOOD AFTERNOON.
PROSPECTIVE JUROR L-0671: GOOD AFTERNOON.
THE COURT: DID YOU HAVE ANYTHING TO ADD?
PROSPECTIVE JUROR L-0671: NO.
THE COURT: IN THE -- I HAVE A FEW THINGS. IN THE QUESTION ABOUT LAW ENFORCEMENT, THERE WAS A QUESTION HAVE YOU OR ANYONE CLOSE TO YOU WORKED IN THE FIELD OF LAW ENFORCEMENT. YOU MENTIONED A COUSIN. WHAT KIND OF --
PROSPECTIVE JUROR L-0671: PRISON GUARDS.
THE COURT: PRISON GUARDS. SO IT'S MORE THAN ONE?
PROSPECTIVE JUROR L-0671: TWO.
THE COURT: YOU HAVE TWO COUSINS?
PROSPECTIVE JUROR L-0671: YES.
THE COURT: AND ARE THEY PRISON GUARDS HERE IN CALIFORNIA?
PROSPECTIVE JUROR L-0671: YES.
THE COURT: DO YOU EVER TALK TO THEM ABOUT

THEIR WORK?

PROSPECTIVE JUROR L-0671: YEP.

THE COURT: IS THERE ANYTHING ABOUT WHAT THEY HAVE TOLD YOU, THEIR EXPERIENCES, THAT WOULD HAVE AN EFFECT ON YOUR VIEWS AS A JUROR?

PROSPECTIVE JUROR L-0671: IT COULD.

THE COURT: IT COULD?

PROSPECTIVE JUROR L-0671: YEAH.

THE COURT: WELL, YOU HAVE TO PUT THAT ASIDE. IN OTHER WORDS, I DON'T -- I DON'T SEE ANY NEED TO GET INTO THE DETAILS WHETHER THEY TOLD YOU THEY LIKED THEIR JOB OR THEY HATE THEIR JOB OR THEY LIKE THE PEOPLE THEY WORK WITH OR THEY DON'T LIKE THEM OR THEY HAVE HAD GOOD EXPERIENCE OR BAD EXPERIENCES WITH INMATES.

PROSPECTIVE JUROR L-0671: RIGHT.

THE COURT: BUT YOU HAVE TO DISREGARD ALL THAT AND REALLY FOCUS ON WHAT IS PRESENTED IN THIS TRIAL.

CAN YOU DO THAT?

PROSPECTIVE JUROR L-0671: YES.

THE COURT: OKAY. AND I WAS A LITTLE UNCLEAR ABOUT YOUR EXPERIENCE ON JURIES. HAVE YOU SERVED IN A TRIAL ON A JURY?

PROSPECTIVE JUROR L-0671: YES.

THE COURT: ABOUT HOW MANY TIMES?

PROSPECTIVE JUROR L-0671: ONCE.

THE COURT: ONE TIME.

WAS THAT A CRIMINAL OR CIVIL CASE?

PROSPECTIVE JUROR L-0671: CIVIL CASE.

THE COURT: CIVIL. THANK YOU.

AND WHAT ARE YOUR VIEWS ABOUT THE PENALTY ISSUES HERE? YOU INDICATED IN THE WRITTEN RESPONSES THAT YOU REALLY DIDN'T HAVE MUCH OF A VIEW.

PROSPECTIVE JUROR L-0671: I DON'T. I DON'T.

THE COURT: HAVE YOU GIVEN ANY THOUGHT TO THAT?

PROSPECTIVE JUROR L-0671: NO.

THE COURT: NO?

YOU HAVE HEARD SOME OF THE DISCUSSIONS THAT WE HAVE HAD WITH OTHER JURORS.

PROSPECTIVE JUROR L-0671: YES.

THE COURT: ARE THERE ANY THINGS THAT HAVE BEEN RAISED THAT CONCERN YOU?

PROSPECTIVE JUROR L-0671: NO.

THE COURT: ARE THERE ANY ISSUES THAT YOU THINK YOU WOULD HAVE TROUBLE WITH WHERE YOU COULDN'T APPROACH IT IN A FAIR AND OPEN-MINDED WAY?

PROSPECTIVE JUROR L-0671: YEP.

THE COURT: WHAT WOULD THAT BE?

PROSPECTIVE JUROR L-0671: I GREW UP IN LOS ANGELES, AND I DON'T WANT TO DEAL WITH NONE OF THE PEOPLE THAT YOU WOULD HAVE UP IN THIS COURT, IF I SEE THEM IN THE STREET, I DON'T WANT TO SAY

I'M SORRY. IF I MADE A BAD DECISION, IT WOULD REFLECT ME. I WANT TO GO OUT ON THE STREET AND NOT SEE NOBODY. I WANT TO GO BACK TO WORK. I DON'T WANT TO SEE -- I DON'T WANT TO GO THAT FAR WITH IT. THAT'S HOW I FEEL, YOUR HONOR.

THE COURT: OKAY.

PROSPECTIVE JUROR L-0671: THE NEIGHBORHOOD YOU ARE TALKING ABOUT WHERE THAT GANG IS, I'VE BEEN IN THAT NEIGHBORHOOD.

THE COURT: SURE.

PROSPECTIVE JUROR L-0671: ALL I'M SAYING IS I LIVE IN L.A. AND I -- I DON'T WANT NO -- TO SEE NOBODY.

THE COURT: OKAY. WELL, WHAT IF YOU WERE SELECTED IN THE CASE, WOULD YOU BE ABLE TO DO YOUR DUTIES AND EVALUATE THE EVIDENCE, OR WOULD YOU JUST TELL ME TO GO POUND SAND?

PROSPECTIVE JUROR L-0671: I WOULDN'T TELL YOU THAT PERSONALLY.

THE COURT: I KNOW THAT. I'M BEING FUNNY, BUT -- OR TRYING TO. BUT YOU SEE WHAT I'M TRYING TO GET AT. SOME JURORS -- I'VE MET JURORS WHO SAID, YOU KNOW WHAT, I DON'T CARE WHAT YOU TELL ME, I'M NOT GOING TO PARTICIPATE IN THIS CASE. AND OTHERS WHO HAVE SAID, YOU KNOW, I WOULD RATHER NOT BE HERE, BUT I UNDERSTAND WHAT MY DUTIES ARE, AND I'LL DO MY BEST.

PROSPECTIVE JUROR L-0671: I UNDERSTAND WHAT

YOU ARE SAYING, BUT I'M SAYING THAT I WOULD RATHER NOT BE ON THIS CERTAIN JURY. I WOULD RATHER NOT BE ON. IF IT WAS SOME OTHER TYPE OF CASE, PROBABLY.

THE COURT: ALL RIGHT. THANK YOU.

JUROR 16, GOOD AFTERNOON.

PROSPECTIVE JUROR O-9824: GOOD AFTERNOON.

THE COURT: DID YOU HAVE ANYTHING TO ADD TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR O-9824: NO. NO.

THE COURT: YOU SAID THAT YOU WERE HELD UP AT GUNPOINT SOME TIME AGO.

PROSPECTIVE JUROR O-9824: YEAH, WHILE AT WORK.

THE COURT: ABOUT HOW LONG AGO WAS THAT, ROUGHLY?

PROSPECTIVE JUROR O-9824: YEAH, ROUGHLY ABOUT TEN, TWELVE YEARS.

THE COURT: TEN TO TWELVE YEARS AGO.

AND THAT WAS AT WORK?

PROSPECTIVE JUROR O-9824: YEAH.

THE COURT: AND WHAT KIND OF A WORKPLACE WAS THAT? WAS IT LIKE A STORE?

PROSPECTIVE JUROR O-9824: NO, I USED TO WORK FOR UPS DELIVERY.

THE COURT: UH-HUH. AND SO YOU WERE OUT MAKING ROUNDS?

PROSPECTIVE JUROR O-9824: RIGHT. RIGHT.

THE COURT: WERE YOU INJURED?

PROSPECTIVE JUROR O-9824: NO.

THE COURT: DID YOU REPORT IT TO THE POLICE?

PROSPECTIVE JUROR O-9824: YEAH, AND I HAVE TO GET SOME PICTURES.

THE COURT: OKAY. AND WERE THERE WEAPONS INVOLVED?

PROSPECTIVE JUROR O-9824: YEAH.

THE COURT: A GUN OR A KNIFE?

PROSPECTIVE JUROR O-9824: PISTOL.

THE COURT: A GUN. OKAY.

ANYTHING ABOUT THAT THAT WOULD AFFECT YOUR VIEWS AS A JUROR?

PROSPECTIVE JUROR O-9824: I DON'T THINK SO.

THE COURT: OKAY. THANK YOU.

NOW, YOU EXPRESSED SOME NEGATIVE VIEWS ABOUT THE IDEA OF LIFE IN PRISON WITHOUT PAROLE FOR CERTAIN CRIMES.

PROSPECTIVE JUROR O-9824: I DON'T BELIEVE IN LIFE WITHOUT PAROLE, UNLESS MAYBE YOU HAVE LIFE WITHOUT PAROLE IN SOLITARY CONFINEMENT. SO I CONSIDER THAT EQUAL TO THE DEATH PENALTY. OTHERWISE, I WOULD JUST AS SOON SEE A CRIMINAL BE PUT TO DEATH.

THE COURT: OKAY. WELL, IN THIS CASE, AS WE HAVE TRIED TO EXPLAIN, THE JURORS ARE GOING TO HAVE TO WEIGH THE TWO CHOICES AND DO SO IN A SERIOUS WAY, NOT JUST SAY, WELL, I'LL DO IT AND

THEN VOTE FOR THE ONE THEY LIKE BEST. BUT REALLY LOOK AT THE EVIDENCE, WEIGH IT, EVALUATE EVERYTHING AND DETERMINE WHAT IS BEST FOR THIS CASE.

CAN YOU DO THAT?

PROSPECTIVE JUROR O-9824: YEAH, I TRY MY BEST.

THE COURT: BUT CAN YOU DO IT?

PROSPECTIVE JUROR O-9824: I GUESS. I'LL TRY. I'LL DO IT, I GUESS.

THE COURT: ARE THERE ANY CIRCUMSTANCES WHERE YOU COULD CONCEIVE OF ACTUALLY VOTING FOR LIFE IN PRISON AS OPPOSED TO DEATH? OR WOULD YOUR PREFERENCE --

PROSPECTIVE JUROR O-9824: I'M AGAINST -- IT'S BEEN SINCE I'VE BEEN -- AFTER ALL THE -- I CAN'T SEE WHAT IS THE REASON FOR KEEPING A PERSON ALIVE FOR THE REST OF HIS LIFE IN PRISON, UNLESS IT'S LIKE SOLITARY CONFINEMENT. IN OTHER WORDS, I WOULD JUST AS SOON THE PERSON SUFFER FOR THE REST OF HIS LIFE.

THE COURT: OKAY. THANK YOU.

JUROR 17, GOOD AFTERNOON.

PROSPECTIVE JUROR B-8940: GOOD AFTERNOON.

THE COURT: DID YOU HAVE ANYTHING TO ADD TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR B-8940: NO.

THE COURT: SO YOU TOOK SOME CLASSES IN THE

AREA OF CRIMINAL JUSTICE AND LAW ENFORCEMENT?

PROSPECTIVE JUROR B-8940: YES, I DID.

THE COURT: DID YOU EVER WANT TO PURSUE THAT AS A CAREER?

PROSPECTIVE JUROR B-8940: YES, I DID.

THE COURT: AND -- BUT YOU ARE NOW WORKING IN A DIFFERENT FIELD?

PROSPECTIVE JUROR B-8940: YES, I AM. WELL, IN THE SAME FIELD I WAS WORKING AT THAT TIME.

THE COURT: WELL, A FIELD DIFFERENT FROM LAW ENFORCEMENT?

PROSPECTIVE JUROR B-8940: CORRECT.

THE COURT: I SHOULD BE MORE EXACT.

AND IS THERE ANY REASON YOU DIDN'T PURSUE LAW ENFORCEMENT? YOU ARE JUST HAPPY DOING WHAT YOU DO NOW, OR DID YOU FIND SOMETHING ABOUT LAW ENFORCEMENT THAT YOU DIDN'T LIKE OR WHAT?

PROSPECTIVE JUROR B-8940: I WAS OFFERED A PROMOTION AT THAT TIME WITHIN THE DEPARTMENT THAT I WORK IN NOW.

THE COURT: SO YOU GOT A BETTER DEAL WHERE YOU ARE NOW?

PROSPECTIVE JUROR B-8940: RIGHT.

THE COURT: OKAY. GREAT. THANK YOU.

JUROR 18, DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR J-6556: JUST THAT I HAVE AN OUTSIDE COMMITMENT ON FRIDAY THE 20TH OF MARCH.

I KNOW THAT IS OUTSIDE YOUR DATES, BUT I WOULD LIKE IT TO BE NOTED.

THE COURT: ALL RIGHT. I WILL NOTE THAT.

PROSPECTIVE JUROR F-1438: IN THE AFTERNOON.

THE COURT: I DON'T THINK WE ARE GOING TO INTERFERE WITH THAT, BUT THANK YOU.

YOU SAID THAT YOUR FATHER HAD A SITUATION WHEN HE WAS WORKING AT A GAS STATION, ATTEMPTED ROBBERY.

PROSPECTIVE JUROR F-1438: YES.

THE COURT: ABOUT HOW LONG AGO WAS THAT?

PROSPECTIVE JUROR F-1438: THAT WOULD HAD TO HAVE BEEN PROBABLY 12 OR SO YEARS AGO.

THE COURT: AND WAS YOUR FATHER INJURED IN ANY WAY?

PROSPECTIVE JUROR F-1438: NO, HE WAS NOT.

THE COURT: AND YOUR FATHER, IT SOUNDS LIKE HE DEFENDED HIMSELF.

PROSPECTIVE JUROR F-1438: THAT'S CORRECT.

THE COURT: BUT WAS HE -- NO CHARGES WERE FILED AGAINST HIM OR ANY OTHER KIND OF --

PROSPECTIVE JUROR F-1438: THAT'S CORRECT.

THE COURT: -- ARREST OR ANYTHING OF THAT NATURE?

PROSPECTIVE JUROR F-1438: NO.

THE COURT: ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS IN THIS CASE?

PROSPECTIVE JUROR F-1438: I DON'T BELIEVE

SO, NO.

THE COURT: ALL RIGHT. THANK YOU.

JUROR 19, GOOD AFTERNOON.

PROSPECTIVE JUROR Q-4527: GOOD AFTERNOON.

THE COURT: DID YOU HAVE ANYTHING TO ADD TO YOUR QUESTIONNAIRE?

PROSPECTIVE JUROR Q-4527: NO.

THE COURT: YOU HAVE EXPRESSED SOME VIEWS ABOUT THE DEATH PENALTY AND LIFE IN PRISON WITHOUT PAROLE. DO YOU HAVE ANY FURTHER THOUGHTS ABOUT THOSE ISSUES HAVING HEARD OTHERS?

PROSPECTIVE JUROR Q-4527: I BASICALLY -- WELL, IN PART I AGREE WITH -- I FORGOT -- JUROR NO. 16 IN TERMS OF NOT BELIEVING IN LIFE WITHOUT PAROLE BECAUSE -- BUT MY REASONING FOR THAT IS WHAT'S THE POINT? IT'S EITHER YOU LET THE PERSON HAVE A CHANCE TO REDEEM THEMSELVES OR THERE IS NO POINT. I BELIEVE IT IS A HUGE TAX BURDEN TO PUT SOMEBODY IN PRISON FOR LIFE WITHOUT PAROLE. SO --

THE COURT: WELL, THAT IS NOT THE LAW OF THE STATE.

PROSPECTIVE JUROR Q-4527: NO.

THE COURT: THE STATE OF CALIFORNIA SAYS OTHERWISE, THAT THAT IS AN APPROPRIATE PUNISHMENT UNDER CERTAIN CIRCUMSTANCES.

ARE YOU -- WHAT DO YOU THINK ABOUT THAT?

PROSPECTIVE JUROR Q-4527: I DISAGREE WITH

THAT. SO --

THE COURT: WOULD THAT HAVE AN EFFECT ON YOUR VIEW OF THE EVIDENCE IN THIS CASE OR YOUR DECISION MAKING AS TO THE APPROPRIATE PENALTY?

PROSPECTIVE JUROR Q-4527: I DON'T KNOW BECAUSE I -- TO BE HONEST, I AM A VERY OPINIONATED PERSON. I HOLD VERY STRONG OPINIONS ABOUT THINGS, AND THAT IS ONE OF THE THINGS THAT I HAVE COME TO BELIEVE. SO I CAN'T SAY BECAUSE I HAVE NEVER BEEN IN A SITUATION WHERE I WOULD HAVE TO, YOU KNOW -- I HAVE NEVER SERVED ON A JURY SO, YOU KNOW, I CAN'T SAY HOW I WOULD REACT IN A SITUATION LIKE THAT. SO --

THE COURT: OKAY. THANK YOU.

JUROR 20, GOOD AFTERNOON.

PROSPECTIVE JUROR S-4922: HELLO.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR S-4922: NO.

THE COURT: SO YOUR HUSBAND WORKS AS A CUSTODY OFFICER FOR A POLICE DEPARTMENT IN ORANGE COUNTY?

PROSPECTIVE JUROR S-4922: YES.

THE COURT: AND WHAT DOES THAT INVOLVE?

PROSPECTIVE JUROR S-4922: WHEN CRIMINALS ARE ARRESTED, HE PUTS THEM IN JAIL.

THE COURT: SO THAT IS A LOCAL LIKE CITY JAIL?

PROSPECTIVE JUROR S-4922: YES.

THE COURT: AS OPPOSED TO THE COUNTY --
PROSPECTIVE JUROR S-4922: YES.
THE COURT: -- JAIL?
PROSPECTIVE JUROR S-4922: YES.
THE COURT: AND HOW LONG HAS HE BEEN DOING THAT KIND OF WORK?
PROSPECTIVE JUROR S-4922: FOUR YEARS.
THE COURT: YOU SAID THAT YOU HAVE A YOUNG COUSIN WHO WAS SHOT?
PROSPECTIVE JUROR S-4922: YES.
THE COURT: AND FROM WHAT YOU KNOW, WERE THERE ANY GANG ISSUES INVOLVED, OR WAS IT JUST A PUZZLE?
PROSPECTIVE JUROR S-4922: JUST A PUZZLE.
THE COURT: JUST A RANDOM STREET SHOOTING?
PROSPECTIVE JUROR S-4922: YES.
THE COURT: AND YOUR COUSIN WAS IN THE WRONG PLACE AT THE WRONG TIME?
PROSPECTIVE JUROR S-4922: RIGHT.
THE COURT: IS THERE ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS AS A JUROR?
PROSPECTIVE JUROR S-4922: NO.
THE COURT: YOU NEED TO PUT THAT ASIDE AND JUDGE THIS CASE FROM THE EVIDENCE PRESENTED HERE. CAN YOU DO THAT?
PROSPECTIVE JUROR S-4922: YES.
THE COURT: ABOUT HOW LONG AGO WAS THAT?

PROSPECTIVE JUROR S-4922: ONE YEAR.

THE COURT: ONE YEAR AGO.

THANK YOU.

AND YOU SAID IN REGARD TO THE PENALTY DETERMINATION THAT THERE ARE SOME THINGS THAT WOULD WEIGH ON YOUR MIND.

PROSPECTIVE JUROR S-4922: YEAH.

THE COURT: DO YOU HAVE ANY FURTHER THOUGHTS ABOUT THAT?

PROSPECTIVE JUROR S-4922: I DON'T THINK IT IS A DECISION THAT I WOULD FEEL COMFORTABLE MAKING.

THE COURT: WOULD YOU BE ABLE TO DO IT IF YOU WERE SELECTED ON THIS TRIAL?

PROSPECTIVE JUROR S-4922: I WOULD HAVE TO. I WOULD HAVE TO MAKE A DECISION. I WOULDN'T BE COMFORTABLE WITH IT, BUT I WOULD HAVE TO DO WHAT'S RIGHT.

THE COURT: IN OTHER WORDS, IF YOU WERE SELECTED, WOULD YOU GO THROUGH THE PROCESS THAT I HAVE TRIED TO DESCRIBE OF WEIGHING ALL THE FACTORS AND AT THE END OF IT BE ABLE TO MAKE YOUR BEST DECISION FROM EVERYTHING PRESENTED? OR WOULD IT BE A SITUATION WHERE -- AND IT SOMETIMES COMES UP WHERE A JUROR SAYS, YOU KNOW, I JUST DON'T THINK I CAN DO IT.

PROSPECTIVE JUROR S-4922: TO BE HONEST, I JUST DON'T THINK I COULD DO IT. I DON'T.

THE COURT: THANK YOU.

JUROR 21, GOOD AFTERNOON.

PROSPECTIVE JUROR M-7882: GOOD AFTERNOON.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR M-7882: NO, I DON'T, SIR.

THE COURT: SO YOUR HUSBAND WORKS FOR THE PROBATION DEPARTMENT?

PROSPECTIVE JUROR M-7882: MY PARTNER DOES.

THE COURT: YOUR PARTNER, I'M SORRY.

AND THAT IS HERE IN L.A. COUNTY?

PROSPECTIVE JUROR M-7882: IN SYLMAR.

THE COURT: SYLMAR. UP IN NORTH --

PROSPECTIVE JUROR M-7882: BY MAGIC MOUNTAIN.

THE COURT: NORTH PART OF THE COUNTY.

ABOUT HOW LONG HAS YOUR PARTNER DONE THAT KIND OF WORK?

PROSPECTIVE JUROR M-7882: ABOUT EIGHT YEARS.

THE COURT: EIGHT YEARS.

AND IS THAT WITH JUVENILES OR --

PROSPECTIVE JUROR M-7882: WITH JUVENILES, YES.

THE COURT: WITH YOUNG PEOPLE.

ANYTHING ABOUT THAT EXPERIENCE THAT WOULD AFFECT YOUR VIEWS AS A JUROR?

PROSPECTIVE JUROR M-7882: NO, SIR.

THE COURT: OKAY. THANK YOU.

JUROR 22, GOOD AFTERNOON.

PROSPECTIVE JUROR M-8404: GOOD AFTERNOON.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR M-8404: I BELIEVE THAT I DIDN'T MENTION THAT -- THE COUNTY OF COMPTON, RIGHT, THAT WE ARE TALKING ABOUT, THE AREA OF THE INCIDENT?

THE COURT: NOT FAR FROM THERE.

PROSPECTIVE JUROR M-8404: OKAY. I GREW UP IN THE TOWN MYSELF.

THE COURT: YOU MENTIONED THAT. YOU GREW UP IN COMPTON.

PROSPECTIVE JUROR M-8404: RIGHT, YEAH.

THE COURT: BUT THAT WAS A FEW YEARS AGO?

PROSPECTIVE JUROR M-8404: THAT WAS SEVERAL YEARS AGO.

THE COURT: RIGHT.

PROSPECTIVE JUROR M-8404: I'M KIND OF --

THE COURT: DO YOU HAVE ANY CONTACT WITH THE AREA NOW, ANY FAMILY?

PROSPECTIVE JUROR M-8404: I DON'T WANT -- NO, SIR, NO.

THE COURT: OKAY. AND YOU EXPRESSED SOME BRIEF THOUGHTS ABOUT THE DEATH PENALTY AND LIFE IN PRISON WITHOUT PAROLE.

DO YOU HAVE ANY FURTHER THOUGHTS ON THAT?

PROSPECTIVE JUROR M-8404: NO, NOT REALLY.

THE COURT: DO YOU THINK YOU WOULD BE ABLE TO DO THE KIND OF DECISION-MAKING THAT WE HAVE

DESCRIBED IF YOU WERE SELECTED AS A JUROR IN THIS TRIAL?

PROSPECTIVE JUROR M-8404: IF I HAD TO, I GUESS, BUT I REALLY WOULDN'T LIKE TO HAVE IT ON MY CONSCIOUS. I'M NOT ONE OF THOSE WHO LIKES TO HAVE THINGS ON YOUR MIND AND IT KEEPS YOUR MIND ROLLING. I DON'T WANT TO HAVE SOMEBODY ELSE'S SOUL ON MY BRAINS HERE. IT DON'T SOUND TOO GOOD.

THE COURT: ALL RIGHT. THANK YOU.

JUROR 23, GOOD AFTERNOON.

PROSPECTIVE JUROR H-5638: GOOD AFTERNOON.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR H-5638: NO, NOTHING TO ADD.

THE COURT: AND I DID NOT HAVE ANY FOLLOW-UP QUESTIONS FROM YOUR QUESTIONNAIRE.

JUROR 24, GOOD AFTERNOON.

PROSPECTIVE JUROR C-5140: GOOD AFTERNOON, SIR.

THE COURT: DID YOU HAVE ANYTHING TO ADD?

PROSPECTIVE JUROR C-5140: NO, SIR.

YOU ARE RETIRED?

PROSPECTIVE JUROR C-5140: YES, SIR.

THE COURT: WHAT KIND OF WORK DID YOU DO BEFORE YOU RETIRED?

PROSPECTIVE JUROR C-5140: I WAS A BARTENDER.

THE COURT: AND HOW LONG HAVE YOU BEEN RETIRED?

PROSPECTIVE JUROR C-5140: OH, ABOUT TEN YEARS.

THE COURT: AND IT LOOKS LIKE YOU KEEP YOURSELF BUSY.

PROSPECTIVE JUROR F-1438: YOU SAY YOU ARE INVOLVED IN COOKING, CHESS, READING?

PROSPECTIVE JUROR C-5140: YES, SIR.

THE COURT: JOGGING?

PROSPECTIVE JUROR C-5140: YES, SIR.

THE COURT: THAT'S ALL I HAVE FOR YOU. THANK YOU.

ALL RIGHT. WE CAN HEAR QUESTIONS FROM THE DEFENSE.

MR. SCHMOCKER: ALL RIGHT. THANK YOU, YOUR HONOR.

GOOD AFTERNOON. I GUESS YOU HEARD A LOT FROM ME. I'M SORRY WE CAN'T GET THIS DONE A LITTLE BIT MORE QUICKLY. I HOPE WE CAN DO THIS -- WE WILL GET THROUGH IT.

JUROR NO. 24.

PROSPECTIVE JUROR C-5140: YES, SIR.

MR. SCHMOCKER: YOU HAD SOME CONFLICTS IN REGARDS TO THE DEATH PENALTY OR LIFE IMPRISONMENT. IS THAT FAIR TO SAY?

PROSPECTIVE JUROR C-5140: NO.

MR. SCHMOCKER: OKAY. IT LOOKED LIKE YOU SAW THE LIFE IMPRISONMENT AS AN APPROPRIATE PENALTY IN SOME CASES?

PROSPECTIVE JUROR C-5140: TRUE.

MR. SCHMOCKER: BUT IT LACKED CATHARSIS IS THE WAY YOU PUT IT.

WHAT DID YOU MEAN BY THAT?

PROSPECTIVE JUROR C-5140: WELL, FOR THE FAMILIES OF THE VICTIMS, IT WOULD BE AN OPEN WOUND, PERHAPS, TO SEE THE PERPETRATOR TO CONTINUE TO EXIST WHILE THEIR LOVED ONE WAS NO LONGER AROUND. AND FINALIZING IT WITH THE DEATH OF THE PERPETRATOR WOULD SORT OF BE THE END OF THE SITUATION CLEARLY AND COMPLETELY.

MR. SCHMOCKER: I UNDERSTAND. THAT'S AN INTERESTING VIEW.

NOW, TELL ME HOW DO YOU THINK THAT WOULD AFFECT YOUR ABILITY TO BE A JUROR IN THIS CASE?

PROSPECTIVE JUROR C-5140: MYSELF, TO MAKE A DECISION EITHER WAY?

MR. SCHMOCKER: YES.

PROSPECTIVE JUROR C-5140: IT WOULDN'T AFFECT ME.

MR. SCHMOCKER: SO YOU WOULDN'T CONSIDER THAT AS ONE OF THE ISSUES?

PROSPECTIVE JUROR C-5140: NO. NOT FOR ME, NO.

MR. SCHMOCKER: YOU WOULD JUST CONSIDER THE MITIGATING AND AGGRAVATING CIRCUMSTANCES?

PROSPECTIVE JUROR C-5140: YES, SIR.

MR. SCHMOCKER: CAN YOU SEE A CIRCUMSTANCE -- CAN YOU SEE A SCENARIO WHERE MR. HARRIS -- YOU KNOW HE HAS BEEN CONVICTED OF MURDER TWO TIMES?

PROSPECTIVE JUROR C-5140: UH-HUH.

MR. SCHMOCKER: SAME EVENT.

DO YOU SEE IN MIND A SITUATION WHEREBY YOU COULD VOTE FOR LIFE?

PROSPECTIVE JUROR C-5140: IT'S POSSIBLE THE CIRCUMSTANCES OUTSIDE OF HIS CONTROL ESCALATED OUT OF HIS CONTROL, PERHAPS THAT WOULD BE MITIGATION.

MR. SCHMOCKER: OKAY. SO YOU COULD CONSIDER MITIGATION EVEN IN THE DEATH CIRCUMSTANCES?

PROSPECTIVE JUROR C-5140: THERE IS NO ABSOLUTES. SO SOMETHING COULD BE EITHER WAY DEPENDING ON THE CIRCUMSTANCES.

MR. SCHMOCKER: I UNDERSTAND. OKAY. THANK YOU. THANK YOU.

DOES ANYBODY HAVE A DIFFERENT POINT OF VIEW IN REGARDS TO THAT? ANYONE WANT TO DIG IN?

NO. ALL RIGHT.

JUROR NO. 21?

PROSPECTIVE JUROR M-7882: YES.

MR. SCHMOCKER: HOW LONG HAVE YOU BEEN LIVING -- WHERE ARE YOU LIVING NOW?

PROSPECTIVE JUROR M-7882: I LIVE IN WHITTIER.

MR. SCHMOCKER: AND ARE YOU A LONG-TIME RESIDENT OF LOS ANGELES COUNTY?

PROSPECTIVE JUROR M-7882: MAYBE 20 YEARS.
MR. SCHMOCKER: OH, OKAY. THAT SOUNDS LIKE A LONG TIME TO ME.
PROSPECTIVE JUROR M-7882: YEAH.
MR. SCHMOCKER: WHERE ELSE HAVE YOU LIVED IN L.A. COUNTY?
PROSPECTIVE JUROR M-7882: IN HIGHLAND PARK.
MR. SCHMOCKER: HAVE YOU HAD ANY EXPERIENCE WITH GANGS THERE?
PROSPECTIVE JUROR M-7882: I MEAN I KNOW THERE WAS SOME THERE, BUT I DON'T KNOW WHO THEY ARE.
MR. SCHMOCKER: NO PARTICULAR NEGATIVE EXPERIENCES?
PROSPECTIVE JUROR M-7882: NO.
MR. SCHMOCKER: I HAVE NOTHING FURTHER. THANK YOU.
AND JUROR NO. 20, DO YOU THINK THAT -- WOULD YOU BE AN APPROPRIATE JUROR IN THIS CASE? WE ARE LOOKING FOR SOMEBODY WHO COULD CONSIDER BOTH?
PROSPECTIVE JUROR S-4922: NO.
MR. SCHMOCKER: YOU JUST CAN'T DO IT?
PROSPECTIVE JUROR S-4922: NO.
MR. SCHMOCKER: JUROR NO. 19, ARE YOU AN APPROPRIATE JUROR IN THIS CASE? DO YOU THINK YOU CAN CONSIDER --
PROSPECTIVE JUROR Q-4527: I DON'T THINK I AM

HONESTLY JUST BECAUSE, LIKE I STATED EARLIER, MY VIEWS ON ONE OF THE TWO CHOICES IS -- IT DOESN'T -- IT DOESN'T SEEM LIKE A GOOD CHOICE TO ME. SO --

MR. SCHMOCKER: I UNDERSTAND.

THIS ISN'T ABOUT RIGHT AND WRONG. WE ARE JUST TRYING -- WE JUST WANT TO KNOW WHAT PEOPLE THINK.

ANYBODY ELSE WHO THINKS THEY WOULD NOT BE AN APPROPRIATE JUROR IN THIS CASE? THEY DON'T SEEM TO BE RAISING THEIR HANDS OR JUMPING IN ON THIS.

JUROR NO. 15, YOU HAD SOME RESERVATIONS ABOUT WHETHER OR NOT YOU WOULD BE A GOOD JUROR; IS THAT RIGHT?

PROSPECTIVE JUROR L-0671: NO.

MR. SCHMOCKER: YOU DIDN'T HAVE ANY RESERVATIONS?

PROSPECTIVE JUROR L-0671: NO.

MR. SCHMOCKER: YOU HAD RESERVATIONS ON SOMETHING, AND I DON'T REMEMBER WHAT IT WAS. CAN YOU TELL ME?

PROSPECTIVE JUROR L-0671: I DON'T RECALL. YOU HAVE TO BRING IT BACK UP TO ME. I DON'T WANT TO SAY SOMETHING OUT OF TURN.

MR. SCHMOCKER: LET ME SEE.

OH, OH, OKAY. YOU HAVE RATHER STRONG FEELINGS ABOUT GANGS.

PROSPECTIVE JUROR L-0671: WHEN YOU LIVE IN L.A. AND DEAL WITH L.A., GANGS ARE AROUND, YOU LEARN TO STAY AWAY FROM IT AND LET THEM BE TO THEY SELVES AND EVERYBODY AROUND. LIKE I SAID, I DON'T WANT TO GO THROUGH L.A. WITHOUT --

MR. SCHMOCKER: EVERYBODY AGREES THAT GANGS ARE GENERALLY NEGATIVE? IS THAT FAIR TO SAY? DOES ANYBODY DISAGREE WITH THAT?

PROSPECTIVE JUROR L-0671: YEAH.

MA'AM, YOU SAID THAT WAY WHEN YOU WERE YOUNG YOU WERE A MEMBER OF A GANG, JUROR NO. 4?

PROSPECTIVE JUROR B-4751: UH-HUH, YEAH.

MR. SCHMOCKER: AND THERE ARE SOME PEOPLE IN A GANG THAT MIGHT BE GOOD AND SOME ARE BAD, RIGHT?

PROSPECTIVE JUROR B-4751: WHAT DO YOU MEAN BY GOOD AND BAD?

MR. SCHMOCKER: WELL, I MEAN THINGS ARE RELATIVE.

PROSPECTIVE JUROR B-4751: RIGHT. I MEAN -- I DON'T KNOW WHAT YOU MEAN BY GOOD AND BAD. I MEAN YOU HAVE TO BE MORE SPECIFIC AS GOOD AND BAD. MOST OF THE PEOPLE THAT ARE IN A GANG ARE TEENAGERS AND KIDS, AND A LOT OF THEM MAKE BAD DECISIONS AND THAT'S WHY THEY ENDED UP THERE. THAT DOESN'T NECESSARILY MEAN THEY ARE A BAD PERSON. THEY COULD DO BAD THINGS, BUT THAT DOESN'T MEAN THAT THEY ARE A BAD PERSON. AND IT IS UP TO THE INDIVIDUAL TO SEE IF THEY WANT TO

STAY THERE OR MOVE ON AND DO SOMETHING BETTER WITH THEIR LIVES.

MR. SCHMOCKER: WELL, THANK YOU, MA'AM. I THINK WE LEARNED A LOT FROM THAT. I APPRECIATE THAT. I LEARNED SOMETHING. THANK YOU.

PROSPECTIVE JUROR B-4751: YOU'RE WELCOMED.

MR. SCHMOCKER: AND JUROR NO. 8, YOU HAVEN'T PREVIOUSLY --

PROSPECTIVE JUROR J-9579: I HAVEN'T SAID ANYTHING.

MR. SCHMOCKER: YOU HAVEN'T SAID ANYTHING.

WHAT DO YOU THINK ABOUT THIS PROCESS? WHAT -- MEANING DO YOU THINK YOU WOULD BE A GOOD JUROR IN THIS CASE?

PROSPECTIVE JUROR J-9579: WELL, YOU KNOW, I SERVED ON A CIVIL CASE BEFORE. I ENJOYED THE PROCESS IMMENSELY. I THINK IT IS OUR CIVIC DUTY, AND I'M HAPPY TO SERVE.

I DO HAVE TO SAY THAT I AM VERY BUSY AT WORK, SO I'M A LITTLE PERSONALLY TORN BETWEEN WANTING TO BE AT WORK AND WANTING TO BE HERE AT THE SAME TIME, BUT I DO ENJOY THE PROCESS AND I DO ENJOY BEING A PART IT.

MR. SCHMOCKER: LET ME ASK YOU ABOUT LIFE WITHOUT THE POSSIBILITY OF PAROLE.

DO YOU SEE THAT AS A POSSIBILITY IN REACHING A DECISION?

PROSPECTIVE JUROR J-9579: I DO SEE IT AS A

POSSIBILITY.

MR. SCHMOCKER: AND DO YOU THINK THAT YOU TEND TO, GENERALLY SPEAKING -- NOT ABOUT THIS CASE, BUT GENERALLY SPEAKING, DO YOU THINK THAT BOTH OF THESE PENALTIES ARE VERY SERIOUS PENALTIES?

PROSPECTIVE JUROR J-9579: I DO BELIEVE BOTH OF THEM ARE SERIOUS.

MR. SCHMOCKER: YOU BELIEVE ONE IS MORE SERIOUS THAN THE OTHER?

PROSPECTIVE JUROR J-9579: I DO BELIEVE THAT DEATH IS MORE SERIOUS THAN LIFE IN PRISON.

MR. SCHMOCKER: OKAY. AND DO YOU UNDERSTAND THAT NOBODY WILL EVER ORDER YOU TO EXECUTE SOMEBODY OR ORDER YOU TO REACH A DEATH VERDICT.

DO YOU UNDERSTAND THAT?

PROSPECTIVE JUROR J-9579: I UNDERSTAND THAT.

MR. SCHMOCKER: THANK YOU, YOUR HONOR.

I HAVE NO FURTHER QUESTIONS.

THE COURT: THANK YOU.

MR. DHANIDINA.

MR. DHANIDINA: THANK YOU.

THIS IS JUST AS TO THE NEWLY SEATED JURORS, CORRECT?

THE COURT: IF THERE IS SOME AREA THAT YOU NEED TO FOLLOW UP, GO AHEAD.

MR. DHANIDINA: OKAY. THANK YOU.

JUROR NO. 4, MA'AM, YOU INDICATED SOME

OPINIONS ABOUT OVERALL FAIRNESS OF THE JUSTICE SYSTEM.

DO YOU REMEMBER THAT?

PROSPECTIVE JUROR B-4751: YEAH.

MR. DHANIDINA: YOU FELT THAT THE SYSTEM WAS OFTENTIMES UNFAIR TO POOR PEOPLE?

PROSPECTIVE JUROR B-4751: RIGHT.

MR. DHANIDINA: AND I THINK YOU SAID, WITH RESPECT TO THE DEATH PENALTY, SOMETHING LIKE YOU NEVER SEE A WEALTHY PERSON GET THE DEATH PENALTY.

PROSPECTIVE JUROR B-4751: RIGHT, YES.

MR. DHANIDINA: DO YOU THINK THERE IS SOMETHING ABOUT -- THERE IS SOMETHING TO THAT, THAT THE SYSTEM FAVORS WEALTHY PEOPLE OVER --

PROSPECTIVE JUROR B-4751: I THINK WEALTHY PEOPLE CAN AFFORD BETTER ATTORNEYS, AND THAT'S WHY THEY DON'T END UP ON DEATH ROW. NOT JUST DEATH ROW, BUT ANYTHING IN GENERAL THAT IF THERE IS GOING TO BE A POOR PERSON AND A RICH PERSON, THE RICH PERSON CAN AFFORD A BETTER DEFENSE THAN A POOR PERSON, SO MOST LIKELY THE POOR PERSON WILL GO TO JAIL. BUT THAT DOESN'T MEAN THAT I'M NOT -- I MEAN THE DEATH PENALTY IS THE LAW, AND IF THAT'S THE LAW AND THE PERSON EARNS THAT OR DOES SOMETHING BAD ENOUGH TO BE PUT TO DEATH, THEN THEY SHOULD BE PUT TO DEATH.

BUT THAT'S ONE OF THE REASONS WHY I DON'T LIKE THE DEATH PENALTY BECAUSE I DON'T THINK

IT'S EQUAL BECAUSE OF HOW MUCH -- YOU KNOW, IF YOU MAKE MORE MONEY YOU ARE LESS LIKELY TO GO TO JAIL.

MR. DHANIDINA: AND THAT'S A TOTALLY LEGITIMATE POINT TO HAVE.

ARE YOU FAMILIAR AT ALL WITH THE SCOTT PETERSON CASE?

PROSPECTIVE JUROR B-4751: YES.

MR. DHANIDINA: WOULD YOU AGREE THAT WAS A SITUATION WHERE A WEALTHY PERSON DID IN FACT GET THE DEATH PENALTY?

PROSPECTIVE JUROR B-4751: RIGHT. BUT THAT'S ONE PERSON OUT OF HOW MANY. I MEAN I COULD BRING UP O.J. AND THEN THERE IS ANOTHER THING THERE. I MEAN YOU COULD GO BACK AND FORTH ON BRINGING CASES BACK AND FORTH ON MONEY AND NO MONEY, BUT THAT'S ONE OF THE THINGS THAT I WOULD SAY THAT THE JUSTICE SYSTEM IS NOT EQUAL WHEN YOU DON'T HAVE ANY MONEY.

MR. DHANIDINA: DO YOU THINK SOMETIMES VICTIMS ARE TREATED DIFFERENTLY BASED ON HOW MUCH MONEY THEY HAVE OR HOW MUCH INFLUENCE THEY HAVE IN SOCIETY?

PROSPECTIVE JUROR B-4751: YES.

MR. DHANIDINA: THAT'S NOT FAIR EITHER, IS IT?

PROSPECTIVE JUROR B-4751: RIGHT.

MR. DHANIDINA: WITH THIS IDEA IN MIND, IF YOU ARE SEATED AS A JUROR, YOU KNOW, THIS CONCEPT

OF THE JUSTICE SYSTEM DOESN'T EXIST ANYMORE.

PROSPECTIVE JUROR B-4751: THAT QUESTION ASKED ABOUT THE DEATH PENALTY, IF I AGREED OR WHATEVER -- I FORGOT HOW IT WAS WORDED ABOUT THE DEATH PENALTY, WHICH IS DIFFERENT THAN BEING ON A JURY AND HAVING TO DECIDE IF SOMEONE DESERVES LIFE IN PRISON AND SOMEONE DESERVES THE DEATH PENALTY, BECAUSE THAT IS THE LAW, THAT IS THE CHOICES THAT YOU HAVE. I MIGHT NOT LIKE THE LAW, BUT THAT IS THE LAW OF THE LAND, SO WE HAVE TO GO WITH WHAT THE LAW SAYS.

SO I WOULD HAVE TO HEAR ALL THE EVIDENCE AND SAY, YOU KNOW, I MIGHT NOT LIKE IT AND I MIGHT NOT AGREE WITH IT, BUT THAT IS THE LAW AND WE HAVE TO GO BY THE LAW.

MR. DHANIDINA: OKAY. ARE YOU GOING TO CONSIDER THE PERFORMANCE OF THE ATTORNEYS INVOLVED IN THE CASE, YOU KNOW, IN DETERMINING WHETHER I THINK THAT ATTORNEY IS BETTER THAN THE OTHER ONE?

PROSPECTIVE JUROR B-4751: NO, I WOULD -- WELL, IF YOU HAVE BETTER EVIDENCE. I MEAN IF YOU PRESENT YOUR CASE BETTER THAN THE OTHER ONE.

I MEAN BETTER? WHAT DO YOU MEAN BY BETTER?

MR. DHANIDINA: YOU ARE THE ONE WHO BROUGHT IT UP THAT SOMETIMES PEOPLE HAVE BETTER LAWYERS THAN OTHER PEOPLE AND THAT THAT AFFECTS HOW FAIR THE SYSTEM IS.

SO ALL I'M ASKING IS, ARE YOU GOING TO BE THINKING ABOUT WHETHER YOU THINK ONE SIDE OR THE OTHER IS GETTING THE KIND OF REPRESENTATION THAT YOU THINK THEY SHOULD HAVE?

PROSPECTIVE JUROR B-4751: NO, I'M JUST GOING TO SEE WHAT THE EVIDENCE EACH ATTORNEY PRESENTS, AND WITH THAT, THEN YOU MAKE YOUR DECISION.

MR. DHANIDINA: OKAY. IF YOU ARE SELECTED TO SIT AS A JUROR IN THIS CASE, ARE YOU GOING TO BE CURIOUS ABOUT WHETHER, YOU KNOW, THE VICTIM COMES FROM A POOR BACKGROUND OR THE DEFENDANT COMES FROM A POOR BACKGROUND? ARE YOU GOING TO LET THOSE TYPES OF THINGS AFFECT HOW YOU VIEW THE EVIDENCE?

PROSPECTIVE JUROR B-4751: IF THAT IS NOT PART OF THE EVIDENCE, I WOULDN'T CONSIDER IT. I'M JUST SUPPOSED TO CONSIDER WHATEVER EVIDENCE YOU PRESENT. IF THAT IS NOT PART OF THE EVIDENCE, THEN THAT IS NOT SOMETHING I'M GOING TO THINK ABOUT BECAUSE SOMEBODY RICH DID TWO PEOPLE AND KILLED THEM THAT DOESN'T MATTER. ON THIS PHASE OF THE TRIAL, HE IS ALREADY CONVICTED, SO IT DOESN'T MATTER IF HE HAD MONEY OR NO MONEY TO GET CONVICTED BECAUSE NOW WE ARE TALKING ABOUT THE PENALTY PHASE OF IT.

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR B-4751: SO THAT DOESN'T MATTER. IF ONE OF THE ATTORNEYS BRINGS IT UP, THEN THAT IS SOMETHING THAT WE WOULD HAVE TO

CONSIDER AS A JURY, BUT THAT IS NOT SOMETHING I'M GOING TO BE THINKING ABOUT WHEN YOU ARE PRESENTING YOUR EVIDENCE.

MR. DHANIDINA: OKAY. PROSPECTIVE JUROR NO. 15, THAT IS YOU, SIR?

PROSPECTIVE JUROR L-0671: YES.

MR. DHANIDINA: JUST TO FOLLOW UP ON WHAT I THINK HAS BEEN ASKED OF YOU BEFORE, AND WE HAVE TO BE DIRECT BECAUSE, YOU KNOW, THE COURT REPORTER IS TAKING EVERYTHING DOWN. ARE YOU CONCERNED THAT IF YOU WERE SEATED AS A JUROR IN THIS CASE THE RESULT -- THE VERDICT THAT YOU REACHED MIGHT JEOPARDIZE YOUR SAFETY DOWN THE ROAD BEING IN CERTAIN NEIGHBORHOOD?

PROSPECTIVE JUROR L-0671: CORRECT. I DON'T WANT TO SEE NOBODY. I DON'T WANT TO SEE NONE OF THE JURY MEMBERS OR NONE OF THE WITNESSES IN HERE, I DON'T WANT TO SEE THEM. I DON'T WANT TO SEE THEM HERE, I DON'T WANT TO SEE THEM OUT IN THE STREET, I DON'T WANT TO SEE THEM PERIOD. THAT'S WHAT I'M SAYING, ON THIS CASE. IF IT WAS ANOTHER TYPE OF CASE AND I'M NOT REALLY DEALING WITH SOMEBODY'S LIFE OR THEIR WELL-BEING OR TRYING TO MAKE A DECISION OVER THAT, THEN IT MAY BE SOMETHING DIFFERENT. BUT AT THIS TIME, NO.

MR. DHANIDINA: SO YOU DON'T -- DO YOU FEEL LIKE YOU WOULD LET THAT CONCERN FOR YOUR OWN PERSONAL SAFETY --

PROSPECTIVE M-7163: YES, I WOULD.

MR. DHANIDINA: -- AFFECT YOU IN THE OUTCOME OF THE CASE?

PROSPECTIVE M-7163: YES, I WOULD.

MR. DHANIDINA: THANK YOU.

I JUST WANTED TO BE A LITTLE BIT MORE EXPLICIT ABOUT THAT.

PROSPECTIVE JUROR L-0671: OKAY.

MR. DHANIDINA: JUROR NO. 16, YOU INDICATED THAT YOU DIDN'T SEE THE POINT TO LIFE WITHOUT PAROLE BECAUSE YOU FELT THAT IT'S JUST AS BAD AS DEATH.

WHAT DID YOU MEAN BY THAT?

PROSPECTIVE JUROR O-9824: I WOULD JUST AS SOON SEE THESE CRIMINALS IN THIS CASE IN A WAY THAT HE WON'T BE ABLE TO HURT NO ONE NO MORE, SOMETHING LIKE THAT ANYWAY.

MR. DHANIDINA: OKAY. NOW, AT THIS STAGE IN THE GAME AS THE JUDGE HAS EXPLAINED TO YOU, THERE ARE REALLY TWO CHOICES FOR THE JURY THAT IS SELECTED. THE PUNISHMENT THAT IS MORE SEVERE WHICH THE LAW DETERMINES AS DEATH, AND THE PUNISHMENT THAT IS LESS SEVERE WHICH IS LIFE WITHOUT PAROLE, WHICH MEANS THE JURY IS HERE TO SORT OF DETERMINE IF THE DEFENDANT DESERVES THE MORE SEVERE PUNISHMENT OR THE LESS SEVERE PUNISHMENT.

DO YOU FEEL LIKE YOU CAN SIT AS A

JUROR AND EVALUATE ALL OF THE EVIDENCE THAT YOU HEAR FROM BOTH SIDES TO DETERMINE IF HE DESERVES THE MORE SEVERE OR THE LESS SEVERE PUNISHMENT?

PROSPECTIVE JUROR O-9824: WELL, I HAVE TO FOLLOW THE COURT'S ORDERS, I GUESS, RULES. AS FAR AS I'M CONCERNED, MY THINKING, I MIGHT BE GOING AGAINST MY WISHES OR MIGHT NOT. MY THINKING, I HAVE TO GO BY THE RULES.

MR. DHANIDINA: SO ULTIMATELY WOULD YOU BASE YOUR DECISION ON THE LAW THAT THE JUDGE INSTRUCTS YOU WITH?

PROSPECTIVE JUROR O-9824: I HAVE TO.

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR NO. 19, YOU INDICATED -- ONE OF THE LAST THINGS YOU SAID IS YOU DON'T THINK YOU WOULD BE A GOOD JUROR ON THIS CASE BECAUSE OF YOUR STRONG OPINION REGARDING A LIFE SENTENCE VERSUS A DEATH SENTENCE; IS THAT RIGHT?

PROSPECTIVE JUROR Q-4527: YES, THAT'S CORRECT.

MR. DHANIDINA: AND CORRECT ME IF I'M WRONG, BUT I THINK WHAT YOU WERE SAYING WAS EITHER SOMEBODY CAN BE REHABILITATED IN WHICH CASE THEY SHOULD HAVE A CHANCE AT PAROLE, OR THERE IS NO HOPE IN REHABILITATING THEM AND WHAT'S THE DIFFERENCE BETWEEN KEEPING THEM FOREVER AND EXECUTION.

IS THAT KIND OF YOUR OPINION?

PROSPECTIVE JUROR Q-4527: YES, THAT'S CORRECT.

MR. DHANIDINA: NOW, UNDERSTANDING HOW OPINIONATED THAT YOU ARE ON THIS PARTICULAR TOPIC, IF THE JUDGE INSTRUCTS YOU TO BASE YOUR DECISION ON AGGRAVATING EVIDENCE AND MITIGATING EVIDENCE SO THAT THE MORE SEVERE PENALTY WOULD BE DEATH, AND IF THE DEFENDANT YOU FELT DESERVED A LESS SEVERE PENALTY, IT'S LIFE WITHOUT PAROLE, THOSE BEING THE ONLY TWO OPTIONS THAT WE HAVE IN A CASE LIKE THIS.

COULD YOU FOLLOW THOSE INSTRUCTIONS OF THE COURT, OR WOULD YOU NOT ABLE TO FOLLOW THE JUDGE'S INSTRUCTIONS?

PROSPECTIVE JUROR Q-4527: I WOULD BE ABLE TO FOLLOW THE JUDGE'S INSTRUCTIONS EXCEPT I WOULD HAVE A BIAS ALREADY. I MEAN THAT'S -- LIKE I SAID, I DON'T KNOW IF I COULD PUT ASIDE EVERYTHING AND BASE EVERYTHING JUST ON WHAT I HEAR BECAUSE OF WHAT I SAID OF MY OPINION ABOUT LIFE WITHOUT PAROLE.

MR. DHANIDINA: WELL, THAT'S INTERESTING.

PROSPECTIVE JUROR Q-4527: SO --

MR. DHANIDINA: WHAT IF -- ARE YOU SAYING THAT YOU WOULD HAVE A BIAS TOWARDS THE DEATH PENALTY?

PROSPECTIVE JUROR Q-4527: VOTING IN FAVOR OF THE DEATH PENALTY, YEAH.

MR. DHANIDINA: OKAY. SO IF YOU HEARD THE EVIDENCE AND YOU ACTUALLY FELT THERE WAS MORE MITIGATION THAN AGGRAVATION, SOME REALLY GOOD THINGS ABOUT THE DEFENDANT THAT YOU BELIEVED WERE TRUE, ARE YOU SAYING THAT BECAUSE THE ONLY OPTIONS ARE DEATH OR LIFE WITHOUT PAROLE, YOU WOULD VOTE TO EXECUTE HIM?

PROSPECTIVE JUROR Q-4527: NO. I MEAN IN THE END, I WOULD HAVE TO FOLLOW THE INSTRUCTIONS GIVEN BY THIS COURT, BUT MY OWN PERSONAL OPINION WOULD BE, AS I STATED BEFORE, WHAT IS THE POINT OF LIFE WITHOUT PAROLE IF YOU THINK THAT THE PERSON -- THE MITIGATING FACTORS OUTWEIGH THE AGGRAVATING FACTS, THEN YOU SHOULD GIVE HIM A CHANCE TO REDEEM HIMSELF, YOU KNOW. BUT I MEAN THAT'S NOT THE -- THAT IS NOT ONE OF THE CHOICES IN THIS CASE.

MR. DHANIDINA: RIGHT. I JUST WANT TO MAKE SURE YOU UNDERSTAND. WE HAVE TWO CHOICES, AND THE JUDGE IS GOING TO EXPLAIN SORT OF HOW YOU AS A JUROR WOULD PICK ONE CHOICE OR THE OTHER.

DO YOU THINK YOU CAN PUT SOME OF YOUR PERSONAL BIASES ASIDE AND FOLLOW THE PROCEDURE AS INSTRUCTED BY THE COURT, OR DO YOU THINK THAT, NEVER MIND WHAT THE JUDGE SAYS, I'M JUST GOING TO DO WHAT I WANT TO DO?

PROSPECTIVE JUROR Q-4527: NO, I DON'T THINK MY BIAS IS THAT STRONG THAT I WOULD GO AGAINST THE INSTRUCTIONS.

MR. DHANIDINA: OKAY.

PROSPECTIVE JUROR Q-4527: BUT YEAH.

MR. DHANIDINA: ALL RIGHT. THANK YOU.

I HAVE NOTHING FURTHER.

THE COURT: ARE THERE ANY MOTIONS OR OTHER MATTERS?

MR. DHANIDINA: YES.

MR. SCHMOCKER: YES, YOUR HONOR.

THE COURT: ALL RIGHT. LET'S TAKE A -- MAY I SEE COUNSEL AT SIDEBAR?

(THE FOLLOWING PROCEEDINGS WERE HELD AT SIDEBAR:)

THE COURT: DO YOU WANT TO GO THROUGH THE MOTIONS FOR CAUSE AND PEREMPTORY CHALLENGES THIS AFTERNOON OR --

MR. DHANIDINA: WE MAY AS WELL, THEN WE WON'T HAVE TO ORDER ANYBODY BACK.

MR. SCHMOCKER: THAT'S FINE.

THE COURT: ALL RIGHT. DO YOU WANT TO DO THE MOTIONS FOR CAUSE AT SIDEBAR HERE, OR SHALL I EXCUSE THE JURY?

MR. DHANIDINA: WHATEVER IS EASIER FOR THE COURT.

THE COURT: I DON'T CARE.

MR. SCHMOCKER: WE CAN DO IT HERE.

THE COURT: ALL RIGHT.

DEFENSE.

MR. SCHMOCKER: YES, YOUR HONOR. WE WOULD LIKE TO MAKE A MOTION FOR CAUSE IN REGARDS TO 15, 16 AND 19. JURORS 15, 16 AND 19.

THE COURT: WHAT IS THE PEOPLE'S POSITION?

MR. DHANIDINA: WE WILL AGREE WITH JUROR 15.

THE COURT: AND 16 AND 19?

MR. SCHMOCKER: ON 16, HE IS THE JUROR THAT TOLD US THAT HE DIDN'T SEE THE POINT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE. HE SOUNDED TO ME LIKE HE WAS SUBSTANTIALLY IMPAIRED IN HIS ABILITY TO RETURN SUCH A VERDICT.

THE COURT: AND 19 FOR THE SAME REASON?

MR. SCHMOCKER: FOR THE SAME REASON.

THE COURT: PEOPLE.

MR. DHANIDINA: TO ME THESE JURORS, THEY ARE NO DIFFERENT FROM THE GENTLEMAN ON THE LAST PANEL, NO. 26 THAT WE HAD WHO HAD VERY STRONG PERSONAL BELIEFS BUT SAID THAT HE COULD SET THOSE ASIDE AND FOLLOW THE COURT'S INSTRUCTIONS.

BOTH OF THESE TWO JURORS, WHILE EXPRESSING A PERSONAL DISAGREEMENT WITH THE PENALTY CHOICES, BOTH I THINK WERE SINCERE IN STATING IN THE END THAT THEY WOULD BE ABLE TO SET THOSE ASIDE AND WHAT IS MOST IMPORTANT IS THAT THEY WOULD FOLLOW THE INSTRUCTIONS GIVEN BY THE COURT.

THE COURT: ALL RIGHT. I'LL GRANT THE MOTION

AS TO 16 AND 19. I DO HAVE CONCERNS ABOUT THEIR ABILITY TO FOLLOW THE LAW.

MR. SCHMOCKER: THANK YOU, YOUR HONOR.

THE COURT: ARE THERE ANY OTHER PEOPLE'S MOTIONS.

MR. DHANIDINA: 20.

MR. SCHMOCKER: I WILL SUBMIT IT, YOUR HONOR. OR I MEAN I DON'T HAVE ANYTHING TO -- I'M NOT GOING TO ARGUE AGAINST IT.

THE COURT: THE MOTION IS GRANTED AS TO JUROR 20. SHE DID EXPRESS SERIOUS RESERVATIONS ABOUT HER ABILITY TO RENDER A DECISION, AND I BELIEVE THAT SHE WOULD HAVE PERSONAL DIFFICULTY DECIDING IN THIS CASE. SO IT'S GRANTED.

MR. DHANIDINA: OH, YOU KNOW WHAT. I DO HAVE ONE MORE.

22 I THINK ALSO STATED THAT HE DIDN'T FEEL COMFORTABLE BEING ON THIS JURY BECAUSE HE DIDN'T THINK THAT HE COULD RENDER PENALTY OF DEATH. HE DIDN'T WANT IT WEIGHING ON HIS CONSCIOUS. HE SAID HE DIDN'T WANT SOMEBODY'S SOUL WEIGHING ON HIS CONSCIOUS OR SOMEBODY'S LIFE WEIGHING ON HIS CONSCIENCE.

MR. SCHMOCKER: I SEE HIM AS LESS IMPACTED THAN THE OTHER JURORS.

THE COURT: I AGREE. 22 IS DENIED.

I THINK HE DID EXPRESS SOME FEELINGS ALONG THOSE LINES, BUT HIS ULTIMATE EXPRESSION WAS

THAT HE COULD FOLLOW THE LAW AND MAKE A DECISION, AND I BELIEVE THAT.

SO 15, 16, 19 AND 20.

MR. SCHMOCKER: I'M SORRY, WHICH NUMBERS?

THE COURT: 15, 16, 19 AND 20.

MR. SCHMOCKER: VERY GOOD. THANK YOU.

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: ALL RIGHT. THE FOLLOWING JURORS ARE EXCUSED.

JURORS IN SEATS 15, 16, 19 AND 20. THANK YOU ALL FOR YOUR PARTICIPATION. YOU SHOULD GO TO THE JURY ROOM AND TELL THEM THAT YOU HAVE BEEN EXCUSED.

ALL RIGHT. WE WILL RETURN TO PEREMPTORY CHALLENGES ADDRESSED TO SEATS 1 THROUGH 12.

IF YOU ARE EXCUSED, YOU HAVE MY THANKS AND YOU SHOULD GO TO THE JURY ROOM.

THE NEXT PEREMPTORY CHALLENGE IS WITH THE DEFENSE.

MR. SCHMOCKER: WE ACCEPT THE JURY AS PRESENTLY CONSTITUTED, YOUR HONOR.

THE COURT: PEOPLE.

MR. DHANIDINA: THE PEOPLE ASK THE COURT TO

PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 4.

THE COURT: JUROR 4 IS EXCUSED.

JUROR IN SEAT 13, PLEASE TAKE SEAT NO. 4.

DEFENSE IS NEXT.

MR. SCHMOCKER: WE ACCEPT THE JURY, YOUR HONOR.

THE COURT: PEOPLE.

MR. DHANIDINA: THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 9.

THE COURT: JUROR IN SEAT 9 IS EXCUSED.

JUROR 14, SEAT 9, PLEASE.

AND THE DEFENSE IS NEXT.

MR. SCHMOCKER: YOUR HONOR, WE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 9.

THE COURT: JUROR 9, MA'AM, YOU ARE EXCUSED.

JUROR 17 GOES TO SEAT NO. 9.

PEOPLE.

MR. DHANIDINA: THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 7.

THE COURT: JUROR 7 IS EXCUSED.

JUROR 18 GOES TO SEAT 7.

DEFENSE.

MR. SCHMOCKER: YOUR HONOR, WE WOULD ASK THE COURT TO THANK AND EXCUSE JUROR NO. 7.

THE COURT: JUROR 7 IS EXCUSED.

JUROR 21 GOES TO SEAT NO. 7.

PEOPLE.

MR. DHANIDINA: THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 2.

THE COURT: JUROR NO. 2 IS EXCUSED.

JUROR 22 GOES TO SEAT NO. 2.

AND THE DEFENSE IS NEXT.

MR. SCHMOCKER: WE ACCEPT THE JURY AS PRESENTLY CONSTITUTED, YOUR HONOR.

THE COURT: PEOPLE.

MR. DHANIDINA: THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 2.

THE COURT: JUROR 2 IS EXCUSED.

JUROR 23, PLEASE TAKE SEAT NO. 2.

DEFENSE.

MR. SCHMOCKER: WE ACCEPT THE JURY, YOUR HONOR.

THE COURT: PEOPLE.

MR. DHANIDINA: THE PEOPLE ASK THE COURT TO PLEASE THANK AND EXCUSE PROSPECTIVE JUROR NO. 6.

THE COURT: JUROR 6.

MR. SCHMOCKER: MAY WE APPROACH, YOUR HONOR.

THE COURT: ACTUALLY JUROR 6, HAVE A SEAT.

WHAT -- WE ARE ALMOST AT THE END OF THE DAY AND WE ARE GOING TO NEED ADDITIONAL JURORS. THERE ARE -- THERE IS ANOTHER GROUP OF JURORS, BUT UNFORTUNATELY THEY ARE NOT SCHEDULED TO BE HERE UNTIL WEDNESDAY MORNING. SO I THINK WHAT MAKES THE MOST SENSE IS TO BREAK FOR THE DAY AND EXCUSE EVERYONE, INCLUDING JUROR NO. 6. ALL

JURORS TO RETURN ON WEDNESDAY AT 9:00 O'CLOCK.

SO AT THAT TIME WE WILL HAVE AN ADDITIONAL GROUP OF JURORS, AND I BELIEVE WE WILL COMPLETE JURY SELECTION ON WEDNESDAY, BUT LOGISTICALLY THAT IS THE WAY THAT IT IS. SO I APPRECIATE YOUR PATIENCE.

IT WILL NOT BE NECESSARY FOR YOU TO COME TO THE COURTHOUSE AT ALL TOMORROW. SO YOU DON'T NEED TO BE HERE. BUT YOU DO NEED TO BE HERE WEDNESDAY THE 25TH AT 9:00 O'CLOCK. SO EVERYBODY IS EXCUSED UNTIL WEDNESDAY THE 25TH AT 9:00 O'CLOCK. THANK YOU ALL SO MUCH FOR YOUR PATIENCE. WE WILL SEE YOU THEN.

(THE JURORS LEFT THE COURTROOM.)

THE COURT: ALL RIGHT. ALL OF THE JURORS HAVE LEFT.

WHAT IS IT THAT THE DEFENSE WANTED TO RAISE?

MS. VITALE: YOUR HONOR, IT IS A BATSON-MILLER TYPE MOTION. THE EXCLUSION OF AT LEAST THREE FEMALE BLACKS, YOUR HONOR, FROM THIS PANEL WHEN EACH OF THEM IN OUR OPINION MAINTAINED THEY WOULD BE ABLE TO ASSESS AND JUDGE THE EVIDENCE FAIRLY AND PROVIDE A FAIR TRIAL TO BOTH THE PROSECUTION AND THE DEFENSE. IT'S OUR

POSITION THAT THERE WAS NO LEGITIMATE REASON FOR EXCUSING THOSE INDIVIDUALS.

THE COURT: ALL RIGHT. THE -- AND WHAT REMEDY ARE YOU REQUESTING?

MS. VITALE: MAY I HAVE A MOMENT?

(COUNSEL CONFER.)

MS. VITALE: YOUR HONOR, I THINK A -- JUST MOVE FOR A MISTRIAL AT THIS POINT.

THE COURT: ALL RIGHT. AS OPPOSED TO RESEATING THE JUROR?

MS. VITALE: WELL, AT LEAST TWO OF THEM HAVE ALREADY BEEN EXCUSED, AND THE THIRD ONE IS STILL THERE. SO NOW WE HAVE A PATTERN OF THREE BLACK FEMALES BEING EXCUSED, AND I DON'T THINK THAT THERE WERE MORE THAN FOUR BLACK FEMALES AND MAYBE TWO BLACK MALES OUT OF A WHOLE PANEL, AND THE PROSECUTOR EXCUSED AT LEAST THREE OF THOSE FEMALES. I THINK ONE MAY HAVE BEEN FOR CAUSE, 0750 ^CK.

THE COURT: WELL, ALL RIGHT.

THE PEOPLE, BY MY RECORDS, HAVE EXERCISED TEN PEREMPTORY CHALLENGES, THE FIRST, B-7993, WAS A FEMALE HISPANIC. THE SECOND, J-2466 WAS A FEMALE BLACK.

THE THIRD, D-5649, WAS A FEMALE BLACK.

THE FOURTH, V-4099, MALE HISPANIC.

THE FIFTH, R-5857, MALE HISPANIC.
THE SIXTH, B-4751, FEMALE HISPANIC.
THE SEVENTH, J-6556, FEMALE BLACK.
THE 8TH, 6745, G, FEMALE HISPANIC.
THE NINTH, A-1180, MALE WHITE.
THE 10TH, M-8404, MALE HISPANIC.
AND THE CURRENT JUROR, P-9765, FEMALE BLACK.

MS. VITALE: SO I MISSPOKE, YOUR HONOR. THAT'S FOUR FEMALE BLACKS.

THE COURT: YES. ALTHOUGH I HAVE TO SAY, JUROR -- THE THIRD PEREMPTORY CHALLENGE, D-5649 I BELIEVE IS AFRICAN-AMERICAN, BUT I HAD A QUESTION MARK BY THAT. BUT I BELIEVE -- SHE IS THE CITY ATTORNEY.

MS. VITALE: YES.

THE COURT: APPEARS TO ME TO BE AFRICAN-AMERICAN, BUT IS NOT AS CLEAR AS THE OTHERS THAT I --

MR. SCHMOCKER: SHE DID DESCRIBE HERSELF IN HER QUESTIONNAIRE AS BEING A MEMBER OF A LAW SOCIETY FOR FEMALE AFRICAN-AMERICANS.

THE COURT: OH, SHE DID. I'M SURE SHE IS FEMALE.

MR. SCHMOCKER: YEAH.

THE COURT: I HAVE NO QUESTION ABOUT THAT.

ALL RIGHT.

(INTERRUPTION IN PROCEEDINGS.)

PROSPECTIVE JUROR P-9765: I'M SORRY. CAN I CHECK TO SEE IF I LEFT MY CELL PHONE?

THE COURT: ALL RIGHT.

PROSPECTIVE JUROR P-9765: I'M SORRY.

THE COURT: DID YOU FIND IT?

PROSPECTIVE JUROR P-9765: YES. THANK YOU.

THE COURT: THANK YOU.

(JUROR P-9765 LEFT THE COURTROOM.)

THE COURT: ALL RIGHT. DO THE PEOPLE WANT TO ADDRESS WHETHER THERE IS A PRIMA-FACIE CASE?

MR. DHANIDINA: YOU KNOW, YOUR HONOR, GIVEN THE CASE LAW, I THINK I WOULD LIKE TO CONCEDE PRIMA-FACIE CASE AND JUST CONTINUE ON AND PROVIDE THE JUSTIFICATION.

THE COURT: ALL RIGHT.

MR. DHANIDINA: ALL RIGHT. WELL, I WILL JUST GO IN THE ORDER THAT I HAVE THEM.

AND -- YEAH, LET ME JUST START WITH JUROR NO. 2466. 2466 WAS -- FROM HER QUESTIONNAIRE, I GOT SOME INFORMATION OF TWO RELATIVES, INCLUDING A BROTHER AND A SON THAT HAD RUN-INS WITH THE LAW, AND WHAT THE SON WAS FOR AN UNREGISTERED GUN. THE BROTHER WAS IN CUSTODY FOR

I GUESS AN UNLAWFUL TOUCHING OF A MINOR WHO WAS A FAMILY FRIEND OR ASSOCIATE.

THOSE ARE THE PRIMARY REASONS FOR THAT JUROR. AND JUST TYPICALLY I FIND THAT JURORS THAT ARE VERY CLOSE RELATIVES WITH PEOPLE WHO HAVE BEEN CONVICTED OR HAD RUN-INS WITH THE LAW IN SERIOUS CASES TO IDENTIFY MORE WITH THE DEFENDANT'S SIDE OF THE CASE AND HIS FAMILY AND WITNESSES THAT WILL TESTIFY. SO JUST AS MATTER OF COURSE, I TEND NOT TO KEEP JURORS WITH THAT BACKGROUND ON THE JURY IF I CAN AVOID IT.

JUROR 5649 WAS THE CITY ATTORNEY THAT WE TALKED ABOUT. SHE SAID THAT SHE WAS AGAINST THE DEATH PENALTY IN GENERAL. SHE SAID THAT SEVERAL TIMES. IN ADDITION TO THAT, SHE INDICATED THAT -- IN HER QUESTIONNAIRE, THAT HER SON HAD MULTIPLE RUN-INS WITH THE LAW BOTH A HIT-AND-RUN AND KNIFE POSSESSION CASES, AND BASED ON HER GENERAL NEGATIVE FEELINGS TOWARDS THE DEATH PENALTY AND THAT SITUATION IN HER FAMILY, I EXCUSED THAT JUROR.

NEXT IS JUROR NO. 6556. JUROR NO. 6556 INDICATED A FEW THINGS THAT WERE TROUBLING TO ME. ONE, THIS IS A VERY RELIGIOUS JUROR WHO INDICATED WHEN I ASKED THAT SHE WOULD BASICALLY THROUGH PRAYER SEEK GUIDANCE AND STRENGTH WHILE ON THE JURY.

WHILE I DON'T THINK THERE IS ANYTHING

WRONG WITH THAT PERSONALLY, I AM ALWAYS WARY OF JURORS THAT INDICATE THAT THEY WOULD SEEK THAT TYPE OF GUIDANCE WHILE THEY ARE ON A JURY. I TRIED TO EXERCISE PEREMPTORIES AGAINST ALL PEOPLE ON THE JURY WHO RAISED THEIR HANDS WHEN I POSED THAT AS A QUESTION. I THINK THAT I HAVE DONE THAT.

IN ADDITION, KIND OF GOING ALONG WITH THAT GENERAL PHILOSOPHY, THIS JUROR INDICATED THAT SHE BELIEVED PEOPLE JOIN GANGS BECAUSE THEY SORT OF GET CAUGHT UP IN SITUATIONS BEYOND THEIR CONTROL WHICH I THOUGHT WAS AN OVERLY LENIENT WAY OF LOOKING AT A SITUATION, ESPECIALLY SINCE WE HAVE A CASE WITH A GANG MEMBER WHERE I KNOW FROM A PREVIOUS TRIAL THE DEFENSE HAS GOT INVOLVED IN A CRIME SINCE HE WAS ENCOURAGED BY HIS CO-DEFENDANT.

SHE ALSO INDICATED ON HER QUESTIONNAIRE THAT SHE BELIEVED THAT ALL PEOPLE CAN CHANGE, AND I FOUND THAT TO BE A PARTICULARLY LENIENT VIEW WHEN I KNOW OUR DEFENSE ARGUMENT IN THIS CASE FOR PENALTY IS THAT KAI HARRIS OUGHT TO BE ALLOWED TO LIVE BECAUSE HE WOULD STILL HAVE AN OPPORTUNITY TO CHANGE.

HER ANSWER TO THAT QUESTION KIND OF LED ME TO BELIEVE SHE WOULD BE AMENABLE TO THAT ARGUMENT. AND THAT WAS IT FOR THAT PARTICULAR JUROR.

AND THE LAST ONE, JUROR NO. 96 --

EXCUSE ME, 9765 HAD A SITUATION -- LET'S SEE WHERE IS IT HERE.

OH, THAT WAS ANOTHER JUROR THAT INDICATED THAT -- SHE RAISED HER HAND WHEN I ASKED THE QUESTION OF PEOPLE WHO WOULD SEEK GUIDANCE OR WISDOM THROUGH PRAYER. SHE WAS ANOTHER JUROR THAT ANSWERED THAT WAY WHEN I ASKED THAT QUESTION, AND SO SHE ALONG WITH SOME OF THE OTHER JURORS, INCLUDING SOME THAT THE DEFENSE HAS NOT CHALLENGED THAT RAISED THEIR HANDS, I USED PEREMPTORIES ON THOSE.

THE LAST POINT THAT I WILL BRING UP WITH RESPECT TO THE FINAL PEREMPTORY WAS THAT I KNEW HER SEAT WOULD BE FILLED BY JUROR NO. 5140 WHO, BASED ON HIS ANSWERS ON THE QUESTIONNAIRE, I FELT WOULD BE A VERY DESIRABLE JUROR TO HAVE ON THE PANEL.

I CAN TALK MORE ABOUT JUROR 5140 IF THE COURT WANTS AS TO I DIDN'T THINK HE IS A GOOD JUROR FOR MY SIDE. IN FACT, I WILL JUST SO THE RECORD ISN'T SILENT AS TO IT.

I PARTICULARLY LIKED HIS ANSWERS REGARDING THE DEATH PENALTY GIVING A SENSE OF CLOSURE OR CATHARSIS FOR THE VICTIM'S FAMILY. I FELT THAT THAT JUROR WOULD BE ONE THAT WOULD BE AMENABLE TO VICTIM IMPACT TYPE EVIDENCE THAT I AM EXPECTING TO PRESENT IN THIS CASE.

BASED ON THOSE ANSWERS -- AND ALSO

THAT HE PUT ON HIS QUESTIONNAIRE THAT THE REASON PEOPLE JOIN GANGS IS TO ENGAGE IN CRIMINAL BEHAVIOR. THAT VIEW IS MORE IN LINE WITH THE POINT OF VIEW I EXPECT TO BE ARGUING IN THIS CASE. THAT IS WHY THAT JUROR IS A DESIRABLE JUROR FOR THE PROSECUTION TO HAVE SEATED ON THE PANEL.

THE COURT: DOES THE DEFENSE WISH TO ADDRESS ANY OF THESE?

MS. VITALE: SUBMITTED, YOUR HONOR.

THE COURT: ALL RIGHT. THE MOTION IS GRANTED AS TO JUROR P-9765. I DO FIND THAT THERE HAS NOT BEEN A SUFFICIENT SHOWING THAT THE CHALLENGE WAS EXERCISED ON A PERMISSIBLE GROUND.

HER RESPONSES TO THE QUESTIONNAIRE ARE VERY UNREMARKABLE. SHE ACTUALLY EXPRESSES SOME POSITIVE FEELINGS ABOUT POLICE OFFICERS. SHE HAS SAID THAT SHE EXPRESSES SOME NEGATIVE VIEWS ABOUT GANGS. AND AS TO THE PENALTY ISSUES, SHE RANKS HERSELF AS A NO. 4 AND BASICALLY SAYS THE SAME THING IN WORDS, THAT IT DEPENDS ON THE EVIDENCE. AND HER RESPONSES -- I DON'T REMEMBER HER SAYING ANYTHING IN REGARD TO RELIGION.

MR. DHANIDINA: I ASKED FOR A SHOW HANDS.

THE COURT: SHE MAY HAVE RAISED HER HAND IN REGARD TO JURORS WHO MIGHT ENGAGE IN PRAYER OR RELIGIOUS CONTEMPLATION, BUT I CERTAINLY DID NOT HEAR ANYTHING THAT SHE SAID THAT WOULD RAISE ANY CONCERNS ABOUT HER -- RAISE ANY CONCERNS ABOUT AN

ATTITUDE THAT WOULD DISPLACE THE LAW WITH RELIGIOUS BELIEFS WHICH IS REALLY WHAT THE CONCERN IS. SO --

MR. DHANIDINA: YOUR HONOR, MAY I -- SINCE WE HAVE --

THE COURT: AND JUST TO FOLLOW MY THOUGHTS. AND AS FOR THE REFERENCE FOR THE NEXT JUROR IN LINE, I JUST DON'T SEE THAT AS A VALID GROUND. I THINK THAT IS EXTRANEOUS TO THE ISSUES OF THE JUROR IN QUESTION.

MR. DHANIDINA: I -- YOU KNOW, YOUR HONOR, I'M GLAD THAT YOU BROUGHT UP THAT LAST POINT BECAUSE I KNOW THAT THE CASE LAW DOES SUPPORT MY POSITION WITH RESPECT TO THAT JUROR. SO MAY I ASK THE COURT TO WITHHOLD THE RULING TO GIVE ME AN OPPORTUNITY TO PRESENT THAT AUTHORITY TO THE COURT, YOU KNOW, BECAUSE I HAVE LOOKED AT THESE CASES VERY RECENTLY, AND I REMEMBER THAT BEING A PERMISSIBLE REASON WHICH WAS PART OF MY CALCULATION IN TRYING TO PICK THE JURY. SO IF THE COURT WOULD INDULGE ME, I CAN PRESENT THAT.

THE COURT: WE CAN ADDRESS THAT FURTHER AT 1:30 TOMORROW.

MR. DHANIDINA: THANK YOU.

THE COURT: I DON'T KNOW THAT IT'S GOING TO AFFECT MY RULING, BUT I AM INTERESTED TO SEE THE AUTHORITIES.

MR. DHANIDINA: YOUR HONOR, I'M JUST

CONCERNED IN PARTICULAR ABOUT THE COURT'S FINDING. SO JUST FOR MY OWN CLARIFICATION.

THE COURT: SURE.

MR. DHANIDINA: IS THE COURT FINDING THAT THE REASONS STATED ARE INSUFFICIENT AS A MATTER OF LAW, OR THAT THEY HAVE BEEN GIVEN BASICALLY FALSELY TO THE COURT AS SOME SORT OF A SUBTERFUGE?

THE COURT: NO, NOT THE LATTER. I DON'T VIEW BATSON MOTIONS AS A CONTEST OF WHAT IS BELIEVABLE AND NOT. I THINK IT IS A MATTER OF EVALUATING THE FACTORS THAT HAVE BEEN GIVEN AND DETERMINING IF IT IS LEGALLY SUFFICIENT TO SUSTAIN THE BURDEN OF PROOF AS TO WHETHER A JUROR WAS EXCUSED FOR NEUTRAL REASONS OR RACE. AND I'M NOT -- I DON'T THINK IT IS A MATTER OF CULPABILITY OR OF ANY KIND. I THINK IT IS -- MY JOB IS TO EVALUATE THE EVIDENCE.

MR. DHANIDINA: NO, I UNDERSTAND.

THE COURT: AND YOU KNOW, I BELIEVE YOUR REASONS ARE SINCERE, JUST THAT MY TENTATIVE RULING IS I DON'T THINK THEY ARE ADEQUATE TO OVERCOME THE FACTORS IN REGARD TO THIS JUROR.

MR. DHANIDINA: THAT WILL HELP ME IN CITING THE APPROPRIATE AUTHORITY TO THE COURT. SO I APPRECIATE THAT.

THE COURT: AND THEN THE DEFENSE CAN GIVE SOME FURTHER THOUGHT AS TO REMEDY. I AM CERTAINLY PREPARED TO RESEAT THE JUROR IF THE DEFENSE AGREES

TO THAT. I SUPPOSE IF THE DEFENSE WISHES TO DECLARE A MISTRIAL, THEN WE WILL SET -- I DON'T KNOW THAT WE HAVE ENOUGH JURORS IN THE NEXT GROUP TO SELECT A JURY, ALTHOUGH WE COULD TRY, START FROM SCRATCH WITH THE GROUP THAT IS COMING IN ON WEDNESDAY MORNING. BUT YOU CAN GIVE SOME THOUGHT TO THAT AS WELL.

MR. SCHMOCKER: VERY GOOD. THANK YOU.

WE WILL BE HERE TOMORROW AT 1:30, THEN.

THE COURT: AT 1:30.

ALL RIGHT. THANK YOU. WE ARE IN RECESS.

(AT 4:31 P.M., AN ADJOURNMENT WAS TAKEN UNTIL FEBRUARY 24, 2009.)

CASE NUMBER: TA074314
CASE NAME: PEOPLE VS. KAI HARRIS
LOS ANGELES, CALIFORNIA TUESDAY, FEBRUARY 24, 2009
DEPARTMENT NO. 108 HON. MICHAEL JOHNSON, JUDGE
REPORTER: LORA JOHNSON, CSR NO. 10119
TIME: 2:00 P.M.

APPEARANCES:

DEFENDANT, KAI HARRIS, PRESENT WITH COUNSEL, JOHN SCHMOCKER AND LYNDA VITALE, BAR PANEL; HALIM DHANIDINA, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

(THE FOLLOWING PROCEEDINGS WERE HELD OUTSIDE OF THE PROSPECTIVE JURY'S PRESENCE:)

THE COURT: GOOD AFTERNOON.

PEOPLE VS. HARRIS. THE DEFENDANT AND ALL COUNSEL ARE PRESENT.

THIS AFTERNOON WE ARE GOING TO ADDRESS THE MOTION IN LIMINE AND FURTHER DISCUSS THE BATSON-WHEELER ISSUES.

MS. VITALE: YES.

THE COURT: WHICH WOULD YOU LIKE TO DO FIRST?

MR. DHANIDINA: WELL, SINCE WE HAVE OUR WITNESS HERE FOR THE MOTION IN LIMINE, MAYBE WE COULD DO THAT FIRST.

THE COURT: ALL RIGHT.

MR. DHANIDINA: SO THE PEOPLE WOULD CALL TO THE STAND DETECTIVE MARK THARP. THIS IS FOR THE 1994 GUN POSSESSION INCIDENT.

THE COURT: YES. YES.

GO AHEAD.

MARK THARP,

CALLED BY THE PEOPLE AS A WITNESS, WAS SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: YOU DO SOLEMNLY STATE THAT THE TESTIMONY YOU SHALL GIVE IN THE CAUSE NOW PENDING BEFORE THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE CLERK: PLEASE HAVE A SEAT.

WILL YOU PLEASE STATE AND SPELL YOUR FIRST AND LAST NAME FOR THE RECORD.

THE WITNESS: MARK THARP, FIRST NAME M-A-R-K, LAST NAME T-H-A-R-P.

THE CLERK: THANK YOU.

THE COURT: ALL RIGHT. AND THIS CONCERNS AGGRAVATING FACTOR NO. 2, THE POSSESSION OF FIREARMS IN --

MR. DHANIDINA: MARCH 22ND, '94.

THE COURT: 1994, YES.

GO AHEAD.

MR. DHANIDINA: THANK YOU.

DIRECT EXAMINATION

BY MR. DHANIDINA:

Q GOOD AFTERNOON, DETECTIVE.

A GOOD AFTERNOON.

Q SIR, WHAT WAS YOUR OCCUPATION AND ASSIGNMENT BACK IN MARCH OF 1994?

A I WAS A DETECTIVE TRAINEE ASSIGNED TO SOUTHEAST DIVISION AND ON LOAN TO SOUTH BUREAU GANG UNIT.

Q ON THAT DAY, WERE YOU WORKING WITH A PARTNER, AN OFFICER TERRONES, T-E-R-R-O-N-E-S?

A ON WHICH DATE, SIR?

Q MARCH THE 22ND.

A I BELIEVE SO, YES.

Q AND WERE THE TWO OF YOU INVESTIGATING A ROBBERY UNDER L.A.P.D., FILE NUMBER 9418080687

A YES.

Q PURSUANT TO THAT, DID YOU SERVE A SEARCH WARRANT?

A YES.

Q WHERE WAS THAT SERVED?

A THE SEARCH WARRANT WAS SERVED AT THE RESIDENCE OF KAI LAVAR HARRIS, WHICH IS -- THAT TIME WAS 1756 EAST 113TH STREET IN THE CITY OF

LOS ANGELES IN SOUTHEAST DIVISION.

Q AND THAT INDIVIDUAL NAMED KAI LAVAR HARRIS, IS THAT SOMEBODY WHO IS IN COURT TODAY?

A YES, THE DEFENDANT AT THE END OF THE TABLE WITH THE BLUE JUMPSUIT.

Q WAS MR. HARRIS PRESENT AT THE TIME OF SERVICE OF THE SEARCH WARRANT?

A HE INITIALLY WAS PRESENT. HE ATTEMPTED TO EVADE US BY FLEEING BETWEEN THE HOUSES. HE WAS WITH ANOTHER MALE, A MALE HISPANIC. HE WAS ARRESTED AND TAKEN INTO CUSTODY WITHOUT INCIDENT.

Q DID YOU ACTUALLY ENTER THE RESIDENCE, THEN, PURSUANT TO THE SEARCH WARRANT?

A YES, WE DID.

Q DESCRIBE IF YOU FOUND ANY ITEMS OF EVIDENTIARY VALUE PURSUANT TO THAT SEARCH WARRANT.

A WE WERE -- YES, WE DID. WE WERE LOOKING FOR EVIDENCE OF THE INITIAL CRIME WHICH WAS A ROBBERY WITH A HANDGUN OR FACSIMILE HANDGUN WHICH APPEARED TO BE OF A CERTAIN TYPE AND MODEL AND OTHER INSTRUMENTS AT THE CRIME, SPECIFICALLY A BANDANA. AND WE LOCATED EVIDENCE SIMILAR TO THAT, EVIDENCE THAT HAD BEEN EARLY -- ITEMS THAT HAD BEEN INDICATED BY THE VICTIM OF THE CRIME IN A ROOM BELONGING TO MR. HARRIS.

Q NOW, WHEN YOU SAY A ROOM BELONGING TO MR. HARRIS, DESCRIBE FOR US WHAT OBJECTIVE FACTS

YOU MADE NOTE OF THAT LED YOU TO THE CONCLUSION THAT THAT ROOM BELONGED TO MR. HARRIS?

A WELL, SPECIFICALLY THE CLOTHING, HIS CLOTHING, THAT OF A 16-YEAR-OLD AT THAT TIME IN HISTORY, 16-YEAR-OLD MALE, AROUND THE ROOM, SCATTERED AROUND THE BED. THE ROOM WAS KIND OF IN DISARRAY INDICATIVE OF A YOUNG MAN AT THAT TIME. AND OTHER PERSONAL ITEMS, SOME OF WHICH WERE MARIJUANA PLANTS. I ASKED HIS MOTHER OR FOLKS AROUND WHO THEY BELONGED TO AND ALL INDICATIONS WERE THAT THEY WERE HIS PLANTS. I ASKED HIM -- I ASKED HIM OUTSIDE OF MIRANDA IF THEY WERE HIS PLANTS, AND HE SAID YES, HIM AND HIS HOMEBOYS THAT THEY WERE GROWING.

I FOUND VARIOUS OTHER ITEMS THAT MADE IT PRETTY COMMON SENSE JUDGEMENT AT THAT TIME THAT IT WAS HIS ROOM AND HIS ROOM SOLELY.

Q SPECIFICALLY DID YOU FIND ANY ITEMS THAT RELATED TO GANG AFFILIATION OR GANG MEMBERSHIP IN THE ROOM THAT YOU WERE ATTRIBUTING TO BEING HIS ROOM?

A BEFORE -- YES. I FOUND 115TH STREET SIGN WHICH HAD BEEN STOLEN FROM THE CITY OF LOS ANGELES, CITY PROPERTY, INDICATIVE OF THAT SET AND THAT AREA.

I FOUND A RED BANDANA. I FOUND OTHER ITEMS. AND IT'S HARD FOR ME TO REMEMBER ALL THE WAY BACK THERE, BUT IT WAS ENOUGH TO MAKE AN

IMPRESSION AT THAT TIME THAT THERE WAS NO DOUBT THAT THIS WAS HIS ROOM.

Q WAS THERE A DRESSER LOCATED IN THE BEDROOM?

A YES, THERE WAS.

Q AND ANYTHING CONNECTED TO IN OR AROUND THE DRESSER THAT COULD BE CONNECTED TO THE DEFENDANT, MR. HARRIS?

A IF YOU --

THE WITNESS: MAY I REVIEW THE REPORT?

THE COURT: YES.

THE WITNESS: THANK YOU.

YES, THERE WAS A PHOTOGRAPH OF THE SUBJECT, OR THE SUSPECT, I'M SORRY, MR. HARRIS, IN THAT DRESSER.

BY MR. DHANIDINA:

Q DESCRIBE -- OR IN THE RESIDENCE IN GENERAL, DID YOU FIND ANY OTHER ITEMS THAT COULD BE CONNECTED TO MR. HARRIS EITHER BY PHOTOGRAPH OR BY NAME?

A IN A HALLWAY, I FOUND -- IN A CLOSET IN THE HALLWAY, I FOUND LETTERS ADDRESSED TO THE SUBJECT.

Q SO THEY ACTUALLY HAD HIS NAME, KAI HARRIS --

A YES, SIR.

Q -- WITH THE ADDRESS ON IT?

A YES, SIR.

Q DESCRIBE WHAT ITEMS OF -- ANY ITEMS RELATING TO FIREARMS OR AMMUNITION THAT YOU FOUND AND WHERE THOSE ITEMS WERE FOUND IN THE RESIDENCE?

A I FOUND A HANDGUN, MODEL RAVEN P25 IN THE ROOM. THAT WAS UNDER THE BED.

I FOUND A .22 CALIBER RIFLE AND AMMUNITION FROM HIS DRESSER, AS WELL AS A FACSIMILE BB GUN, PELLET GUN, WHICH RESEMBLED AN ACTUAL FIREARM, A SKI MASK AND A PLASTIC REPLICA .45 CALIBER HANDGUN. AND WHEN I SAY .45 CALIBER, IT LOOKED LIKE .45 CALIBER HANDGUN. AND THAT AND LOTS OF AMMUNITION.

Q WERE THE FIREARMS AND AMMUNITION ALL FOUND IN THE SAME PART OF THE ROOM?

A IN THE VICINITY OF HIS BED, SOMEWHERE REACHABLE, SOMEWHERE YOU WOULD CONSIDER PUTTING SOME OF YOUR PERSONAL ITEMS.

Q SO EITHER DIRECTLY ON THE BED OR WITHIN JUST AN ARM'S LENGTH?

A OVER -- YEAH, I DON'T REMEMBER IT TO BE A VERY LARGE ROOM.

THE COURT: WERE ALL OF THESE THINGS FOUND WITHIN THE BEDROOM?

THE WITNESS: ALL OF THEM, YOUR HONOR, WITH THE EXCEPTION OF THE MARIJUANA PLANTS WHICH WERE ON THE WINDOWSILL OF THE BEDROOM ON THE OUTSIDE WINDOWSILL. AND SOME LETTERS ADDRESSED TO THE SUBJECT AT THAT TIME, THEY WERE IN A HALLWAY

CLOSET.

THE COURT: THANK YOU.

MR. DHANIDINA: THANK YOU. I HAVE NOTHING FURTHER.

THE COURT: CROSS-EXAMINATION.

MR. SCHMOCKER: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. SCHMOCKER:

Q DETECTIVE, THE HOUSE THAT YOU SEARCHED, HOW MANY BEDROOMS WERE IN IT?

A I DON'T RECALL EXACTLY, BUT I'M -- IT'S 1994, AND WE PRIMARILY FOCUSED ON HIS BEDROOM. I THINK WE CLEARED THE HOUSE, AND I HAD A UNIT, A TACTIC UNIT CLEAR THE HOUSE FOR ME, AND THEN I PROCEEDED INTO HIS BEDROOM.

Q WAS IT A TWO-STORY OR ONE-STORY HOUSE?

A I BELIEVE IT TO BE A TWO-STORY HOUSE.

Q AND WERE THE BEDROOMS GENERALLY UPSTAIRS?

A YES.

Q IS THE BEDROOM THAT YOU SEARCHED UPSTAIRS OR DOWNSTAIRS?

A UPSTAIRS. AND THIS IS -- YOU KNOW, THIS IS THE BEST OF MY RECOLLECTION. THIS IS 1994.

Q AND THE REPORT -- YOU PREPARED A REPORT WITH REGARDS TO THAT?

A YES.
Q AND THE REPORT YOU HAVE WITH YOU HERE TODAY?
A MAY I LOOK AT IT?
Q SURE.
(PAUSE WHILE WITNESS VIEWS DOCUMENT(S).)
A THANK YOU.
Q IS THAT THE REPORT? DID YOU BRING THE REPORT WITH YOU TODAY?
A YES, I DID.
Q AND BESIDE THE REPORT, WAS THERE A VIDEOTAPE MADE OF THE SEARCH?
A NO.
Q WERE THERE ANY PHOTOGRAPHS TAKEN OF THE INTERIOR?
A YES. THERE WERE -- AS WAS POLICY IN 1994, POLAROID PHOTOGRAPHS WERE TAKEN AND SUBMITTED WITH THE CASE PACKAGE, I BELIEVE, TO, YOU KNOW, THE RECORDS UNIT. THAT DIDN'T COME BACK WITH ANY OF THIS.
Q NO MENTION IN THE REPORT IN REGARDS TO THE PHOTOGRAPHS, IS THERE?
A I WOULD HAVE TO REVIEW IT AGAIN. BUT NO, NOT THAT I CAN SEE.
Q YOU MENTIONED THERE WAS A STATEMENT MADE BY MR. HARRIS OUTSIDE OF MIRANDA?
A YES.

Q IS THAT MENTIONED IN THE REPORT?
A YES, IT IS.
Q WHEN THE HOUSE WAS CLEARED, HOW MANY PEOPLE CAME OUT?
A I DON'T RECALL.
Q OKAY. WERE THERE ANY -- WAS THERE ANYBODY BESIDES MR. HARRIS DETAINED?
A THERE WAS ONE OTHER INDIVIDUAL THAT WAS DETAINED.
Q IS THAT THE MALE HISPANIC THAT WAS WITH HIM?
A YES.
Q WHAT ABOUT -- WHAT ABOUT WAS THERE ANY ADULTS?
A YES. HIS MOTHER WAS THERE IN THE HOUSE.
Q OKAY. AND DID YOU INQUIRE OF HER WHERE HER SON SLEPT?
A I DON'T RECALL.
MR. SCHMOCKER: MAY I JUST HAVE A MOMENT, YOUR HONOR?
THE COURT: YES.
BY MR. SCHMOCKER:
Q BESIDES KAI, DID YOU -- YOU SAID KAI FLED THE SCENE; IS THAT CORRECT?
A HE ATTEMPTED TO FLEE, YES.
Q AND THE -- HIS MOTHER WAS THERE WHEN THE HOUSE WAS SEARCHED; IS THAT RIGHT?

A YES. YES, SIR.

Q WAS THERE ANY OTHER ADULTS -- ADULTS THERE?

A I DON'T RECALL.

MR. SCHMOCKER: I HAVE NOTHING FURTHER, YOUR HONOR.

THE COURT: ANY REDIRECT?

MR. DHANIDINA: NO. THANK YOU.

THE COURT: THANK YOU, SIR. YOU ARE EXCUSED.

THE WITNESS: THANK YOU, YOUR HONOR.

THE COURT: SO WHAT WOULD THE PEOPLE SEEK TO INTRODUCE AS TO THIS INCIDENT?

MR. DHANIDINA: YOU KNOW, YOUR HONOR, SIMILAR TO LAST TIME WE BROUGHT THIS UP, I THINK THE -- ANY WEAPONS AND AMMUNITION ARE RELEVANT. I WILL CONCEDE THE POINT THAT THE COURT BROUGHT UP REGARDING THE MARIJUANA. I DON'T THINK THIS IS NECESSARY NECESSARILY FOR THAT TO COME IN, BUT I CERTAINLY THINK ANY FIREARMS, AMMUNITION. THERE WAS A KNIFE AS WELL AS A SKI MASK AND BANDANA. THE REASON WHY I WOULD SEEK THE SKI MASK AND BANDANA IS BECAUSE IT PUTS THE ITEMS IN A CONTEXT FOR THE JURY WHERE THEY CAN CONSIDER THE WEAPONRY AS BEING -- CONSTITUTING AN IMPLIED THREAT OF VIOLENCE BECAUSE OF THE NATURE OF THE POSSESSION OF THOSE WEAPONS. IT ALSO -- IN FACT, YOU KNOW, I WOULD ADD TO THAT THE STREET SIGN SHOWS CONNECTION BETWEEN THE DEFENDANT HIMSELF AND THE ROOM AND

SOME OF THE OTHER FOUNDATIONAL ITEMS THAT THE DETECTIVE TALKED ABOUT IN ORDER TO CONVEY TO THE JURY THAT THERE WAS OBJECTIVE THINGS FOUND IN THE ROOM THAT COULD BE CONNECTED TO THE DEFENDANT HIMSELF. BUT I WOULD CONCEDE THE MARIJUANA AS NOT BEING RELEVANT TO THIS PARTICULAR INQUIRY.

THE COURT: ALL RIGHT. THE DEFENSE OBJECTIONS AND ANY ARGUMENT?

MR. SCHMOCKER: NOTHING FURTHER, YOUR HONOR. WE WILL SUBMIT IT ON THE STATE OF THE RECORD.

THE COURT: ALL RIGHT. THEN I WILL PERMIT -- WELL, I DO FIND FROM THE TESTIMONY OF OFFICER THARP THAT THERE IS A SUFFICIENT FOUNDATION LINKING THE ITEMS TO THE DEFENDANT, AND THE PEOPLE ADMIT EVIDENCE OF A SEARCH AND THAT THE RELEVANT ITEMS WERE FOUND CONSISTING OF THE FIREARMS, AMMO, THE REPLICA WEAPONS, THE KNIFE, THE SKI MASK, ALL OF WHICH ARE UNDER THE CIRCUMSTANCES EVIDENCE THAT THERE WAS NO LEGITIMATE POSSESSION OTHER THAN POTENTIAL USE FOR VIOLENT PURPOSES.

IN ADDITION, THE PEOPLE MAY INTRODUCE AS EVIDENCE OF PERSONAL OR IDENTIFYING ITEMS THE STREET SIGN, THE BANDANA, THE LETTERS.

MR. DHANIDINA: AND THERE IS ALSO A PHOTOGRAPH FROM THE DRESSER.

THE COURT: AND A PHOTOGRAPH.

THE MARIJUANA, WHILE IT MAY HAVE SOME RELEVANCE TO IDENTIFYING THE DEFENDANT WITH THE

ROOM, I WILL EXCLUDE UNDER EVIDENCE CODE 352.

MR. SCHMOCKER: YOUR HONOR, MAY I INQUIRE WITH REGARDS TO THE STREET SIGN. I'M SORRY. IT WAS IDENTIFYING -- I WOULD OBJECT. I DON'T REALLY THINK THAT IT'S IDENTIFYING MR. HARRIS TO THE LOCATION.

MR. DHANIDINA: WELL, I THINK THE TESTIMONY OF THIS DETECTIVE, AS WELL AS DETECTIVE SCHMIDT WHO IS EXPECTED TO TESTIFY, CAN CONNECT A STOLEN 115TH STREET SIGN WITH THE -- A SET OF THE PARTICULAR GANG THE DEFENDANT BELONGED TO.

THE COURT: THAT IS HOW I UNDERSTOOD THE OFFICER'S TESTIMONY, IS THAT IT WAS -- HE FELT IT WAS FURTHER EVIDENCE LINKING THE DEFENDANT WITH THE ROOM, AND THAT IT WAS THE KIND OF SIGN THAT HE WOULD HAVE WANTED TO POSSESS.

MR. SCHMOCKER: VERY WELL. THANK YOU, YOUR HONOR.

MR. DHANIDINA: BEFORE WE CONTINUE --

THE COURT: PARDON ME? GO AHEAD.

MR. DHANIDINA: I WAS JUST GOING TO ASK BEFORE WE GOT TO ANYTHING ELSE, IF I COULD JUST HAVE A SECOND TO INFORM THE DETECTIVE THAT HE NEEDS TO COME BACK ON THURSDAY.

THE COURT: YES.

MR. DHANIDINA: I'LL BE RIGHT BACK.

(PAUSE IN PROCEEDINGS.)

THE COURT: ALL RIGHT. EVERYONE IS HERE AGAIN. I HAVE ALREADY RULED ON THE SHANK, PERMITTING THE INTRODUCTION OF THAT.

AS FAR AS THE LAST ITEM TO WHICH THE DEFENSE HAD AN OBJECTION --

MR. DHANIDINA: YOU KNOW, YOUR HONOR, I DON'T MEAN TO INTERRUPT, BUT I FORGOT TO TELL THE COURT -- I DID TELL THE DEFENSE -- THAT I AM GOING TO BE WITHDRAWING THAT LAST ITEM.

THE COURT: THE ASSAULT IN CUSTODY?

MR. DHANIDINA: YES, FROM FEBRUARY 2008. I'M WITHDRAWING THAT ONE.

THE COURT: ALL RIGHT.

THEN THE OTHER ISSUE IS THE BATSON QUESTION. I RECEIVED THE BRIEF WHICH THE PEOPLE FILED AND REVIEWED IT. THERE WERE ALSO SOME SUPPLEMENTAL CASES SUBMITTED, PEOPLE VERSUS ALAMEIDA AND PEOPLE VS. JOHNSON.

I DON'T HAVE THE CITES. DID YOU -- DO YOU HAVE THOSE WITH YOU FOR THE RECORD?

MR. DHANIDINA: YOU KNOW, I BELIEVE I SENT THOSE BY WAY OF E-MAIL TO THE COURT, THOUGH I LEFT THEM UP IN MY OFFICE. BUT IF THE COURT CAN ACCESS ITS E-MAIL, THE NAMES AND THE CITES WOULD BE ON THERE.

MR. SCHMOCKER: I THINK I HAVE THE JOHNSON CITE.

THE COURT: I HAVE THEM.

IT'S PEOPLE VS. JOHNSON, 47 CAL. 3D 1194, PAGE 1220. PATTERSON, P-A-T-T-E-R-S-O-N, VERSUS ALAMEIDA, A-L-A-M-E-I-D-A, WHICH IS A FEDERAL DISTRICT COURT DECISION AT 2008 U.S. DISTRICT LEXIS, 91711, AND THE OTHER CASE IS PEOPLE VS. ALVAREZ, A-L-V-A-R-E-Z, 14 CAL. 4TH, 155 AT 195.

SO IS THERE ANYTHING FURTHER THAT EITHER SIDE WOULD LIKE TO ADD BY WAY OF ARGUMENT?

MS. VITALE: JUST BRIEFLY, YOUR HONOR, IF I MAY.

FIRST OF ALL, I'M A LITTLE TAKEN ABACK BY THE CONTENT OF THE INTRODUCTION, AND I'M SURE THE COURT IS NOT GOING TO BE CONSIDERING THE EFFECT THAT IT MAY HAVE -- ITS RULING MAY HAVE ON THE PROSECUTING ATTORNEY. I'M NOT SURE WHY THAT IS EVEN A CONSIDERATION.

MR. HARRIS OBVIOUSLY IS ON TRIAL FOR HIS LIFE, AND SO I THINK THE BENEFIT OF ANY DOUBT SHOULD ALWAYS SHIFT TO THE DEFENDANT IN ANY CASE, BUT PARTICULARLY IN THIS CASE.

THE CONCERN AGAIN IS THE EXCLUSION OF THE EXCUSAL OF FOUR FEMALE AFRICAN-AMERICANS ON THE BASIS STATED BY THE PROSECUTION AFTER STIPULATING TO A PRIMA-FACIE SHOWING, ON THE BASIS THAT THEY WERE INDICATING THAT THEY WOULD SEEK SOME GUIDANCE THROUGH PRAYER.

TAKEN IN THAT CONTEXT, IN LIGHT OF

EVERYTHING ELSE THAT THEY SAID BOTH IN THEIR QUESTIONNAIRE AND ORALLY, IT IS OUR POSITION THAT THAT ALONE, STANDING ALONE, IS NOT A BONA FIDE REASON TO HAVE EXCLUDED THESE FEMALE AFRICAN-AMERICAN JURORS.

I WOULD ASK THE COURT TO TAKE JUDICIAL NOTICE THAT I DON'T BELIEVE THAT THERE ARE ANY MORE AFRICAN-AMERICAN MEMBERS OF THE JURY LEFT AT THIS TIME, ALTHOUGH WE ARE NOT THROUGH WITH OUR SELECTION OF THE REMAINING JURORS OUT OF THE B GROUP.

IT IS OUR POSITION THAT COUNSEL HAS NOT ARTICULATED A RACE NEUTRAL REASON FOR EXCLUDING THESE AFRICAN-AMERICANS AND PARTICULARLY FEMALES. I THINK THERE IS A PERCEPTION THAT SOMETIMES FEMALE JURORS HAVE A TENDENCY TO MAYBE GIVE SOME GREATER WEIGHT TO MITIGATION EVIDENCE, AND WE DON'T BELIEVE THAT THE PEOPLE HAVE SHOWN A SUFFICIENT BONA FIDE NON RACIAL REASON FOR EXCLUDING THESE JURORS, PARTICULARLY JUROR 5649, WHO IS A PROSECUTOR, HAS FRIENDS IN LAW ENFORCEMENT.

I THINK HER SON HAD SOME MINIMAL RUN-IN WITH THE LAW ON A WEAPONS CHARGE. IT SOUNDED AS THOUGH HE MAY HAVE HAD A DIVERSION KIND OF DISPOSITION. SHE WAS CLEAR THAT SHE WOULD FOLLOW THE LAW. SHE VERY ARTFULLY STATED WHAT THE LAW WAS WITH RESPECT TO CONSIDERATION OF THE DEATH

PENALTY, AND THE FACT THAT SHE MAY HAVE -- SHE CERTAINLY DIDN'T SAY THAT SHE WOULD NOT BE ABLE TO OPPOSE THE DEATH PENALTY IF THE CIRCUMSTANCES WARRANTED IT. NONE OF THE JURORS THAT WERE EXCLUDED HAD ANY OVERRIDING CONCERN ABOUT IMPOSING THE DEATH PENALTY UNDER THE PROPER SET OF CIRCUMSTANCES, AND IT IS OUR BELIEF THAT THERE HAS NOT BEEN A PROPER SHOWING OR AN ADEQUATE SHOWING BY THE PEOPLE THAT THERE WAS A RACE-NEUTRAL REASON FOR EXCLUDING THESE AFRICAN-AMERICANS FROM THIS PANEL.

SUBMITTED.

THE COURT: AND WHAT ARE YOU SEEKING BY WAY OF REMEDY?

MS. VITALE: I THINK WE STATED YESTERDAY THAT WE WOULD BE MOVING FOR A MISTRIAL. I THINK THE COURT SUGGESTED PERHAPS LEAVING ONE OF -- THE LAST JUROR TO BE EXCUSED ON. IT IS JUST HARD TO KNOW WHAT IS COMING UP WITH THE B GROUP, YOUR HONOR, QUITE FRANKLY. SO I THINK WE ARE OPEN TO SUGGESTIONS FROM THE COURT WITH RESPECT TO THAT, BUT I THINK OUR POSITION WOULD BE TO START OVER AGAIN.

THE COURT: ALL RIGHT. I'LL HEAR FROM THE PEOPLE.

MR. DHANIDINA: THANK YOU.

YOUR HONOR, THE REASON WHY I ASKED FOR CLARIFICATION FROM THE COURT YESTERDAY IS BECAUSE

MY UNDERSTANDING OF THE WHEELER BATSON LINE OF CASES IS THAT, AS LONG AS A RACE-NEUTRAL REASON IS OFFERED, ONE OR MORE IS OFFERED FOR ANY PARTICULAR CHALLENGED JUROR AND THAT IT'S A LEGITIMATE REASON -- AND BY LEGITIMATE, I JUST MEAN SINCERELY GIVEN OR TRUTHFULLY GIVEN REASON, THEN THAT REALLY ULTIMATELY IS THE END OF THE INQUIRY. THERE -- EVEN THE FACT THAT OTHER JURORS MAY HAVE FELT ABOUT THE DEATH PENALTY IN PARTICULAR, THAT IS GETTING INTO THE AREA OF A CHALLENGE FOR CAUSE, AND THAT'S NOT WHAT I'M TALKING ABOUT HERE.

I THINK IT IS ALSO IMPORTANT TO NOTE THE DEFENSE HAS STATED THAT THERE ARE NO MORE AFRICAN-AMERICANS LEFT ON THE JURY. THE DEFENSE THEMSELVES MADE A MOTION FOR CAUSE TO ELIMINATE ONE OF THE AFRICAN-AMERICAN JURORS YESTERDAY. AND WE DO HAVE ANOTHER HALF OF THE PROSPECTIVE JURY PANEL COMING IN. JURY SELECTION IS BY NO MEANS CONCLUDED OR EVEN NECESSARILY NEARING AN END.

WITH RESPECT TO THE JURORS THAT THE DEFENSE IS TALKING ABOUT THAT WE TALKED ABOUT A LITTLE BIT YESTERDAY, IN PARTICULAR THE FINAL ONE THAT I USED A CHALLENGE ON, INDICATING THAT SHE AS WELL AS OTHER JURORS -- AND NON AFRICAN-AMERICAN JURORS, TOO, I MIGHT ADD -- THAT I STRUCK WITH MY PEREMPTORY CHALLENGES, THAT SHE WOULD SEEK SOME SORT OF A GUIDANCE IN PRAYER IS SOMETHING THAT I IN EVERY CASE AM VERY WARY OF, BUT IN PARTICULAR

IN A DEATH PENALTY CASE WHERE JURORS I THINK ARE OFTENTIMES TEMPTED -- AND WE SAW YESTERDAY FROM ONE JUROR IN PARTICULAR -- TO CONSULT OUTSIDE AUTHORITY, OUTSIDE RESOURCES IN COMING TO A DECISION WHEN FACED WITH A DIFFICULT DECISION LIKE THIS. THAT BY ITSELF IS A RACE-NEUTRAL REASON, UNLESS THE COURT THINKS THAT I'M CONTRIVING IT TO MISLEAD THE COURT.

BUT IN ADDITION TO THAT HE --

THE COURT: WELL, I JUST DON'T RECALL ANY QUESTIONS OF JUROR 6 ABOUT THAT.

MR. DHANIDINA: THAT'S TRUE.

THE COURT: AND I LOOKED BACK THROUGH THE NOTES, AND YOU DID QUESTION A GREAT MANY OTHERS WHO RAISED THEIR HANDS ABOUT SAYING THAT THEY MIGHT PRAY AT VARIOUS TIMES DURING THE TRIAL, BUT NOT NO. 6.

MR. DHANIDINA: NOT ALL OF THEM, YOUR HONOR. BUT THERE WERE -- I DID I THINK TWO OR THREE OF THEM. AND I JUST DIDN'T WANT TO BELABOR THE POINT BY LOOKING LIKE I WAS ATTACKING ALL OF THESE JURORS, AND I THINK I WAS SAYING IT IS A LEGITIMATE ATTITUDE TO HAVE, IT'S TOTALLY REASONABLE. I THOUGHT THE POINT HAD BEEN MADE, AND FROM MY STANDPOINT I WAS JUST TRYING TO IDENTIFY WHO THEY WERE. BUT THEN IN ADDITION TO THAT, THE POINT THAT I WAS TRYING TO GET TO WAS THE FACT THAT AT LEAST WITH THE ONE ALTERNATE THAT

WAS LEFT AT THE TIME YESTERDAY WAS A JUROR THAT I WAS ANXIOUS TO GET ON THE PANEL, AND THAT WAS BECAUSE OF A VARIETY OF THINGS THAT HE SAID IN HIS QUESTIONNAIRE AND ALSO IN COURT REGARDING, YOU KNOW, HOW THE PENALTY MIGHT IMPACT THE VICTIM'S FAMILY, WHICH I CONSIDER TO BE A FAVORABLE OPINION FOR OUR SIDE SINCE WE ARE GOING TO BE PRESENTING VICTIM IMPACT TESTIMONY.

THIS WAS AN AREA THAT THE COURT OPINED YESTERDAY WAS NOT A RELEVANT INQUIRY.

THE COURT: WELL, I DIDN'T SAY THAT. I SAID I HAD NEVER SEEN A CASE WHICH HAS UPHELD A CHALLENGE ON THAT ALONE.

MR. DHANIDINA: OKAY. WELL, IN ANY EVENT, THE -- I WASN'T PRESENTING THAT CHALLENGE, THAT PARTICULAR POINT BY ITSELF, AND THAT WAS PART OF THE REASON WHY I SUBMITTED THE ALVAREZ CASE BECAUSE, SINCE MY EARLIEST DAYS IN TRAINING, THAT HAS BEEN SORT OF THE STATE OF THE LAW THAT WE DISCUSSED IN RESPECT TO JURY SELECTION AND THESE TYPES OF CHALLENGES.

FROM MY READING OF THE CASES, AS LONG AS REASONS THAT ARE ADVANCED ARE NOT SHAM EXCUSES AND THEY ARE RACE-NEUTRAL IN AND OF THEMSELVES, AS THEY WERE -- LIKE I INDICATED YESTERDAY, THERE WERE NON AFRICAN-AMERICAN JURORS THAT RAISED THEIR HAND TO THE PRAYER QUESTION AND THEY WERE EITHER DISMISSED FOR CAUSE OR BY THE USE OF ONE OF MY

PEREMPTORIES.

THE COURT: WELL, AGAIN, NOT ACCORDING TO MY REVIEW OF THE NOTES. THERE IS A JUROR SITTING UP THERE NOW WHO RAISED HER HAND AND IN FACT YOU QUESTIONED ABOUT PRAYER, JUROR IN SEAT 5. AND SHE IS STILL THERE.

MR. DHANIDINA: AND AGAIN, YOUR HONOR, WE --

THE COURT: I UNDERSTAND THERE IS A WHOLE VARIETY OF FACTORS THAT GO INTO IT, BUT --

MR. DHANIDINA: AND WE ARE STILL IN THE PROCESS OF SELECTING THIS JURY. YOU KNOW, I THINK WE ARE AT 10 AND 8 PEREMPTORY CHALLENGES, AND I AM NOT REALLY AT A POINT WHERE I BELIEVE THE JURY IS FINALIZED. I'M TAKING ALL THE FACTORS IN THE COMPOSITE OF THE JURY TOGETHER.

I'M SENSING FROM THE COURT THAT THE COURT IS NOT PERSUADED BY THE AUTHORITY THAT I HAVE SUBMITTED WHICH MAY JUST BE A DIFFERENCE IN UNDERSTANDING OF WHAT IS REQUIRED.

I AM AT LEAST GRATIFIED BY WHAT THE COURT STATED YESTERDAY IN THE RECORD THAT THE COURT DOESN'T BELIEVE I'M OFFERING CONTRIVED EXCUSES, AND I APPRECIATE THAT.

WHAT I WOULD SUGGEST IF -- BEING AT THE POINT WHERE WE ARE, IF THE COURT WOULD PERMIT ME, I WOULD OFFER TO WITHDRAW THE PEREMPTORY CHALLENGE AND WE CAN RESEAT THE JUROR, AND IF FURTHER INQUIRY IS NECESSARY OR ANYTHING ELSE

COMES OUT, THEN WE CAN ADDRESS IT AT THAT POINT. BUT IF IT IS ALL RIGHT WITH THE COURT AND WITH COUNSEL, I HAVE NO PROBLEM JUST WITHDRAWING IT AND CONTINUING WITH JURY SELECTION AS WE HAVE GONE.

I THINK THE COURT'S VIEW OF A GRANTED WHEELER-BATSON MOTION AND MY VIEW ARE SUBSTANTIALLY DIFFERENT WHICH IS WHY I PUT IN SOME OF THE LANGUAGE THAT I DID IN THE INTRODUCTION. AND RATHER THAN GET TO THAT POINT, YOU KNOW, IF IT CAN BE AVOIDED, AND GIVEN SOME OF THE COURT'S COMMENTS YESTERDAY WHICH I APPRECIATE, I'M GOING TO ASK THE COURT IF IT WOULD PERMIT ME TO WITHDRAW THE CHALLENGE AND JUST PROCEED WITH JURY SELECTION.

THE COURT: I'LL HEAR FROM THE DEFENSE.

MS. VITALE: YOUR HONOR, I THINK THAT WHAT IS HAPPENING IS THAT WE ARE LUMPING TOGETHER THE PEOPLE THAT SAID THAT THEY MIGHT ASK FOR GUIDANCE DURING THIS TRIAL WITH JUROR NO. 2 WHO ACTUALLY SOUGHT THE ADVICE OF A SPIRITUAL VISOR. AND I DON'T THINK ANY OF THOSE PEOPLE THAT WERE EXCUSED BECAUSE THEY SAID THEY PERHAPS WOULD SEEK SOME GUIDANCE THROUGH PRAYER FALL UNDER THE SAME CATEGORY AS THE JUROR WHO SOUGHT OUTSIDE ADVICE.

I MEAN SOME OF US SEEK GUIDANCE THROUGH PRAYER AS TO WHICH ELEVATOR TO GET ON IN THIS BUILDING, AND THAT DOESN'T MEAN THAT WE WOULDN'T THEREAFTER FOLLOW THE INSTRUCTIONS OF THE COURT OR THE RULES OF LAW THAT GOVERN US ALL.

SO I DON'T AGAIN THINK THAT THE REASONS GIVEN BY THE PROSECUTION ARE BONA FIDE FOR HAVING EXCUSED THOSE VERY LIMITED NUMBER OF BLACK FEMALE JURORS. I THINK WE STILL HAVE THAT SAME PROBLEM, EVEN WITH THE SEATING OF THE JUROR THAT COUNSEL FORMERLY EXCUSED AND HAS OFFERED TO RETRACT.

I'M GOING TO DEFER TO MY --

(DEFENSE COUNSEL CONFER.)

MS. VITALE: AND WE ARE TAKING THE POSITION THAT A MISTRIAL IS APPROPRIATE.

THE COURT: HAVE YOU LOOKED AT PEOPLE VS. WILLIS, 27 CAL. 4TH, 811, IN TERMS OF THE REMEDIES THAT IT DISCUSSES?

MS. VITALE: NO, I HAVE NOT.

THE COURT: WOULD YOU LIKE THAT OPPORTUNITY?

MS. VITALE: YES, I WOULD.

THE COURT: IT TALKS ABOUT RESEATING THE JUROR, PROVIDING ADDITIONAL PEREMPTORY CHALLENGES.

MS. VITALE: ALL RIGHT.

THE COURT: IF REQUESTED, CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR UNDER A MORE CONTROLLED CIRCUMSTANCE. IT BASICALLY SAYS A WHOLE VARIETY OF REMEDIES ARE AVAILABLE.

MS. VITALE: THAT IS WHY WE ARE ASKING FOR

SOME GUIDANCE FROM THE COURT BECAUSE OBVIOUSLY THE MISTRIAL IS THE MOST SEVERE PENALTY TO IMPOSE AT THIS POINT. SO --

THE COURT: WELL --

MR. DHANIDINA: MAY I INTERJECT WITH JUST ONE POINT?

THE COURT: NO, NOT YET.

MR. DHANIDINA: OKAY.

THE COURT: I MEAN I AM STILL INCLINED -- AND I WILL EXPLAIN MY REASONS AND SO FORTH -- TO GRANT THE MOTION.

AND AS I WILL EXPLAIN, I DO NOT FIND THAT THE DEFENSE HAS SUSTAINED THE MOTION WITH REGARD TO THE FIRST THREE. BUT THE ONE THAT I DO FIND THE DEFENSE HAS SUSTAINED ITS BURDEN ON IS THE JUROR WHO IS CURRENTLY IN SEAT NO. 6, JUROR P-9765.

WELL, I MAY AS WELL EXPLAIN MYSELF, AND THEN I CAN -- IF YOU WANT MY SUGGESTION OR MY THOUGHTS ON REMEDY, I WILL GIVE THEM. OF COURSE THEY ARE NOT BINDING.

MS. VITALE: YES.

THE COURT: I REVIEWED THE PEOPLE'S PEREMPTORIES YESTERDAY. THE JURORS IN QUESTION ARE J-2466, THE PEOPLE'S SECOND PEREMPTORY, A BLACK FEMALE. SHE INDICATED THAT SHE HAD A SON WHO HAD BEEN ARRESTED. SHE EXPRESSED FAVORABLE REVIEWS ABOUT GANGS. SHE SAID PEOPLE IN GANGS ARE

SEARCHING FOR LOVE, AMONG OTHER THINGS. SHE REALLY HAD NO THOUGHTS ABOUT PENALTY.

THE PEOPLE, IN GIVING JUSTIFICATIONS, HAVE SAID THAT THEY WERE CONCERNED ABOUT HER FAMILY MEMBERS BEING ARRESTED AND CONVICTED. SHE HAD ANOTHER FAMILY MEMBER WHO WAS CONVICTED. AND HER RATHER FAVORABLE VIEWS ABOUT GANGS. I FIND THAT ENTIRELY SUFFICIENT. SHE HAS A NUMBER OF PROBLEMS.

THE NEXT IS JUROR D-5649. THAT WAS THE THIRD PEREMPTORY CHALLENGE BY THE PEOPLE. THAT'S A BLACK FEMALE. SHE IS A LAWYER FOR THE CITY ATTORNEY'S OFFICE. FRANKLY, I THINK ANY TIME YOU HAVE A LAWYER, IT IS A PROBLEM -- OR A POTENTIAL PROBLEM. BUT MORE TO THE POINT, THE PEOPLE SAID THAT THEY HAD CONCERNS ABOUT HER VIEWS ON THE DEATH PENALTY. SHE IN FACT SAID SHE IS AGAINST THE DEATH PENALTY IN GENERAL AND THAT SHE AGREES MOSTLY WITH LIFE WITHOUT THE POSSIBILITY OF PAROLE.

SHE HAD TALKED ABOUT HER SON BEING ARRESTED, THOSE VIEWS ON THE DEATH PENALTY, THOSE VIEWS ABOUT HER SON TO A LESSER EXTENT, BUT MOSTLY HER VIEWS ABOUT THE DEATH PENALTY ARE ENTIRELY SUFFICIENT, AND I CREDIT THOSE.

THE NEXT JUROR IN QUESTION IS J-6556. THAT WAS THE PEOPLE'S SEVENTH PEREMPTORY CHALLENGE, ALSO A BLACK FEMALE. SHE TOLD US THAT

SHE WAS A DEPARTMENT OF PUBLIC SERVICES SOCIAL WORKER. SHE EXPRESSED IN HER QUESTIONNAIRE SHE HAD FRIENDS WHO WERE POLICE OFFICERS, OBVIOUSLY POSITIVE. BUT SHE ALSO EXPRESSED FAVORABLE VIEWS ABOUT GANGS. SHE SAID THAT YOUNG PEOPLE WERE FORCED INTO GANGS. SHE ALSO EXPRESSED RATHER STRONGLY HELD RELIGIOUS BELIEFS AGAINST THE DEATH PENALTY. SHE TOLD US THAT SHE HAD FAMILY MEMBERS WHO WERE IN PRISON.

THE PEOPLE SAID THAT SHE WAS EXCUSED BECAUSE OF HER EXTREMELY RELIGIOUS VIEWS CONCERNING THE DEATH PENALTY AND HER POSITIVE VIEWS ABOUT GANGS. I FIND THAT FULLY SUPPORTED, AND I CREDIT THAT AND HER LEGITIMATE REASONS.

AS I SAID, MY CONCERN IS JUROR P-9765. THAT WAS THE PEOPLE'S ELEVENTH PEREMPTORY CHALLENGE. SHE IS A BLACK JUROR, FEMALE BLACK, AND AS NOTED SHE IS THE LAST REMAINING AFRICAN-AMERICAN JUROR AMONG THIS FIRST GROUP.

SHE WAS SEATED IN NO. 6 INITIALLY, AND SHE REMAINED THERE THROUGHOUT THE PROCESS UNTIL SHE WAS EXCUSED BY THE PEOPLE LATE YESTERDAY.

SHE TOLD US IN HER QUESTIONNAIRE THAT SHE IS SINGLE, SHE HAS FOUR CHILDREN. IT APPEARS THAT EVERYTHING ABOUT HER AND HER CHILDREN IS STABLE. THEY ARE ALL WORKING AND SO FORTH. SHE IS A TYPIST FOR THE DEPARTMENT OF WATER AND POWER. SHE SAID SHE HAS RELATIVES IN LAW ENFORCEMENT.

SHE TOLD US THAT HER SON WAS ARRESTED BUT WAS FAIRLY TREATED BY THE POLICE. SHE EXPRESSED IN HER QUESTIONNAIRE POSITIVE VIEWS ABOUT THE POLICE. SHE EXPRESSED NEGATIVE VIEWS ABOUT GANGS. SHE EXPRESSED NO PREFERENCE REGARDING THE DEATH PENALTY, NO STRONG VIEWS ABOUT THE DEATH PENALTY.

HER COMMENTS WERE SO UNREMARKABLE THAT I DID NOT ASK HER ANY QUESTIONS. MR. SCHMOCKER DID NOT ASK HER ANY QUESTIONS. THE PEOPLE QUESTIONED HER AND SHE ACTUALLY SAID THAT -- IN REGARD TO QUESTIONS ABOUT HER SON'S ARREST, THAT SHE THOUGHT HE WAS TREATED VERY WELL, HE WAS RELEASED IMMEDIATELY. SHE SAYS SHE HAD NO HARD FEELINGS ABOUT THE POLICE.

SHE RESPONDED TO MR. DHANIDINA'S QUESTIONS ABOUT THE DEATH PENALTY BY SAYING WITHOUT QUALIFICATION SHE COULD RETURN A DEATH VERDICT IF THE FACTS WERE THERE, AND SHE AGREED WITH MR. DHANIDINA THAT THE DEATH PENALTY IS NOT RESERVED FOR WEALTHY VICTIMS OR VICTIMS WHO HAVE SPECIAL CIRCUMSTANCES, THAT SHE THOUGHT IT SHOULD APPLY TO ALL VICTIMS EQUALLY.

THE PEOPLE HAVE SAID THAT -- THEY EXPRESSED TWO CONCERNS, ONE THAT SHE RESPONDED THAT SHE WOULD SEEK GUIDANCE THROUGH PRAYER DURING THE COURSE OF THE TRIAL, AND SECONDLY THAT THE NEXT JUROR WAS MORE FAVORABLE TO THE PROSECUTION.

I LOOKED THROUGH THE RECORD, AND I

SIMPLY DID NOT FIND ANY QUESTIONS OF JUROR NO. 6 OR ANY INDICATIONS THAT SHE WAS QUESTIONED ABOUT PRAYER. AND I HAVE TO SAY I DON'T REMEMBER -- MR. DHANIDINA MAY BE RIGHT THAT SHE RAISED HER HAND, BUT UNLIKE SEVEN OTHER JURORS, SHE WAS NEVER ASKED WHAT ARE YOU GOING TO PRAY ABOUT OR WHAT ARE YOUR CONCERNS? SEVEN OTHER PEOPLE WERE SPECIFICALLY QUESTIONED.

I THINK IT IS SIGNIFICANT THAT THE PEOPLE ACCEPTED THE PANEL SEVERAL TIMES WITH THIS JUROR, JUROR NO. 6 AND HER SEAT MATE, JUROR NO. 5, WHO ALSO SAID SHE WOULD PRAY.

SO IT'S -- WHEN I LOOK AT ALL OF THESE THINGS, I THINK THAT THE DEFENSE HAS A STRONG SHOWING THAT THERE IS SOME RACIAL DISCRIMINATORY INTENT OR EFFECT.

SHE IS THE LAST JUROR. SHE IS THE ONLY REMAINING BLACK JUROR. HER QUESTIONNAIRE IS NEUTRAL, IN SOME RESPECTS POSITIVE TO THE PROSECUTION. HER ORAL QUESTIONS WERE NEUTRAL AND IN SOME RESPECTS POSITIVE TO THE PROSECUTION. AND THEN WHEN I LOOK AT THE PROSECUTION'S JUSTIFICATIONS, I JUST DON'T SEE ANY SUPPORT IN THE RECORD ABOUT CONCERNS FOR PRAYER.

AND AS FOR THE FINAL POINT THAT THE NEXT JUROR IS PREFERABLE, I CERTAINLY APPRECIATE THAT, BUT I JUST DON'T THINK THERE IS CASE LAW WHICH SUPPORTS THAT AS A SUFFICIENT REASON BY

ITSELF, PARTICULARLY WHEN THE NEXT JUROR IS A MALE WHITE.

THE CASES THAT HAVE BEEN CITED, PEOPLE VS. ALVAREZ, PEOPLE VS. ALAMEIDA, BOTH INVOLVE SITUATIONS WHERE THERE WERE A VARIETY OF FACTORS THAT HAD BEEN CITED BY THE PROSECUTION, ACTUALLY A HANDFUL OF FACTORS, ONLY ONE OF WHICH WAS AN EXPRESSION ABOUT A PREFERENCE FOR LATER JURORS OR THE OVERALL COMPOSITION OF THE PANEL.

AND SO I JUST -- I MEAN IT SEEMS TO ME TO DEFEAT THE WHOLE PURPOSE OF BATSON-WHEELER TO BE ABLE TO SAY WHEN IT COMES DOWN TO IT THAT THE ONLY VALID JUSTIFICATION IS A PREFERENCE FOR THE NEXT JUROR WHO IS OF A DIFFERENT RACIAL GROUP.

SO AGAIN, I DON'T VIEW THESE AS SOME KIND OF SEARCH FOR MISCONDUCT BY LAWYERS. I HAVE JUST VIEWED IT AS A MATTER OF WEIGHING THE EVIDENCE.

I MEAN I SPENT A GOOD DEAL OF MY CAREER AS A LAWYER DEFENDING PEOPLE IN CIVIL RIGHTS AND DISCRIMINATION CASES, AND I DEFENDED A LOT OF GOOD PEOPLE WHO HAD THE BEST OF INTENTIONS, BUT IF THE EVIDENCE ISN'T THERE, YOU KNOW, THE RULING IS THE WAY IT IS. AND THAT'S KIND OF THE WAY I SEE THIS.

I'M NOT GOING TO REPORT MR. DHANIDINA TO ANYBODY. I DON'T THINK HE IS ENGAGED IN SOME KIND OF INTENTIONAL MISCONDUCT, BUT WHEN I WEIGH

THE EVIDENCE, I JUST, AS I HAVE TRIED TO EXPRESS, I FIND THAT THE PEOPLE'S EXPLANATION IS NOT STRONG IN COMPARISON WITH THE FACTORS RELIED UPON BY THE DEFENSE.

MR. DHANIDINA: WOULD THE COURT THEN --

THE COURT: SO JUST TO FINISH MY THOUGHTS, I DO RECOMMEND THAT THE DEFENSE READ PEOPLE VS. WILLIS, 27 CAL. 4TH, 811. IT GIVES THE COURT DISCRETION TO FASHION ALTERNATIVE REMEDIES TO A MISTRIAL. IT IS A QUESTION OF WHAT THE VICTORIOUS PARTY, IN THIS CASE THE DEFENSE, WANTS. IT IS NOT SOMETHING I WOULD COMPEL OR CAN COMPEL. IT IS ESSENTIALLY A STIPULATION BY THE DEFENSE AS TO WHAT THE APPROPRIATE REMEDIES ARE.

YOU ASKED, SO I WILL TELL YOU. MY VIEW IS YOU ACCEPTED THE PANEL A NUMBER OF TIMES WITH JUROR NO. 6 ON IT, AND SO IF WE RESEAT JUROR NO. 6, IT SEEMS TO ME IT PUTS YOU RIGHT BACK IN THE SAME PLACE THAT YOU WERE BEFORE WE ENTERTAINED ALL OF THIS.

THERE ARE A NUMBER OF -- A LARGE NUMBER OF JURORS WHO ARE REMAINING, SO IT IS NOT AS THOUGH WE ARE DOWN TO THE LAST SELECTION OR TWO. AND IF THERE IS SOME OTHER REMEDY THAT YOU REQUEST IN ADDITION SUCH AS AN ADDITIONAL PEREMPTORY CHALLENGE OR TO DENY THE PEOPLE THE PEREMPTORY CHALLENGE THAT THEY HAVE USED, OR TO MAKE -- EVEN THOUGH WE ARE RESEATING NO. 6 TO NOT

GIVE BACK THE PEOPLE THE PEREMPTORY CHALLENGE THAT WAS USED TO DENY HER OR TO ELIMINATE HER, YOU KNOW. I'M NOT VERY ARTICULATE IN WHAT I'M SAYING, BUT YOU KNOW, THERE IS A VARIETY OF ALTERNATIVES.

AND AGAIN, IT IS UP TO YOU AT THIS POINT. IF WHAT YOU SAY IS, NO, WE WANT A MISTRIAL, START ALL OVER, THEN I GUESS WE WILL SET A NEW TRIAL DATE IN THE FUTURE AND GET STARTED AGAIN. BUT IT'S UP TO YOU.

MR. SCHMOCKER: YOUR HONOR, IF WE COULD HAVE AN OPPORTUNITY TO READ THAT CASE.

THE COURT: YES.

MR. SCHMOCKER: I HAVE READ CERTAIN CASES IN REGARDS TO REMEDIES ALREADY, BUT I'M NOT FAMILIAR WITH THE WILLIS CASE, AND I WOULD LIKE TO TAKE A LOOK AT IT.

THE COURT: SO DO YOU WANT TO DO THAT THIS AFTERNOON OR REPORT BACK TOMORROW OR WHAT?

MR. SCHMOCKER: HOW ABOUT THIS AFTERNOON. LET'S TAKE A LOOK AT IT RIGHT NOW.

THE COURT: ALL RIGHT. YOU CAN USE MY VOLUME EVEN.

MS. VITALE: THANK YOU.

MR. SCHMOCKER: THANK YOU.

THE COURT: ALL RIGHT. IS THERE ANYTHING FURTHER, THEN?

MR. SCHMOCKER: NO, SIR.

THE COURT: ALL RIGHT. SO WE CAN TAKE A

RECESS AND YOU CAN LOOK AT THE CASE.

(AT 2:45 P.M., A RECESS WAS TAKEN UNTIL 3:05 P.M.)

THE COURT: ALL RIGHT. WE HAVE TAKEN A RECESS. EVERYONE IS BACK.

WHERE DO WE STAND?

MR. SCHMOCKER: YOUR HONOR, THANK YOU FOR ALLOWING ME TO READ THE WILLIS CASE. I UNDERSTAND THE WILLIS CASE, AND I HAVE READ THE ISSUE IN SIMILAR CONTEXT. AND I HAVE SPOKEN WITH MY CLIENT IN REGARDS TO IT. WE WOULD ASK FOR A MISTRIAL.

THE COURT: ALL RIGHT. WELL, I'M SURE YOU HAVE CONSIDERED THE ISSUE CAREFULLY.

MR. SCHMOCKER: WE DID.

THE COURT: AND THAT'S YOUR CALL.

VERY WELL. THEN THE MATTER IS DECLARED A MISTRIAL.

MR. SCHMOCKER: YOUR HONOR, WE HAVE -- OR MR. DHANIDINA STARTED THE INQUIRY OF THE CLERK. I UNDERSTAND THAT THERE IS A POTENTIAL OF A TRIAL DATE IN AUGUST. I HAVE ADVISED MR. HARRIS OF THAT.

MR. DHANIDINA: THIRD WEEK OF AUGUST.

MR. SCHMOCKER: AND MR. HARRIS WOULD BE WILLING TO WAIVE TIME IN ORDER TO HAVE A DATE IN AUGUST.

THE COURT: 17TH, YOU MEAN?

MR. DHANIDINA: WHATEVER THE BEGINNING OF THE THIRD WEEK IS.

MS. VITALE: IT IS.

MR. SCHMOCKER: SHOULD WE --

THE COURT: SO IS THAT WHEN YOU WANT TO START?

MR. SCHMOCKER: YES.

THE COURT: SO AUGUST 17. WE CAN MAKE THAT EIGHT OF TEN WITH WEDNESDAY THE 19TH AS THE LAST DAY.

MR. SCHMOCKER: VERY WELL.

THE COURT: MR. HARRIS, YOU HAVE THE RIGHT TO A TRIAL WITHIN 60 DAYS OF TODAY'S DATE WHICH WOULD BE THE LATTER PART OF APRIL. THE DATE THAT WE HAVE DISCUSSED IS BEYOND THAT.

DO YOU AGREE WITH THAT DELAY?

THE DEFENDANT: YES.

THE COURT: SO THE LAST DAY FOR YOUR TRIAL, THEN, WOULD BE AUGUST 19.

DO YOU AGREE TO THAT?

THE DEFENDANT: YES.

THE COURT: WHEN DO YOU WANT TO RETURN?

MR. SCHMOCKER: SHOULD WE HAVE SOME SORT OF A STATUS CALL IN THE MEANTIME?

THE COURT: RIGHT.

IN EARLY JUNE?

MR. SCHMOCKER: THAT WOULD BE FINE.

THE COURT: JUNE 5, FRIDAY?

MR. SCHMOCKER: JUNE 5 WOULD BE FINE, YOUR HONOR.

THE COURT: ALL RIGHT. VERY WELL.

MR. DHANIDINA: YOUR HONOR, WOULD THE COURT -- I DON'T MEAN TO BE REDUCTANT ON THIS PARTICULAR COURT, BUT JUST BASED ON THE COURT'S COMMENTS, WOULD THE COURT CONSIDER ADDING INTO THE MINUTES SOMETHING TO THE EFFECT THAT THE COURT IS NOT -- IS GRANTING A MISTRIAL BUT NOT MAKING A FINDING OF PROSECUTION MISCONDUCT?

IT WOULD BE HELPFUL, YOU KNOW, RATHER THAN ORDERING UP TRANSCRIPTS AND THAT SORT OF THING.

THE COURT: WELL, I'M -- WE CAN PUT IT IN THE MINUTE ORDER, OR I CAN WRITE-UP AN ORDER. WHATEVER THE PARTIES WANT.

MR. DHANIDINA: A MINUTE ORDER IS FINE.

THE COURT: ALL RIGHT. WELL, THE MINUTE ORDER SHOULD INDICATE THAT THE MOTION WAS GRANTED BASED UPON THE WEIGHING OF EVIDENCE, AND THE COURT DETERMINED THAT THE DEFENSE SUSTAINED ITS BURDEN OF PROOF UNDER BATSON. THE COURT DOES NOT FIND ANY KIND OF INVIDIOUS CONDUCT OR OTHER MISCONDUCT BY THE PROSECUTION, IT'S SIMPLY A FACTOR OF WEIGHING THE EVIDENCE.

MR. DHANIDINA: I APPRECIATE THAT. THANK YOU.

MR. SCHMOCKER: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

VERY WELL. WE WILL SEE EVERYONE JUNE 5.

MR. DHANIDINA: THANK YOU.

MR. SCHMOCKER: YOUR HONOR, WE WILL BE DECLARING A -- WE ARE READY FOR TRIAL. THE COURT UNDERSTANDS THAT. WE ARE WAIVING TIME.

THE COURT: YES.

MR. SCHMOCKER: BUT WE ARE READY FOR TRIAL.

THE COURT: RIGHT.

LET ME JUST ADDRESS ONE OTHER THING. IT WOULD SEEM TO ME UNDER THE CIRCUMSTANCES IT IS NO LONGER NECESSARY TO RETAIN ALL OF THESE QUESTIONNAIRES IN THE RECORD.

AM I WRONG ABOUT THAT?

MR. SCHMOCKER: YOU ARE NOT WRONG. I DON'T BELIEVE YOU ARE WRONG.

THE COURT: SO EVERYBODY AGREES THAT WE CAN DESTROY THE QUESTIONNAIRES FOR ALL OF THE JURORS?

MR. SCHMOCKER: THAT WOULD BE AGREEABLE.

MR. DHANIDINA: AGREED.

THE COURT: ALL RIGHT.

MR. SCHMOCKER: YOUR HONOR, IF I MAY ASK, THE COURT OF COURSE WILL TAKE CARE OF PANEL B? PANEL B IS DUE TOMORROW.

THE COURT: AS WELL AS THE REMNANTS OF PANEL A.

MR. SCHMOCKER: PANEL A, YES.

WELL, WE WOULD HELP IF YOU WANT US TO.

THE COURT: NO, I THINK I WILL PROBABLY BRING THEM ALL IN THE COURTROOM AND JUST SAY THAT THE TRIAL HAS BEEN DISCONTINUED. I'M NOT GOING TO GIVE ANY REASONS, BUT I APOLOGIZE FOR EVERYONE THAT WE TOOK UP THEIR TIME, BUT THESE THINGS HAPPEN.

MR. SCHMOCKER: THANK YOU, YOUR HONOR.

(AT 3:13 P.M., AN ADJOURNMENT WAS TAKEN UNTIL JUNE 5, 2009.)

DECLARATION OF SERVICE BY MAIL

People v. Donte Lamont McDaniel

Supreme Court No. S171393
Superior Court No. TA074274

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California, 94607. I served a copy of the following document(s):

MOTION FOR JUDICIAL NOTICE

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **August 6, 2015,** as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on August 6, 2015, at Oakland, California.

MARCUS THOMAS