No. S171393

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.	Los Angeles Superior Ct. No. TA074274

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

HONORABLE ROBERT J. PERRY, JUDGE

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to those of respondent's contentions which are adequately addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any particular contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief.

ARGUMENT

I.

THE PROSECUTOR VIOLATED *BATSON* AND *WHEELER* IN HIS PEREMPTORY CHALLENGE OF PROSPECTIVE JUROR NO. 28

A. Introduction

That the prosecutor engaged in invidious discrimination cannot reasonably be denied: The trial court found he did so when he eliminated Prospective Juror No. 46, and he was held to have violated the Constitution in the same way in the co-defendant's case.[1] It scarcely requires citation that a prosecutor "brings [his] history of *Batson*[2] violations with him." (*Currie v. McDowell* (9th Cir. 2016) 825 F.3d 603, 611; see also *People v. Fuentes* (1991) 54 Cal.3d 707, 722 (conc. opn. of Mosk, J.) [explaining that reversal stemmed from the fact that "only a few months earlier" the prosecutor had been found to have violated *Batson/Wheeler*[3] in another case, and he "failed—or refused—to learn his lesson"].) The prosecutor's repeated acts of discrimination in the instant case undermine his already dubious explanations for the excusal of Prospective Juror No. 28.

Respondent urges this Court to not even reach the issue of discrimination in jury selection, on the theory that the claim is forfeited. Respondent's contention is that objection to the discriminatory elimination of Prospective Juror No. 28 was forfeited because, when the trial court

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[1] See Appellant's Motion for Judicial Notice (filed August 6, 2015); Reply to Respondent's Opposition to Appellant's Motion for Judicial Notice (filed September 9, 2015.)

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

[3] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

found discrimination against another juror (Prospective Juror No. 46), the defense agreed to have No. 46 reseated and did not press for a mistrial at that point. But the trial court never presented defense counsel with a remedy for the error at issue before this Court – namely, the discriminatory elimination of Prospective Juror No. 28. It may be true, as respondent contends, that defense counsel preferred reseating of jurors as a remedy, as opposed to mistrial. (RB at 60.) But neither reseating of No. 28, nor any other remedy with respect to the unlawful elimination of that juror, was ever offered. To assert that appellant "forfeited" a claim because he did not accept a remedy, never offered for it, is logically unsupportable.

Respondent also claims that the trial court must have meant something other than the obvious – a finding of purposeful discrimination – when it sustained the defense's *Batson/Wheeler* challenge as to Prospective Juror No. 46. According to respondent, the trial court did not find discrimination, but simply reseated Prospective Juror No. 46 by applying an incorrect "for cause" standard. Respondent provides no authority suggesting that the trial court's phrase "not a valid reason" means that it was erroneously employing a for-cause standard. More importantly, respondent's contention was presented to the trial court – and unequivocally rejected – during a fully briefed hearing on a motion for reconsideration of the ruling. The record supports the trial court's interpretation of its own ruling, and deference must be afforded a finding of discrimination just as surely as deference is given to findings of no discrimination. (*People v. Muhammad* (2003) 108 Cal.App.4th 313, 322 ["No less deference is due when the trial court finds the explanation to be pretext, ..."].)

On the other hand, respondent insists that great deference should be afforded the implicit finding that the prosecutor's justifications for excusing

Prospective Juror No. 28 were genuine. (RB at 62-67.) Both logic and precedent preclude deference to an implicit "no discrimination" finding where the trial court fails to take into account the prosecutor's other, adjudicated discriminatory acts. (See *People v. Turner* (1994) 8 Cal.4th 137, 168 [where prosecutor had prior *Batson* violation in the case, trial court decision was "sufficient" where it "stated it was conscious of the basis for the earlier [*Batson* violation] and had this history in mind when it ruled"].) Here, no such explicit account of the prosecutor's prior *Batson* violation was made, and context suggests this crucial evidence was never considered. Nor did the trial court expressly consider the issue – though raised before it – that the prosecutor's justifications failed comparative analysis. Because the trial court quite apparently failed to consider *all* of the relevant circumstances – as *Batson* requires – its denial of the claim regarding Prospective Juror No. 28 should be reviewed de novo.

Finally, respondent claims there is substantial evidence to support the trial court's decision because "all of the reasons advanced by the prosecutor have been found race neutral" in decisions of this Court. (RB at 69.) Respondent's formulation misunderstands the issue. The question is not whether the reasons were facially race neutral, or whether similar justifications have been found race neutral when offered by other prosecutors in other cases. The true question – in light of the fact that the prosecutor was already found to have engaged in race-based peremptory challenges *in this case* – is whether these justifications withstand the extremely careful scrutiny the circumstances demand. They do not.

The three proffered justifications for excusing Prospective Juror No. 28 were questionnaire responses that (1) a sentence of life without the possibility of parole ("LWOP") was more severe than death; (2) voiced

concern that the trial would be too long; and (3) his educational level. All three of the purported reasons for excusing No. 28. applied as well to dozens of the other prospective jurors. (See AOB 75-76 [33 prospective jurors found LWOP more severe than death]; 78-79 [33 prospective jurors had high school education or less]; 80-82 [over 50 jurors expressed concern stemming from the length of the trial].) Most fundamentally, many seated jurors accepted by the prosecution shared these characteristics.

Respondent does not dispute that several seated jurors shared the very characteristics which the prosecutor found disqualifying with regard to black jurors. Respondent is thus relegated to sifting through the juror questionnaires for possible grounds – none ever voiced by the prosecutor – upon which to distinguish the seated jurors from Prospective Juror No. 28. The high court has recently reiterated its rejection of this method. (See *Foster v. Chatman* (2016) 136 S.Ct. 1737, 1752 [fact that stricken juror's son had received a 12-month suspended sentence did not render him incomparable to seated jurors].) If simply identifying differences between seated and excused jurors was sufficient to defeat comparative analysis, there would be no purpose in performing it. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 247 fn. 6 [such a rule would render *Batson* "inoperable"].)

Respondent highlights this Court's statements that where comparative juror analysis was not broached at the trial level, and thus the prosecutor was never asked to distinguish seated jurors, appellate review is "necessarily circumscribed." (RB at 76 [citing *People v. Lenix* (2008) 44 Cal.4th 602, 624].) But critically, in this case the prosecution was *not* deprived of the opportunity to provide an explanation for failure to strike similarly-situated jurors. Defense counsel clearly raised the point in the trial court and the prosecution said nothing. Respondent therefore

improperly requests this Court to assume the role of prosecutor by providing explanations and distinctions never provided below when the opportunity presented itself.

Comparative analysis exposes the fact that traits the prosecutor claimed were disqualifying as to excused black jurors were shared by numerous seated jurors. And the record *already* demonstrates that the prosecutor engaged in discrimination against black jurors. The only question is the how far did this misconduct reach. The record, read in its totality, provides the answer. Appellant therefore requests what the law demands: that he be afforded a trial free from the taint of discrimination.

B. Because Counsel Repeatedly Opposed The Exclusion Of Prospective Juror No. 28 And Was Never Offered A Remedy, There Was No Forfeiture

The purpose of the forfeiture rule is "to encourage counsel to object and thereby give the trial court an opportunity to consider the objection." (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 356.) Of course, counsel *did* object to the exclusion of Prospective Juror No. 28 – repeatedly. (5 RT 1072, 1079-1080.) Respondent nonetheless insists that the claim is forfeited because the only remedy now available for *this* violation – a new trial – was not sought by the defense as a remedy for a *different* violation. The argument does not withstand analysis.

The pertinent rule has been clearly enunciated by this Court. Defense counsel's failure to object "to the trial court's *proposed* alternative remedy *when the opportunity to do so arises*," serves as a waiver of the default remedy of mistrial. (*People v. Mata* (2013) 57 Cal.4th 178, 186, second italics in original.) But there was no "proposed" remedy for the improper exclusion of Prospective Juror No. 28, only for that of Prospective Juror No. 46. That is because the trial court only found a *Batson* violation –

and thus only offered a remedy – in regard to the latter. The defense therefore never had reason, much less an "opportunity" to object to a remedy he was never offered as to Prospective Juror No. 28.

Because defense counsel accepted the trial court's offer to reseat Prospective Juror No. 46, and did not insist on a mistrial, respondent assumes that counsel would not have asked for a mistrial had the court found *Batson* error in the elimination of Prospective Juror No. 28. This is of course just speculation: trial counsel could well have made a different strategic choice regarding the remedy for exclusion of a different juror, and it is thus improper for any court to assume what choice counsel would have made given that no choice was offered. (See *People v. Mata*, *supra*, 57 Cal.4th at p. 193 (conc. opn. of Werdegar, J.) [because of the "strategic nature of the decision, for the trial court to impose one remedy or another absent counsel's waiver or consent would be improper"].)

But even if respondent's assumption were correct, and trial counsel would have preferred to reseat Prospective Juror No. 28, it would make no difference now. Of course, had reseating of No. 28 been offered, the record suggests defense counsel would have accepted it, and the discrimination would have been remedied. But *that* remedy is no longer available (and, to reiterate, was never offered). The *only* remedy now for the prosecutor's discriminatory elimination of No. 28 is to afford appellant a new trial. Respondent's assertion that appellant cannot request the "very same remedy, i.e., a new trial, that he specifically rejected below" (RB at 60) is therefore specious. And respondent's citation to *People v. Burgener* (1986) 41 Cal.3d 505 (RB at 61), in which counsel affirmatively objected to the remedy he was offered for the error that had been identified in that case is simply inapposite. Appellant requests now what he has always requested, a

trial in which the invidious taint of discrimination has been remedied. Appellant's pursuit of a remedy is nothing new; it is the very reason defense counsel objected below. (5 RT 1072, 1079-1080.) It is because *no* remedy was offered for the exclusion of Prospective Juror No. 28 that appellant must now request a new trial, the only remedy now available.

C. The Trial Court Found That The Prosecutor Discriminated During The Course Of Jury Selection And The Trial Court Should Have Expressly Taken This Finding Into Account

In his opening brief, appellant argued this Court should give great weight to the trial court's finding of discrimination by the prosecutor against Prospective Juror No. 46, and should review the claim with respect to Prospective Juror No. 28 de novo because this critical finding was not taken into account. (AOB at 57-61.) Respondent raises two arguments with respect to the trial court's critical finding of discrimination. The first is to pretend that no such finding was ever made, asserting that the trial court was instead employing an erroneous "for cause" standard when it held that the prosecution's strike was "not valid." (RB at 65-67.) Respondent's second argument is that the trial court need not take a finding of discrimination into account absent an express request for reconsideration by the defense. Neither argument should be accepted.

1. Respondent's Contention That the Trial Court Employed the Wrong Standard Is Unsupported by the Record

Respondent does not appear to contest appellant's assertions that, short of an outright admission by the prosecutor, a finding of pretext by the trial court in the case before it is perhaps the strongest single piece of evidence of discrimination that could possibly be adduced at a *Batson* hearing. (AOB at 59.) Respondent's focus is instead on the claim, raised

below by the prosecutor and expressly rejected by the trial court, that the trial court employed an incorrect "for-cause" standard. This reading of the record fails, for the reasons articulated by the trial court and discussed below. But before examining the record, it is important to note the highly charged and uncomfortable context of a *Batson*/*Wheeler* proceedings and how that should inform the analysis of the record in this case.

2. This Court Should Be Extremely Hesitant to Nitpick the Language of a Trial Court's Grant of a *Batson*/*Wheeler* Motion

As a starting point, this Court has reiterated time and time again how much deference should be afforded the trial court's determination of the findings underpinning a *Batson/Wheeler* motion. (*People v. Williams* (2013) 56 Cal.4th 630, 650 [appellate courts give "great deference to the trial court's ability to distinguish bona fide reasons from sham excuses"].) "No less deference is due when the trial court finds the explanation to be pretext[.]" (*People v. Muhammad, supra*, 108 Cal.App.4th at p. 323.) This is "especially true when the bench officer is an experienced trial judge."[4] (*Id.* at p. 322; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1219, fn. 6 [trial judges "know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of reasons given for peremptory challenges"].)

When a *Batson* motion is *granted*, even greater caution from appellate courts is warranted. "Prosecutors are often repeat-players who have developed trusting relationships with judges." (Polster, *From Proving Pretext to Proving Discrimination: The Real Lesson of* Miller-El *and*

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[4] The trial judge in this case was extraordinarily experienced, having been on the bench for over 16 years and having tried more than 550 felony trials. (4 RT 998.)

Snyder (2012) 81 Miss. L.J. 491, 538.) The trial judge is therefore "often in the awkward position of questioning whether a prosecutor, who comes before the judge on a regular basis, is lying to the court." (Note, Johnson v. California *and the Initial Assessment of* Batson *Claims*, (2006) 74 Fordham L. Rev. 3333, 3355; Charlow, *Tolerating Deception and Discrimination After* Batson (1997) 50 Stan. L. Rev. 9, 11.) Put simply, "[n]o one wishes to accuse those with whom they regularly associate, both professionally and often personally, of moral wrongdoing. Yet virtually every *Batson* ruling potentially carries such a stigma." (Charlow, Batson "*Blame*" *and Its Implications for Equal Protection Analysis* (2012) 97 Iowa L. Rev. 1489, 1493.) This element of stigma and blame has been cited by numerous scholars as one reason that the rule in *Batson* has failed to eliminate bias in jury selection. (See generally, *ibid.*).

Thus, when a trial court granting a *Batson* motion decides to use respectful and mollifying language such as positing that a proffered reason is "not valid" (5 RT 1085), or states that it focuses not simply on the truth of a given justification but the "validity of those reasons to *prove actual bias*" (16 RT 3058, italics added) as opposed to stating "you are lying" or "your reasons are pretextual and intended to cover up your act of racial discrimination," appellate courts should pause before presuming that the trial court has suddenly adopted an incorrect legal standard. Instead, appellate courts should attempt to interpret the record by putting themselves in the shoes of the trial court.

The record in this case vividly illustrates how uncomfortable those shoes may be. The prosecutor accused of misconduct filed a highly unusual motion for reconsideration after the first penalty phase jury deadlocked. When the trial court stated that the motion had "nothing to do with this

trial" and that it was about the "prosecutor's perception of his record as a prosecutor" (17 RT 3056), the prosecutor made no effort to dispute this conclusion.

Defense counsel (quite understandably) seems to have wanted to avoid participation in the hearing altogether, stating at the beginning of the hearing that he wished "to leave it up to the court, between the court and the prosecutor" and, after being pressed by the court, stating that he had talked to the prosecutor and told him he would submit it to the court. (16 RT 3055-3056.) In ruling, the trial court made serious efforts to underscore his "respect" for the prosecutor, apologizing that the prosecution had "taken the Court's ruling so personally." (16 RT 3056.) The court even offered to write the prosecutor a letter of support should he later seek appointment to the bench. (16 RT 3057.) In sum, the hearing epitomized the awkward professional and interpersonal position trial courts are placed in when granting a motion based on a prosecutor's use of race-based peremptory challenges.

In this context, an appellate court should make every effort to read the trial record for what it is: a difficult balancing act by the trial court, who may not wish to "accuse those with whom [it] regularly associated, both professionally and often personally, of moral wrongdoing." (Charlow, *supra*, 97 Iowa L. Rev. at p. 1493.) Viewed though this lens, and in its totality, the record in this case firmly supports the conclusion that the trial court applied the correct legal standard. At a bare minimum, the record does not overcome the presumption that the trial courts apply well-settled standards correctly.

3. The Record Does Not Overcome the Presumption That the Trial Court Here Employed the Correct Standard

Where a legal issue is "well settled, it is presumed that the trial judge applied the appropriate standard." (*In re Fred J.* (1979) 89 Cal.App.3d 168, 175; *People v. Asghedom* (2015) 243 Cal.App.4th 718, 725 [presumption applied where the applicable standard is "well established" and trial court's order is "not facially inconsistent with the application of the correct standard"].) As a result of this presumption, ambiguities are generally resolved in favor of the trial court. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631.)

Few issues are more "well-settled" than the three-step showing required to prove a *Batson*/*Wheeler* violation. (See *People v. Cunningham* (2015) 61 Cal.4th 609, 663 ["The applicable law is well settled"]; *People v. Streeter* (2012) 54 Cal.4th 205, 221 [accord]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 77 [accord]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1104 [accord].) The strong presumption, therefore, is that the trial court was aware of and followed the established three-step *Batson*/*Wheeler* jurisprudence. Indeed, this fact need not be presumed: the record in this case affirmatively demonstrates that the trial judge had a keen interest in *Batson*/*Wheeler*, and that he been reading an article on *Batson*/*Wheeler* law on the very morning of the challenge. (5 RT 1084.)

Despite the trial court's obvious familiarity with the general *Batson*/*Wheeler* case law, respondent asserts that, instead of applying the familiar three step approach, the trial court chose to blaze a new path, adopting a lawless "for cause" standard. (RB at 65-66.) In respondent's somewhat tentative view, the trial court "apparently" or "appeared to" have

granted the *Batson* motion under this incorrect standard. (RB at 66.)

First, respondent notes the trial court's statement that a juror's radio station listening habits was "not a valid reason." (5 RT 1085.) Respondent provides no authority for its argument that the trial court's words ("not a valid reason") must be construed as applying a for-cause standard. (Cf. *People v. O'Malley* (2016) 62 Cal.4th 944, 974 [finding no *Batson*/*Wheeler* violation where trial court stated that the "People's reasons for exercising the peremptory challenges are valid reasons"]; see also RB at 62 [alleging that prosecutor had "valid" reasons for excusing Prospective Juror 28].) Second, respondent, like the prosecutor, also points to the trial court's statement that "he looked like an acceptable juror." (5 RT 1086; RB at 66.)

Respondent completely ignores the trial court's question to defense counsel immediately preceding the grant of the *Batson*/*Wheeler* motion: "are you arguing that this – that [the prosecutor] is *making false representations to the Court* and that this panel should be dismissed?" (5 RT 1085, italics added.) When trial counsel immediately responded by requesting reseating of Prospective Juror No. 46, the trial court's very next statement was "I am going to grant the request." (5 RT 1085.) It was *then* that the court stated that "the radio station that somebody listens to is not a valid reason." (5 RT 1085.)

Thus, the context of the hearing itself suggests that the trial court found what other courts have occasionally found: mere unexplored association with an allegedly unfavorable radio station "seems quite pretextual, particularly in the absence of any showing that [the juror] had anything to do with the purported telecast/broadcast" at issue. (*Chisolm v. State* (Miss. 1988) 529 So.2d 635, 639.) Indeed, in light of the fact that the prosecutor himself had just admitted to listening to and enjoying the *very*

same radio station (5 RT 1081), it seems likely that the trial court believed that race-based stereotypes led the prosecutor to group the prospective juror in a different category than the prosecutor himself. (See 5 RT 1082 [defense counsel's statement that the juror "may listen to the same thing [on this station] you do"].)

More importantly, the trial court subsequently explained precisely what it meant by "not a valid reason" during the motion for reconsideration. It explained that, even if the statements were "honest[]" in the sense that they were race-neutral and subjectively undesirable, the court may rely on the "validity" of those reasons "to prove *actual bias*." (15 RT 3057-3058, italics added.)

In other words, even if the prosecutor was truly suspicious of people who (like himself) listened to public radio, the justification draws so little support in reality and actual trial tactics that a trial court might find that (even while a true statement), it was not the true motivation for the excusal. In the trial courts words, the "validity" of the justification may help to prove "actual bias." (15 RT 3058; *People v. Muhammad*, *supra*, 108 Cal.App.4th at p. 322 [though "an honestly held belief . . . is a legitimate basis for a peremptory challenge" this is not so if it the explanations "offered were intended to disguise the actual reason for peremptory challenges: group bias."].) As the Supreme Court has taught: "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) This is true whether or not the prosecutor is "honest" in the sense that some – or even all – of the juror characteristics articulated are subjectively undesirable to the prosecutor. The ultimate focus is always on the existence of pretext and group bias.

Respondent contends (as did the prosecutor below) that the trial court's statements that the radio station habits of the juror was "not a valid reason" and that the juror "looked like an acceptable juror" means that the trial court applied a "for cause standard. (RB at 66.) But this reading of the record thrives only in isolation. This interpretation ignores the trial court's earlier statement that the issue at stage three was whether the prosecutor was making "false representations to the court." (5 RT 1085.) It likewise ignores the trial court's clear statement of the ultimate issue when it found a "prima facie case of excusals *based on race*." (5 RT 1075, italics added.) Nor can respondent's interpretation be squared with the trial court's later insistence that the "validity" or "adequacy" of the prosecutor's statement was useful only insofar that it helped "to prove actual bias." (16 RT 3058.) Respondent provides no explanation under its reading for any of these statements.

Finally, the trial court's concluding statement at the motion for reconsideration strongly reinforces the conclusion that by "not a valid reason" it had meant "pretext." The trial court stated that "I didn't think the reasons you were advancing at the time – and 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*." (16 RT 3060-3061, italics added.) In other words, the trial court engaged in some form of comparative juror analysis with respect to Prospective Juror No. 46. Comparative juror analysis is an established tool at step three of the *Batson* analysis "for determining whether facially race-neutral reasons *are a pretext for discrimination*." (*Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 956, italics added.) Respondent does not even attempt to explain why the trial court would make use of comparative juror analysis for Prospective Juror

No. 46 if it were simply employing a for-cause standard based on radio listening habits. And the entire premise of respondent's argument hinges on the radio station being the *sole* "for cause" issue on which the trial court rested its finding. But the credibility of the radio station justification was *not* the sole reason: in referencing it's comparative analysis, the trial court stated that the "*reasons* . . . I don't think *they* were valid" because of similar statements by other jurors. (16 RT 3060-3061, italics added.)

While appellant will not unnecessarily complicate this claim by undertaking a complete comparative analysis for Prospective Juror No. 46, appellant notes that one of the reasons deployed against this juror – that he indicated that the death penalty and life in prison are "essentially the same" (5 RT 1081), completely fails comparative analysis, as does the similar justification for excusal of Prospective Juror No. 28. Of the 12 jurors initially seated, only half stated that the death penalty was more severe, and less than half of the alternates. (AOB at 76-77.) Appellant also notes that the prosecutor, rather suspiciously, attempted to add further reasons (including the potentially race-charged allegation that the juror worked at an organization named "Urban Possibilities"), only *after* the motion was granted. (5 RT 1085-1086.)[5] In sum, there is ample support in the record for the trial court's correct finding of discrimination against Prospective Juror No. 46.

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[5] After adding reference to "Urban Possibilities," the prosecutor subsequently protested that there were "throughout the questionnaire . . . a number of race neutral reasons." (5 RT 1086.) It is suspicious that the prosecutor compiled reasons voiced only after the finding of discrimination. (Cf. *Foster v. Chatman* (2016) 136 S.Ct. 1737, 1752 [the "reasons for the strike shifted over time, suggesting that those reasons may be pretextual"].)

D. Because Of The Trial Court's Failure To Expressly Address Powerful Evidence Of Discrimination And Pretext, This Court Should Review The Trial Court's Decision De Novo

A reviewing court "must be sensitive not only to the possibility of disingenuousness on the part of the prosecution in its explanation of challenges, but also to the possibility of ingenuousness or alacrity on the part of the trial court in its acceptance of those explanations." (*People v. Clay* (1984) 153 Cal.App.3d 433, 456.) Unfortunately, in its haste to move beyond the uncomfortable finding of discrimination against the prosecutor with respect to one juror, the trial court ignored this critical evidence of pretext against another. But the rule set forth by the United State Supreme Court could not be clearer: "*all* of the circumstances that bear upon the issue of racial animosity *must be consulted.*" (*Snyder v. Louisiana* (2008) 552 U.S. 472, 478, italics added.) For this reason, appellant argued in the opening brief that the trial court's decision should be reviewed de novo.

First, the trial court did not take into account its own finding that the prosecutor was engaged in discrimination and pretextual cover-up with respect to Prospective Juror No. 46. (AOB 57-61.) Second, although appellant urged the trial court to engage in comparative analysis, the trial court did not spell out what – if any – comparative analysis it performed with respect to Prospective Juror No. 28. (AOB at 61-66.) Appellant addresses respondent's counter arguments to de novo review in turn.

1. The Trial Court's Failure to Expressly Account for It's Own Crucial Finding of Discrimination and Pretext Warrants Close Appellate Scrutiny

Respondent contends that there is no requirement that the trial court reexamine its denial of the *Batson*/*Wheeler* motion with respect to Prospective Juror No. 28 because defense counsel did not expressly move

for reconsideration after the grant of the motion with respect to Prospective Juror No. 46. (RB at 64.) Respondent draws by analogy to cases in which this Court has held that a trial court has no sua sponte duty to reconsider its prior rejection of a prima facie case as to some jurors when a prima facie case is found as to a subsequent juror. (RB at 64, citing *People v. Hamilton* (2009) 45 Cal.4th 863, 900, fn. 10 [citing *People v. Avila* (2006) 38 Cal.4th 491, 552] ("Avila").) *Avila* is factually and legally distinguishable.

The court below made a global finding of a prima facie case with respect to all five black jurors. (See 5 RT 1075 ["I am finding a prima facie case of *excusals* based on race"], italics added.) It then solicited justifications with respect to all five jurors. (5 RT 1076-1084.) The trial court then made a global denial of the motion with respect to all five jurors, though one was later reconsidered. (5 RT 1085 ["I am accepting of the articulated reasons that have been advanced here."].) *Avila* holds that when there are several *Batson*/*Wheeler* objections, some of which are initially rejected at the prima facie stage, defense counsel must later alert a trial court which finds a prima facie case – but does not solicit justifications for prior jurors – that those prior jurors remain at issue. (*Avila*, *supra*, 38 Cal.4th at p. 552 ["the trial court was not required to ask the prosecutor to provide race-neutral explanations" for jurors previously subject to objections].) But in this case the trial court found a prima facie case as to each of the five excusals, and solicited justifications as to all five jurors. Thus, the holding of *Avila* does not apply.

Nor does respondent's effort to extend *Avila* to a different context fare any better. First, the difference in factual context renders application of *Avila* inappropriate. The *Avila* rule deals with a process whereby defense counsel makes seriatim prima facie challenges against prospective jurors.

(See *Avila*, 38 Cal.4th at p. 552 [discussing fact that *Batson*/*Wheeler* challenges are made in succession and each "objection is a discrete event and should be resolved independently"].) In this situation present in *Avila*, it makes sense to require the defense to put the trial court on notice as to which jurors continue to be subject to defense challenge. Here, there is no such confusion and thus no reason to require the defense to make the obvious suggestion that powerful evidence of discrimination (a finding of a *Batson/Wheeler* violation) should be considered as to each and every juror.

But even in the *Avila* context, a prior excusal, though not at issue because of failure to renew the prior objection, continues to be "part of the totality of the relevant facts to be considered" as to the jurors who *are* at issue. (*Avila*, *supra*, 38 Cal.4th at p. 552.) The *Avila* formulation is thus precisely how the trial court *should* have considered the discriminatory excusal of Prospective Juror No. 46 – as a crucial fact in the "totality of the circumstances."

Second, the purpose of the *Avila* rule does not support its application to this case. As explained in *Avila*, "the presumption that a prosecutor uses his peremptory challenges in a constitutional manner is 'suspended when the defendant makes a prima facie showing of the presence of purposeful discrimination' but '*reinstated . . . when the prosecutor makes a showing of its absence*.' Thus, on a later motion, the defendant must make a prima facie showing anew." (*Avila*, *supra*, 38 Cal.4th at p. 552, italics added, citing *People v. Alvarez* (1996) 14 Cal.4th 155, 199.) The presumption does not apply in this case: not only was a prima facie case established as to *all* of the disputed jurors, but the prosecutor was explicitly found to have discriminated against one of them. As such, there is no reason to apply a rule grounded in "reinstat[ing]" the presumption that the prosecution is

acting without regard to race when it provides legitimate reasons. (*Avila*, 38 Cal.4th at p. 552.)

The question is whether the trial court should have explicitly considered the record evidence of pretext and discrimination which arose only moments *after* it implicitly accepted the genuineness of the justifications as to Prospective Juror No. 28. (5 RT 1085.) This Court has recently reiterated that strong evidence of discrimination, even when arising *after* the trial court's ruling can – indeed must – be considered. (*People v. Scott* (2015) 61 Cal.4th 363, 391 [even if coming after the denial of a prima facie case, a "facially discriminatory" justification "*must be weighed* with the totality of the relevant facts to determine whether they give rise to an inference of discriminatory purpose and thus compel analysis of the subsequent steps in the *Batson/Wheeler* framework"], italics added.) Yet there is no evidence in the record that the trial court took account of its finding of discrimination and pretext.

2. It Is Unlikely that the Trial Court Took the Discriminatory Excusal of Prospective Juror No. 46 into Account, and Failure to Analyze this Evidence Is a Circumstance in which Deference to an Unreasoned Denial Is Inappropriate

Respondent asserts that the trial court "did take into consideration its ruling regarding Prospective Juror No. 46 when it accepted the prosecutor's reasons for challenging Prospective Juror no. 28." (RB at 65.) This reading finds no support in the record.

To reiterate, the trial court made a unreasoned, global finding denying the challenge with respect to all five jurors, stating that it was "accepting of [*sic*] the articulated reasons that have been advanced here." (5 RT 1085.) Moments later, it changed its ruling with respect to

Prospective Juror No. 46 and found the prosecution had violated *Batson*/*Wheeler* with respect to this juror. (5 RT 1085; AOB at pp. 59-60.) Absent precognition, at the time it ruled on Prospective Juror No. 28, the trial court could not "take into consideration" a finding that had yet to be made. The failure to weigh this powerful evidence is why the ruling as to No. 28 does not warrant deference. (See *United States v. Stephens* (7th Cir. 2008) 514 F.3d 703, 712 ["[W]e cannot defer to a district court decision that ignores material portions of the record without explanation."].)

The one California case appellant could find touching on the issue of prior *Batson*/*Wheeler* violations by the same prosecutor in the same case seems to sanction the rule proposed by appellant in the opening brief. In *People v. Turner* (1994) 8 Cal.4th 137 (*Turner II*), there was a retrial after a reversal due to a *Batson*/*Wheeler* violation with the same attorney serving as prosecutor in both cases. (*Id*. at p. 163; see generally *People v. Turner* (1986) 42 Cal.3d 711 (*Turner I*).) When the appellant in *Turner II* urged that the prosecutor's prior history in the case compelled a lower threshold for an inference of discrimination, this Court held that the trial court's decision denying a prima facie case was "sufficient" because the trial court "stated it was conscious of the basis for the earlier reversal *and had this history in mind* when it ruled that no prima facie case had been established." (*Turner I*, *supra*, 8 Cal.4th at p. 168, italics added.) Here, there is no such explicit reference to the finding of pretext and discrimination. And the sequence of the trial court's implicit finding accepting the prosecutor's reasons as to Prospective Juror No. 28 (prior to the grant of the *Batson* motion with respect to Prospective Juror No. 46) makes such an accounting unlikely.

Assuming the implausible – that the trial court did take the finding

into account without ever mentioning it – simply raises more troubling questions. How much weight did the trial court accord to its own finding of discrimination? Assuming that it accorded appropriate weight, how and why was that extraordinary evidence of pretext overcome as to the other jurors? What bearing did the fact that the prosecutor used an extremely similar justification (concerning the severity of LWOP) for his pretextual excusal of Prospective Juror No. 46 have on the validity of this justification in excusal of Prospective Juror No. 28? What effect might the finding of pretext have had on the defense request for comparative analysis as to Prospective Juror No. 28? (See *ante*.)

It is, of course, impossible to answer any of these questions due to the trial court's silence on the subject. This case is therefore a prime example of a factual context in which deference to unreasoned opinions is unwarranted. (See *People v. Williams* (2013) 56 Cal.4th 630, 699 (dis. opn. of Werdegar, J.) [de novo review of unreasoned denials warranted under "egregious circumstances" of a given case]; see also *id.* at pp. 690-728 (dis. opn. of Liu, J.) [urging court to revisit deference to unreasoned *Batson* denials].)

3. This Court Should not Defer to Detailed Comparative Juror Analysis that the Trial Court Did not Expressly Perform, and which this Court's Precedent Indicates Could not Have Been Performed without the Aid of the Prosecutor

Respondent attacks appellant's request for de novo review due to the absence of reasoned comparative juror analysis on two grounds. First, respondent contends that trial counsel's "comment that there were other jurors who shared the same characteristics that the prosecutor found troublesome in Prospective Juror No. 28" (RB at 67) is not a request for

comparative juror analysis. Second, it excuses the trial court by blaming defense counsel for failing to provide a list of jurors to whom to compare the stricken jurors.

The first argument is easily disposed of. The contention that other jurors "share the same characteristics that the prosecutor found troublesome" in the stricken juror (RB at 67; 5 RT 1079-1080) is the very essence of comparative juror analysis (*People v. Johnson, supra*, 30 Cal.4th at p. 1330 (conc. opn. of Werdegar, J.)). It is true that defense counsel did not provide any detail other than that "many jurors" shared "those particular reasons, the [lack of] education, the L-WOP is more severe, ... the time issue with regard to the jury [service]." (5 RT 1079.) But whether comparative juror analysis was urged is likewise indisputable. And this Court has in fact explicitly sanctioned less than exhaustive efforts by defense counsel. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 624 [noting that defense counsel can object to disparate treatment of seated and stricken jurors based only on memory and "without having reviewed voir dire transcripts"].)

Respondent's second contention is factually accurate, but proves too much. Respondent argues that a trial court "cannot be expected" to perform detailed comparative juror analysis unless it is provided detailed briefing or argument listing the various jurors to be compared." (RB at 65.) On this point, respondent is correct: a trial court cannot conduct a detailed, juror-by-juror comparative analysis mid-trial without the assistance of counsel. This Court concluded as much in *People v. Johnson*, *supra*, 30 Cal.4th at p. 1323 [although agreeing that comparative juror analysis is useful and can be conducted by trial courts,"we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate

lawyers and courts can do after scouring the often lengthy appellate record during the appeal. "].) But if it is *impossible* for the trial court to have conducted a detailed juror by juror analysis without assistance, there is no reason for an appellate court to defer to the conclusions of such an analysis by pretending that such a detailed analysis was conducted in the first place.

The real question – if the issue of comparative juror analysis is raised before the trial court – is whose burden it is to distinguish (or compare) stricken and seated jurors in a detailed fashion. Respondent asserts without authority that the burden is on the defense.

Respondent's assertion was answered to the contrary in *Wheeler* itself, which assigned the burden of comparing seated and stricken jurors to the prosecutor. (See *People v. Wheeler* (1978) 22 Cal.3d 258, 282 ["it will be relevant if [the prosecutor] can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds"]; see also *People v. Moss* (1986) 188 Cal.App.3d 268, 278 ["It is the prosecution's responsibility to bring [similarly situated jurors] to the trial court's attention. It is neither the function nor the duty of the trial courts, or the appellate courts on review, to speculate as to prosecutorial motivation for other peremptory challenges. [citation]."].) Obviously, defense counsel has no ability whatsoever to know or explain why the prosecutor chose to strike or seat various jurors. Only the prosecutor can answer the question of why seated and stricken jurors, who possess characteristics that were similar, were nonetheless treated differently. (See *Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal.3d 55, 71 ["Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the

evidence on the issue although it is not the party asserting the claim."].)

So when a request for comparative analysis (even at a minimum level of detail) is raised by the defense, it is the *prosecution* that is to blame for failing to provide the trial court with the aid of more detailed comparative juror analysis. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 624 ["the *prosecutor* can respond to the alleged similarities."], italics added; see also *id.* at p. 633 (conc. opn. of Baxter, J.) [when comparative analysis is requested in the trial court "*the prosecution is afforded* a fair opportunity" to explain its failure to challenge similarly situated jurors], italics added; *People v. Jones* (2011) 51 Cal.4th 346, 365 ["One of the problems of comparative juror analysis not raised at trial is that *the prosecutor generally has not provided, and was not asked to provide*, an explanation for nonchallenges"].) As articulated by Justice Werdegar in her concurrence in *Johnson*, it is when a defendant *fails* to assert the issue of comparative analysis that he "deprive[s] the prosecution of the opportunity to explain the pattern of its preemptive challenges to the trial court, [and] also deprive[s] the trial court of the opportunity to evaluate [the prosecutor's] explanation in the context of the voir dire the court observed." (*People v. Johnson, supra*, 30 Cal.4th at p. 1330 (conc. opn. of Werdegar, J.).)

In this case, the prosecutor knew full well which characteristics the defense alleged failed comparative analysis – all of them: "the [lack of] education, the L-WOP is more severe, ... the time issue with regard to the jury [service]." (5 RT 1079.) Indeed, the prosecutor, on notice due to the defense comments, explicitly conceded that "many others" had initially answered that LWOP was more severe than death. (5 RT 1078-1079.) But instead of distinguishing the jurors which he did not strike, the prosecutor said nothing, leaving the trial court bereft of assistance and in a difficult

position.

The trial court also bore some responsibility in this regard. This Court has held that the fact that comparative analysis 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.) Here, not only did the prosecutor fail to provide any explanation, the trial court did not probe further as *Hall* commands. This failure to inquire about the common characteristics continued even after the trial court found the prosecutor was engaged in discrimination and even though the prosecutor provided a pretextual justification for Prospective Juror No. 46 nearly identical to that deployed against Prospective Juror No. 28. (See 5 RT 1082 [justification that Prospective Juror No. 46 believed "life without parole and the death penalty are essentially the same because life in prison is not a life"].)

No doubt the trial court did its best to recall the entirety of the voir dire and the various juror questionnaires in the fast-moving hearing.[6] But it is one thing to presume on a silent record that a trial court followed well-settled law. (*In re Fred J., supra*, 89 Cal.App.3d at p. 175.) It is quite another thing to presume that the trial court conducted a detailed comparative analysis that this Court, and respondent, has recognized is impossible without the assistance of the prosecution. (RB at 67; *People v.*

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[6] Appellant does not suggest a trial court cannot engage in *any* comparative analysis without the assistance of counsel. A trial court may have a vague sense or chance recollection that certain characteristics were shared by some seated and stricken jurors. Indeed, the trial court in this case seems to have been able to do so with respect to Prospective Juror No. 46. (See 16 RT 3060-3061.) But the detailed juror-by-juror comparison conducted by appellant and respondent is clearly impossible.

Johnson, supra, 30 Cal.4th at p. 1323 ["we cannot expect the trial court to [perform comparative analysis] itself"].) And quite another still to *defer* to a detailed analysis which was obviously never performed.

As discussed below, a detailed comparative analysis provides critical evidence which undermines the legitimacy of the prosecutor's explanations. Because there is no reason to believe that the trial court considered in detail this vital evidence, it makes no sense to defer to its ruling as though it had. (See generally, AOB at 59 [collecting cases holding that no deference is due where "evidence of pretext was not confronted but rather was overlooked by the trial court in assessing the prosecutor's credibility"]; *Harris v. Hardy* (7th Cir. 2012) 680 F.3d 942, 951; *United States v. Stephens*, *supra*, *514* F.3d 703, 712; *McGahee v. Alab. Dept. Of Corrections* (11th Cir. 2009) 560 F.3d 1252, 1263.)

E. Where a Prosecutor Has Been Caught *In Flagrante Delicto* Discriminating Against Black Jurors, The Fact That The Jury, As Subsequently Accepted, Includes Black Jurors Has No Significance

The prosecutor in this case used five out of his first twelve strikes against black prospective jurors, at which point the trial court ruled that he had violated *Batson*/*Wheeler* by discriminating on the basis of race and reseated Prospective Juror No. 46. For the remainder of voir dire – unsurprisingly – 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 final jury included four black jurors, and there was one black alternate juror.

Respondent cites this pattern as evidence of the prosecutor's "good faith" in selecting jurors without respect for race. (RB at 93, citing *People*

v. Ward (2005) 36 Cal.4th 186, 203.) It is not. If a prosecutor is caught violating *Batson/Wheeler*, he or she is extremely unlikely to continue to discriminate based on race and risk the trial court's displeasure. (See *People v. Muhammad*, *supra*, 108 Cal.App.4th 313 [upholding $1,500 sanction against Los Angeles prosecutor who violated *Batson/Wheeler*].) This Court has explained that even the *threat to file a motion* may induce a prosecutor to alter his or her suspicious and disproportionate strikes against minority jurors. (See *People v. Trevino* (1985) 39 Cal.3d 667, 688 ["The prosecution left a solitary Spanish surnamed juror on the panel as an alternate, but only after the defense advised the court that it intended to make the *Wheeler* motion."]; see also *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 Hispanics were stricken "in effect warned" the prosecutor and therefore reviewing court discounted prosecutor's later acceptance of jurors of protected group].) If anything, the stark contrast in the prosecutor's pattern of excusals before and after the ruling *supports* a finding of discrimination. It does nothing to dispel the strong evidence of discrimination present in this case.

F. The Prosecutor's Failure To Question Prospective Juror No. 28 About Any Of The Alleged Bases For His Excusal Is Extremely Suspect

Respondent does not dispute appellant's unassailable contention that the questioning of Prospective Juror No. 28 was perfunctory and wholly unrelated to the alleged bases for his excusal. Instead, respondent attempts to explain away the prosecutor's failure to question this juror. These arguments are unpersuasive.

1. **Failure to Question on the Severity of LWOP Is Suspicious Because the Prosecution Questioned Other Juror's on Precisely this Point**

Before addressing the desultory questioning itself, respondent invokes *People v. Clark* (2011) 52 Cal.4th 856, for the proposition that desultory questioning is of "limited significance" in cases "which the prosecutor reviewed the jurors' questionnaire answers and was able to observe their responses and demeanor, first, during extensive individual questioning by the court and later, during group voir dire." (RB at 71, citing *People v. Clark*, *supra*, 52 Cal.4th at p. 906-907 (*Clark*).)[7] But respondent misrepresents the rule, which derives from *People v. Taylor* (2010) 48 Cal.4th 575, 615-616 (*Taylor*). (RB at 71).

As this Court in *Taylor* explained, the desultory questioning of a juror by the prosecutor is normally a "significant" factor. (*Taylor*, *supra*, 48 Cal.4th at p. 615.) And failure to ask "obvious follow-up" questions of a juror regarding a ground for excusal "strongly suggests" that the prosecutor was not actually interested in that purported justification. (*United States v. Atkins* (6th Cir. 2016) 843 F.3d 625, 638.)

However, in *Taylor*, this Court explained that where the trial court has taken "primary responsibility for conducting voir dire" and, "[n]either

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[7] Respondent also refers to a statement by a trial court quoted in *People v. Bell* (2007) 40 Cal.4th 582, 598-599, that there can "never" be perfunctory questioning when there are jury questionnaires. (RB at 71.) Although this comment has been noted in other cases, it does not correctly set forth governing law. This rule has never been adopted by this Court or any other reviewing court. Nor should it. Depending on the context, failure to meaningfully question may be entitled to more or less weight. But to create a rule that desultory questioning is never at play in the presence of questionnaires would serve to exempt this important consideration from most death penalty cases, in which questionnaires are extremely prevalent.

the prosecutor nor defense counsel *asked questions of any prospective juror* during voir dire in open court" it is hard to fault the prosecutor for desultory questioning. (*Taylor*, *supra*, 48 Cal.4th at p. 616, italics added; see also *U.S. v. Brown* (7th Cir. 2016) 809 F.3d 371, 375 ["we are skeptical as to whether the failure to ask a follow-up question in this case suggests pretext. The jury selection process moved quickly and neither counsel asked any questions"].) The *Taylor* rule clearly has no application to appellant's case, where the parties engaged in extensive questioning of prospective jurors. *Clark* cited *Taylor* as its only authority on this point, *Clark*, *supra*, 52 Cal.4th at p. 907, so presumably it was applying the same rule.

In this case, the prosecutor explicitly decided to question several other jurors further on his allegedly "primary concern" for Prospective Juror No. 28 – the relative severity of LWOP. (4 RT 942-943.) So we know for a fact that the prosecutor did *not* believe excusal without further questioning was warranted simply based on this answer. Indeed, many seated jurors had provided identical or similar answers about the severity of LWOP. (AOB at 75-77.)

Respondent writes off the questioning of other jurors on this point by speculating that, in light of time constraints, Prospective Juror No. 28's "negative characteristics" may have "outweighed his positive responses and that it was unnecessary to voir dire him on this [or any other] point." (RB at 73.) Respondent does not articulate what "negative characteristics" are at issue. But regardless, such an interpretation runs headlong into the prosecutor's frank admission that the relative severity of LWOP was in fact his "primary" concern with respect to Prospective Juror No. 28. (5 RT 1079.) By definition, if further follow-up might have revealed that this juror did not believe that LWOP was *always* more severe and that it

depended on the case, the prosecutor's "primary concern" would be alleviated. Although one can question whether a prosecutor in any given case deems such follow-up on a particular point worthwhile, this is *precisely* what the prosecutor did elicit through follow-up in *this case*. (See 4 RT 943 [after prosecutor follow up, prospective juror affirmed that LWOP would not be more severe if the defendant did not "actually feel bad" about his crimes and thus would "depend on the individual"]; see also 24 RT 4551 [prosecution argument that appellant bragged about and was proud of the killings].)[8]

In short, while it is always theoretically plausible to speculate that any juror's "negative" questionnaire responses obviate the need for further questioning on an issue, this cannot be true when (1) further questioning on the exact issue *was* conducted; (2) this characteristic was the 'primary" concern that justified excusal; and (3) comparative analysis demonstrates that the given characteristic did not result in all jurors who possessed it being stricken.

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[8] In co-defendant Kai Harris's case, which was tried after appellant's, the prosecutor here similarly elicited exactly the same answer about LWOP from the prospective jurors in that case with the same follow-up questions (i.e., jurors that initially stated that LWOP would be more severe indicated that LWOP may not be more severe if the defendant does not feel bad about the killing). (*People v. Kai Harris*, Los Angeles County Superior Court Case No. TA74314 at 11 RT 2051-2053 [appellant's motion for judicial notice pending].) This provides even further proof that the prosecutor believed follow-up questioning – on this issue – was worthwhile.

2. Failure to Question Any Juror on Their Education Level Is Suspicious in Light of the Vast Range of Educational Attainment of the Seated Jurors and the Ambiguity in Their Questionnaire Responses

The prosecutor's second purported justification was Prospective Juror No. 28's education level – he was seeking a jury with a high level of formal education and No. 28 "just completed 12th grade." (5 RT 1079.) In his opening brief, appellant demonstrated that the prosecutor's alleged concern with education level was likely pretextual, as he did not inquire of *any jurors* about their education. (AOB at 71-73.) In reply, respondent contends that there was no ambiguity in the jurors' questionnaire responses on this point and thus no reason to inquire. Respondent ignores seated jurors who provided unquestionably ambiguous responses such as "14" (4 CT 861; see AOB at 79-80 fn. 21), and to a lesser extent, "12 years." (4 CT 837.) But putting that aside, the idea that "some college" would act as a crystal-clear, talismanic distinction, as respondent suggests (RB at 74), confounds common sense. Although clearly "some college" unambiguously implies attendance but not graduation (RB at 74), there is a significant difference between signing up for a college course and nearly completing a four-year degree. Likewise, there is a potentially significant difference in "some high school" (4 CT 801) between a ninth grade drop-out and someone who completed four years of high school courses but failed to graduate only because of insufficient physical education credits. That is, these differences would be significant if one was actually concerned about a juror's level of education as having a bearing on the case.

Respondent convincingly asserts that it is "not surprising" that the prosecutor would not ask any questions – to anyone – about how far jurors progressed through "some" college, or even "some" high school, despite

being concerned about educational attainment. (RB at 74.) The explicit assumption underlying the lack of surprise – as respondent explains – is that there are obviously much "weightier" issues that the prosecutor was probing than the education levels of the jurors. (RB at 72.) But this contention simply strengthens appellant's pretext argument. For instance, the prosecutor predictably focused on support for the death penalty, which Prospective Juror No. 28 found was applied "too seldom." (5 CT 1216.) Neither respondent, nor the prosecutor, provides any explanation whatsoever for why the prosecutor would prefer a juror pursuing a graduate degree who thought the death penalty was applied "about right" (4 CT 849, 856 [Seated Juror No. 11]) to an ex-military high school graduate who worked on aircraft, and who thought the death penalty was applied "too seldom." (5 CT 1216.) The prosecutor's failure to provide any such explanation on this "weightier" issue is particularly troublesome in light of the fact that defense counsel actually challenged the prosecution's exclusion of Prospective Juror No. 28 on that *very basis*: that "he seemed fairly strong on the death penalty." (5 RT 1072.)

3. The Failure to Question Prospective Juror No. 28's Time Concerns Is Further Evidence of Pretext where the Prosecutor Extensively Questioned Another Juror with Similar Concerns

The prosecutor's third justification was Prospective Juror No. 28's statement that he did not wish to serve on the jury because it would be "too long." (5 RT 1079; 5 CT 1216.) As an initial matter, appellant argued in his opening brief that alleged solicitude for Juror No. 28's time concern is implausible on its face and that, because the United States Supreme Court has viewed this justification with suspicion, this Court should too. (AOB at 70-71, citing *Snyder v. Louisiana* (2008) 552 U.S. 472. (*Snyder*).)

Respondent first tries to distinguish the prosecutor's justification in *Snyder* (that the juror might rush through deliberations and deliver an unfavorable verdict), from the prosecutor's statement in this case that "a juror that is in a rush is not a juror that I want to have." (5 RT 1079.) Respondent's fine point of distinction is that the prosecutor was not concerned with a juror rushing through deliberations but simply that he wanted jurors who "had a more positive attitude about serving on this case." (RB at 74.)

The first problem is that respondent's formulation is *not* what the prosecutor said. (*People v. Khoa Khac Long* (2010) 189 Cal.App.4th 826, 844 [rejecting Attorney General's attempt to reinterpret the justification on appeal].) Although the prosecutor did explain that he did not want jurors who "don't want be here and don't want to take the time in particular to be here" (5 RT 1079), he went on to clarify the point that he was making. He stated there would be "many witnesses" at guilt and penalty and there would "deliberation on the guilty phase" and "possibly deliberation on [the penalty] phase. And a juror that is in a rush is not a juror that I want to have." (5 RT 1079.) In other words, just as in *Snyder*, the prosecutor connected deliberations and the fact that the juror could be "in a rush." The idea that a "rushed" juror would be more likely to render an unfavorable verdict as opposed to a favorable one is inherently implausible and has no support in fact or common sense. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 482.)

Perhaps more telling, the prosecutor *did* inquire further with respect to other jurors who expressed concern with the length of trial. (See, e.g., 4 RT 964-965 [Seated Juror No. 5.]; AOB at 82-83.) Seated Juror No. 5 not only reaffirmed his questionnaire response that he did not want to serve, but further stated that his conflicting obligations would actually impact the way

he looked at the evidence. (4 RT 964.) Respondent claims, without strong support, that Juror No. 5 was "rehabilitated" on this point. (RB at 87.)[9] Assuming, *arguendo*, that the prosecutor did rehabilitate Seated Juror No. 5 through follow-up questioning, respondent proves appellant's point: the prosecutor did *not* believe that merely not wanting to serve on the jury was disqualifying and *did* believe that such a response warranted further questioning and possible "rehabilitation." He just did not believe such rehabilitation was warranted for a black juror.

G. The Prosecutor's Inexplicably Negative Rating of Prospective Juror No. 28 Provides Further Evidence of Discrimination

In his opening brief, appellant pointed to the extremely negative grading of Prospective Juror No. 28, which seems out of step with his questionnaire and voir dire responses, as further evidence of pretext. (AOB at 74; see also *Foster v. Chatman*, *supra*,136 S.Ct. at p. 1749 (*Foster*) [conflict between prosecutor's statement that juror was only "questionable" and notes suggesting juror was "definite no" was strong evidence of pretext].) Respondent counters that this evidence is wholly answered by its extraordinarily narrow comparative juror analysis, which demonstrates that Prospective Juror No. 28 is not identical to any of the seated jurors. (RB at 75.) Although respondent does not provide further explanation, presumably it suggests that because Prospective Juror No. 28 (like all jurors) is unique, the prosecutor could have found him uniquely undesirable.

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[9] In fact, the record reflects this juror's repeatedly and strongly voiced desire not to serve, and ultimate success in getting off the jury over defense objection (after a suspicious claim that he was "uncomfortable" deliberating due to the fact that "maybe" he feared retaliation and that it would be better to be excused "just in case"). (AOB at 82-83; 4 CT 784, 787, 4 RT 964-965; 9 RT 1834-1836.)

Respondent misses the point entirely. The question with respect to the prosecutor's extremely negative grading is whether it is was logically related to the justifications provided or whether the context suggests that added weight was provided by the impermissible factor of race.

As *Snyder* indicates, when a particular characteristic is widespread among the jury, it is hard to credit that characteristic as a guiding principal for prosecution jury selection strategy. (*Snyder*, *supra*, 552 U.S. at 480 ["Mr. Brooks was 1 of more than 50 members of the venire who expressed concern that jury service or sequestration would interfere with work, school, family, or other obligations."]; see also *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 362 [rejecting justification relating to hardship where such concerns were "commonplace"].) After all, if scores of jurors have issues with the length of trial and thus wish not to serve, it would make little sense to count such a response as a indelible mark against them; such a practice would interfere with an intelligent jury selection strategy, based on "weightier" characteristics. (RB at 72.)

The high court recently reaffirmed this principle in *Foster*, noting that the prosecutor's reliance on alleged "confusion" with respect to specific voir dire questions was prextual where the trial court had stated that this particular "confusion about the death penalty questions was not unusual." (*Foster*, *supra*, 136 S.Ct. at p. 1754.) That is exactly what the trial court observed in this case with respect to the severity of LWOP. (4 RT 857 ["many of you in your responses said . . . I think life without parole is worse."]; see also 5 RT 1078-1079 [prosecutor's admission that Prospective Juror No. 28 "along with many others" had answered that LWOP is more severe].) For this reason, respondent is incorrect when it faults appellant for urging this Court to look at the common characteristics

of jurors who were not ultimately seated. (RB at 75, fn. 30.) Looking skeptically at justifications which are frequently occurring characteristics in the pool as a whole is an analysis sanctioned repeatedly by United States Supreme Court cases. *Snyder*, *supra*, 552 U.S. at p. 480; *Foster*, *supra*, 136 S.Ct. at p. 1754; see also *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1030 [comparative analysis includes "all venire members" and not merely stricken jurors].)

Each and every one of the characteristics voiced by the prosecutor in this case were shared by literally dozens of prospective jurors. (See, e.g, AOB 75-76 [33 prospective jurors found LWOP more severe than death]; 78-79 [33 prospective jurors had high school education or less]; 80-82 [over 50 jurors expressed concern stemming from the length of trial].) This raises a significant prospect that the prosecutor did not actually find any of these characteristics as strongly negative, a point which comparative analysis underscores. (See *ante*). This point is highlighted by the prosecutor's *selective* use of Prospective Juror No. 28's commonplace characteristics as justifications for his excusal. As noted in the opening brief, for example, when asked to justify his discriminatory excusal of Prospective Juror No. 46, the prosecutor made no mention of his alleged concern about educational level, despite the fact that the Prospective Juror No. 46, like Prospective Juror No. 28, had only a high school education. (AOB at 78.) This pattern (deploying a given characteristic *only* against Prospective Juror No. 28, though it existed for other stricken jurors) occurred repeatedly.[10]

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[10] Compare (6 CT 1342 [Prospective Juror No. 40 only graduated high school] with 5 RT 1080-1081 [no mention of educational level in justifying strike]; compare 4 CT 1010 [Prospective Juror No. 7 stated (continued...)

In sum, there is significant evidence that the prosecutor in this case used common characteristics "as needed" to justify his strikes. Whether or not this practice is conclusive proof of discrimination, it is at least strong evidence that the reasons articulated were feeble, and thus supports the conclusion that they were pretextual.

H. Respondent's Comparative Juror Analysis Improperly Relies On Distinctions Never Mentioned By The Prosecutor And Fails On Its Own Terms

In the opening brief, appellant pointed out that all three of the justifications provided for excusing Prospective Juror No. 28 were extremely common in the venire and failed comparative juror analysis when applied to seated jurors. (AOB at 75-84.) In response, respondent hunts through the juror questionnaires and finds distinctions for each seated juror, differences which in its estimation render no seated juror similarly situated. (RB at 75-94.) Respondent argues that this Court's cases permit, and indeed require, this methodology. (RB at 76 [citing *People v. Chism* (2014) 58 Cal.4th 1266, 1391.) This argument fails for two reasons. First, because the existence of similarities was raised in the trial court and the prosecutor said nothing, it is entirely inappropriate for this Court to now supply grounds of distinction on behalf of the prosecutor. Second, the points of distinction fail on their own terms because they are insufficiently material to explain the disparate treatment.

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[10](...continued)
LWOP was more severe] 4 RT 942 [Prospective Juror No. 7 raised her hand to reiterate that position despite the trial court's admonition]; 5 RT 1077-1078 [no mention of this juror's position on LWOP when justifying strike].)

1. It Is Inappropriate for a Reviewing Court to Assume the Role of Prosecutor in Providing Points of Distinction when the Issue Was Raised in the Trial Court and the Prosecutor Had the Opportunity to Make his Points Himself

As the United States Supreme Court has taught, a justification should be considered "difficult to credit" when "the State willingly accepted [non-black] jurors with the same traits that supposedly rendered [the juror in question] an unattractive juror." (*Foster v. Chatman* (2016) 136 S.Ct. 1737, 1750; see also *id.* at p. 1751 ["even this otherwise legitimate reason is difficult to credit in light of the State's acceptance of" a juror who "gave practically the same answer"].)

This Court has tempered the application of this rule in cases in which comparative analysis is raised for the first time on appeal, for then "the prosecutor [has] never [been] given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 623.) In such cases, this Court has held that a reviewing court can itself supply reasons to distinguish similarly situated seated jurors. This Court has recently explained the rationale for adopting this practice as follows:

> *[b]ecause defendant did not raise the issue* [of comparative analysis] *at trial*, the prosecutor was not given the opportunity to explain his reasons for dismissing D.C. while later retaining [other jurors.] *Under these circumstances,* we have said that 'a reviewing court need not, indeed, must not turn a blind eye to reasons the record discloses for not challenging other jurors even if those other jurors are similar in some respects to excused jurors.' [citation]."

(*People v. O'Malley* (2016) 62 Cal.4th 944, 977, italics added.)

Whatever the merit of the practice in cases in which comparative analysis is newly raised on appeal, it has no appropriate application to the

instant case.[11] Again, the cases adopting this methodology all assume that comparative juror analysis was *not* raised at the hearing in the trial court. (See RB at 76, citing *People v. Chism*, *supra*, 58 Cal.4th at p. 1391 and *People v. Jones*, *supra*, 51 Cal.4th at pp. 365-366)

This case is unlike *O'Malley*, *Lenix*, *Chism*, and *Jones*, or any other case cited by respondent. Here, the prosecutor was put on notice that there were similarly situated jurors with respect to each and every one of his purported justifications. He made no effort to differentiate similarly situated jurors from those he struck, and instead rested on the original justifications alone. (5 RT 1079.) In these circumstances, it is not the place of this Court to "reasonably infer" distinctions that the prosecutor himself never proposed. To do so would place this Court in the role of an advocate and backstop for the prosecution, not a neutral adjudicator.

Respondent, as an advocate, may be excused for attempting to manufacture post-hoc rationalizations to distinguish the seated and excused jurors. As discussed below, many of the claimed differences are insubstantial. Others, while theoretically plausible, are unpersuasive because they would themselves fail comparative analysis if adopted by the prosecutor. But respondent's entire exercise of poring through the questionnaires to look for any possible differences that might have justified *some* prosecutor to find distinctions between the seated and stricken jurors is entirely beside the point. Because *this* prosecutor did not believe that the

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[11] There are significant questions regarding the propriety of this method. (See *People v. Williams*, *supra*, 56 Cal.4th at p. 721 (dis. opn. of Liu, J. [under current law and in violation of United States Supreme Court precedent "the court merely scours the record for statements by the struck jurors that might support the prosecutor's explanations"].)

differences identified were sufficiently “material” to warrant mention when the issue was raised, it is impossible, to “reasonably infer” that such differences actually motivated him. (Cf. *O'Malley*, *supra*, 62 Cal.4th at p. 977.)

2. Comparative Juror Analysis Supports the Evidence of Pretext and the Hypothetical Grounds of Distinction for Seated Jurors Posed by Respondent Are Unpersuasive

Respondent spends considerable effort identifying every conceivable ground for distinction between the seated and excused jurors in order to undercut appellant's comparative analysis. (RB at 75-94.) Even were it appropriate to employ this methodology where the prosecutor did not proffer any such grounds for distinction below, the argument would fail because the grounds proposed are insufficiently “material” to undercut the value of the comparative analysis presented in the opening brief. (Cf. *O'Malley*, *supra*, 62 Cal.4th at p. 977.) Appellant will address respondent's juror-by-juror comparative analysis for each factor, as well as some of respondent's global arguments with respect to each justification.

a. The severity of LWOP

Again, the principle justification for excusing Prospective Juror No. 28 – that he answered that LWOP was more severe on his questionnaire – is undercut by the fact that dozens of prospective jurors answered identically, and several of these jurors were seated. Respondent replies by scouring the record to find distinctions between the challenged juror and those who gave similar questionnaire responses but were accepted by the prosecution. Some of those purported distinctions are illusory, some merely trivial – but none sufficiently material to support the difference urged by respondent.

At the outset, respondent elects to quibble about just how common it

was for jurors to respond as Juror No. 28 did regarding the relative severity of LWOP. In his opening brief, appellant observed that only 50 percent of the seated jurors had affirmatively indicated that they believed death was the more severe punishment. Respondent makes much of the fact that not all of those specifically said that LWOP was more severe. It is true that, if one includes alternates, "only" five of eighteen who were seated (about 27%) gave that specific answer, while others wrote that the two punishments were equivalent – in total roughly 40% of the jurors gave one of those two answers. (See AOB at 76-77; RB at 79.) Given that the prosecutor also claimed that the latter response – that the two were equivalent – was itself a basis for exclusion (5 RT 1081), the distinction is meaningless.[12]

More important, regardless how one crunches the numbers – whether the number of seated jurors who were materially similar to Prospective Juror No. 28 in this respect was 20%, or 40% or 50% – they refute the prosecutor's seemingly unconditional claim that he did not want jurors who failed to recognize that death was a more severe punishment than LWOP. (See 5 RT 1078.)[13]

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[12] Respondent's attempt to limit comparative analysis to *identical* juror responses on a particular issue of supposed concern also contradicts Supreme Court precedent. (See *Foster*, *supra*, 136 S.Ct. at p. 1754 [discussing "similar" responses in comparative analysis]; *Miller-El*, *supra*, 545 U.S. at pp. 231, 252 [comparative analysis encompasses "panel members who expressed *similar* views"], italics added.)

[13] Respondent also makes much of the fact that the prosecutor excused two of the three prospective jurors (Nos. 7 and 49) who raised their hands to indicate they *still* believed LWOP was more severe, even after the trial court had admonished the group that LWOP was, by law, to be

(continued...)

As a result, there is significant evidence that the prosecutor's "primary" concern fails comparative analysis. As appellant argued in the opening brief, under the Supreme Court's reasoning in *Snyder*, that should be the end of the matter. (AOB 43, 73-74, citing *Snyder*, *supra*, 552 U.S. at 485.) To forestall such a finding, respondent provides a laundry list of potential distinctions for the seated and alternate jurors who had stated that they considered LWOP to be a more severe punishment. (RB 80-85.) Given that the issue of similar jurors was raised at trial, the fact that there exists potential distinctions that the prosecutor never mentioned is beside the point. However, because the imagined distinctions do little to undermine the comparative analysis, appellant will nonetheless address each juror in turn.

i. Seated Juror No. 4

Respondent attempts to distinguish Juror No. 4 because this juror received from the trial court a brief, second admonition regarding the severity of LWOP quite similar to the admonition received minutes earlier

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[13](...continued)
considered a less severe punishment. (RB at 79; 4 RT 857.) The point is a weak one at best; there is no evidence that Prospective Juror No. 28 was one of those that raised his hand at that point. Moreover, the strikes against prospective jurors 7 and 49 do not demonstrate much of anything. We know that Prospective Juror No. 7 was *not* excused because of her statements about LWOP; the prosecutor struck her for entirely different reasons which he set forth in the record. It is similarly unlikely that white Prospective Juror No. 49 was excused due to her statements about the severity of LWOP; she stated in her questionnaire that she was "uncomfortable" but "undecided" about the death penalty and that she had some religious scruples against the death penalty because "only God can give or take a life." (6 CT 1432-1433.) The prosecutor pressed her repeatedly about these statements. (4 RT 962-963.)

by all jurors. (RB 81; see 4 RT 877 ["Court: you understand you can't consider that [belief that LWOP is more severe]. Juror: Yeah"]) *compare* 4 RT 857 [Court: "You have to put it aside [the feeling that LWOP is more severe]. You have to be willing to follow the law and the law says life is less severe than death. Everybody with me on that?"].) It is hard to see these nearly identical admonitions as a clear dividing line. But if the simple additional interchange with Juror No. 4 was the crucial difference required to redeem any juror who had originally answered LWOP is more severe, presumably the prosecutor would have presented the same query – even in just a single question to the pool. But the prosecutor never did so. Nor did he bother to initiate a colloquy similar to that with Juror No. 4 with Prospective Juror No. 28, despite discussing the topic of LWOP's relative severity with other jurors. (See *Miller-El v. Dretke*, *supra*, 545 U.S. 231, 246, [failure to inquire of juror regarding a matter of supposed concern bolsters the inference of pretext].)

Equally implausibly, respondent cites the respective educational levels of Seated Juror No. 4 and Prospective Juror No. 28, as though a juror who went to "some college courses" and worked in a mail room (4 CT 765) was somehow more intelligent or qualified than an aircraft electrician who went to the military after graduating high school (5 CT 1209).

Other purported distinctions would themselves fail comparative analysis if they had been proposed by the prosecutor. Thus, respondent notes that unlike Seated Juror No. 4, Prospective Juror No. 28 was (1) "religious";[14] (2) had a family member who had been arrested or charged

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[14] But cf., e.g., 4 CT 848 [Seated Juror No. 11 answered she was religious]; 4 CT 864 [Seated Juror No. 12 answered she was religious]; 4
(continued...)

with a crime;[15] and (3) was concerned with the length of trial.[16] In light of the fact that so many seated jurors shared these same qualities, these distinctions ring hollow.

ii. Seated Juror No. 8

Respondent raises similar, and similarly insubstantial, distinctions for Seated Juror No. 8.[17] Respondent recites Seated Juror No. 8's lack of religiosity, which would fail comparative analysis as addressed above with respect to Seated Juror No. 4. But there is a second reason to doubt this

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[14](...continued)
CT 876 [Alternate Juror No. 1 (same)]; 4 CT 888 [Alternate Juror No. 2 (same)]; 4 CT 900 [Alternate Juror No. 3 (same)]; 4 CT 911 [Alternate Juror No. 4 (same)].

[15] But cf. 4 CT 780 [Seated Juror No. 5 stated a family member had been arrested or charged]; 4 CT 842 [Seated Juror 10's son arrested or charged]; 4 CT 864 [Seated Juror No. 12's nephew arrested or charged]; see also 4 CT 912 [Alternate No. 4 had friend convicted of rape].)

[16] See *ante*.

[17] Respondent makes much of the fact that some of the comparable seated jurors, including No. 8, were black, suggesting that comparative juror analysis in these cases improper. (See, e.g., RB at 83, 90, 91.) However, comparative analysis includes "all venire members" not any particular subset. (*Green v. LaMarque*, *supra*, 532 F.3d at p. 1030.) Comparison of seated white jurors to stricken black jurors may be the most powerful evidence of pretext. But sometimes a prosecutor's seemingly unconditional "policy" with respect to certain characteristics is used to justify a strike. Comparative analysis can prove such policies less than absolute, which is some evidence of pretext, regardless of the race of the seated jurors who expose the fallacy. (See *People v. Manibusan*, *supra*, 58 Cal.4th at p.108 (conc. opn. of Liu, J.) Here, the prosecutor's broad statement was that a belief that LWOP is more severe is not a "good instinct to have on a death penalty jury." (5 RT 1079.) This claimed justification is undermined by the fact that allowed a number of jurors with that "instinct" – including some black jurors – to serve.

alleged ground of distinction. Respondent asserts that Prospective Juror No. 28's religiosity might indicate that he had "moral issues with imposing the death penalty." (RB at 81.) This hypothesis ignores No. 28's answer that his feelings about the death penalty were not based on religion (5 CT 1215), and that the death penalty was imposed "too seldom." (5 CT 1216.)

Respondent also alleges that the fact that Seated Juror No. 8 went to "trade school" distinguishes him from Prospective Juror No. 28 who unquestionably received equivalent training to become an aircraft electrician. (RB at 82.) Respondent actually cites the fact that Juror No. 8 had the *same* answer as Prospective Juror No. 28 (he did not want to serve due to concern for the length of trial and possible conflicts), in order to argue that he was "rehabilitated" by the prosecutor. (RB at 82-83.) But the only reason that Seated Juror No. 8 was "rehabilitated" was because the prosecutor actually chose to inquire about his potential conflict. The idea that the desultory questioning of Prospective Juror No. 28 serves to *support* his strike contradicts the contrary teachings of this Court. (*People v. Huggins* (2006) 38 Cal.4th 175, 235 ["failure to engage in any meaningful voir dire examination on a subject a party asserts it is concerned about is evidence suggesting that the stated concern is pretextual"].)

iii. Alternate Juror No. 2

Respondent reiterates prior purported grounds of distinction (lack of arrested or charged family member, desire to serve on jury, and AA degree) which appellant has shown would fail comparative analysis if adopted at the hearing.

iv. Alternate Juror No. 4

Respondent again presents educational attainment as a distinguishing ground, noting that Alternate Juror No. 4 had attended one year of junior

college. (RB at 84.) Respondent provides no explanation for why attending one year of junior college would make a juror more desirable to the prosecution than a juror with a twelfth grade education and appellant can think of none. Respondent similarly contends – without explanation – that this juror's experience as a judicial assistant in a civil court setting could have been considered an "asset." (RB at 84.) This is sheer speculation: perhaps it would have been considered an asset, but it could equally well be considered a liability. Simply identifying a difference and speculating that it might be an asset does not make the difference "material" such that this Court could "reasonably infer" it motivated the pattern of strikes. (Cf. *O'Malley*, *supra*, 62 Cal.4th at p. 977.)

Respondent also points out that this juror felt that serving on the jury was her "civil duty." (RB at 84.) This is hardly a ground of distinction. By showing up and making no attempt to get off the jury, Prospective Juror No. 28 certainly evidenced that he honored his own sense of civic duty, as the trial court itself seems to have noted. (4 RT 828 [trial court voicing appreciation for Prospective Juror No. 28 showing up despite concerns for the length of trial].)

b. The education justification was untethered to the facts of the case and fell disproportionately against black jurors

Educational attainment is at best an ambiguous factor that can be cited either as a rationale for or against a juror's inclusion by the prosecution. (*People v. Reynoso* (2003) 31 Cal.4th 903, 925, fn. 6 [strike may be justified if "occupation reflects *too much education*, and that a juror with that particularly high a level of education would likely be specifically biased against their witnesses," italics in original]); but see *id*. at p. 924

[lack of college education also suffices]; see also *People v. Clark*, *supra*, *52* Cal.4th at p. 907 [fact that potential juror had taken college courses in psychology was race-neutral reason to excuse her].)

The prosecutor in this case provided no explanation as to why he believed that less-educated jurors would be biased against his case. (*Wheeler*, *supra*, 22 Cal.3d at p. 276 [justifications must reveal "bias relating to the particular case on trial"].) When the prosecutor provides an explanation which does not itself explain why the alleged factor is relevant, courts must be cautious: such an explanation "lends itself to pretext." (*Dolphy v. Mantello* (2d Cir. 2009) 552 F.3d 236, 239 [criticizing trial court's ready acceptance of justification that juror was overweight because "[w]hich side is favored by skinny jurors?"].)

This is particularly true when a justification not tied by the prosecutor to the facts of the case – such as educational attainment here – falls disproportionally on African-American jurors.[18] The fact that more African-Americans share a given characteristic is "relevant to the inquiry as to whether the reasons were sincere and not merely pretextual." (*People v. Melendez* (2016) 2 Cal.5th 1, 18; *Hernandez v. New York* (1991) 500 U.S. 352, 363 (plur. opn. of Kennedy, J.).) As noted in the opening brief, lack of educational attainment, at least among older black jurors such as Prospective Juror No. 28, is largely the direct product of de facto and de jure discrimination against blacks. (AOB at 73) It is decidedly not

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[18] Of the 38 jurors who entered the box, 75 percent of the black jurors had no college experience, while 27 percent of the non-black jurors had no college experience. (See 4 CT 753, 4 CT 801, 4 CT 813, 4 CT 837, 5 CT 1209, and 6 CT 1342 [black prospective jurors with no college]; see also 4 CT 777, 4 CT 861, 5 CT 1089, 5 CT 1137, 5 CT 1197, 6 CT 1366, 6 CT 1390, and 6 CT 1474 [non-black prospective jurors with no college].)

evidence of an absence of intellectual rigor, curiosity, or motivation. Nor do respondent's attempts to distinguish the numerous jurors with similarly limited educational attainment undercut the evidence of pretext.

i. Seated Juror No. 5

Respondent concedes that this juror was similar to Prospective Juror No. 28 on both educational attainment (11th grade) and a voiced desire on the questionnaire not to serve. (RB at 87.)[19] Grasping at straws, respondent contends that because Seated Juror No. 5 was seated 10th, as opposed to 8th, this Court should ignore the stark failures to pass comparative analysis. (RB at 88.) In doing so, respondent attempts to transform the broad language from *People v. Chism, supra*, 58 Cal.4th at p. 1318, that a "combination of factors" may motivate a prosecutorial strike, into mere pablum. (RB at 88.) If such picayune differences satisfy the "material" requirement set forth in *O'Malley* (*O'Malley*, *supra*, 62 Cal.4th at p. 977), there is surely no point in conducting comparative analysis.

ii. Seated Juror No. 7

Respondent reiterates his claim – which would fail comparative analysis if offered by the prosecutor – that the difference must be that Seated Juror No. 28 had a nephew who was arrested or charged with a crime. (RB at 89.)[20] Respondent then boldly claims that although Seated Juror No. 7 provided *the same answer* regarding interest in serving on the case ("No"), (4 CT 808) he was nonetheless more "willing to serve" than

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[19] Respondent's assertion, that this juror was "rehabilitated" in regard to his desire not to serve, is dispatched above. (See *ante* at pp. 34-35 & fn. 9.)

[20] Comparative analysis of this factor is addressed above with respect to Seated Juror No. 4.

Prospective Juror No. 28 because he stated he would “do his best in understanding the facts” if selected. (*Ibid.*) Nothing in Prospective Juror No. 28’s questionnaire – or indeed any juror’s questionnaire or voir dire – indicated that they would not attempt to understand the facts. This alleged distinction is thus irrelevant.

iii. Seated Juror No. 10

Respondent concedes that both Seated Juror No. 10 and Prospective Juror No. 28 had the same level of education and age, and had both served in the military, but claims that this juror could be distinguished because he was a “traffic officer.” (RB at 90.) Traffic officers in Los Angeles “enforce all parking laws in the California Vehicle Code and Los Angeles Municipal Code.”[21] Respondent accepts that this juror specifically disclaimed employment in law enforcement, but suggests that because his job description included “traffic control and recovering stolen vehicles” he would be pro-prosecution. (RB at 90.) There is nothing in the record that remotely suggests that Los Angeles traffic officers have any involvement in crime-fighting, and their involvement in “recovering” stolen vehicles is almost certainly limited to towing stolen vehicles abandoned on the streets. Regardless, appellant is aware of no case indicating that parking enforcement agents are or should be considered strongly pro-prosecution.

Respondent also notes that Seated Juror No. 10 was related to a security guard. (RB at 90.) There is nothing inherently pro-prosecution about security guards. Appellant notes that in many cases, prosecutor’s

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[21] See Los Angeles Department of Transportation, Parking Enforcement, available at http://ladot.lacity.org/what-we-do/parking/parking-enforcement.

have stricken jurors *because* they were security guards.[22] Suffice it to say, appellant does not believe that this difference is so material that it explains the pattern of strikes.

3. Willingness to serve on a jury

For this criterion, respondent merely rehashes the same alleged distinctions, which appellant has both noted and refuted above. (RB at 91-92.) Respondent again attempts to distinguish Juror No. 28 from several seated jurors who similarly expressed concerns about scheduling conflicts by asserting that the ones who were seated had been "rehabilitated" on this point. (RB at 91-92 and fn. 35.) Once again, however, respondent fails to note that the prosecutor never even bothered to inquire about Prospective Juror No. 28's concern for the length of trial, so no such "rehabilitation" could have occurred. As noted above, the disparate and desultory questioning of Prospective Juror No. 28 on this issue serves to strengthen appellant's claim, not to weaken it.

I. Conclusion

Respondent's approach to comparative juror analysis is to throw anything against the wall and hope something sticks. But its dizzying array of distinctions for various jurors simply exposes the need to meaningfully enforce the requirement that differences be so "material" that a court may "reasonably infer" that they motivated the pattern of strikes. (*O'Malley*,

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[22] *People v. Rosas* (Cal. Ct. App., Aug. 15, 2011, No. B223322) 2011 WL 3558977, at *3 ["The prosecutor excused juror number G–2628 because she was a security guard"]; *People v. Vigil* (Cal. Ct. App., Oct. 19, 2005, No. B179887) 2005 WL 2659937, at *8 [accord]; *People v. Ludd* (Cal. Ct. App., Sept. 21, 2010, No. C061017) 2010 WL 3639158, at *7 [accord]). Appellant does not cite these cases for their precedential value, or the truth of the prosecutor's assertions contained therein, but only to show courts have confronted such justifications.

supra, 62 Cal.4th at p. 977.) Given the extraordinarily strong evidence of discrimination in this case, namely that the prosecutor *repeatedly engaged in discrimination against African-American jurors*, it should likewise take extraordinarily strong evidence to "reasonable infer" that an unvoiced concern cancels out the failure of comparative analysis.[23] Respondent's speculative conjectures fail to do so. Because of the compelling evidence of discrimination in this case, appellant is entitled to a new trial.

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[23] Respondent again takes issue with appellant's citation to the prosecutor's *Batson*/*Wheeler* violation in the co-defendant's case to support the finding of discrimination in this case. (RB at 94, fn. 36.) Because this violation occurred a few months after appellant's trial, respondent cites the general rule that an appellate court "reviews whether the trial court's decision [on a *Batson* motion] was correct *at the time it was made and not in light of subsequent events*." (*Ibid.*, citing *People v. Williams* (2006) 40 Cal.4th 287, 310, 311, italics in original.) Respondent's attempt to apply this rule to the instant case overlooks an important distinction. This Court recently held that certain extraordinary categories of evidence – such as "facially discriminatory" justifications – may be considered by the appellate court to inform the correctness of the trial court ruling even if they occur only *after* that ruling. (*People v. Scott*, *supra*, 61 Cal.4th at p. 392 [appellate court may consider facially discriminatory reasons provided after the trial court's ruling on the prima facie case even if they arise after a stage one denial].) In any event, if consideration of properly judicially noticeable evidence from the co-defendant's trial is the *sine qua non* which convinces this Court that discrimination was afoot with respect to Prospective Juror No. 28, there is no point in waiting for habeas counsel to be appointed to raise the exact same evidence in a subsequent proceeding. (See *Miller-El v. Dretke* 3, *supra*, 545 U.S. at p. 261 [relying on *Batson*/*Wheeler* violation against the same prosecutor by a state court that post-dated the defendant's trial].) On the other hand, if the *Batson*/*Wheeler* violation in the co-defendant's trial does not convince this Court that discrimination occurred (even if combined with all of the other evidence of discrimination and pretext), than the propriety of the motion for judicial notice is a moot question.

II.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SUPPRESS, THEREBY VIOLATING HIS FOURTH AMENDMENT RIGHTS AND REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

In the opening brief, appellant argued that the trial court erroneously denied his motion to suppress the fruits of the *Terry*-stop at which appellant was arrested.[24] (AOB at 85-113.) Appellant was a passenger during a routine traffic stop of a car that was stopped because it was missing a rear license plate. When appellant attempted to exit the vehicle, he was ordered back into the car. Because police had no evidence that appellant had done anything wrong, he should have been free to walk away. Instead, the police officer detained him, without any reasonable suspicion. (Cf. *People v. Gonzalez* (1992) 7 Cal.App.4th 381, 386 [when a passenger subject to a routine stop signals his "intention to leave the car by opening the door and beginning to step out but [is] compelled to remain to comply with [a] police command" law enforcement must put forward "a reasonable, articulable suspicion of [the passenger's] criminal activity . . . to justify a detention."].) Respondent recognizes the split of authority within California and across the United States on this precise issue. (See RB at 107, fn. 37 [listing a number of cases that have "held the opposite" of the rule it proposes]; see also AOB at 89, fn. 26 [providing a more complete list].) One reason for this persistent disagreement is the wide-ranging impact of the standardless rule respondent proposes. Respondent wishes to grant police authority to detain any passenger, anywhere at the scene, for the entirety of an inquiry wholly unrelated to the passenger, without the slightest suspicion that the

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[24] *Terry v. Ohio* (1968) U.S. 1.

passenger has done anything wrong, or poses any threat to the officer. Appellant urges this Court not to adopt this rule, which will inevitably fall disproportionately on certain passengers, from certain communities.

A. There Was No Forfeiture By Appellant

Respondent first contends that appellant forfeited the issue of whether he was unlawfully detained, pointing to defense counsel's failure to cite certain cases mentioned in the opening brief, and his failure to explicitly articulate the precise moment in time at which the unlawful detention began. (RB at 97-99.) Respondent parses the rules of preservation far too finely.

As for the need for defense counsel below to cite particular cases raised later in appellate briefing, there is simply no such requirement. (*People v. Wattier* (1996) 51 Cal.App.4th 948, 952-953 [issue adequately preserved where defense counsel informed the court of the "general ground" for exclusion of evidence but did not cite specific case authority, even when invited to do so].) Indeed, such a requirement was explicitly rejected in the very case cited by respondent in favor of forfeiture: *People v. Williams* (1999) 20 Cal.4th 119 (*Williams*). (See *id*. at p. 133 [disapproving case upholding local rule that required "specific authority or authorities which will be offered in support of the theory or theories upon which suppression of the evidence is urged."].)

As for setting forth the general grounds for exclusion of evidence, respondent cites the correct standard: a defendant must only provide "sufficient" or "reasonable" notice to the court and the prosecutor. (RB at 98; *Williams*, *supra*, 20 Cal.4th at p. 131 ["Defendants need only be specific enough to give the prosecution and the court reasonable notice"].) However, a fair reading of the record demonstrates that opposing counsel

and the trial court were on notice. The prosecutor *specifically* responded to defense comments on the precise issue in this appeal (appellant's attempted exit and the order back into the vehicle) and its alleged legal justification.

To place the issue in its full context, defense counsel filed a motion to suppress alleging as follows:

> It is the contention of the defense that the police *lacked reasonable and probable cause to detain,* search, arrest and question this defendant. The defendant was a passenger in a vehicle stopped by the police. *He was detained* and searched *without just cause.*

(2 CT 399, italics added.) As legal support for this contention, the defense counsel's motion cited *Terry*, *supra*, 392 U.S. at p. 16, governed by the familiar reasonable suspicion standard. (2 CT 401.) In the motion, defense counsel also cited the principle (recognized in both *Terry* and California cases) that, if an individual's "freedom to walk away" is restricted by a police officer, then the officer has "seized" him under the meaning of the Fourth Amendment. (2 CT 401, citing *People v. Bower* (1979) 24 Cal.3d 638, 643; see also *Terry*, *supra*, 392 U.S. at p. 16.) In other words, from defense counsel's motion alone, it cannot be reasonably disputed that the prosecutor and the trial court knew that this was a *Terry*-stop case, based on a restriction of appellant's right as "a passenger of a vehicle" to walk away. (2 CT 399.) Nor can it be disputed that the *basis* of the *Terry*-stop violation was that appellant was "detained . . . without just cause." (*Ibid*.)

But in case there was any ambiguity as to the point being pressed in the motion, defense counsel clarified it during the argument at the hearing. He first reiterated that the police conduct in this case amounted to a "fishing expedition" (3 RT 259), which is a well known shorthand for searches and seizures unsupported by "just cause" as articulated in the motion (see *U.S. v. I.E.V.* (9th Cir. 2012) 705 F.3d 430, 433 [searches without sufficient

justification under *Terry* amount to "fishing expedition[s]"]; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002 [officer's conduct was lawful when aimed at particular evidence and was not a "general 'fishing expedition'"]).

More importantly, defense counsel then explained that appellant's exit from the vehicle did nothing to raise suspicion (and thus supply justification for his detention), stating "many times I have been in the car that has been stopped for a traffic violation when I was in the passenger seat and gotten out of the car." (3 RT 259-260.) Finally, defense counsel disputed the police officer's unsupported characterization of appellant's exiting the vehicle as "running," explaining that Deputy Turner's "testimony about [appellant] . . . attempting to run is contradicted by [Turner's] own testimony that [appellant] just stood there, that he never took a step." (3 RT 260.) Respondent ignores these statements entirely in its bald assertion that appellant did not raise the issue in the trial court.

Respondent provides no explanation – nor can appellant think of one – for why defense counsel was arguing about appellant's exit from the vehicle except to dispel it as a lawful basis for appellant's subsequent detention. Given the absence of any alternate explanation, the only logical conclusion is that defense counsel was urging that there was nothing suspicious about appellant's single step out of the vehicle that would transform the officer's conduct from a "fishing expedition" to a lawful detention grounded on articulable suspicion. And almost these exact facts, under the case cited by respondent, have been held to support preservation of the issue on appeal. (*Williams*, *supra*, 20 Cal.4th at p. 133 [approving of case holding that defendant "would have satisfied this obligation if" he had argued "that the police exceeded their authority by ordering him out of the

car"].)

Respondent sole contention seems to be that there was a potential confusion because defense counsel did not explicitly point out the specific moment in time when the unlawful detention began, i.e., when the police ordered him to remain put. (RB at 97 ["Defense counsel never argued that appellant was improperly detained *when the deputies ordered him to return to the Toyota*"], italics added.) There is no basis in the record to conclude that the prosecutor or the trial court were deprived of notice of the issue. First of all, the motion itself argued that appellant was unlawfully detained. (2 CT 399.) At what other point in time was appellant unlawfully detained? One could hypothesize that the motion referred to the stop of the vehicle itself. But at the hearing, defense counsel made no arguments about the stop of the vehicle, which based on the evidence presented at the hearing (and in the motion) was quite plainly supported by reasonable suspicion because the car lacked a rear license plate. So the *only* conceivable unlawful "detention" referenced by defense counsel's motion was when police officers provided an additional show of force by ordering appellant into the car. (See *People v. Brendlin* (2006) 38 Cal.4th 1107, 1117, rev. by *Brendlin v. California* (2007) 551 U.S. 249 ["Absent further direction from the officer effecting the stop [citation] or some indication that the passenger is the subject of the officer's investigation or show of authority, the passenger is free to ignore the police presence and go about his or her business."].) And quite sensibly, this is why defense counsel chose to bring up this exact issue.

But even were there possible ambiguity in defense counsel's reference to appellant's innocuous exit, the record provides no support for the conclusion that the prosecutor was somehow confused by it. The record

affirmatively demonstrates that the prosecutor in fact understood the statements as pertaining to the lack of justification for appellant's detention. The prosecutor *immediately* responded to the defense argument about appellant's exit by explaining why he believed the order to return to the vehicle was justified:

> The reason why Mr. McDaniel never got any further than the door well, because he was ordered not to move and get back in the car. He initially got out of the car without anyone asking him to do so. That left the officer with the impression he was attempting to flee. *That is why he was ordered to return to the inside of the compartment of the car*.

(3 RT 260, italics added.) For this reason, the prosecutor argued that everything the officer did was "reasonable," a point with which the trial court agreed in denying the motion. (3 RT 261.)

In other words, the prosecutor and the trial court were both on notice, because the precise issue in dispute was discussed by both sides. This is enough for preservation purposes. (*Williams*, *supra*, 20 Cal.4th at p. 134 [discussion of factual issue gives sufficient notice "of at least that possible basis for the motion to suppress"].)

And it is because everyone was on notice of the issue below that the prosecutor forfeited the officer-safety justification respondent now manufactures for consumption on appeal. (Cf. RB at 98 ["The prosecutor certainly could not have been expected to defend against an unknown theory of illegal detention or seizure."].)[25] Because the prosecutor *actually*

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[25] Respondent also contends that the safety justification is preserved because the prosecution stated in his motion that the "*search* was legally justified for officer safety." (RB at 99; 2 CT 414.) It is the *detention*, not the search, that is at issue. Appellant does not question that the search was (continued...)

did defend the police officer's conduct (albeit on the grounds that detention was justified by appellant's alleged attempt to "flee") and said nothing with respect to an officer-safety justification, that issue cannot know be raised for the first time on appeal. (AOB at 94; *People v. Gonzalez* (1992) 7 Cal.App.4th 381, 385 [although the "justification urged is officer safety" given lack of record substantiating safety concerns "to rule in respondent's favor would be to authorize the police detention of an individual with no articulable justification."].)[26]

B. This Court Should Not Extend The Rule of *Maryland v. Wilson* (1997) 519 U.S. 408 To Restrict A Passenger's Freedom To Walk Away

As noted in the opening brief, some cases have suggested or held that the rule of *Maryland v. Wilson* (1997) 519 U.S. 408 (*Wilson*) be

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[25](...continued)
ultimately supported by reasonable suspicion of a threat to officer safety. (See *Terry*, *supra*, 392 U.S. at p. 27 [a limited, protective pat-search for weapons is permissible if the officer has "reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."].) According to the testimony at the hearing and the police reports referenced in the prosecution motion, the search was conducted after the police officer ordered appellant to exit and noticed a bulge in his pocket that the officer "immediately recognized as the outline of a semi-automatic weapon." (2 CT 408; 3 RT 242-243.)

[26] If this Court adopts at respondent's request a "per se rule allowing . . . officers to control passengers during valid traffic stops" then the question of the prosecution's forfeiture becomes moot. (RB at 110.) But to the extent that appellant would have had the opportunity to rebut any specific evidence relied upon to demonstrate a threat to officer safety, he should have been given the opportunity to do so at the suppression hearing. (Cf. RB at 111, fn. 38 [relying on post-hearing trial testimony to substantiate threat to officer safety].)

extended to allow police carte blanche authority to detain passengers without reasonable suspicion of criminal activity or a threat to officer safety. Respondent urges this Court to adopt this reasoning here. (RB at 108.) Appellant disagrees with respondent on this point.

Respondent fails to acknowledge that *Wilson*, unlike the present case, does absolutely nothing to undermine the cornerstone of Fourth Amendment law, requiring some suspicion in order to limit an individual's "freedom to walk away." (*People v. Bower* (1979) 24 Cal.3d 638, 643 [the Fourth Amendment guarantees the "freedom to walk away"]; *Terry, supra*, 392 U.S. at p. 17 [same]; *People v. Souza* (1994) 9 Cal.4th 224, 234 ["an individual is free to avoid contact with a police officer . . . '[t]o hold that the mere exercise of this liberty justifies a detention would be tantamount to holding that an officer may insist upon an encounter without adequate cause.' [Citation.]"].)

Nor does respondent acknowledge that – when strategically advantageous – the state has argued that passengers *do* have the right to walk away when drivers are detained during routine traffic stops. (See *People v. Brendlin*, *supra*, 38 Cal.4th at p. 1115 [noting state's position that when a driver is detained "the passenger is free to disregard the police and go about his or her business"].)

Nor does respondent explain why the governing rule – or any overarching officer safety concerns – are or should be any different when there is a stop of two companions walking down the street versus two companions driving down the street. (See AOB at 105 ["an officer-safety rationale would make an inexplicable distinction between *Terry* stops of individuals who were driving and those who were simply walking or standing"].) While police would no doubt be comforted by the power to

detain anyone in proximity to a subject of reasonable suspicion, unsubstantiated guilt-by-association is not permitted by the Fourth Amendment. Whether one is walking, running, bicycling, driving, taking a train, a bus, or traveling by any other mode, reason to detain a person suspected of wrongdoing does not automatically justify detention of that person's innocent companion(s).

In urging this Court extend the rule of *Wilson*, respondent largely ignores appellant's arguments as to why this is a doctrinally unsound and potentially a discriminatory tool. On that point, appellant refers the Court to the discussion in his opening brief. (AOB at 96-106.)

C. There Was No Reasonable Suspicion Or Articulable Threat to Safety When Appellant Was Detained

Respondent contends that even if some basis was required, appellant's detention was lawful because the record "undeniably supports the conclusion that his detention was based on officer safety concerns." (RB at 108.) Respondent first reiterates that "as a matter of course" (i.e., without any articulable basis), police should be allowed to detained passengers of a car who attempt to leave. (RB at 110.) Recognizing that this may not be permissible, respondent attempts to piece together other evidence which would provide a reasonable suspicion to detain for investigation and/or for officer safety. All fail to do so.

First, respondent notes that appellant was, in fact, armed, and thus the traffic stop could "have quickly become the type of violent encounter that the *Vibanco* court envisioned had the deputies not taken control of the situation." (RB at 110.) As tempting as it surely must be in this case, it is a "fundamental[]" precept of Fourth Amendment law that "we do not evaluate probable cause in hindsight, based on what a search does or does

not turn up." (*Florida v. Harris* (2013) 133 S.Ct. 1050, 1059; *U.S. v. Martinez-Fuerte* (1976) 428 U.S. 543, 565 [Fourth Amendment serves to "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure."].) The officers were unaware that appellant was armed at the time he was ordered back in the vehicle, and therefore the fact that he was later found to be armed is irrelevant.

Respondent next asserts that the stop was "not far" from the "high crime area" of Nickerson Gardens (RB at 111 & fn. 38.) This justification is doubly problematic. First, it has been held – repeatedly – that the fact that a detainee happens to *be in* a high-crime neighborhood is, of itself, insufficient to support a reasonable suspicion for a peace officer to detain that person. (*In re Tony C.* (1978) 21 Cal.3d 888, 897, superseded by statue on other grounds as stated in *In re Christopher B.* (1990) 219 Cal.App.3d 455, 460, fn. 2; *People v. Pitts* (2004) 117 Cal.App.4th 881, 887; *People v. Medina* (2003) 110 Cal.App.4th 171, 177.) Respondent's argument is even more extreme. There are countless places in any metropolitan area that are "not far" from a high crime area. Some of these places are, in fact, low crime areas. Nothing in the record at the hearing informed the trial court that the location of the stop was in a high crime area.

Second, even assuming some relevance from some general proximity to a high crime neighborhood, the evidence respondent cites was not presented at the hearing. Respondent improperly seeks to bolster the trial court's ruling by citing snippets of testimony from police officers at trial, testimony which defendant had no opportunity to rebut at the hearing, and which notably does *not* establish that the block on which appellant was stopped was in a high crime neighborhood. (See RB at 111, fn. 38.) Respondent's unsubstantiated claim that the site of the stop was in a

"precarious location" (RB at 112), should be entitled to no weight.

Respondent also notes that the stop occurred at approximately 10 p.m. (RB at 111), but there was no evidence at the hearing that the fact of being a passenger in Los Angeles at night is in any way unusual or suggestive of a unique threat to officer safety. (See *Lyttle v. State* (2006) 279 Ga.App. 659, 662 [investigatory stop not authorized because "the deputy did not observe [the defendant] doing anything other than driving at night, lawfully, on a public road in a high crime area"]; *U.S. v. Williams* (4th Cir. 2015) 808 F.3d 238, 248 ["there is nothing inherently suspicious about driving at night"].)

Respondent finally cites the fact that there were two occupants in the vehicle, including appellant. (RB at 112.) Respondent relies on *People v. Vibanco*, (2007) 151 Cal.App.4th 1, in which the officers were confronted with four occupants in a vehicle. (*Id.* at pp. 5-6; RB at 110.) As noted in the opening brief, unlike in *Vibanco*, the arresting officers in this case were not outnumbered by the detainees, nor, more importantly, was anyone reaching for their waistband or making other threatening movements or furtive gestures. (3 RT 256-257 [Deputy Turner denied seeing any furtive motions in the car]; cf. *Vibanco*, *supra*, 151 Cal.App.4th at p. 13.) Thus, the case is factually distinguishable. (See AOB at 95.)

More fundamentally, although the *Vibanco* court noted the heightened threat of confronting multiple individuals, the court failed to grapple with the fact that this danger is not unique (or even related) to routine traffic stops. Police may accost a pedestrian on the street for a minor infraction, or a probation search. Despite the fact that the officer's "attention would have been divided" by allowing this pedestrian's companion(s) to walk away, the mere fact that an officer sees multiple

people does not give the officer a safety justification to detain innocent bystanders during every detention.

Imagine that appellant had already exited the vehicle, as it was parked with the driver remaining in the car, moments prior to the police noticing that it lacked a rear license plate. The police would unquestionably have a basis to detain the driver. But simply because there were multiple people at the scene would not give police a safety justification to detain the former passenger, or for that matter, anyone else nearby. There is no basis in logic to presume that a carte blanche safety justification should obtain simply because appellant exited the vehicle moments *after* the police noticed the rear license plate was missing versus moments *before.* The same reasoning holds if the police detain a bus-driver for a routine traffic violation. Whether the passengers exit moments before or moments after the infraction, there is simply no reason to presume the simple fact of multiple passengers creates a safety justification warranting detaining all of the innocent passengers. The reason that a "divided attention" theory does not apply in either case is because there is *no basis to assume a threat* from the passengers (or from the driver), during a routine traffic stop. Which is why courts of several other jurisdictions would have granted appellant's suppression motion. (See AOB at 89, fn. 26.) This fundamental assumption – that there is no threat to police simply because they pull someone over – is why police must provide *additional* suspicion to conduct a patdown search. (*Maryland v. Buie* (1990) 494 U.S. 325, 334, fn. 2 [there is no "bright-line rule authorizing frisks for weapons in all confrontational encounters"].) And for the reasons explained in appellant's opening brief, the officer-safety justification of *Wilson* rested entirely on a"minimal intrusion" doctrine which does not apply to indefinite detention of a

passenger, as opposed to a non-intrusive order to briefly exit the vehicle. (AOB at 98-100.)

Nor does the officer's unsubstantiated conjecture that appellant exited the vehicle "as if he was going to start running" provide reasonable suspicion. (3RT 243; see also 3RT 238 [appellant "made a motion and tried to run out of the vehicle"].) As explained in the opening brief, the testifying officer clarified that appellant managed only to put his feet on the ground outside the vehicle and stand up and did not take a single step before being ordered to return. (3 RT 253-254; AOB at 87, 96.) Respondent's arguments that appellant was engaged in "headlong" and "unprovoked" flight, and thus there was suspicion that he was engaged in criminal activity, is thus without factual basis. (RB at 114.) As noted by Deputy Turner himself, passengers trying to exit vehicles after a routine stop, as appellant did, is not unusual. (3 RT 259.) Respondent's exaggerated description of appellant's attempted exit does not supply reasonable suspicion of a threat to officer safety. Nor, for the reasons addressed above, is appellant's status as a passenger, at night, in an area in some unidentified "proximity" to Nickerson Gardens. (RB at 114-115.)

D. The Inevitable Discovery Doctrine Does Not Apply

For the first time on appeal, respondent urges a new ground for admission, not raised in the trial court: inevitable discovery. (RB at 116 [citing *People v. Robles* (2000) 23 Cal.4th 789, 800].) This doctrine may be introduced for the first time on appeal. (*Ibid.*) However, if "the success of the inevitable discovery theory turns upon a determination of facts not presented to the trial court, the People's new theory is not subject to review." (*People v. Chapman* (1990) 224 Cal.App.3d 253, 260; see also *People v. Robles*, *supra*, 23 Cal.4th at p. 801 ["the People have not met

their burden of legally and factually demonstrating that the inevitable discovery doctrine is properly applied in this case"].)

Respondent's argument fails for this reason. Deputy Turner approached appellant who was in the front passenger seat and "actually grabbed his hand . . . when [he] noticed the bulge in his waistband" that he identified as a firearm. (3 RT 258.) When the unlawful order was made for appellant to reenter the car, Deputy Turner's partner was in the doorway of the patrol car, while Deputy Turner was still in the car. (3 RT 244.) There is no evidentiary support for respondent's contention that from this distance, Deputy Turner "would have seen the distinctive bulge in appellant's pants pocket," while appellant was leaving the scene. Therefore, the inevitable discovery theory cannot be applied. (*People v. Robles*, *supra*, 23 Cal.4th at p. 801.)

E. Suppressing the Murder Weapon Is A Paradigmatic Example Of Prejudicial Error

Suppressing the murder weapon is perhaps the strongest example, short of suppressing a confession, of prejudicial error. Respondent nonetheless asserts that suppressing the murder weapon could not have impacted the trial under the strict test of *Chapman v. California* (1967) 386 U.S. 18.

First, respondent faults appellant for arguing that suppression of a murder weapon is a "classic example of prejudicial error" because appellant relied "only on a search and seizure treatise and Justice Harlan's concurring opinion in *Bumper v. North Carolina* (1968) 391 U.S. 543." (RB at 118.) As detailed in the opening brief, the treatise cited "numerous cases" from various jurisdictions supporting the point, a point which was so obvious that appellant thought it unnecessary to collect cases. Yet the case cited by

respondent proves the point by way of contrasting example. Respondent notes that in *People v. Tewksbury* (1976) 15 Cal.3d 953, this Court found that failure to suppress a gun "believed to be used in the charged murder" was harmless. (RB at 118.) The Court in *Tewksbury* went on to explain why this unconventional result obtained:

> the part [the gun] played in the commission of the crime, if any, was never established. Defendant's counsel aptly described the insignificance of such gun evidence in urging that it could not be deemed as corroborative of [the accomplices] testimony . . . . He stated that the gun was "many orders of magnitude removed from linking (defendant) to the matter. The gun was found at a different location (than that where defendant was arrested). There is no identification that the gun was in fact the gun that was used . . . ."

(*Id.* at p. 972.)

In the instant case, however, there was conclusive – and undisputed – ballistic evidence that the gun used in the homicide was the same as the gun found in appellant's possession. (9 RT 1560-1563.) Although respondent claims that the relevance of the murder weapon and ammunition was "minimal at best" (RB at 121), respondent fails to realize that the "defense might have pursued a different theory of defense had the trial court granted its motion to suppress." (AOB at 110.)

As explained in detail in the opening brief, the witnesses who identified appellant as the shooter, were (1) two drug users asleep at a drug party (awakened moments before the shooting) who were not in a position to give, and did not give, strong eye-witness testimony, and (2) a neighborhood crack addict whose story could not be squared with the facts presented by the prosecution. (AOB at 108-109.) Thus, but for the failure to suppress the murder weapon, appellant could have argued that the eye-

witnesses' testimony was weak and that there was reasonable doubt as to the identity of the actual killer. Instead, appellant's counsel conceded second degree murder. (9 RT 1927-1928.) Where there is evidence that a case "would have been tried differently" but for a trial court error, this is prejudice that requires reversal. (See *People v. Marzett* (1985) 174 Cal.App.3d 610, 617 [reversal required where "the case was not tried on [given] theory and would have been tried differently" but for a change in law]; see also *People v. Barrick* (1982) 33 Cal.3d 115, 130 overruled by statute as stated in *People v. Collins* (1986) 42 Cal.3d 378 [where trial court error prevents defendant from testifying "[t]his court has no way of knowing what defendant's testimony would have been, thus, we have no basis for concluding that such testimony would not have affected the result"].)

Respondent notes that some additional witnesses corroborated the testimony of the three central (though highly impeached) identifying witnesses. (RB at 119-121.) But the corroborating testimony cited largely supports only a conclusion that appellant may have been at the scene. The fact that multiple witnesses described appellant's clothing as "dark colored" (RB at 121), for instance, does not conclusively establish that appellant was the actual shooter. Respondent also cites as "particularly damaging" the testimony of Angel Hill, who allegedly overheard a conversation between appellant and co-defendant Harris after the shooting in which appellant allegedly confessed to the shooting. (RB at 120.) But not only was Hill the girlfriend of co-defendant Harris and therefor arguably seeking to cover for Harris and to inculpate appellant, she was actually caught conspiring with Harris to provide false exculpating evidence. (AOB at 14.) Moreover, at the time of the shooting Hill did drugs "everyday all day" and on the night

of the crime was using a mind-bending cocktail of crystal meth, PCP, cocaine, marijuana, and liquor. (AOB at 13.) Likely as a result of this intense drug-abuse, whatever she allegedly gleaned from listening to appellant was overheard just prior to a three-hour sojourn to a bathroom because she was "not feeling well." (AOB at 14.)

Another corroborating witness cited by respondent, Shirley Richardson, testified appellant was armed just prior to the shooting with a three-foot long rifle (6 RT 1358-1360), testimony which could have raised further doubt as to appellant's identity as the actual shooter, since the ballistic evidence would have excluded rifle ammunition.

Respondent also recounts the testimony of Dollie Sims, who stated that appellant came to her house shortly before the shooting, upset, and told Harris he wanted help to "handle" a problem. (RB at 120.) As noted in the opening brief, Sims was not in the same room when this alleged conversation took place, and her version of the conversation contradicted the versions provided by witnesses who were actually present. (AOB at 125.) But more importantly, Sims testimony similarly did not conclusively identify appellant as the shooter.

In short, none of the evidence cited by respondent would have precluded a defense that *others* were the actual shooters – or at least that reasonable doubt existed on that issue, a standard defense in multiple assailant cases such as this one. As explained in the opening brief, the prosecution theory was that this was a gang-motivated killing, and there were two other Bounty Hunter gang members *in the house at the time of the shooting* and a third, unidentified individual – never accounted for by the prosecution – spotted by the most credible eye-witness. (AOB at 107-108.)

Even if failure to suppress the murder weapon was harmless at the

guilt phase, the ability to credibly argue that some lingering doubt existed as to whether appellant was the actual shooter is the type of evidence that this Court has found mitigating. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1226 [improper limitations on lingering doubt theory prejudicial where there was no physical evidence linking defendant to the shooting and weak identification testimony given by the prosecution eyewitnesses]; *In re Sakarias* (2005) 35 Cal.4th 140, 167 [prosecutorial misconduct improperly attributing actual killing to one co-defendant was prejudicial where the jury "deliberated for more than 10 hours over three days"] cf. AOB [jury deliberated on penalty for 20 hours over four days].)

And the prejudice of precluding such an argument was magnified by the prosecutor's powerful use of the weapon and ammunition as evidence that appellant (1) intended to kill again and (2) was incapable of reform in prison. (AOB at 110-111; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Colum. L. Rev. 1538, 1559 [survey of capital jurors indicates that evidence of future dangerousness is, by far, the most likely to cause capital jurors to vote for death].) Respondent does not even attempt to rebut the profoundly prejudicial nature of these arguments. As such, it has not shown that the error could not, beyond a reasonable doubt, have effected the penalty verdict.

Accordingly, the entire judgment must be reversed.

III.

THE TRIAL COURT IMPROPERLY ADMITTED HEARSAY EVIDENCE THAT WAS THE BASIS FOR OTHERWISE IRRELEVANT AND PREJUDICIAL GANG TESTIMONY

In his opening brief, appellant argued that the trial court improperly admitted certain portions of hearsay statements made by victim George Brook's sister, Kanisha Garner, to Brooks, prior to his death. (AOB at 113-130). Appellant argued that the trial court properly admitted the portions of Brooks's hearsay statements that Brooks had received drugs which has was planning to sell. But the trial court improperly admitted *collateral* hearsay statements concerning how and from whom Brooks obtained these drugs. These hearsay statements were not statements against interest, nor were they reliable, and thus should not have been admitted. But they served as the entire basis for the otherwise irrelevant and highly inflammatory gang testimony in this case.

Respondent contends the collateral hearsay statements – specifically that Brooks was offered the drugs by William Carey (a.k.a. Billy Pooh) and that during the transaction Brooks left with the drugs in the middle of an unrelated firefight – qualified as statements against interest. (RB at 131.) Respondent's entire argument, however, depends on an interpretation of Brooks's statements that conflicts with the actual words Brooks used in his conversation with Garner. As such, respondent repeats the errors of the prosecution below, which similarly and incorrectly imputed to Brooks a theft from Carey, despite Brooks's statements to the contrary.

A. This Court Should Not Find Appellant's Argument Forfeited

Defense counsel clearly objected to the hearsay statement, stating an objection under the grounds of the "U.S. constitution[], confrontation, due

process, equal protection, 8th amendment and *Crawford.*"[27] (3A RT 482.) Respondent contends that because he omitted an explicit reference to hearsay (a necessary prerequisite to a *Crawford* violation), any state law hearsay claim is therefore forfeited. (RB at 125-126.) Appellant disagrees.

First and most important, the *prosecution* brought the hearsay issue to the court's attention, filing a motion in limine arguing that the statements were admissible under the declarations against interest doctrine. (3 CT 581-594.) "The whole idea behind the objection requirement is to afford the proponent of the evidence an opportunity to establish its admissibility and assist the court in making an informed decision. [Citation]." (*People v. Brenn* (2007) 152 Cal.App.4th 166, 174.) Those goals may be met "when the prosecution addressed the [] issue in its pretrial motion, and the court addressed the issue in rendering its decision." (*Ibid*. [confrontation claim preserved despite absence of objection where prosecution affirmatively raised *Crawford* issue in motion and hearing before trial court].) This case is quite similar to *Brenn,* and review of the merits of the claim is warranted for similar reasons.

Even more similar, in *People v. Morgan* (2005) 125 Cal.App.4th 935, as in the instant case, the appellate court considered whether a hearsay objection was preserved for appeal when, at trial, defense counsel objected to the admission of evidence on confrontation grounds. (*Id.* at p. 940.) Despite the absence of a hearsay objection, because the prosecutor affirmatively argued the statements would survive a hearsay objection, and the trial court ruled in the prosecution's favor on that point, the court determined that the hearsay objection was not waived. (*Ibid*.)

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[27] *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

The same reasoning applies here. It was, after all, the prosecutor's burden to establish the admissibility of the hearsay in question, an obligation he attempted to satisfy in his in limine motion. (*People v. Woodell* (1998) 17 Cal.4th 448, 464 [proponent has the burden of showing admissibility of hearsay].) Implicit in the grant of the prosecutor's motion – which argued that the statements were wholly admissible as declarations against interest – was the trial court's acceptance of the prosecutor's argument.

In addition, appellant also argues that the admission of the hearsay at issue had such a catastrophic effect on his trial that it violated due process, a ground which was specifically raised by trial counsel. (AOB at 122, citing *People v. Albarran* (2007) 149 Cal.App.4th 214, 227-231.) Respondent concedes that appellant raised these federal constitutional claims at trial. (RB at 126, 139.) Since the due process claim rests on the statements being inadmissible in the first instance, little utility will be gained by avoiding decision on the merits of the hearsay issue.

Finally, with respect to the state law hearsay grounds, to the extent that defense counsel interposed the incorrect objection, he was ineffective for so doing. Defense counsel's sole reference to the confrontation clause objection that he *did* raise was acknowledging that it was meritless. (See 3A RT 483 [admitting that the statement by Brooks to his sister was "probably not testimonial"].) Because trial counsel acknowledged the obvious – that this was *not* testimonial hearsay – this is not a case in which choice of objection was even conceivably a matter of trial tactics. (*People v. Lanphear* (1980) 26 Cal.3d 814, 828-829 [to raise ineffective assistance on appeal, a "defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be

explained on the basis of any knowledgeable choice of tactics.' [Citations.]"].) The record itself affirmatively demonstrates that appellant's trial counsel wished to exclude the hearsay statements at issue. Raising an inapplicable *Crawford* objection instead of an applicable hearsay claim constituted deficient performance, and as explained below, was prejudicial.

Nor should the claim be forfeited by defense counsel's failure to renew his loss of the in limine motion at trial. (RB at 126-127.) Respondent contends that a "tentative" in limine ruling may require further objection if there is a "changed context" in which the evidence is introduced in the trial itself. (RB at 126, citing *People v. Morris* (1991) 53 Cal.3d 152, 190, and *People v. Holloway* (2004) 33 Cal.4th 96, 133.) Neither requirement is met here. The trial court's ruling on the hearsay statements did not appear tentative in any respect; the court stated simply: "I am going to admit it. So over objection the People may use the statement or read the statement." (3A RT 483.) Nor did the context of the statement change when Brooks's hearsay was presented at trial. (Cf. RB at 126.) As explained in more detail below, Garner provided the exact same testimony at appellant's trial that she had previously at Harris's trial: Brooks told her he was *given* (and did not steal) drugs from Carey.

B. Appellant's Argument For Exclusion Of The Collateral Hearsay Statements Is Supported By This Court's Recent Decision in *People v. Grimes* (2016) 1 Cal.5th 698

People v. Grimes (2016) 1 Cal.5th 698 (*Grimes*) was issued after appellant's opening brief. Analyzing Brooks's statements through the framework of *Grimes* provides further support for appellant's argument that the collateral statements at issue were inadmissible as declarations against interest under Evidence Code section 1230.

As a preliminary matter, the *Grimes* court provided that while it

generally reviews a trial court's decision as to whether a statement is admissible under section 1230 for abuse of discretion, "[w]hether a trial court has correctly construed Evidence Code section 1230 is, however a question that we review *de novo*." (*Grimes*, *supra*, 1 Cal.5th at p. 712.) Because the trial court's admission of Brooks's collateral statements was based on a *legally* erroneous application of section 1230 and the collateral assertion doctrine (as opposed to an exercise in discretion), as in *Grimes* this Court should review the trial court's admission of those statements de novo.

In *Grimes*, this Court addressed Evidence Code section 1230 and reaffirmed that the ultimate test as to whether a statement is against a declarant's interest is whether "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true." (*Grimes*, *supra*, 1 Cal.5th at pp. 711-719; Evid. Code, § 1230.) The Court explicated the collateral assertion doctrine set forth in *People v. Leach* (1975) 15 Cal.3d 419 and, in so doing, endorsed the reasoning of *People v. Duarte* (2000) 24 Cal.4th 603, *People v. Lawley* (2002) 27 Cal.4th 102, and *People v. Frierson* (1991) 53 Cal.3d 730, all cases relied on by appellant in his opening brief in support of the argument that the trial court should have excluded Brooks's statements. (See AOB 117-121; *Grimes*, *supra*, 1 Cal.5th at pp. 710-717.)

In *Grimes*, the defendant and an accomplice were charged with murder and robbery. (*Grimes*, *supra*, 1 Cal.5th at p.703.) A witness testified that the accomplice had told her that he killed the victim by strangling and stabbing her. (*Id.* at p. 710.) Because the accomplice's admission was unquestionably a declaration against his penal interest, it was admitted into evidence as such. (*Ibid*.) The trial court, however, excluded

portions of the accomplice's statements indicating the defendant had not committed the killing and had appeared surprised by the killing, finding those portions of the admission not disserving to the accomplice's interest. (*Id.* at pp. 710, 712.)

This Court ruled that the trial court erred in excluding the collateral assertions exculpating the defendant and determined that, when viewed in context, those collateral statements were against the accomplice's penal interests because they showed that the accomplice accepted "undiluted responsibility" for the killing. (*Grimes*, *supra*, 1 Cal.5th at pp. 712-715, citing *U.S. v. Paguio* (9th Cir. 1997) 114 F.3d 928, 934.) As a point of contrast, the Court noted with approval its prior opinions finding that where statements collateral to an admission revealed an attempt by the declarant to shift blame onto others, to diminish responsibility in comparison to others, or to curry favor, those collateral statements were inadmissible under Evidence Code section 1230. (*Id.* at pp. 715-717, citing *Duarte*, *supra*, 24 Cal.4th at p. 612; *In re Sakarias* (2005) 35 Cal.4th 140, 155.) Emphasizing that it was breaking "no new ground," the Court further provided that where statements collateral to an admission lacked "sufficient reliability" when considered in context, those statements remained inadmissible as declarations against interest. (*Id.* at pp. 716, 718, citing *Lawley*, *supra*, 27 Cal.4th at p. 155; *Duarte*, *supra*, 24 Cal.4th at p. 611; *Frierson*, *supra*, 53 Cal.3d at p. 745.)

If the trial court had properly evaluated Brooks's statements in context, in accordance with the rules explicated in *Grimes*, it would have determined that Brooks's statements that Carey had offered to give him drugs to sell and that he had left with the drugs in the midst of an unrelated firefight were not disserving to Brooks's social or penal interests. For the

reasons explained in the opening brief, associating with a high ranking gang member, if anything, enhanced his prestige. (AOB at 121.) And, as will be discussed below, the theory that Brooks was misleading his sister about being given the drugs on consignment, when in fact, according to respondent, he stole them, simply diminishes his responsibility for the theft. They do not enhance the collateral statements' reliability as required by the statement against interest doctrine.

C. Nothing In Garner's Testimony – Either As Proffered At The In Limine Hearing Or Later Presented At Trial – Indicated That Brooks Robbed Carey

Respondent contends that appellant improperly cited Garner's testimony at appellant's trial, as opposed to her prior testimony at Kai Harris's trial – referenced in the in limine motion – to argue that Brooks's collateral statements were not against his interests. (RB at 129.) Garner's testimony at appellant's trial, however, was wholly consistent with her prior testimony at Harris's trial, and thus only confirms the meaning of Brooks's hearsay statements recounted in Harris's trial that were the subject of the in limine motion. Respondent, in a notable departure from the prosecutor's theory at trial, asserts that the two sets of testimony were different: testimony from Harris's trial "clearly indicated that Brooks had stolen the drugs from Carey," while Garner's testimony at trial was that "Carey gave the drugs to Brooks (and therefore Brooks did not steal them)." (RB at 129.) Although the concession that the prosecutor's theory at appellant's trial was unsupported by the record is an important one, respondent misreads the record with respect to Harris's trial.

According to Garner's testimony from Harris's trial, Brooks told his sister that "he was dealing some business with Billy Pooh, and [Carey] was trying to *give him some stuff* to make money with out of jail." (3 CT 588,

italics added.) When asked specifically to avoid euphemisms, Garner reiterated that Carey "wanted to *give him some drugs* to make some money" but that "an incident happened" at the time the drugs were transferred to Brooks and "Billy Pooh's house . . . was shot up. Billy Pooh left drugs in the house, and he [Brooks] took the drugs and left." (3 CT 589, italics added.) Garner then testified that Brooks "said that he wasn't dealing with Billy Pooh no more after that. He said he didn't want no more dealings with him. That was the last I heard from my brother saying about that, but Billy Pooh was looking for him at that time.' (3 CT 589.) Upon further questioning, Garner explained, "He told me Billy Pooh was trying to *give him* some drugs to make some money with when he got out of prison," and that Carey was in fact "*giving* him drugs, but he have to pay for them." (3 CT 591, italics added.) Garner explained that "[Brooks] was there doing business with Billy, *getting* drugs from Billy when the house was shot up" and "[Brooks] said Billy Pooh *was already leaving* when the house was being shot up. So he said he grabbed up the drugs that was in the house and left. He never said nothing else to him no more." (3 CT 592, italics added.) In other words, just as at appellant's trial, the evidence before the trial court at the hearing was that *there was no robbery*. Carey wanted to and did "give" Brooks drugs to sell, Brooks was "there doing business with Billy getting drugs" and Brooks later would later "have to pay for them." (3 CT 591, 592.) There was an unrelated firefight after Carey was *already* leaving, at which point Brooks took the drugs given to him and left.

This portion of Garner's testimony – like the testimony introduced at appellant's trial – in no way indicated that Brooks stole drugs from Carey. And it was identical in all substantive respects the version provided at appellant's trial – which respondent *concedes* demonstrated that there was

no theft. (RB at 129.) And if there were any ambiguity, it was resolved by Garner's final statement that she was advised Brooks at the time not to "deal [drugs] *with* Billy" due to her concerns with Carey and appellant. (3 CT 591.) In other words, it was clear to Garner at the time of the conversation that Brooks was dealing drugs *with* Carey and not stealing from him.

Respondent's contrary contention is drawn from editorializing comments offered in the prosecutor's motion in limine, and not Garner's actual testimony from the Harris trial. (RB at 130, fn. 44.) Contrary to respondent's repeated assertions, Garner never relayed that Brooks said he "stole" drugs from Carey, or that he was in "trouble" with Carey. (Cf. RB 130-133.) Respondent's reference to a statement that Brooks said that he "had gotten into some trouble with a local drug dealer" (RB at 130, 131) is a quote that was taken from the prosecutor's motion, not Garner's actual testimony. (Compare 3 CT 582 [motion] with 3 CT 587-594 [Garner's testimony].) It is axiomatic that arguments of counsel are not evidence. (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [citation to points and authorities "obviously is not to admissible evidence in the record"].) The *only* support for respondent's contention that Carey's offer to "give" Brooks the drugs was "not accepted by Brooks" (RB at 130 fn. 44) is the citation from the prosecutor's motion that Brooks "got in trouble." (*Ibid*.; see also RB at 133 [citing prosecution motion for proposition that Brooks "admitted he was in trouble for what he had done"].)

Respondent similarly claims that Garner testified that "Carey was looking for Brooks after Brooks had stolen the drugs" (RB at 132), but there is only evidentiary support for the former clause (i.e., the innocent fact

that Carey was looking for Brooks, with whom he was dealing drugs) not the later (i.e., that Brooks had stolen the drugs). Nor is there any evidentiary support in Garner's testimony for respondent's final theory that "Brooks had taken or obtained drugs from Carey, had not paid Carey back for them, and was concerned about possible retaliation." (RB at 139.) Nothing in Garner's testimony indicates that Brooks had not paid (or did not intend to pay) Carey back, or that he was concerned about retaliation. The only thing that even comes close is Garner's statement that *she* was concerned about, and advised against, Brooks decision to "deal" with Carey. (3 CT 592-593.) But this statement is only further indication that Brooks was dealing drugs for, and not stealing drugs from, Carey.

In other words, the prosecutor's massaging of the meaning of Garner's testimony and respondent's argument suffer from the same basic defect: they both assume that the collateral statements at issue (i.e., that Carey was "giving" Brooks drugs) were untruthful. This is decidedly not a reason to substantiate them as reliable hearsay. Thus, even if respondent is correct that a close familial relationship is a sign of trustworthiness (RB at 137), it cannot aid respondent's theory as applied to this case, which depends on interpreting the statement that Brooks was "given" drugs by Carey as a lie covering for a theft.

It is true, as respondent indicates, that the prosecution always wanted the jury to believe that Brooks had stolen from Carey, as indicated by the prosecutor's opening and closing arguments. (RB at 136-138.) The problem is not a lack of consistency on the part of the prosecution. The problem is that Garner never testified at either trial that there was a theft from Carey by Brooks. As such, the statements of Brooks she relayed are precisely the type of unreliable collateral hearsay that should have been

excluded.

D. The Erroneous Admission Of The Hearsay Was Prejudicial

Appellant argued that much of the gang evidence hinged on the improper hearsay, which the prosecutor himself explained was the "foundation" of the prosecution's motive theory. (3 CT 585.) Respondent urges that, even without Brooks's hearsay, the gang retaliation theory was supported by evidence that (1) Carey, Brooks, and Harris were all members of the same gang; (2) appellant had a close relationship with Carey, a narcotics dealer; (3) that appellant allegedly bragged to Carey about the killing after it took place: and (4) Derrick Dillard stated to Brooks prior to the murder that Carey was looking for him. (RB at 141-142.) This, according to respondent, was sufficient to support a finding that the motive of the murder was to make Carey "proud of what appellant had done" in light of the gang expert testimony that criminal acts bolster a gang member's status in the gang. (RB at 142.)

The idea that appellant randomly shot four people, including a member of his own gang (without regard to the alleged drug theft from Carey) solely to make Carey proud of him and enhance his reputation in the gang is not what the prosecution argued, and only a weakly supported inference. And the argument misses the central point.

The prosecution used the hearsay and resultant gang-retaliation theory as a vehicle to introduce and support the gang expert testimony, which was intended to (and likely did) prejudice the jury against appellant. Once the jury believed this was a gang retaliation case, they were much more likely to accept the premise that the gang expert's inflammatory opinions concerning the cold-blooded and evil motives that allegedly drive

all gang members in the commission of all of their violent crimes actually applied to this case. In other words, once the prosecution made this a gang retaliation case, the jury was much more inclined to believe that the murders were committed by appellant simply to "elevate his status" in the gang, to create fear in the neighborhood as a means of witness intimidation, and to enhance appellant's reputation. (AOB 128.) Absent the inadmissible hearsay, the jury may have believed that appellant merely had a personal dispute with Brooks, unrelated to the gang, that escalated out of control once Harris decided to shoot Anderson. (Cf. *People v. Sanchez* (2016) 63 Cal.4th 665, 699 [a gang member may commit crimes, "regardless of any gang affiliation, and without an intent to aid anyone but himself."].)

Thus, although respondent is correct that motive is not an element and the jury was so instructed (RB at 141), this strongly understates the prejudicial component of the gang retaliation theory. Given that the hearsay was used by the prosecutor to frame the case as a gang-retaliation case (which was, after all, the prosecutor's intent) the hearsay may have been sufficient to lead the jury to believe that the gang expert's highly prejudicial opinions about gang-related retaliation crimes applied to this case. This, in turn, would tend to negate the defense theory at guilt, and even more strongly would be aggravating evidence at penalty.

The disastrous consequences of the hearsay explicated above is precisely why defense counsel, on numerous occasions, highlighted the weakness of the evidence regarding Carey (see AOB 124) despite conceding that appellant committed second degree murder. And it is also precisely why the prosecution sought to admit the hearsay, and why it returned to the gang retaliation motive so many times during the penalty phase. (See, e.g., 24 RT 4555, 4564, 4572, 4575-4576.)

It is true that there was other evidence that appellant participated in the murders (after all, defense counsel conceded second degree murder). But as explained above, Argument II.D, *ante*, the evidence that appellant was the actual killer of Anderson was significantly weaker and lacked forensic support. (See also AOB 129.) Respondent provides no answer to appellant's central argument for prejudice at the penalty phase: that the hearsay-supported gang retaliation theory may have contributed to an irrebuttable presumption that appellant was the actual killer of the Anderson, despite the lack of corroborating forensic evidence. (AOB at 127 ["the forensic evidence strongly suggested [the killing of Anderson] was attributable to co-defendant Harris"]; see also *id*. at 128-129.) As noted in the opening brief (*id*. at 129), "an accomplice is far less likely to receive the death penalty than the triggerman." (*People v. Garcia* (1984) 36 Cal.3d 539, 546, overruled on other grounds in *People v. Lee* (1987) 43 Cal.3d 666, 676.) For this reason, the improper admission of the hearsay evidence at issue here requires, at a minimum, reversal of the personal use finding and appellant's death sentence.

IV.

BECAUSE THE GUILT AND PENALTY PHASE JURIES IMPROPERLY CONSIDERED HIGHLY INFLAMMATORY GANG ENHANCEMENTS FOR WHICH THERE WAS INSUFFICIENT EVIDENTIARY SUPPORT, REVERSAL OF APPELLANT'S CONVICTION AND SENTENCE IS REQUIRED

Anticipating this Court's decision in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), appellant argued in the opening brief that there was insufficient evidence that the Ace Line Bounty Hunters, with which appellant was associated, was a criminal street gang. (AOB at 130-152.) In particular, there was no evidence that appellant knew or associated with Ravon Baylor and Lamont Sanchez, members of an unidentified clique of the umbrella gang the Bounty Hunter Bloods, who committed the predicate crimes proven by the prosecution. As noted in appellant's opening brief, the trial court specifically instructed the jury that the crimes committed by Baylor and Sanchez had "nothing to do with Mr. McDaniel." (AOB at 132; 8 RT 1746.) And there was no evidence that Baylor or Sanchez associated themselves with the Ace Line Bounty Hunters, or indeed any evidence regarding which clique(s) they belonged to. There was no evidence that appellant had ever met, or was even aware of the existence of either Baylor or Sanchez, much less that he associated with them or even members of their clique in any way. (Cf. *Prunty*, *supra*, 62 Cal.4th 59 at p. 67 [under the STEP Act, the prosecution must "introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang."].) In other words, "subsets must share some associational or organizational connection with the larger group, whether arising from individual members' routine collaboration with each other or otherwise." (*Id.* at p. 72.) Because the prosecution failed to introduce any

such evidence, the gang enhancements, and the conviction and sentence of death, must be overturned.

A. The Was No Forfeiture

It is well established that "questions of sufficiency of the evidence are not subject to forfeiture." (*People v. Butler* (2003) 31 Cal.4th 1119, 1128.) Respondent nonetheless claims that the sufficiency claim relating to the gang enhancement is forfeited because "a defendant . . . who does not move for acquittal pursuant to section 1118.1 at the close of the prosecution's case[] waives any claim that the evidence was *at that point insufficient*." (RB at 147, citing *People v. Smith* (1998) 64 Cal.App.4th 1458, 1469, italics added.) Respondent overlooks the dispositive importance of the italicized phrase. Although *Smith* and other cases hold that failure to raise a motion for acquittal waives a claim that the prosecution's *case-in-chief* did not present sufficient evidence, appellate courts will still review the *entire record* to determine if the evidence at trial was sufficient to support a conviction. (See *id.* at p. 82 [despite failure to move for acquittal under 1118.1, appellate court must still "review the entire record" to assess sufficiency claim].)

Nor is the claim forfeited because appellant failed to object to the admission of any particular component of the gang evidence presented by the prosecution. (RB at 147.) Appellant's argument is not that any one component of the gang expert's testimony was objectionable, but that the prosecution provided insufficient evidence to prove that appellant was a member of a criminal street gang under the STEP Act. This is precisely what occurred in *Prunty*, an identical sufficiency challenge, and the failure to object in that case likewise did not present a forfeiture issue. (See *Prunty*, *supra*, 62 Cal.4th at p. 90 (conc. and dis. opn. of Cantil-Sakauye,

C.J.) [noting that gang expert testimony in that case had been "admitted without objection or challenge"].)

B. The Rule Of *Prunty*

Because *Prunty* was decided after the opening brief was filed, appellant reviews its facts and holding. *Prunty* involved a similar challenge to the sufficiency of the prosecution's evidence to sustain a gang enhancement. (*Prunty*, *supra*, 62 Cal.4th 59 at pp. 70–71.) This Court held "that the STEP Act requires the prosecution to introduce evidence showing an associational or organizational connection that unites members of a putative criminal street gang." (*Id.* at p. 67.) And "where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22[, subdivision] (f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Id.* at p. 71.)

The STEP Act also "requires that the gang the defendant sought to benefit, the individuals that the prosecution claims constitute an 'organization, association, or group,' and the group whose actions the prosecution alleges satisfy the 'primary activities' and predicate offense requirements of section 186.22[, subdivision] (f), must be one and the same." (*Id.* at pp. 75-76.) The prosecution does not need to demonstrate the exact scope of the criminal street gang, but the jury must be able to infer that the gang the defendant sought to benefit included the group that committed the primary activities and predicate offenses under the STEP Act. (*Id.* at p. 76.) "And where, as in this case, the alleged perpetrators of the predicate crimes under section 186.22[, subdivision] (f) are members of particular subsets, the behavior of those subsets' members must connect them to the gang the defendant sought to benefit." (*Id.* at p. 80.)

The evidence showed that Prunty identified as Norteño generally and that he claimed membership in a Detroit Boulevard subset. (*Prunty*, *supra*, 62 Cal.4th 59 at p. 67.) "[T]he prosecution's gang expert testified about the Sacramento-area Norteño gang's general existence and origins, its use of shared signs, symbols, colors, and names, its primary activities, and the predicate activities of two local neighborhood subsets." (*Ibid*.) The expert also testified in support of the prosecution's theory that Prunty committed the charged assault with the intent to benefit the Sacramento-area Norteños. (*Id*. at pp. 67, 69.) This Court held that "where the prosecution's evidence fell short is with respect to the predicate offenses." (*Id*. at p. 82.)

The prosecution introduced evidence of two predicate offenses involving three alleged Sacramento Norteño subsets – Varrio Gardenland Norteños, Del Paso Heights Norteños and Varrio Centro Norteño. (*Prunty*, *supra*, 62 Cal.4th at p. 67.) The prosecution's gang expert characterized these groups as Norteños, but "he otherwise provided no evidence that could connect these groups to one another, or to an overarching Sacramento-area Norteño criminal street gang." (*Ibid*.) In particular, the expert "never addressed the Norteño gang's relationship to any of the subsets at issue. . . . . Instead, [the expert] simply described the subsets by name, characterized them as Norteños, and testified as to the alleged predicate offenses." (*Id*. at p. 83.) While he testified that Norteño street gangs are associated with the Nuestra Familia prison gang, he did not testify about any relationship between any Nuestra Familia shot callers and any of the Sacramento-area Norteño subsets. (*Ibid*.) This testimony was insufficient "to permit the jury to infer that the organization, association, or group at issue included the subsets that committed the predicate offenses." (*Id.* at p. 81.)

C. This Court Should Decline Respondent's Invitation To Overrule *Prunty* In All But Name

As argued in the opening brief, there was no evidence that the predicate acts introduced by the prosecution, the crimes committed by Ravon Baylor and Lamont Sanchez, had anything to do with appellant and his clique, the Ace Line Bounty Hunters. Nor was there any evidence of a nexus between the umbrella gang (Bounty Hunter Bloods) and Baylor or Sanchez, or between Baylor and Sanchez the Ace Line Bounty Hunters.

Respondent contends that this complete failure of evidence of organizational association between the umbrella group and the subsets is immaterial, because the gang expert opined that all individuals (appellant, Sanchez, and Baylor, and other witnesses in the case) were members of the umbrella gang, the Bounty Hunter Bloods. (See, e.g., RB at 149.) This extraordinarily limited reading of *Prunty* has a number of problems.

First, under respondent's theory, all the prosecution has to do to avoid the problems of proof identified in *Prunty* (namely a requirement to prove some associational or organizational connection between subsets) is to play a semantic exercise. Instead of connecting subsets with *actual evidence*, gang experts can simply apply the umbrella label to the defendants, the perpetrator's of the predicate offenses, and the criminal street gang which is purportedly benefited. In fact, respondent distinguishes *Prunty,* and excuses a failure to explain the association between the subsets and the umbrella gang, with two brief sentences: "That was not the prosecution's theory here. Hence, *Prunty* does not apply." (RB at 152.) As is evident by this cursory logic, respondent's theory eviscerates this Court's holding in *Prunty* by providing prosecutors an effortless means of evading it. This Court should not transform *Prunty* into an easily avoided word

game.

Second, respondent's theory contradicts the evidence presented by the prosecution's *own* gang expert. The prosecution's expert testified that there exists "no structured hierarchy" within the Bounty Hunter Bloods, and instead it is formed of many distinct neighborhood cliques. (8 RT 1750-1751.) Different cliques include "Bellhaven Bloods," "Block Bloods," "Ace Line," "112th Street," "Deuce Line," "114th Street," "115th Street," "Four Line," "Five Line," "Shad Lot," "Folsom Lot," "Nelson Lot," and "Hunter Lot." (AOB at 134.) Critically, these groups did not get along at all, and frequently feuded. (AOB at 134-135.) And the cliques had no relationship "other than they are all Bounty Hunters." (8 RT 1751.) The prosecution's expert provided no testimony that the various cliques worked together in any fashion. Instead, he affirmed that the warring cliques within the town-sized Nickerson Gardens are "Hatfields and McCoys." (8 RT 1777.) To assume – without any evidence – that all cliques organized as a cohesive whole ignores the prosecution's own witness. (*Prunty*, *supra*, 62 Cal.4th at p. 83 [rule in *Prunty* applied because gang expert testified that umbrella gang's presence "all over Sacramento" with "subsets based on different neighborhoods"].)

Respondent posits that "[i]f anything, the evidence showed that the cliques were merely a geographical identifier for the Bounty Hunter members. Depending on where a Bounty Hunter member lived at any given time, he was both part of that street's clique and still a member of the Bounty Hunters." (RB at 150.) This reading of the evidence may be true, as far as it goes, since the prosecution expert did state that the relationship between the cliques was that "they all grow up together. They live together. It just could be at anyone point in time where they're living at that point in

time, they'll say they're Ace Line or Five Line." (8 RT 1751.) But to the extent that respondent suggests that the cliques were *only* a geographic moniker with no structural significance, (i.e., one that changed the moment a member changed address), it does not square with the evidence: it would make no sense for cliques that depended simply on momentary address changes to engage in "feuds" as the prosecution's expert explained the cliques did. (*Ibid*.; see also 8 RT 1777 [describing the cliques as "Hatfields and McCoys" getting in "inner gang fighting" and "feuds" over various parking lots].)

Prunty, of course, did acknowledge that "evidence that subset gangs have periodically been at odds does not *necessarily* preclude treating those gangs collectively under the STEP Act." (*Prunty*, *supra*, 62 Cal.4th at p. 80, italics added.) But internal fighting does have significance: it indicates that the subsets are not, simply by the fact of sharing a common umbrella gang name, necessarily a cohesive whole. In other words, once evidence that warring subsets exists, the prosecution cannot ignore it and focus exclusively on the fact that the many subsets share part of a name.

In fact, this precise issue was recently confronted by the court of appeal in *People v. Nicholes* (2016) 246 Cal.App.4th 836 (*Nicholes*). In *Nicholes*, the prosecution similarly contended "that *Prunty* did not apply because 'the prosecution endeavored to prove that the Norteño gang – not a specific subset of the gang – met the statutory definition of a criminal street gang by introducing evidence of its primary activities and the requisite predicate offenses.'" (*Id.* at p. 845.) The problem was that, as in this case, the prosecution's evidence "showed that defendant, like *Prunty*, was a member of the Norteños generally *and a particular Norteño subset* – here, the Oak Park Norteño subset." (*Ibid*., emphasis added.) Although it was

not precisely clear which Norteño subset the perpetrators of the predicate offenses in *Nicholes* were identified with, the evidence suggested that they were members of another subset, and "[r]egardless, there was no evidence from which the jury could infer that these offenses were committed by members of a subset in Oak Park" like the defendant. (*Id.* at p. 846.) So too here. There was no evidence from which the jury could infer that the offenses of Baylor and Sanchez were committed by members of appellant's subset, or that there was an association between Baylor and/or Sanchez's group and appellant's, or the umbrella gang.

Respondent's contends that the "prosecutor focused on appellant's ties to the Bounty Hunters, not his connection to the Ace Line clique," and that "the cliques did not play an important role in the prosecutor's case." (RB at 150.) But that is exactly the problem: identifying the various subsets and their associational structure *should* have been part of the prosecutor's case. Thus, when respondent affirmatively concedes that the prosecution did not prove anything about the various cliques working together, or even which cliques the various purported gang members belonged to (RB at 150), it has conceded that there is insufficient evidence to support the gang enhancement.[28]

Respondent points to one piece of evidence to tie all the cliques

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[28] Respondent contends that "appellant does not dispute that the Bounty Hunter Bloods was a criminal street gang within the meaning of section 186.22." (RB at 151.) Respondent is incorrect. Criminal street gangs have a particularized legal meaning, requiring the commission of predicate offenses. (§ 186.22, subd. (f).) Predicate offenses by members of particular cliques do not render an umbrella organization a criminal street unless there is a tie between the subsets and the umbrella group. No such evidence was produced. Although the Bounty Hunter Bloods may be a criminal street gang, there was insufficient evidence to prove it in this case.

together: appellant's tattoo reading "ALCK" which according to the gang expert meant "Ace Line Crip Killer." (RB at 151.) This tattoo, respondent contends, demonstrates that appellant was "first and foremost a Bounty Hunter." (*Ibid*.) This tattoo, identifying a common enemy (Crips), is insufficient to show that appellant bore any connection to Sanchez and Baylor or their unidentified clique. (*People v. Prunty*, *supra*, 62 Cal.4th at p. 72 [STEP Act requires more than that a "group simply shares a common name, common identifying symbols, and a common enemy"].) Nor does appellant's association with Carey or other witnesses in the case (none of whose subsets were ever identified) say anything about Baylor or Sanchez, or there relationship to the umbrella gang. (Cf. RB at 151.)

"At a minimum, *Prunty* requires that the prosecution, in a case involving [an umbrella gang] and testimony that [the umbrella gang] operates through subsets, introduce evidence specific to the subsets at issue. (*Nicholes*, *supra*, 246 Cal.App.4th at p. 848.) Because the prosecution's own evidence demonstrated that the Bounty Hunter Bloods had no structured hierarchy and operated through subset cliques (8 RT 1750), the prosecution was required to show some form of association or organizational structure before the acts of seemingly unrelated individuals could be used punish appellant. (*Prunty*, *supra*, 62 Cal.4th at p. 82 [the prosecution's evidence fell short "with respect to the predicate offenses" where there was "no evidence that could connect [the subset] groups to one another, or to an overarching Sacramento-area Norteño criminal street gang."].) The prosecution failed to do so here.

D. In its Prejudice Analysis, Respondent Incorrectly Presumes That Trial Court Would Have Admitted Into Evidence All Of The Gang Expert Testimony

Appellant argued in the opening brief that much of the gang expert's

testimony, introduced through the vehicle of the STEP Act enhancement, was prejudicial and irrelevant. As but one example, appellant pointed to the highly inflammatory statement that the Bounty Hunter Bloods "primary activities" included committing "a lot of crimes involving shootings and murder." (AOB at 149, 8 RT 1744.) The prejudicial impact of the fact that appellant allegedly voluntarily joined such an organization cannot be understated.

Respondent contends that, even in the absence of a valid gang-enhancement, the trial court would have admitted, and instructed the jury to consider, the highly inflammatory gang expert evidence to prove identity and motive. (RB at 154, citing *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, for the proposition that "evidence of gang membership is often relevant to, and admissible regarding, the charged offense.")

Although it is at least conceivable that *some* information *might* have come in about the Bounty Hunter Bloods gang in the absence of a valid STEP Act enhancement, respondent provides no evidence that *all* of it *would* have come in. It is quite likely that, had the trial court been aware of the insufficiency of the gang allegations, it may have exercised discretion to exclude the most inflammatory statements made by the gang expert, or strike his testimony in its entirety. Respondent points to no evidence to the contrary.

In fact, in contending the relevance of the gang testimony, respondent reiterates the prejudicial stereotypes about gangs which the jury was likely to hold against appellant due to the expert's inflammatory testimony. (See RB at 154 [gang expert's testimony would aid jury in understanding how theft from a prominent gang member "could escalate into a senseless and brutal murder when gang members are involved"] see

also *ibid*. [gang evidence would explain why the defendant would "savagely kill (or attempt to kill) the innocent bystanders"].)

The erroneous admission of the gang-expert testimony had the effect of undermining appellant's defense theory, and likely caused appellant's jury to find that he was the actual killer of Anderson. (See AOB at 129-130, 151-152.) Therefore, appellant's conviction and sentence of death must be reversed.

V.

THIS COURT SHOULD INDEPENDENTLY REVIEW THE REPORTER'S TRANSCRIPTS OF THE IN CAMERA PROCEEDINGS AND THE UNDERLYING DOCUMENTS REVIEWED DURING THE PROCEEDINGS TO DETERMINE WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S PITCHESS MOTION

In his opening brief, appellant asked this Court to independently review the transcripts of the in camera hearings and the documents reviewed by the trial court to determine whether the trial court erred in denying appellant's *Pitchess* motions.[29] (AOB at 153-156.) Respondent has no objection (RB at 156), and appellant and respondent agree on the proper procedures. The issue is therefore joined.

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[29] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

VI.

THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT ONE OF THE VICTIMS HAD BEEN STRICKEN BY CANCER AND ALLOWING THE PROSECUTOR TO ARGUE THAT THIS TERRIBLE PLIGHT, WHOLLY UNRELATED TO VICTIM IMPACT EVIDENCE, SHOULD SUPPORT A DEATH SENTENCE FOR APPELLANT

In service of its overarching goal of obtaining a death sentence, the prosecutor confronted the trial court with an argument that "I want to get into [victim Annette Anderson's] cancer." (19 RT 3494.) As argued in the opening brief, the undeniably tragic fact that one of the victims in this case had been struggling on and off with cancer – a heart-wrenching travail that lasted two decades – was irrelevant to the jury's decision on whether to sentence appellant to death. The prosecutor below gave three reasons for why the jury needed to hear about Anderson's cancer: (1) because the cancer made her a particularly vulnerable victim; (2) because her life was more precious because she may have had limited time left; and (3) to explain why Anderson had become involved in the use of illegal drugs. (AOB at 159.)

Respondent abandons the first theory of relevance, as well it should: there was no evidence adduced at any point that Anderson was experiencing any symptoms from cancer that rendered her particularly vulnerable at the time she was killed. Although the prosecutor clearly intended to, and did, improperly argue that Anderson's cancer diagnosis rendered her a particularly vulnerable victim, it was an argument without any evidentiary support. (AOB at 162-163.) As such, it was improper. (Cf. *Miller v. State* (Okla. Crim. App. 1998) 977 P.2d 1099, 1109 [testimony regarding victim's childhood disability and resultant inability to play sports was not "gratuitous

pandering to the jury" because it explained "the extent of the [victim's] lack of upper body strength" which was relevant to the nature of the crime].) Respondent, by jettisoning this basis of relevance in its argument, appears to concede this point.

Respondent does contend, however, that the other two justifications warranted admission of the cancer evidence. First, respondent contends that Anderson's illness was necessary to show why "Anderson was using drugs at the time of the murder and thereby [to] rebut[] appellant's attempt to tarnish her character." (RB at 160.) But respondent's argument proves exactly why the cancer evidence should *not* have been admitted. As appellant acknowledged in his opening brief, the evidence of Anderson's drug abuse – whether or not related to her cancer diagnosis – was strictly *inadmissible* to "tarnish the victim's character." (AOB at 163-166.) California law is absolutely clear that a victim's drug use is not admissible to "make[] the victim look bad." (*People v. Loker* (2008) 44 Cal.4th 691, 736). And appellant's trial counsel specifically disclaimed any argument that the victim's drug use had any bearing on her murder, (24 RT 4658-4659), other than to provide context and corroboration for the drug theft retaliation theory presented by the prosecution (18 RT 3449, 3457-3458; see also 24 RT 4658 [evidence was presented to show that "everyone in that house was using drugs"]). Regardless of the defense argument below, the trial court specifically held that the fact that either victim had been using drugs at the time they were killed had "no relevance." (18 RT 3456.)

To allow in evidence of Anderson's otherwise irrelevant cancer diagnosis to rebut a legally improper attack that the defense was not making, and which ultimately allowed the prosecutor to denigrate appellant's penalty phase defense as "hoping that you [the jury] are going to

see the victims in this case as subhuman" (24 RT 4589-4590) was not the proper course. It has long been the rule that "admission of evidence which was irrelevant, . . . will not authorize the admission of other irrelevant evidence offered to rebut the same." (*Stringer v. Young's Lessee* (1830) 28 U.S. 320, 336 (Marshall, J.).) Instead of carelessly "let[ting] it all come in and let[ting] the jury sort it out" in the hopes of navigating "the safest way from an appellate review standpoint," the trial court should have excluded evidence that was irrelevant: both Anderson's cancer and her drug use. (See Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].)

Respondent also adopts the prosecutor's relevance theory below, that the cancer showed that Anderson knew that she had "precious limited days left with [her] life" because her illness, and therefore the crime was "particularly egregious." (19 RT 3487.) In respondent's words, the evidence demonstrated Anderson's "uniqueness" by showing that "the specific harm caused by appellant's crime was to cut short the precious time that Anderson's family had to spend with her." (RB at 160.) This reasoning, while stirring in its sentiment, lacks rational mooring – which is why the evidence should not have been admitted on this basis.

Life is not more or less precious because of a diagnosed illness. Life is precious, period. Respondent seems to be urging the familiar principle that the prospect of death may serve as a potent reminder to enjoy those precious moments we have. (Isiah 22:13 ["Let us eat and drink, for tomorrow we may die"].) Often, sudden and senseless killings of the kind before this Court deprive the victims, and their relatives, of the opportunity to heed these occasional reminders of mortality and to take the moments afforded to them to enjoy time with family and friends. But, if anything,

that is the opposite of what happened in this case. Unlike many murder victims, because of her illness, Anderson had been reminded of her mortality and was already trying to spend as much time as possible with her family. (21 RT 4094, 4099-4100; RB at 160.)

This is not to say that the crime did not have a monumental impact on Anderson's entire family. The record before the jury was unclear on Anderson's medical prognosis: it could have been that she had decades more to live. But even if Anderson had been told she would die from her illness within a week of the crime, this did not lessen appellant's culpability. As a result of the killing, Anderson's time on this earth was violently and inexcusably cut short, and her family was deprived of whatever remaining days were left to her. This was the harm of the crime, which appellant does not dispute. But the "specific harm caused by appellant" (RB at 160) had nothing to do with Anderson's cancer.

What the prosecutor sought to do was cynically manipulate the terrible hardship with which Anderson had been stricken – one wholly unrelated to the crime or its impact on the surviving victims – in order to secure a death sentence. The heartrending tragedies befalling murder victims and their families, unrelated to the underlying crime, are not independently relevant as victim impact evidence. This principle has been affirmed by this Court and others. (See *People v. Tully* (2012) 54 Cal.4th 952, 1036-1037 [trial court "appropriately" sustained objection to a question regarding surviving victim's mother's earlier cancer diagnosis]; *Short v. State* (Okla. Crim. App. 1999) 980 P.2d 1081, 1101 ["statements concerning [victim's mother's] fifteen year illness [preceding crime] . . . were not relevant victim impact evidence."]; *Floyd v. State* (2002) 118 Nev. 156, 175, abrogated on other grounds by *Grey v. State* (2008) 124 Nev. 110

(2008) [unrelated kidnapping of victim's family and sexual assault of victim's sister was improper victim impact evidence]; see also *State v. Clay* (Mo. 1998) 975 S.W.2d 121, 132 ["passing comment" that family had previously lost child crippled with cerebral palsy "not so prejudicial as to render the trial fundamentally unfair"]; *State v. Gill* (Mo. 2005) 167 S.W.3d 184, 196 [suggesting that witnesses "reference to her [victim] father having been a prisoner of war" may have been irrelevant but explaining that statements "were brief and did not prejudice" the defendant].)[30]

Here, unlike in some of the aforementioned cases, the reference to the victim's cancer was not a "passing comment." The prosecutor clearly intended, in advance, to use Anderson's illness in hope of obtaining a death sentence. And he returned to the subject of her cancer on no less than five separate occasions during closing argument. (See AOB at 170.)

With some understatement, respondent admits that the testimony regarding Anderson's cancer "arguably may have been emotional." (RB at 161.) Nonetheless, respondent claims that there could be no prejudice because the fact that Anderson had cancer "was nowhere near as

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[30] Although these out-of-state cases appropriately conclude that hardships befalling victims and their family members unrelated to the defendant's crimes are not relevant victim impact evidence, some employ a prejudice analysis in conflict with California law. As explained below, admission of *irrelevant* victim impact is assessed in this state under the parallel standards of *Chapman v. California* (1967) 386 U.S. 18, 24, and *People v. Brown* (1988) 46 Cal.3d 432, 447-448. (AOB at 169.) Therefore, this Court should disregard the prejudice analysis of those cases to the extent that they hold that the defendant must demonstrate that the irrelevant victim impact evidence rendered the trial "fundamentally unfair." (See *Short v. State*, *supra*, 980 P.2d at pp. 1099–1100 [citing "fundamentally unfair" standard]; *Floyd v. State*, *supra*, 118 Nev. at p. 175 [accord]; *State v. Clay*, *supra*, 975 S.W.2d at p. 132 [accord].)

inflammatory as the details of her murder." (*Ibid*.) That is not the test for prejudice.

As noted in the opening brief – and nowhere disputed by respondent – the prejudice standard for improper admission of irrelevant victim impact evidence at the penalty phase is that of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and the equivalent standard of *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448. (AOB at 169, citing *People v. Abel* (2012) 53 Cal.4th 891, 939.) The question is therefore not, as respondent asserts, whether the victim impact evidence here was as inflammatory as the facts of Anderson's murder (RB at 161), but whether the government can prove, beyond a reasonable doubt, that the error did not affect the penalty verdict. As detailed in the opening brief, the penalty phase resulted in a hung jury, and four days of deliberations after retrial. (AOB at 170.) It is precisely the type of close case one in which admittedly "emotional" yet irrelevant evidence could have swayed the jury's verdict. Certainly, respondent's cursory argument does not disprove the possibility beyond a reasonable doubt. Therefore, respondent is entitled to a reversal of his death sentence.

VII.[31]

THE TRIAL COURT ERRED IN REJECTING APPELLANT'S REQUEST FOR A LINGERING DOUBT INSTRUCTION AT THE PENALTY RETRIAL, AND BY INSTRUCTING THE JURORS THAT THEY HAD TO ACCEPT THE GUILT AND OTHER FINDINGS MADE BY THE PRIOR JURY, INCLUDING THAT APPELLANT WAS THE ACTUAL SHOOTER OF VICTIM ANNETTE ANDERSON

The evidence that appellant was the actual shooter of Anderson was not strongly supported by the forensic evidence. (See also AOB 174-175 [recounting forensic and physical evidence suggesting that the co-defendant Kai Harris fired both shots that killed Anderson].) Nor were any of the surviving witnesses (two drug users asleep at a drug party moments before being shot) in a position to conclusively identify who fired the crucial, initial shots. Lingering doubt that appellant may not have killed Anderson, the far more sympathetic of the two victims, was therefore an important component of appellant's defense at the penalty phase. Yet when appellant repeatedly asked for a lingering doubt instruction, the trial court denied it on the basis that such an instruction was "inappropriate" in a penalty retrial. (AOB at 176.)

Appellant made two arguments with respect to the denial of the lingering doubt instruction in his opening brief: (1) that this Court should reconsider its contradictory prior cases and require a lingering doubt instruction during the penalty phase (AOB at 181-186); and (2) a lingering doubt instruction should have been given under the particular circumstances

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[31] In the AOB, arguments VII-X are inaccurately labeled as arguments VIII-XI. These numbering errors are corrected in this brief, and therefore these affected arguments have different (and correct) number headings.

of appellant's case, particularly in light of the prosecutor's attempts to negate the concept of residual doubt through its argument and through its use of the trial court's mid-argument rulings and instructions. (AOB at 186-191.) The prosecutor's argument that appellant personally killed Anderson relied much more heavily on the findings of the prior jury than it did on the evidence the second jury heard, and the defense objections to this potentially misleading argument were overruled. Most importantly, the trial court's mid-argument rulings and mid-argument instructions were used by the prosecutor in a manner that likely conveyed to appellant's second jury that they could not consider lingering doubts as to the first jury's finding that appellant shot Anderson. (AOB at 188-191.) Because of this confluence of events, an instruction that the jury *could* indeed consider lingering doubt should have been given.

Respondent's sole response to appellant's argument that a lingering doubt instruction should always be required is to claim that "[a]ppellant has not put forward any basis in law or fact that would distinguish the appellant's case from precedent or require reconsideration of well-settled precedent." (RB at 162.) Because respondent presents no substantive response to appellant's critique of the existing rule – i.e., that lingering doubt instructions are arbitrarily provided or withheld at the whim of the trial court – there is no need for appellant to reply and the issue is properly joined.

With respect to appellant's second argument – i.e., that the circumstances of this case warranted a lingering doubt instruction, and the failure to give such an instruction likely led to juror confusion – respondent does provide counter arguments. Respondent takes no position on the rule which was proposed by Justice Mosk in his concurrence in *People v.*

Johnson (1992) 3 Cal.4th 1183, and which is advanced by appellant here, namely that a lingering doubt instruction should be given when there is a "a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception in this regard." (*Id.* at p. 1261 (conc. opn. of Mosk, J.).) However, respondent notes (and then attempts to dispute) the six factors highlighted by appellant that illustrate why a lingering doubt instruction was improperly denied in his case, namely: (1) he had requested a lingering doubt instruction; (2) the second penalty phase jury was not the jury that had rendered the guilty verdicts; (3) his request for the lingering doubt instruction was denied for an "illogical reason"; (4) the trial court repeatedly instructed the jury that it "'must accept'" the guilt phase jury's finding that appellant had personally killed Anderson; (5) the prosecutor's argument that appellant had personally killed Anderson "relied heavily on an appeal to the findings of the prior jury"; and (6) the context in which the penalty jury heard the prosecutor's argument, the trial court's instructions, and the trial court's rulings on defense counsel's objections during the prosecution's penalty phase closing argument. (RB at 162.) Appellant will address respondent's points in turn.

A. The Trial Court Abused Its Discretion By Denying A Lingering Doubt Instruction On The Basis Of A Factor That Militates In Favor Of Providing An Instruction

Respondent cannot dispute that appellant repeatedly requested instructions on lingering doubt. (9 CT 2407; 24 RT 4514-4515; 25 RT 4677.) Nor does respondent dispute this Court's statements explaining that allowing evidence of lingering doubt is *most* important in a case, like appellant's, where there is a penalty retrial and the penalty jury may believe that it must give conclusive weight to the previous jury's guilt findings and

therefore cannot consider evidence of residual doubt. In such a posture, the penalty jury is *most* likely to harbor "confusion" about the meaning of the previous jury's guilt verdict. (See *People v. Gay* (2008) 42 Cal.4th 1195, 1219 [there is a heightened risk of jury confusion on the issue of lingering doubt during penalty retrials].) For this reason, appellant argued that the trial court necessarily abused its discretion by denying a lingering doubt instruction precisely *because* this was a penalty retrial, which the trial court categorically believed was an "inappropriate" circumstance in which to give a lingering doubt instruction. (AOB at 187.)

Respondent counters that the trial court in *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254 (*Gonzales*) made precisely the same mistake – denying the lingering doubt instruction *because* it was a penalty retrial – yet this Court failed to find error in the trial court's reasoning. (RB at 162.) According to respondent, the trial court's flawed logic in *Gonzales* means that the trial court's reasoning in this case – that a lingering doubt instruction is "inappropriate" in a circumstance in which the evidence on lingering doubt is *most* important – is not "illogical" and therefore there was no abuse of discretion. (RB at 163.) Respondent provides no explanation for why the trial court's decision in either this case or *Gonzales* was logical, or any argument that it does not contradict the principles articulated in *People v. Gay, supra*, 42 Cal.4th 1195, other than the fact that no error was identified in *Gonzales*.

Respondent's reading of *Gonzales* is mistaken. The *Gonzales* court never expressed any approval of the trial court's illogical reasoning, beyond noting its existence in stating the procedural facts. (*Gonzales*, *supra*, 52 Cal.4th at p. 325.) "It is axiomatic that cases are not authority for propositions not considered. [citation]." (*In re Marriage of Cornejo* (1996)

13 Cal.4th 381, 388.) Respondent also overlooks two critical facts which strongly suggest that the *Gonzales* never intended to provide even silent guidance on the propriety of the trial court's dubious logic in that case.

First, in its supplemental briefing on the issue of lingering doubt the defendant in *Gonzales* never argued that the trial court abused its discretion in denying the lingering doubt instruction due to its improper reasoning. This itself would provide a probable explanation for why the *Gonzales* court never passed on that issue. Second, the trial court in *Gonzales* made its decision denying the lingering doubt instruction in a trial that occurred in 1998, a decade before this Court affirmed in *People v. Gay*, *supra*, 42 Cal.4th 1195, the principle that lingering doubt evidence is most important in a penalty retrial under the current death penalty scheme. It would have been odd for this Court – or the defendant in *Gonzales* – to accuse the trial court of abusing its discretion for employing logic in tension with principals enunciated in a case that would not issue for another 10 years.

The penalty retrial in this case, however, occurred only months after the opinion in *Gay* issued, reminding trial courts across the state that penalty retrials are the instances in which lingering doubt evidence is most critical and the concept of lingering doubt is most likely to result in juror confusion. If anything, the trial court's upside-down logic in *Gonzales*, when combined with the trial court's identical reasoning in appellant's case, shows that this improper thinking (lingering doubt instructions are "inappropriate" at penalty retrials) is a widespread and continuing problem that this Court should address. If abuse of discretion means anything, it surely entails not drawing conclusions or making rulings contrary to the law. Although there may be sound reasons to deny a lingering doubt instructions in a given case, trial courts must provide some basis other than

one which in fact militates in favor of giving the instruction.

B. There Is Significant Evidence That The Jury Likely Believed They Were Conclusively Bound By The Prior Jury's Findings And Therefore Could Not Give Mitigating Effect To Evidence Of Lingering Doubt

Respondent brushes aside the remaining evidence which likely caused the jury to ignore any evidence of lingering doubt. Respondent acknowledges that the trial court instructed appellant's second jury that it "must accept" the findings of the prior jury. (RB at 163; AOB at 188.) As noted in the opening brief, one of the problems found in *Gay* was that the error in excluding evidence on lingering doubt "was compounded by the trial court's instruction to the jury, following opening statement, that defendant's responsibility for the shooting *had been conclusively proven*." (*People v. Gay*, *supra*, 42 Cal.4th at p. 1224, italics added.) Even in *People v. DeSantis* (1992) 2 Cal.4th 1198, a case cited by respondent, this Court noted the risk that a trial court's instructions and rulings on how to consider the prior jury's findings may "in effect serve[] the verdict of guilt on a platter without an opportunity to resolve any doubts, no matter how slight, about [the defendant's] role in the crimes." (*Id.* at p. 1239.) Appellant's is such a case.

Respondent makes no dispute that the prosecutor's argument relied heavily on the prior jury's findings, as opposed to focusing more strictly on the evidence presented at the penalty retrial. (See AOB at 188-189.) Respondent instead argues that the jury was "steeped in the nuances of the case," and the prosecutor's argument merely reminded the jury that guilt (i.e., guilt beyond a reasonable doubt) was "to be conclusively presumed." (RB at 163, citing *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1238, 1240.) Respondent fails to acknowledge that the distinction between "conclusively

presuming" that guilt and other findings have been found beyond a *reasonable* doubt, and conclusively presuming that a second jury "must accept" the findings of the prior jury without regard to *residual* doubt, is an extremely subtle one. There is, at a minimum, great potential for confusion by lay jurors who are not "steeped" in the law on lingering doubt and who receive no instruction thereon. Where there is no specific instruction, the jurors are dependant largely on the arguments of the parties. (See *People v. Mickey* (1991) 54 Cal.3d 612, 699 ["in deciding whether the jurors in any given case were in fact misled, 'we examine the whole record and in particular the arguments of counsel' [citation]."') But the jury argument is exactly where the most significant problems arose.

What respondent most obviously fails to grapple with is the context of the argument itself. The prosecutor argued that "based upon . . . *what you have been instructed*, McDaniel shot all four people in that apartment." (24 RT 4556, italics added; see *People v. Gay*, *supra*, 42 Cal.4th at p. 1225 [noting that the prosecutor "even quoted from" the judge's instruction negating lingering doubt in his closing argument].) When defense counsel repeatedly attempted to object to the prosecutor's appeal to the prior jury's findings as conclusive statements about what "we know" (24 RT 4554-4556), the trial court again and again overruled the defense counsel's objections. The judge even took the time to reinstruct the jury – mid-argument – as to the prior jury's finding that appellant shot Anderson. (24 RT 4557.) And it was immediately following the trial court's mid-argument admonitions that the prosecutor reinforced his argument against the very concept of residual doubt, stating that the *instructions* dictated to the second jury who shot Anderson. (24 RT 4556-4557.)

Given the potential for confusion that this Court has already

recognized, the context of the argument makes it reasonably probable that a lay juror could witness the exchange between the court and the parties and conclude that it was not allowed to consider lingering doubt as to appellant's responsibility for personally killing Anderson. (See 24 RT 4553-4558.) Thus, although it may be theoretically possible to give lingering doubt effect through a factor (k) instruction (RB at 163), the jury likely would not have believed it could have done so in this case.

C. The Error Was Prejudicial

Respondent contends that the error was harmless based on two grounds. First, the error was harmless because appellant was allowed to present evidence to support lingering doubt that could be considered under the rubric of the general instructions. (RB at 164.) This, however, is merely a rehashing of the merits. As argued above, the reason that a lingering doubt instruction should have been required in this case is because the circumstances suggest that the jury would have mistakenly believed that it could *not* give effect to this evidence under the general instructions. Instead, the jury would likely have taken to heart the judges repeated admonitions that it "must accept" the prior jury's findings, (17 RT 3167, 25 RT 4681), and would have tempered its understanding of these instructions through the prosecutor's argument (and the trial court's mid-argument rulings and admonitions) that the instructions conclusively dictated the issue of who killed Anderson.

Second, respondent summarily concludes that the "guilt evidence was overwhelming and the aggravating evidence was too strong to overcome." (RB at 164.) For the reasons set forth in appellant's opening brief, this was a close case that resulted in a hung jury on penalty and lengthy deliberations on the issue of penalty at the penalty retrial. (AOB at

169-170.) While there was significant evidence placing appellant at the scene, the evidence concerning who killed Anderson was far from ironclad. Lingering doubt that appellant did not in fact kill Anderson would have had a substantial impact on these already fraught deliberations. (AOB 191-195) Reversal of the death judgment is thus required.

VIII.

PENAL CODE SECTION 1042 AND ARTICLE I, SECTION 16 OF THE STATE CONSTITUTION REQUIRE THAT A SENTENCE OF DEATH AND THE AGGRAVATING FACTORS BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Appellant argued in his opening brief that article I, section 16 of the California Constitution and Penal Code section 1042 require that all "issues of fact" be tried by a jury, in accordance with the common law protection of unanimity and proof beyond a reasonable doubt. (AOB 196-224.) Appellant argued that the ultimate determination of penalty and the existence of aggravating factors are indeed "issues of fact" as properly understood under state law. (See generally AOB 203-210.) As a consequence, appellant argued that (1) unanimity is required as to the existence of aggravating factors and (2) proof beyond a reasonable doubt is required as to the ultimate penalty determination. Particularly because this Court's decisions to the contrary derive from this Court's uncritical acceptance of litigation positions taken by capital defendants (AOB at 211-217), appellant invited this Court to revisit its prior decisions on this issue.

Respondent counters by simply citing cases – none of which explicitly address either section 1042 or article I, section 16 of the California Constitution – which have held that the jury protections do not apply to the penalty phase. (RB at 164-165.) Respondent's only additional argument is the conclusory assertion that there is "no precedent" for appellant's argument. (RB at 165.) To the contrary, as laid out in the opening brief and in appellant's supplemental opening brief, there is considerable precedent supporting the idea that all issues of fact must be found by a jury, unanimously and beyond a reasonable doubt.

Because respondent provides no substantive rebuttal to appellant's underlying assertion that the ultimate determination of penalty and the existence of aggravating factors are indeed "issues of fact" under state law, the issues are fully joined and no further reply is necessary.

IX.

CALIFORNIA'S DEATH PENALTY STATUTE AND CALJIC INSTRUCTIONS, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATE THE UNITED STATES CONSTITUTION

In appellant's opening brief, appellant argued that the the California death penalty is unconstitutional. (AOB 228-247.) Respondent simply relies on this Court's prior decisions without adding any new arguments. (RB 165-168.) Accordingly, the issues are fully joined and no reply is necessary.

X.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In appellant's opening brief, he argued that the cumulative prejudice of the multiple errors identified warranted reversal of the judgment and sentence. (AOB at 248-251.) Respondent argues only that there are no errors to cumulate. (RB at 168.) Accordingly, the issues are fully joined and no reply is necessary.

CONCLUSION

For the reasons set forth in appellant's opening brief and above, the entire judgment must be reversed.

DATED: May 9, 2017

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Elias Batchelder, am the attorney assigned to represent appellant in this automatic appeal. I conducted 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 is approximately 35, 447 words in length.

DATED: May 9, 2017

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Elias Batchelder

DECLARATION OF SERVICE BY MAIL

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Superior Court No. TA074274

I, the undersigned, declare 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 May 9, 2017 at Oakland, California.

____
DECLARANT