Supreme Court Copy

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CATHERINE THOMPSON,

Defendant and Appellant.

S033901

CAPITAL CASE

Automatic Appeal from the Superior Court of the State of California
County of Los Angeles, Case No. SA004363
The Honorable George W. Trammell, III, Judge

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CATHERINE THOMPSON, Defendant and Appellant.	S033901 CAPITAL CASE

STATEMENT OF THE CASE

Appellant and three others – Phillip Sanders, Carolyn Sanders and Robert Jones – were arrested and charged with murder and other related crimes in connection with the death of Melvin Thompson. The cases against Carolyn Sanders and Robert Jones were severed from the trial of appellant and Phillip Sanders. Before and during trial, appellant moved multiple times for severance and/or dual juries, to avoid being tried with Phillip Sanders. All such motions were denied, and appellant and Phillip Sanders were tried together during the guilt phase. (See Argument I, *infra*, Relevant Factual and Procedural Background Section and record citations therein.)

In an information filed by the Los Angeles County District Attorney, appellant was charged in count I with conspiracy to commit murder (Pen. Code, §§ 182, 187, subd. (a)).[1] Count II charged appellant with the June 14, 1990 murder of her husband, Melvin Thompson (§ 187, subd. (a)). It was further alleged as special circumstances that the murder was committed by appellant for

1. Unless otherwise indicated, all further statutory references are to the Penal Code.

financial gain (§ 190.2, subd. (a)(1)), to prevent a witness from testifying in a criminal proceeding (§ 190.2, subd. (a)(10)), and while lying in wait (§ 190.2, subd. (a)(15)). In count III, appellant was charged with grand theft of personal property (§ 487), and it was further alleged that the value of the property exceeded $25,000, within the meaning of section 12022.6, subdivision (a). (3CT 692-696.) Appellant was arraigned, pleaded not guilty, and denied the special circumstance and property-value allegations. (4CT 944.)[2]

Trial was by jury. (CT 2374.) The jury found appellant guilty of both remaining counts and found the special circumstance allegation to be true. Phillip Sanders was likewise found guilty of murder, and the special circumstance allegation was likewise found true. (10CT 2644-2645, 2790.) At the conclusion of the penalty phase, the jury fixed the penalty for appellant at death. (11CT 2894.) A mistrial was declared as to Phillip Sanders's penalty phase, and the prosecution ultimately opted not to pursue a penalty trial against him, and he was sentenced to life in prison without the possibility of parole. (68RT 9704.2; 12 CT 3429.)

The trial court denied appellant's automatic motion for reduction of sentence, pursuant to section 190.4, subdivision (e). (12CT 3477.) In accordance with the jury verdict, the court sentenced appellant to death. (12CT 3493.)

This appeal is automatic following a judgment of death. (§ 1239.)

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2. The entirety of count III, as well as the lying-in-wait and killing-a-witness special circumstances, were dismissed before trial. (4CT 1145.)

STATEMENT OF FACTS

Appellant and Melvin Thompson were husband and wife. She handled all of their personal and business finances, keeping Melvin unaware of their economic situation.

In 1986, appellant became indebted to an employer in an amount exceeding $30,000. Without Melvin's knowledge, she gave the employer a lien on their home, and agreed to repay the debt in full, though she never did.

In 1989, the home in which she and Melvin lived went into foreclosure. She made a deal with the buyer of the property that allowed her to pay rent and keep living there while she made arrangements to repurchase the property. Melvin was never informed about the foreclosure, or appellant's dealings with the new owner.

In order to obtain the money needed to reacquire her home, appellant and a man named Phillip Sanders (hereinafter codefendant Sanders) masqueraded as Melvin and Mellie Thompson -- Melvin's ex-wife -- to perpetrate a fraudulent loan transaction. Using false identification, appellant and codefendant Sanders secured a loan on a piece of property still owned by Melvin and Mellie. Melvin again had no knowledge of appellant's dealings.

Appellant next attempted to secure a loan to repurchase the foreclosed home. Using yet another alias, she used false information and a fictional bank account to dupe the mortgage broker and lender to obtain financing.

Needing more money, in May 1990, appellant began planning with Sanders and his wife, Carolyn, to murder Melvin for life insurance proceeds. On June 14, 1990, in accordance with that plan, codefendant Sanders shot and killed Melvin Thompson.

A. The Guilt Phase

1. The Prosecution's Case-In-Chief

a. Appellant's Financial Problems And Related Fraudulent Acts

At the time of Melvin Thompson's murder, in 1990, he and appellant had been married for approximately seven years.[3] During the entirety of their marriage, appellant controlled all of their finances. At home, appellant would retrieve the mail each day, and pay all of the bills. She likewise handled all the financial aspects of Melvin's automotive repair businesses, known as Kayser Service and Community Brake, which were located in Santa Monica. Appellant had a complete set of keys to the auto repair shop, including one to the back gate. (26RT 4617.) Prior to marrying appellant, Melvin had controlled the business finances. (23RT 3902-3903; 26RT 4477-4480; 4631-4632; 36RT 6258-6260.)

In 1986, appellant worked for Edith Ann's Answering Service as an office manager. (25RT 4329-4330.) Appellant became indebted to Edith Ann's in the amount of $33,325.37. (25RT 4333.) In November 1986, appellant agreed to repay the debt, signing a note and giving Edith Ann's a lien on the West Hills home she and Melvin lived in at 8034 Hillary. (25RT 4334, 4336; 33RT 5769; Peo's. Exh. 63-A.) Appellant only repaid $7,500 of the debt. (25RT 4335.)

In September 1989, the Hillary home went into foreclosure, and the property was purchased by Tony DeGreef of Bid Properties. Mr. DeGreef began eviction proceedings, but did not follow through. Instead, he entered into an agreement with appellant where she would pay rent and continue living

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3. Melvin Thompson preferred to be called "Tom," though that was not his legal name. (23RT 3896).

in the house, and would eventually re-purchase the house from him. (24RT 4108-4109.)

In her negotiations and conversations with Mr. DeGreef, appellant included her friend, Isabelle Sanders. Both Isabelle and appellant represented that Ms. Sanders was appellant's mother. Melvin Thompson, however, never met with Mr. DeGreef. Appellant falsely told him that Melvin was very ill, and unavailable to participate in any of the meetings. Appellant specifically told Mr. DeGreef that she did not want Melvin informed about the foreclosure. (24RT 4113.) Mr. DeGreef was concerned that appellant would not have the money to re-purchase the house. When he asked appellant about her assets, she and Isabelle Sanders claimed appellant would be receiving money from a trust and a life insurance policy. (24RT 4116-4117.)

Though they were divorced, Melvin Thompson and his ex-wife, Millie, jointly owned a house in which Millie lived, located at 3534 South Sycamore in Los Angeles.[4] (23RT 3898.) In November 1989, two months after losing her West Hills home in foreclosure, appellant and codefendant Sanders (Isabelle's son), posing as Mellie and Melvin Thompson, met with mortgage broker, Dorothy Reik, in an attempt to obtain a loan on the South Sycamore property. (23RT 3949-3952.) To facilitate the fraud, appellant and codefendant Sanders produced temporary driver's licences which purported to identify them as Mellie and Melvin Thompson. Ms. Reik observed that the temporary licenses had been issued that very day. In response to the observation, appellant and codefendant Sanders claimed that their actual licenses had been stolen. Ms. Reik also observed that codefendant Sanders's weight was inconsistent with the weight listed on the Melvin Thompson

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4. At this time, Millie was in the process of attempting to purchase Melvin's ownership interest in the home. (See 23RT 3900-3901, 3931-3934.)

temporary driver's license. Isabelle Sanders explained the inconsistency by claiming that "Melvin" had been sick. (23RT 3949-3954, 3980-3981.)

Ms. Reik attempted to verify appellant's story concerning the stolen licenses. She called Kayser Service. A woman who identified herself as "Rene" answered the telephone and confirmed the stolen license story proffered by appellant and codefendant Sanders.[5] (23RT 3981.)[6]

Because appellant and codefendant Sanders were unable to produce photo identification (the temporary licenses had no photographs), Ms. Reik required witnesses to formally identify appellant and codefendant as actually being Mellie and Melvin Thompson. Isabelle Sanders was one of the witnesses, and Carolyn Sanders (codefendant Sanders's wife) and Carolyn Moore (Isabelle's daughter and codefendant Sanders's sister) were the others. Appellant and codefendant Sanders signed the loan documents for the Sycamore property in Ms. Reik's presence. (23RT 3955-3959.)

Carolyn Thompson Jones, the daughter of Mellie and Melvin, was also listed on the deed to the Sycamore property, so her signature on the loan documents was therefore also required.[7] To deal with that contingency, Isabelle Sanders produced a fraudulent power of attorney letter purporting to give her the authority to act on Carolyn Thompson's behalf. Ultimately,

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5. Melvin Thompson did not answer the phone at Kayser Service. (26RT 4481-4482.)

6. Rene Griffin was appellant's close friend. Ms. Griffin claimed that she never told a loan company representative that Melvin Thompson had lost his wallet and identification in a robbery, or that Melvin Thompson had lost weight, to explain why he looked different from his driver's license picture. (34RT 5941-5942.)

7. Mellie had originally planned to purchase Melvin's interest in the Sycamore home. However, she was unable to qualify for a loan. She therefore assigned a one-quarter interest in the property to her daughter, Carolyn, with the hope that Carolyn would be able to qualify for the loan. (23RT 3900-3901.)

Isabelle Sanders signed for Carolyn Thompson, and the loan funds were dispersed. Appellant and codefendant Sanders signed an authorization to release $25,000 of the funds prior to the close of escrow, and that money was given to appellant and codefendant Sanders. Additional funds were used to pay off a first trust deed and outstanding property taxes. The remainder of the $98,000 was later given to appellant and codefendant Sanders as well. Ms. Reik eventually discovered that appellant and codefendant Sanders had been imposters. (23RT 3960-3964, 4059.)

Bruce H. Blum, an attorney, was contacted by Isabelle Sanders in late 1989. Isabelle told Mr. Blum that her "daughter" had lost her house in foreclosure, and asked whether there was anything he could do to help her re-acquire the home. (24RT 4158, 4160-4161.)

By December 1989, Mr. Blum began working for appellant to re-acquire the Hillary home. On appellant's behalf, he sent a letter to the new owner of the Hillary house, agreeing that appellant would pay rent on the house with $20,000 from a trust fund. Mr. Blum used the money, a $20,000 check drawn from a Kayser Service account, to pay rent on the foreclosed home from January through April of 1990. (24RT 4159-4160, 4165-4166; Peo's. Exh. 53.)

Mr. Blum also entered into negotiations for appellant to re-purchase the Hillary home, but there were financing problems due to appellant's poor credit history. (24RT 4169-4170.) Appellant attempted to obtain financing through Isabelle Sanders, and when that was ineffective, she attempted to do it under her maiden name, Catherine Bazar. (24RT 4135, 4139-4140, 4170-4172.) To this end, appellant acquired a driver's license and a new social security number for "Catherine Bazar." (26RT 4522, 33RT 5770-5771.)

In March of 1990, appellant, identifying herself as Catherine Bazar, and Isabelle Sanders met with mortgage broker, David Yourist, with respect to appellant's desire to re-purchase the Hillary home. (23RT 4047-4048.)

Appellant filled out a loan application and a verification for deposit, listing her bank as "Community Bank." Appellant provided the address and telephone number of Kayser Service/Community Brake as the address and telephone number for "Community Bank." The verification of deposit was received, and then sent back to Mr. Yourist, confirming appellant's false representations concerning the money she claimed to have in her "Community Bank" account.[8/] (23RT 4049-4050.)[9/]

b. Plan's For Melvin Thompson's Murder

Christine Kuretich was living with Carolyn and codefendant Sanders in May and June of 1990. During that time period, Ms. Kuretich observed that Carolyn and codefendant Sanders "were hiding something, a secret." They spoke in "hush tones and whispers" and stopped talking when Ms. Kuretich would enter the room. (29RT 5084-5086.)

Ms. Kuretich would often answer the residence telephone and take messages. From the beginning of June 1990, to the date of the murder, Ms. Kuretich took five or six messages from a woman identifying herself as "Cathy." "Cathy" would ask to speak to codefendant Sanders, and if he was not available, then to Carolyn. (29RT 5087.)

From the time she moved into the Sanders' residence in mid-May of 1990, to the date of Melvin Thompson's murder on June 14, 1990, Ms. Kuretich heard "a great deal of conversations" between codefendant Sanders

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8. Rene Griffin denied representing herself to be an operations Vice President of "Community Bank" and signing appellant's verification of deposit in that capacity. (34RT 5942.)

9. Mr. Yourist eventually referred the loan to Jane Rogers, an escrow officer. Escrow-related forms were sent to the potential buyer, Catherine Bazar. However, the address provided by appellant was not her address, but instead that of Isabelle Sanders. (23RT 4024-4029.)

and Carolyn about murdering Melvin Thompson. Of all the conversations Ms. Kuretich heard between Carolyn and codefendant Sanders, eighty to ninety percent of them concerned the murder of Melvin Thompson for insurance money. Ms. Kuretich heard codefendant Sanders and Carolyn discuss that appellant wanted her husband dead, and that appellant would pay them to facilitate his murder. (29RT 5087-5089, 5095.)

In late May or early June of 1990, Carolyn Sanders asked Ms. Kuretich if she knew anyone willing to commit murder for money. Carolyn told Ms. Kuretich that appellant had hired codefendant Sanders and herself to kill appellant's husband. (32RT 5522.) Carolyn further stated that Melvin Thomson was going to be murdered for his insurance money, and that she and codefendant Sanders were going to be paid thousands of dollars to have Melvin killed. (32RT 5523.) Ms Kuretich also heard codefendant Sanders and Carolyn discuss their need to find someone to commit the murder. However, approximately a week before the murder occurred, they decided that codefendant Sanders, using a gun, would kill Melvin Thompson. Codefendant Sanders and Carolyn Sanders had already taken money from appellant -- and spent it -- and could not find anyone else to commit the crime. (29RT 5090.)

Robert Jones, Carolyn Sanders's son, was also present for many of the conversations about murdering Melvin Thompson. Carolyn asked Robert to obtain a gun to be used in committing the crime. Days before the murder, Robert informed Carolyn that he had obtained a gun. (29RT 5091.)

Anita Freedman was a switch board operator at Barish Chrysler-Plymouth, located at 444 South La Brea, in Los Angeles, where codefendant Sanders worked as a car salesman. (27RT 4694-4695.) Between May 1 and June 13, 1990, Ms. Freedman took several phone messages for codefendant Sanders from a woman identifying herself as "Mrs. Thompson" or "Cathy." Ms. Freedman specifically remembered one particular call where "Mrs.

Thompson" was very upset because she had not heard from codefendant Sanders. Mrs. Thompson never asked to speak to anyone other than codefendant Sanders. (27RT 4696-4700.)

The original plan was for the murder to take place on June 13, 1990. Codefendant Sanders stated that he was nervous. "He was afraid and didn't want to do it." Carolyn and her son Robert talked about killing Melvin Thompson the day before the actual murder, but they did not complete their plan until June 14, 1990. (29RT 5093.)

c. The Murder

Charlotte Wark lived in a condominium complex directly adjacent to Kayser Service. On June 14, 1990, she arrived home at approximately 6:40 p.m. As she entered her complex, she saw Melvin Thompson standing outside, in the back of his shop. (25RT 4288-4291.) Ms. Wark made small talk with Melvin before parking her car, but he was less talkative than usual. Melvin seemed nervous, and kept staring at his office. (25RT 4294, 4296, 4302.) After parking, as she was getting out of her car, she heard "four or five pops," which she thought were firecrackers. She looked out the gate of her parking garage, but did not see anything. (25RT 4295.)

On that date, Michael Lutz was in West Los Angeles, on the corner of Santa Monica Boulevard and Greenfield, across the street from Kayser Service. At approximately 6:30 p.m., he observed a white Plymouth Acclaim occupied by two Black males double-parked in the alley north of Greenfield. The passenger exited the car and entered the alley. The Acclaim then proceeded south on Greenfield and made a right turn on Santa Monica Boulevard. Shortly thereafter, Mr. Lutz heard "two large loud bangs." (25RT 4356-4357.) A few minutes after the "bangs," the Acclaim returned, and the Black male who had been the passenger, and who had entered the alley, reappeared. Very discretely,

and concealing something, he walked out of the alley, through some trees, and reentered the Acclaim, which then left. (25RT 4348-4359, 4361, 4370.)

Mr. Lutz wrote down the license plate number -- 2PLU782 -- and a description of the Acclaim. In court, Mr. Lutz identified codefendant Sanders as the passenger, and Robert Jones as the driver. (25RT 4363-4365, 4380.) Within two weeks prior to the murder, both Robert Jones and codefendant Sanders had been seen at Kayser Service. (26RT 4486-87, 4490-91.)

After writing down the license plate number, Mr. Lutz observed appellant walk out of the alley and towards a pay telephone. He then used a different payphone to make a 9-1-1 call. (25RT 4367-4368.)

Detective Kurt Wachter was assigned to investigate the case. He arrived at Kayser Service at approximately 6:55 p.m. on the date of the murder. (33RT 5745-5746.) He entered through an open gate at the front entrance, and immediately proceeded to the restroom area of the building.[10] (33RT 5748, 5750.) Upon arrival, the detective saw Melvin Thompson on the bathroom floor. Mr. Thompson had gunshot wounds to his head and chest, as well as what appeared to be a mouth wound. He had no pulse and was not breathing. (33RT 5750-5751.) Melvin Thompson died as a result of the multiple gunshot wounds. (36RT 6094-6095.)

Mr. Thompson was fully clothed, and his pants pockets were intact (meaning they were not turned outward). (33RT 5753.) His clothing had not been tampered with, and his wallet, which still contained several credit cards and more than $1,300 in cash, was in his left-rear pants pocket. Another 43 dollars were found in one of the victim's front pockets. (33RT 5754-5756.)

Detective Wachter searched the premises. (33RT 5758.) In searching a desk drawer in one of the offices, he found a cash box containing some change. He also found a man's pair of prescription glasses on the desk, and a

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10. The rear gate was closed and locked. (33RT 5803.)

letter indicating that ownership of Melvin Thompson's business had been placed in the name of "Catherine Jaquet." (33RT 5760-5761, 5772-5773.) Certified city records indicated that the business was placed in appellant's name just eight days prior to the murder. (33RT 5774; Peo's. Exh. 116.)

Detective Wachter also confiscated some computer disks. A copy of the text from a letter, from the "Guaranty Trust of Louisiana," was found on one of the disks. (33RT 5774-5775.) Tommy Thompson, Melvin's son, never saw anyone other than appellant use the computer in the shop. (26RT 4522-4523.)

Following his initial investigation at the murder scene, Detective Wachter proceeded to the hospital where Melvin Thompson had been taken. Appellant was present and appeared calm. (33RT 5775-5776.) While being questioned by the detective at the hospital, appellant never claimed to have seen anyone running out of the repair shop. She claimed to have left the shop at 5:45 p.m. to recycle some cans, and that she returned between 45 and 60 minutes later. However, when Detective Wachter searched the repair shop after the murder, he noticed two large bags filled with aluminum cans. (33RT 5814-5815, 5817.)

Appellant claimed that when she left the shop, a customer, Tommy Thompson (Melvin's son), and an employee named Howard Custer were still there. She also claimed that when she returned, she parked her car on Greenfield. As she was walking back to the shop, she said she thought she heard two or three gunshots. She further claimed that, after hearing the shots, she saw a Black male, approximately 30 years old, with a medium build and broad chest, walking north on Greenfield, away from the murder scene. She never claimed that the man was codefendant Sanders, or that she saw codefendant Sanders running out of the shop after hearing the gunshots. (33RT 5815-5817.)

Appellant also told Detective Wachter that Melvin Thompson owned a Rolex watch that would have been in a desk drawer in his office or on his wrist. A replica Rolex watch was recovered from appellant's Hillary residence when it was searched by police following the murder. The watch was in a locked armoire in the master bedroom, and was wrapped in an article of clothing. (33RT 5818-5820.) Nancy Rankin, a friend of appellant's, had told Detective Wachter that, subsequent to the murder, she had found the watch where the detective ultimately located it. (34RT 6006.) Appellant also told Detective Wachter that Melvin Thompson always wore glasses. (33RT 5821.)

Michael Lutz provided the detective with the vehicle license plate number he had written down on a piece of paper. After tracing the plate number, the detective, along with two other detectives and a uniformed officer, proceeded to a residence at 15025 Polk Street, in Sylmar, California, arriving sometime before midnight on the night of the murder. Upon arrival, Detective Wachter observed a white Plymouth Acclaim bearing the license plate number provided by Mr. Lutz parked in the carport. (33RT 5763-5764.)

Detective Wachter knocked on the door of the residence. Carolyn Sanders answered and invited the officers to come inside. Immediately upon entering, Detective Wachter observed codefendant Sanders seated on the couch. The detective also saw a set of keys attached to a Thrifty Rent-A-Car tag on the kitchen table. Detective Wachter picked up the keys, which had been sitting on a piece of paper on the table. Removing the keys, the detective observed a telephone number written on the piece of paper. The telephone number was the same as one he had earlier recorded as the home telephone number for appellant. The detective then took the keys and tested them on the white Plymouth, determining that the keys fit that car. (33RT 5765- 5768.)

Detective Wachter conducted a tape-recorded interview with codefendant Sanders two or three days after he was arrested for Melvin

Thompson's murder. During the interview, Mr. Sanders denied being in West Los Angeles on the date of the murder, and denied having driven in the white Plymouth at any time that same evening. He further claimed that he did not know who killed Melvin Thompson. (33RT 5776-5777.)

On August 7, 1990, Detective Wachter served a search warrant on appellant's West Hills residence. (33RT 5769.) During the search, the detective confiscated two driver's licenses, one in the name of "Catherine Thompson," and another in the name of "Catherine T. Bazar." He also recovered a sheet of paper bearing the address of 1335 North Barranca, No. 19, in Covina, which was the same address as the one listed on the "Catherine T. Bazar" driver's license. And he recovered a "Notice to Vacate" the Hillary residence, dated October 1989. All items were located in appellant's bedroom. (33RT 5770-5771.)

d. Further Investigation And Additional Evidence Of Appellant's Involvement In The Murder

On the night of the murder, Christine Kuretich was sleeping at a friend's house. At approximately 1:00 a.m., Carolyn Sanders called her and told her that codefendant Sanders had been arrested, and that she wanted Ms. Kuretich to return to the Sanders' residence. Upon her return, Ms. Kuretich observed Carolyn Sanders to be very upset. (32RT 5524-5525.)

Carolyn Sanders made a telephone call. Shortly thereafter, a man named Greg Jones, codefendant Sanders's brother-in-law, arrived. The murder was discussed. (32RT 5524- 5526.) Some time after that night, Carolyn Sanders told Ms. Kuretich it was her belief that Gregory Jones provided information to police implicating codefendant Sanders's involvement in the murder. (32RT 5623.) Carolyn Sanders then instructed Ms. Kuretich to blame the murder on Greg Jones, which Ms. Kuretich initially did. (32RT 5527, 5623-5624.) However, she also implicated codefendant Sanders. (32RT 5529.)

After codefendant Sanders's arrest, Ms. Kuretich spoke with Detective Monsue. Ms. Kuretich was not initially truthful with the detective. Instead, she attempted to place the blame on Gregory Jones, who actually had nothing to do with the killing or the planning. (29RT 5095-5097.) Ms. Kuretich initially told investigators that Greg Jones had come over to the Sanders' residence on the night of the murder to discuss codefendant Sanders "killing somebody." (32RT 5530.) She also told investigators that Greg Jones was there to "talk about a lawyer for Phillip," and that Greg Jones "knew that Phillip did it." (32RT 5531, 5544.) In actuality, Greg Jones had no knowledge of the murder before coming to the Sanders' residence on the night Melvin Thompson was killed. (32RT 5541.) Ms. Kuretich was re-interviewed in August 1990, when she finally told the truth, informing police that codefendant Sanders and appellant were involved in the murder. (29RT 5097; 32RT 5591.) Ms. Kuretich was fearful of codefendant Sanders and appellant. (32RT 5615-5619.)

Tommy Thompson never heard appellant talk to Melvin about the foreclosure on the Hillary home. Tommy also never heard Melvin acknowledge whether he was aware that the house was in foreclosure. (26RT 4485.)

Melvin Thompson had glasses, but rarely wore them. He only used them to read very fine print, or the lettering on a shift kit when rebuilding a transmission. Though there was a desk in Melvin's office, he never sat at it to do any reading. (26RT 4491.) It was very unusual that Melvin's glasses would be sitting on top of the desk. As Tommy explained, Melvin "never sat there. The glasses wouldn't be there. The glasses would be in the back room in the drawer." (26RT 4493.)

Whenever a customer paid in cash, appellant would take the money and put it in a metal box. (26RT 4492.) When shown a photograph of the metal cash box with its lid open, Tommy explained that it never would have been left in that opened state. (26RT 4494.)

Appellant never parked her car along Greenfield. When she picked up Melvin at the end of the day, she would usually stop on Santa Monica Blvd. in front of the shop's front gate, but not park. The only place she parked the car was at a nearby gas station, pursuant to an agreement with the station owner. (26RT 4494-4496.)

On the night of Melvin's death, Tommy saw appellant at the hospital, and then again later at her home in West Hills. He observed that "she didn't cry at all." (26RT 4498.) However, on a prior occasion where her cat of 12 years died, she cried and was so upset that she did not come to work for three or four days. (26RT 4508-4509.)

Following Melvin's death, appellant did not immediately return to work at the shop. (26RT 4499.) However, she sent her friend, Rene Griffin, to pick up all the cash made during the day. Ms. Griffin also took several documents that were located in the same place that Tommy had found the letter written on the Guaranty Trust Company letterhead. However, even though Rene was regularly collecting money for appellant, who was supposedly still handling the business's financial aspects, the rent on the business property became delinquent. Appellant told Tommy that she paid the rent, but when confronted by him following his learning otherwise, appellant said that she would take care of it. Finally, a few weeks after Melvin's death, Tommy stopped turning over the business money to appellant, and handled the financial aspects of the business himself. (26RT 4510-4511.)

Tommy found additional documents in the shop that he turned over to the police. (26RT 4500.) One of the documents was a letter written by someone named "Katrina Brazarr" on letterhead purportedly from Guaranty Bank and Trust Company. He also located some rub-on stencils that could be used to create letterhead logos. (26RT 4501-4502, 4507.)

Within a week after his father's funeral, Tommy found a second letter (Peo's. Exh. 85) underneath a blotter on appellant's desk in the shop. The letter, which was in appellant's handwriting, described Melvin Thompson's age, appearance, and work habits, in terms of the timing of his usual arrival and departure. Melvin Thompson was the only person working at the shop who wore a one-piece jumpsuit and had a beard. (26RT 4512-4516, 4523-4524.)

Tommy found another letter on Kayser Service letterhead dated May 3, 1990. The letter was addressed to "whom it may concern," and was written by "Catherine Bazar" from an address on Barranca in Covina. Tommy had no idea as to the identity of Catherine Bazar. (26RT 4516-4517.)

Appellant told Rene Griffin that Melvin had taken his Rolex to the shop with the intention of taking it to a jeweler for repairs. The weekend following the murder, appellant told Ms. Griffin that someone had been arrested in San Francisco in possession of Melvin's watch. Ms. Griffin attempted to verify appellant's claim by calling police to inquire, but the police had no information about any arrest of someone in possession of Melvin's watch. (34RT 5941, 5943-5945.)

Appellant told Ms. Griffin that, on the day of the murder, as appellant was walking to the shop, a tall man she did not recognize came around the corner and almost bumped into her. (34RT 5945-5946.) After codefendant Sanders was arrested in connection with the murder, Ms. Griffin saw his picture in the paper. She asked appellant if it was codefendant Sanders who she had almost bumped into, but appellant said he was not the man. (34RT 5947.)

On one occasion after the murder, Ms. Griffin went to appellant's West Hills home. She removed a Sheriff's Notice from the door and asked appellant whether she needed any help. Appellant said "not to worry about it." She also said the notice was not related to the Hillary address, but was instead for Melvin's previous residence that he owned with his ex-wife. Appellant never

said that foreclosure proceedings had been initiated against the Hillary home. (34RT 5949.)

Appellant also told Patricia Ceaser that, upon returning to the shop on the night of the murder after recycling some cans, she heard what appeared to be gunshots. Appellant claimed that, while running to Kayser Service, she saw a tall, thin Black man coming out of the shop. Ms. Ceaser asked whether the man was codefendant Sanders, and appellant stated that it was not. (34RT 5961-5962.)

Appellant wrote Ms. Ceaser several letters following the murder. In one particular letter, appellant blamed Greg Jones for the murder. (34RT 5965-5969; Peo's. Exh. 123.)

On the night of the murder, Nancy Rankin rode with appellant and Rene Griffin from the hospital to appellant's home. In the car, appellant said, "I didn't mean for it to happen this way," or "it wasn't supposed to happen this way." After the murder, Ms. Rankin showed appellant a picture of codefendant Sanders in the newspaper. Appellant claimed she did not know him. (34RT 5975-5976.)

On another occasion after the murder, while at appellant's home, appellant told Ms. Rankin to look in a dresser in appellant's bedroom for the registration for a handicapped license plate. While doing so, Ms. Rankin discovered a watch wrapped in a pair of underwear. Ms. Rankin inspected the watch closely, then wrapped it back up, replaced it, and locked the dresser. She did not tell appellant that she found the watch. (34RT 5977-5978.) Her understanding was that Melvin Thompson was murdered over a Rolex watch. (34RT 5999.) Appellant told Ms. Rankin that two men were arrested in San Francisco in possession of the watch. (34RT 5982.)

Carolyn Walsko was a claim consultant for Prudential Insurance. (26RT 4435.) She handled appellant's claim concerning Melvin Thompson's life

insurance policies. (26RT 4436.) One policy was worth $100,000, and the other $150,000. However, due to a double indemnity clause, the latter policy was worth $300,000 if death was determined to be accidental, and a homicide qualified. (26RT 4439-4440, 4469.) Both policies were in effect at the time of Melvin Thompson's death. (26RT 4441-4443.) Appellant assigned the rights to the proceeds of Melvin's life insurance to Tony DeGreef of Bid Properties so she could re-purchase the Hillary property. (24RT 4122.)

On June 18, 1990, Detective Lee Kingsford, along with his partner, Gary Fullerton, arrested appellant for the murder of Melvin Thompson. (27RT 4712-4713.) Specifically, appellant was informed that she was under arrest for hiring someone else to murder her husband. In response, appellant stated, "I didn't know Phil at all. I only met him once and that was about the sale of a car." (27RT 4717.) Prior to appellant making that statement, neither Detective Kingsford nor Detective Fullerton had ever mentioned the name codefendant Sanders or "Phil" to appellant. (27RT 4714.)

2. Appellant's Defense

Patricia Ceaser first met appellant in 1976 or 1977. At that time, appellant was going by the name "Catherine Jacquet." In 1977 or 1978, Ms. Ceaser introduced appellant to Melvin Thompson. During the course of the relationship between appellant and Melvin Thompson, Ms. Ceaser observed them to be "happy." She never observed them fighting. (27RT 4731-4733, 4735.)

Ms. Ceaser visited appellant the day after Melvin's death. Appellant "seemed to be her normal self." (27RT 4759.) During the visit, a reporter from the Los Angeles Times came to the house to interview appellant, at which point appellant cried. (27RT 4760.)

Ms. Ceaser was aware that Melvin Thompson gambled. (27RT 4738.) She also "knew Tom to drink a lot."[11] He kept "a bottle" at the shop and would drink while working. After marrying Melvin, appellant told Ms. Ceaser that his drinking diminished. Appellant also told Ms. Ceaser that she was helping Melvin with his gambling problem. (27RT 4751-4754, 4756-4757.)

Rene Griffin socialized with appellant and Melvin Thompson, and would sometimes go with them to gambling establishments like the race track or Las Vegas. (35RT 6102-6103.) Appellant and Melvin Thompson got along well, though they were not openly affectionate. (35RT 6104.) Appellant never expressed any hatred for her husband. (35RT 6106.)

Appellant and Melvin Thompson were financially secure. Based on their earnings, it did not appear that appellant spent money excessively. (35RT 6109.)

Appellant was not very emotional. After Melvin's murder, she seemed distraught, but did not cry. However, a few days later, when at the funeral parlor to select a coffin for Melvin, she became very emotional. (35RT 6110-6112.)

Appellant did not attend Melvin's funeral because she had been taken into custody for his murder. She instructed Ms. Griffin to make sure all the jewelry put on Melvin's body by the mortician was removed and returned to appellant. (35RT 6113-6114.) Appellant later pawned Melvin's jewelry. (35RT 6130.)

In August of 1990, Detective Wachter asked Ms. Griffin to "wear a wire" and to ask appellant certain questions. Ms. Griffin declined. (35RT 6115.) At trial, Ms. Griffin claimed that she had never been afraid of appellant. (35RT 6116.)

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11. "Tom" refers to Melvin Thompson. (23RT 3896.)

Leonard J. Williams was a sales representative for Prudential Insurance. He became appellant's agent in approximately 1980, and met Melvin Thompson through appellant. Appellant had a $50,000 life insurance policy, and Melvin Thompson was the named beneficiary. (35RT 6162-6168.) She later obtained a $100,000 policy, again naming Melvin as the beneficiary. The beneficiary was changed to her son Girard after Melvin's death. (35RT 6171-6173.) Melvin Thompson also had life insurance, with appellant as the named beneficiary.[12] At the time of Melvin's death, he was insured for $500,000. (35RT 6175-6176, 6227.)

Mr. Williams also wrote the homeowner's insurance policy on the Hillary house purchased by Melvin and appellant. The premiums were kept current through Melvin's death. (35RT 6169-6171.) The premiums on all the insurance policies were approximately $1,400 per month. (35RT 6195.) Appellant stopped paying the premiums after Melvin's murder. (35RT 6198.)

Mr. Williams would occasionally personally pick up premium payments at Melvin's shop. Mr. Williams never got the impression that appellant dominated Melvin. (35RT 6214.) However, it did appear that appellant handled "the business side of things" including the life insurance matters. (35RT 6220.)

Charles Kayser owned the Kayser automotive repair shop prior to Melvin Thompson taking over the businesses in approximately 1982. At the time Mr. Kayser owned the shop, both Community Brake Westwood and Kayser Service were doing business at the location. When Mr. Kayser retired, Don Russell had the lease for both Community Brake and Kayser Service. Melvin ran Kayser Service while Mr. Russell continued to run Community Brake. (36RT 6250-6252.)

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12. In early 1990, Mr. Williams suggested that Melvin acquire more life insurance, since he had an expensive home and a business. (35RT 6180-6187.)

Isabel Kayser was married to Charles Kayser. Mrs. Kayser drafted the lease agreement between the Kaysers and Melvin Thompson when Melvin acquired Community Brake and was going to operate that shop and Kayser Service as one business. Many of the lease negotiations were handled by appellant. Melvin seemed knowledgeable as a business person and understood the provisions of the lease. (36RT 6257-6266.)

Melvin was sometimes late paying the rent. In 1990, the Kaysers reduced the rent Melvin Thompson paid as a result of repairs he had to make to the property. When the lease was renegotiated to reduce the rent, appellant signed the addendum because, by that time, she was running the brake shop. (36RT 6269-6272.)

Mrs. Kayser went to the hospital to be with appellant on the night Melvin Thompson was shot. Appellant was crying and upset. (36RT 6273.) While at the hospital, either appellant or a neighbor who was also there told Mrs. Kayser that a witness had recorded a license plate of the car in which two men were observed leaving the murder scene. (36RT 6280-6281.) Appellant told Mrs. Kayser that she believed Melvin was killed during a robbery. (36RT 6283.) Mrs. Kayser visited appellant the day after the murder, at which time appellant appeared calm. (36RT 6286.)

Girard Jacquet was appellant's son from a prior marriage. He was approximately 12 or 13 years of age when appellant met Melvin Thompson. He lived with appellant and Melvin through the time of Melvin's death. During the last four years of Melvin's life, after Melvin had stopped drinking alcohol, he and Girard developed a strong relationship. (36RT 6297-6300.) Appellant and Melvin seemed to have a good relationship. (36RT 6302.)

While he was in high school, it was generally Girard's job to get the mail each day. After collecting it, he would put it on a kitchen counter top. (36RT 6306.)

On occasion, Melvin and Girard would shop together for gifts for appellant. Melvin and appellant would purchase expensive gifts for each other on special occasions. (36RT 6308-6310.)

Appellant was financially generous with her friends, who included Isabelle Sanders, Rene Griffin and Nancy Rankin. (36RT 6313.)

Girard never knew that the Hillary house had been foreclosed. He had no knowledge of any economic problems experienced by Melvin and appellant. (36RT 6324.)

According to Detective Wachter's recollection, Tommy Thompson told him that he found the letter describing Melvin Thompson's physical appearance and work routine (Peo's. Exh. 85) on the floor between the desks in the east office of the repair shop, not underneath a blotter on top of the desk. (36RT 6334-6335.) Detective Wachter had searched the east office prior to receiving the letter from Tommy Thompson, but did not find the letter during that search. (36RT 6336.) However, the detective did not look on the floors, under the desks or in the area between the wall and the desk. He was looking in the areas normally associated with business records and paper documents. (37RT 6390.)

Following codefendant Sanders's arrest, Michael Lutz was shown some photo six-packs. While looking at one of the six-packs, Mr. Lutz identified a photograph as depicting an individual appearing similar to the driver of the white Acclaim. The photograph was not of either codefendant Sanders or Robert Jones. (39RT 6600.) A picture of codefendant Sanders was among the six, but Mr. Lutz did not identify that photograph as depicting someone he recognized. (39RT 6601.)

When shown a second photo six-pack, Mr. Lutz conditionally identified a photograph of Robert Jones as depicting the passenger in the white Acclaim. When shown a third photo six-pack, Mr. Lutz conditionally identified a photograph of an individual other than Robert Jones or codefendant Sanders as

depicting the driver of the white Acclaim. A picture of codefendant Sanders was in the third photo six-pack. (39RT 6601-6603.)

Detective Wachter never performed a gunshot residue test on appellant or codefendant Sanders to determine whether either had recently fired a gun. He also never had photographs taken of the rear gate to the Kayser shop, or had the rear gate or its lock checked for fingerprints. (37RT 6381, 39RT 6604-6605.)

Jera Trent was a legal secretary who lived near Kayser Service, and came to know appellant and Melvin Thompson. Approximately three months prior to Melvin Thompson's murder, during the course of approximately five conversations, both appellant and Melvin Thompson inquired whether title on a property owned by Melvin and his ex-wife could be changed to add appellant as a title holder instead of the ex-wife. (37RT 6351-6355.)

On the night of June 14, 1990, codefendant Sanders left his house and returned about an hour later. He was "quiet" and "didn't have too much to say" at that time. (44RT 7619.) Later that night, codefendant Sanders told his wife, Carolyn, that he had shot somebody named "Lee" in the bathroom of a transmission shop. Codefendant Sanders stated that he shot this person three times – in the forehead, in the face and in the throat. (44RT 7619-7621, 7636, 45RT 7788.) He had previously told Carolyn that he was going to kill someone for insurance money for "Cathy." Codefendant Sanders was to make $20,000 for committing the murder. Christine Kuretich heard the discussion where codefendant Sanders informed Carolyn that he was going to commit a murder.[13/] (44RT 7626-7627.) Approximately a week after he was arrested, codefendant Sanders told Carolyn to blame Gregory Jones for the murder. (44RT 7636.)

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13. During the time Christine Kuretich lived in the Sanders' home, she had a drinking problem and used cocaine. (44RT 7622-7623.)

Approximately a week prior to discussing the murder with her husband, Carolyn found a typewritten note on her husband's dresser. There was a logo on the letter that she had previously seen at Kayser Service. The note referred to a "bearded man," stated that "the time would be between 6:00 and 7:00," and that "Tuesday and Thursdays" were the best days. (45RT 7766-7768.)

A day or two before the murder, Carolyn Sanders went to Santa Monica to pick up $1,500 from appellant. She had also seen appellant another time in 1989. (44RT 7627, 7629.) Other than those two occasions, Carolyn Sanders had never met appellant before June 14, 1990. She knew her afterwards because the two were housed in the same jail and were friendly. (44RT 7623, 7638.) On one occasion while in custody, appellant told Carolyn that the insurance money had come through. (44RT 7637.)

3. Codefendant Sanders's Defense

Codefendant Sanders met appellant through his mother, Isabelle Sanders. (39RT 6618.) In November 1989, codefendant Sanders obtained a driver's license on which he was identified as "Melvin Thompson." He did so at the request of his mother, who told him that he would need it to do a favor for her friend so that the friend could save her house. Codefendant Sanders needed the fraudulent license to sign Melvin Thompson's name on some documents. (39RT 6621, 41RT 7100.)

After obtaining a temporary driver's license that falsely identified him as Melvin Thompson, codefendant Sanders went to a location in Tarzana to sign some documents. When he arrived at the location, he was met by his mother, his wife and appellant. He represented himself to be Melvin Thompson, and forged Melvin's signature 11 times. (39RT 6624, 41RT 7101.) Codefendant Sanders's mother paid him and Carolyn Sanders $100 each for their assistance. (39RT 6625.)

Between November 1989 and May 1990, codefendant Sanders had no contact with appellant. (39RT 6626.) In the first week of May 1990, appellant contacted codefendant Sanders, a car salesman, about purchasing a car for her son, Girard. (39RT 6627.) Codefendant Sanders had a telephone conversation with appellant on May 15, and then met with her the next day concerning the prospective automobile purchase. (39RT 6632.) Credit checks revealed that it would have been "virtually impossible for Girard or Catherine to finance a vehicle." Codefendant Sanders referred appellant to an individual who could help improve her credit. (39RT 6634.) After meeting with the individual, appellant met with codefendant Sanders again. At that time, she told codefendant Sanders that she wanted her stepson, Tommy Lee, killed, and inquired whether codefendant Sanders knew of anyone who would commit the murder for her.[14] Appellant implied that she would benefit financially if Tommy were killed. (40RT 6892) Codefendant Sanders told appellant he did not know anyone who could help her. That night, codefendant Sanders told his wife about the conversation with appellant. Carolyn asked codefendant Sanders whether he was "going to follow through on it," and he responded that he was not. Approximately a week later, appellant again told codefendant Sanders of her desire to hire someone to kill her stepson for "a couple of grand," but codefendant Sanders again told her he did not know anyone who could help her. (39RT 6705-6707.)

At some point in time, Carolyn Sanders discussed the murder-for-hire situation with Christine Kuretich. According to codefendant Sanders, there were never any discussions in his home concerning the planning of a murder. (39RT 6670-6709.)

Between May 4, 1990, and June 14, 1990, the date of the murder, numerous telephone calls occurred between locations regularly attended by

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14. Tommy Thompson's actual middle name is Harold. (41RT 7112.)

appellant and codefendant Sanders. Specifically, 11 calls were made from codefendant Sanders's home to Kayser Service. Nineteen calls were made from Kayser Service to the Sanders' home. Three calls were made from appellant's home to Barrish Chrysler-Plymouth, codefendant Sanders's place of employment. And two calls were made from Barrish Chrysler-Plymouth to appellant's home. Codefendant Sanders acknowledged that many of the calls were between himself and appellant, but claimed the conversations concerned the prospective purchase of an automobile for appellant's son. However, sales documents showed that Girard Jaquet never purchased a car from codefendant Sanders, and instead purchased an automobile from a Ford dealership well before any of the calls were made that codefendant Sanders claimed related to Girard's potential purchase of a car from him. (40RT 6776-6778; Peo's. Exh. 144.) According to codefendant Sanders, some of the other calls concerned a $1,500 loan from appellant. He did not recall some of the other calls, or contended that he was not a party to them. (39RT 6636-6658, 6683-6703.)

On June 14, 1990, codefendant Sanders was driving a rented white Plymouth because codefendant Sanders's car had been damaged in an accident. That morning, his wife drove him to work, and then picked him up at approximately 3:40 p.m. He went to a medical appointment, and then went home. He had taken medication for injuries suffered in the automobile accident, and upon arriving home, consumed some beer. As soon as he arrived at home, at approximately 5:00 p.m., codefendant Sanders called appellant at Kayser Service. According to him, the call was to make arrangements to pick up the money appellant had agreed to loan him, and to arrange a plan to pay it back over the course of a few months. An hour later, codefendant Sanders called appellant again at Kayser Service. According to him, the call was simply to confirm that he was coming to the service shop to finalize the loan

arrangements. His stepson, Robert Jones, then drove him to Kayser Service. (39RT 6699-6704.)

When they arrived, they parked on the corner, and codefendant Sanders walked to the front gate. Codefendant Sanders did not have a gun, and made no attempt to conceal himself. (39RT 6709-6710.) Codefendant Sanders called for appellant, who appeared inside, and waved to codefendant Sanders to enter the building. As codefendant Sanders entered, appellant motioned for him to "be quiet." She then turned and walked towards a door. He could see that she had "something in her hand." (39RT 6710-6711.)

She approached the door and "said something." The door opened, at which point appellant raised a weapon and fired what sounded like two shots at a man in the bathroom. The man fell to the floor. (40RT 6943.) Codefendant Sanders was shocked. Appellant then handed the weapon to him, told him to get rid of it, and that he would be "taken care of." (39RT 6711-6712; 40RT 6942.) Codefendant Sanders knew he possibly could have saved the man's life by making a 9-1-1 call, but he opted to protect appellant at that point. (40RT 6944.)

Codefendant Sanders walked to the front gate and back to the car. On his way, he dropped the gun in some ivy. He then got into the car, and Robert began driving. Codefendant Sanders did not tell Robert what had happened, but did tell him that he had "gotten rid of this gun back there." Robert told codefendant Sanders that they needed to go back and retrieve the gun, which they did. Robert then drove codefendant Sanders home. Upon arrival, codefendant Sanders gave the gun to Robert and instructed him to destroy it. (40RT 6889.) Codefendant Sanders went inside and Robert left. (39RT 6713-6715.)

Codefendant Sanders told his wife what had happened. He took some more muscle relaxants, consumed more alcohol, changed his clothes, and then

sat on his couch. Approximately five hours later, the police arrived at his home. (39RT 6715-6717.)

When the police asked codefendant Sanders whether he had been at Kayser Service that evening, he lied and said that he had not. He lied because he was afraid for himself and for Robert, and worried about his wife. (39RT 6718.) Codefendant Sanders was arrested that night. (40RT 6897.)

While incarcerated at the Men's Central Jail, codefendant Sanders received several letters (see Peo's. Exhs. 138-142) he believed were from appellant. (40RT 6824, 6832-6835.) There were no signatures, and he did not recognize the writing, but the content of the letters, which pertained to the murder of Melvin Thompson and other aspects of the case, led him to believe that appellant was the author. (40RT 6825.)

Appellant offered codefendant Sanders money if he agreed to change his testimony. He did not accept the money, nor did he alter his testimony. (40RT 6831.) According to codefendant Sanders, he did not shoot and kill Melvin Thompson (39RT 6614.)

Jennifer Lee met appellant at Sybil Brand Institution. (40RT 6811.) While incarcerated with appellant there between May and October 1991, Ms. Lee wrote four letters (Peo's. Exhs. 138-141) at appellant's request. Appellant first wrote the letters and then Ms. Lee copied them in her handwriting. (40RT 6813-6815.) Appellant then discarded the originals she had written. Appellant told Ms. Lee that the letters would be sent to one of appellant's friends, and that they needed to be in Ms. Lee's handwriting so the friend would not know they were from appellant. (40RT 6818.)

4. The Prosecution's Rebuttal

Tommy Thompson found the note describing Melvin Thompson's physical appearance and his work routine (Peo's. Exh. 85) under the blotter on

the desk. Nothing he gave to Detective Wachter was found on the floor of the office. He never went by the name of Tommy Lee Thompson, and appellant had no other stepsons who went by such a name. (43RT 7374-7376.)

When interviewed on June 17, 1990, codefendant Sanders provided a list of several suspects to Detective Wachter. None of them were appellant. (43RT 7408.)

Girard Jacquet did not buy a car from codefendant Sanders, and ultimately purchased a Ford Probe from a different dealer in February 1990, approximately three months prior to the telephone calls between appellant and codefendant Sanders that Sanders claimed concerned Girard's purchase of a car. (43RT 7457-7458, 7491.) Girard had the car until it was repossessed in August 1991. His meetings with codefendant Sanders occurred about three weeks before he purchased the Ford Probe. (43RT 7463.) When he previously testified that he had initially met codefendant Sanders in May 1990, he was mistaken. (43RT 7483-7484.)

Carolyn Thompson Jones, Melvin's daughter, was an investigator with the Department of Defense and had special training in observing people. When at the hospital on the night of Melvin's murder, appellant appeared calm most of the time. She never displayed any tears, and only displayed any emotion when someone was watching her. (43RT 7507-7508.)

The day after the murder, Ms. Thompson Jones went to appellant's home. Appellant showed little emotion or grief during the two or three hours Ms. Thompson Jones was there. (43RT 7512-7513.) Ms. Thompson Jones had seen appellant cry after her cat died. (43RT 7530.)

Cecelia Klotzman owned a pawn shop in Culver City. On June 22, 1990, appellant pawned six pieces of jewelry in her shop. Appellant never returned to reclaim the jewelry. (43RT 7532-7535.)[15]

B. The Penalty Phase

1. The Case In Aggravation

Appellant had suffered two prior felony convictions for forgery in 1974 and 1975. (56RT 9104.)

The last time Carolyn Thompson Jones saw her father was Christmas day, 1989. Shortly thereafter, she and her mother filed a lawsuit against Melvin and appellant, in relation to the fraudulent loan obtained by appellant and codefendant Sanders on the Sycamore house, and were instructed not to contact Melvin anymore. Ms. Thompson Jones was "heart broken" not to be able to speak to her father. If she had had the opportunity, she would have told him that she loved him, and upon learning the true facts, that she knew he was wrongly named as a defendant in the civil suit. Melvin Thompson made Carolyn Thompson Jones the responsible, independent person that she was, and she would never be able to tell him that. (56RT 9105-9109.)

2. Appellant's Case In Mitigation

According to two chaplains from Sybil Brand for Women, the institution where appellant was incarcerated after her arrest and through trial, appellant could be trusted, was dependable, faithful and reliable. During the two years appellant was there, she came to church every Sunday and attended Bible study

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15. Appellant called two witnesses on surrebuttal (Charles and Isabel Kayser). The testimony contradicted Carolyn Thompson Jones's recollection that Charles Kayser had been at the hospital on the night Melvin Thompson was murdered. (43RT 7515, 44RT 7567, 7570.)

every week. Appellant was helpful, demonstrated compassion for others and was selfless. She was very caring, and had a good rapport with other inmates, who all seemed to like her. If sent to prison, appellant would be a positive influence on other inmates. She never demonstrated any character trait for violence or ill temper. (57RT 9143-9145, 9180-9183.)

Girard Jacquet's natural father was deceased, but he considered Melvin Thompson to be his father. The closeness between Melvin and Girard developed during the last two years of Melvin's life. Melvin was helping Girard learn to become an independent person. (57RT 9191-9193.)

Girard also had a close relationship with appellant. She taught him the value of being a loving and caring person, and encouraged him to be honorable and honest. Girard knew his relationship with appellant was going to change, following her conviction, but he planned on continuing the relationship with her by visiting and writing. Girard loved appellant. (57RT 9194-9196.)

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ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REJECTING EACH OF APPELLANT'S MOTIONS FOR SEVERANCE

Appellant complained before, during and after the guilt phase of the trial about codefendant Sanders's participation in the case. Before and during the guilt phase, appellant's complaints were in the form of motions for severance, dual juries and/or mistrials. Prior to the penalty phase, appellant complained about codefendant Sanders's absence, and insisted that she was entitled to a new jury. All of appellant's motions were denied. Appellant now claims that the trial court abused its discretion in denying those motions, and that her state and federal constitutional rights were violated. (AOB 40-102.) Respondent submits there was no abuse of discretion in the denials of appellant's motions for severance, separate juries and/or mistrials. Accordingly, appellant's claims of error must fail.

The prosecution of this case proceeded on the theory that appellant hired Phillip Sanders to murder her husband for insurance proceeds. As might be expected, both defendants claimed innocence and laid all of the blame at each other's feet.

Before and during the guilt phase of the trial, appellant made many motions for severance, dual juries and/or mistrials. Appellant's underlying theme – then and now – was that she and codefendant Sanders had antagonistic defenses. For that reason, and that reason only, appellant argued at trial and now on appeal that it was prejudicially unfair for her to be tried with him before the same jury. Appellant focuses on some specific examples of how the antagonistic defenses were prejudicial to her, including a marital privilege issue that temporarily threatened to keep out some evidence appellant wanted

admitted, and a discovery issue concerning some letters that appellant created but somehow surprised her and her attorneys when she learned codefendant Sanders intended to use them in his defense. But appellant's sole basis for contending severance should have been granted was and is her antagonistic defenses argument.

The primary shortcoming with appellant's argument is that it is not supported by the applicable law. Appellant relies on numerous decisions of the lower federal courts and some out-of-state authorities. But she does not even mention this Court's most recent, directly-on-point, controlling explanation of the law of severance in the context of antagonistic defenses. In *People v. Coffman* (2004) 34 Cal.4th 1, 41-42, this Court clearly explained that, "to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty. [Citation.]" As this Court continued, "[w]hen, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation.]" (*Ibid.*)

It is true that appellant and codefendant Sanders pointed fingers at each other at trial. It is equally true that the prosecution's case against appellant, without any assistance from codefendant Sanders, or the evidence presented during his defense, was utterly compelling. Appellant was not convicted because codefendant Sanders incredibly claimed she was the shooter. Indeed, even the prosecution sided with appellant on this point, and at all times maintained that codefendant Sanders was the gunman. Appellant was convicted because the evidence overwhelmingly demonstrated how she hired codefendant Sanders to kill her husband so she could recover insurance money to repurchase a house she lost in foreclosure. Thus, because the independent

evidence of appellant's guilt guaranteed her conviction, the trial judges did not abuse their discretion in denying every one of appellant's unwarranted motions to be tried separately.

A. Relevant Factual And Procedural Background

1. The Pretrial Motions

a. The First Motion Before Judge Weisberg

In a motion filed on April 3, 1992, appellant argued that her trial should be severed from codefendant Sanders's trial for three reasons.[16] First, appellant argued portions of a confession made by Sanders to prosecution witness Juanita Williams referenced appellant and would be inadmissible.[17] Second, appellant argued that the evidence of codefendant Sanders's guilt was much stronger than the evidence implicating appellant, and she would be unfairly prejudiced based on her prior association with him. And finally, appellant argued that she and codefendant Sanders would present mutually antagonistic defenses at trial, warranting severance. (6CT 1682-1693; 3RT 314-315.)

Appellant also made an ex parte offer of proof in support of the motion. There, appellant indicated that her defense would be that she was not present when her husband was shot, and believed that codefendant Sanders must have killed him out of anger or to obtain money. Appellant also referred to independent evidence in support of that theory, including evidence placing codefendant Sanders at the scene and his confession to his wife, Carolyn Sanders. Appellant further surmised that codefendant Sanders's defense would be that he witnessed appellant shoot and kill Melvin Thompson when

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16. The trial court had already severed the trials of Carolyn Sanders and Robert Jones from that of appellant and codefendant Sanders.

17. This argument was rendered moot when the People agreed that Williams would not be called as a witness. (3RT 316.)

codefendant Sanders arrived at the auto shop to discuss a $1,500 loan. (4RT 533-537.)[18]

Judge Weisberg denied the motion. Following consideration of the written motion and ex parte offer of proof, the trial court explained:

> I realize the People weren't privy to this offer of proof, but I'm not convinced. I heard the offer of proof as to these allegedly inconsistent defenses, and these problems arise always when you have a joint trial. I don't see anything here that is any different from what happens in many situations, and nothing that would preclude [appellant] from having a fair trial with the cases joined as it is, and it's thoroughly within the court's discretion, and I am exercising my discretion in denying the motion to sever on that basis.

(3RT 315.)

b. The Renewed Motion Before Judge Weisberg

On April 29, 1992, in the context of discussing various pretrial issues, appellant's trial counsel informed the court that the severance motion would be renewed based on newly received evidence, in the form of a tape-recorded polygraph examination of codefendant Sanders. On the tape, Sanders directly implicated appellant as the actual killer. (3RT 479.)

On May 11, 1992, the renewed motion to sever was heard. The focus of appellant's argument was that, in light of codefendant Sanders's overt

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18. As appellant points out (AOB 44, n.27), the transcript of the in camera proceedings before Judge Weisberg was sealed until the trial was over, and was then made part of the record on appeal. However, this transcript was unavailable, so the content of the hearing was resolved via settled statement and reference to a June 8, 1992 similar in camera proceeding before Judge Trammel, where the same arguments were made in a renewed severance motion. (See Orders filed December 4, 1998 and January 20, 1999; 65RT 9576-9583.)

accusation that appellant shot and killed her husband while codefendant Sanders watched, the defendants had "antagonistic and mutually incompatible defenses," which supported severance. (3RT 494.)

The prosecution responded by relying on this Court's then-recent decision of *People v. Hardy* (1992) 2 Cal.4th 86. The prosecutor argued that *Hardy* noted that no court's refusal to grant severance when there were antagonistic defenses had ever been held to constitute an abuse of discretion. The prosecutor further argued that antagonistic defenses had been construed very narrowly, and that in certain situations, such defenses actually supported joint trials. (7CT 1909-1911; 3RT 494-495.) The trial court denied the motion again, explaining that the antagonistic defenses argument had been considered during the first motion. (3RT 496.)

c. The Motion Before Judge Trammel

The case was transferred to Judge Trammel's court. (See 3RT 506.) Appellant renewed her motion for severance, arguing changed circumstances. (4RT 515.) In an in camera hearing, appellant's lawyer made all the same arguments earlier raised before Judge Weisberg concerning the antagonistic nature of the defenses both defendants would utilize. (4RT 531-543.) The prosecution reiterated its reliance on the *Hardy* case and the fact that no denial of a severance motion had ever been held to constitute an abuse of discretion when the reason asserted for severance was antagonistic defenses. (4RT 550-554.) The prosecutor also noted that even if the cases were severed, that would not guarantee that codefendant Sanders would not offer evidence against appellant. As the prosecutor explained,

> And most importantly, there isn't one piece of evidence, I believe, that [appellant's attorney] can point to that is going to be admitted in a joint trial that would be inadmissible in a separate trial. [¶] So even if the court were to grant the severance

> motion, what hypothetically would prevent the prosecution from working out some kind of deal. [¶] I'm not suggesting he would do this, but what hypothetically would prevent us from working out a deal with Mr. Sanders to testify against [appellant]?

(4RT 554.)

Judge Trammel denied the motion. Initially, the trial court explained that the in camera offer of proof was insufficient to warrant severance, and that the "new data" offered was insufficient to warrant reconsideration of Judge Weisberg's earlier denials. Judge Trammel indicated that, if it were a matter of first impression, and had not already been litigated twice, he might have exercised his discretion differently. But in the end, he explained:

> I am not in a way hiding behind [Judge] Weisberg's decision because if I felt in my mind that it was an abuse of discretion, I certainly would – I am not about to have all of us go through a trial where in my mind it would be an act of futility, because first as a matter of law, I feel it's discretionary and I choose to allow the prior rulings to remain.

(4RT 560.)

d. Renewed Motions Before Judge Trammel

Appellant moved twice more for severance before trial started. On June 24, 1992, appellant's counsel moved for severance or separate juries based on an ex parte hearing the court previously had with counsel for codefendant Sanders. Appellant's counsel did not know it at the time, but the subject of that ex parte hearing was whether codefendant Sanders could, with the prosecution's agreement, withhold discovery of the Jennifer Lee letters and Ms. Lee's identity as a witness, since she feared appellant. (see also Argument II, *infra*). As explained in more detail in Argument II, from jail appellant wrote some inculpatory letters to codefendant Sanders, but she had another inmate –

Jennifer Lee – copy the letters so as to disguise the handwriting. Codefendant Sanders intended to use the letters as part of his defense and did not want to disclose them to the prosecution until closer to trial, because once the prosecution possessed the evidence, disclosure to appellant would be required. There was a fear that Lee would suffer intimidation by appellant if appellant learned that Lee would be a witness. As codefendant Sanders's attorney explained:

> So I mean we're in a very awkward position. We will not turn over that witness because if they go see her, we will not have a witness. She has told us that she is frightened.

(5RT 762.)

The prosecution had no objection to forgoing discovery of the letters until a later time, and the trial court approved codefendant Sanders's request. (5RT 759-767.) The trial court denied the renewed severance motion / motion for two juries, explaining:

> I see no reason for either a severance or two juries to hear the case at the same time. In other words, nothing was revealed in that that would cause me to believe it would be necessary to do that.

(9RT 1156.)

Appellant again moved to sever the cases when the trial court rejected appellant's request to alter the order of proof so that her defense case would follow codefendant Sanders's. Appellant believed that if her defense case proceeded first, she would be sandwiched between "two prosecutors," in that both the actual prosecution and codefendant Sanders would accuse her of committing the murder (with codefendant Sanders contending she was the actual killer). (22RT 3796-3797.) Codefendant Sanders's attorney argued that he would be in the same position if his defense was forced to proceed first, and

that he had an actual need to put on his defense last, as the safety of certain witnesses was in issue. The trial court then ruled as follows:

> Primarily for the reasons disclosed, in the ex parte in camera motion, [appellant] will be required to present her defense prior to defendant Sanders presenting their defense.

(22RT 3798.)

On the basis of this ruling, appellant again moved for severance, and the motion was again denied. (22RT 3809.)

2. The Motions During Trial

a. Opening Statements

During opening statements, the prosecution told the jury that the evidence would demonstrate that codefendant Sanders was the actual killer. Codefendant Sanders's attorneys told the jurors that the evidence would demonstrate that appellant was the actual killer. Relying on her antagonistic defenses argument, appellant renewed her motion for severance or in the alternative for two juries. Both motions were summarily denied. (22RT 3829, 3857, 3868, 3878.)

b. Carolyn Sanders And The Marital Privilege

During the prosecution's case-in-chief, Carolyn Sanders was called to testify, in part, to inculpatory statements codefendant Sanders made to her after the murder. Codefendant Sanders asserted the marital communications privilege to prevent Carolyn from testifying. Appellant moved for a mistrial and renewed her severance motion, arguing that: the marital privilege would not prevent Carolyn from testifying if the defendants had separate trials; and the issue of who the actual killer was would be very significant, especially in terms of a penalty phase, so Carolyn Sanders's testimony was critical to appellant's defense. (32RT 5711-5713.)

In response, the prosecutor argued that, assuming severance was granted, there was no evidence whatsoever that Carolyn Sanders would be willing to testify as a witness on appellant's behalf. Second, and more importantly, the prosecutor argued that the marital privilege would exist whether or not appellant and codefendant Sanders were tried separately or jointly. The privilege was his to assert and he would have standing to assert it even if he was not a party in the case. (33RT 5713-5717.) Codefendant Sanders's attorney agreed that the martial privilege would be asserted regardless of whether codefendant Sanders and appellant were tried together. (33RT 5717.) The trial court agreed with the prosecution's and codefendant Sanders's attorney's assessment in this regard. (33RT 5717-5718.)

Thereafter, Carolyn Sanders's attorney explained that, if the trials of appellant and codefendant Sanders severed, he would advise Carolyn not to testify at appellant's trial, based on the marital privilege and Carolyn's Fifth Amendment Privilege against self-incrimination. (33RT 5722, 5733.)

Finally, the prosecution represented that in order to avoid severance, Carolyn Sanders would *not* be called as a witness. (33RT 5734.) The trial court then denied the motions for mistrial and severance, explaining:

> I'm going to refuse to allow you to call her. I'm going to deny the motion for a mistrial based on [Carolyn's lawyer's] comment that you were under no circumstances would she testify, and I think Mr. Sanders' claim of privilege would stand up in any kind of a state court action, criminal or civil.

(33RT 5736.)

Based on the possibility that the issue could arise again if codefendant Sanders testified that appellant shot her husband, appellant's attorney reemphasized all the prior reasons he believed severance was appropriate and again renewed the motion. The motion was denied. (33RT 5737-5739.)

c. The Jennifer Lee Letters

On August 14, 1992, the prosecution disclosed to appellant the letters Jennifer Lee transcribed (from appellant's handwriting), which were sent to codefendant Sanders in jail. As described by the prosecutor:

> Basically the gist of the letters is that one discusses a possible defense that you could offer of mistaken identity, and another letter appears to be a script of suggestion confession for Phillip Sanders to offer to the authorities admitting his guilt and essentially exonerating his wife and [appellant].

(38RT 6481.)

The prosecution received the letters the night before when they were disclosed by codefendant Sanders's lawyers. (38RT 6481.)

Appellant moved for a mistrial and severance based on their receipt of the evidence just that morning. Counsel for appellant argued:

> I think it is a manifest violation of [appellant's] due process rights to ask her to defend in front of a jury, a capital jury, against evidence of which she has had no notice. [¶] It is clear that she has notice, nothing even approaching adequate notice. That would be notice in which we would have a chance to evaluate that between Mr. Wager and myself, have a chance to speak with our client, to examine the evidence, to get her explanations and interpretations. [¶] The court seems bound and determined to maintain the integrity of this case as a whole if possible, but I think with the advent of this new testimony, I think the court really is compelled to sever us out.

(38RT 6494-6495.)

The motion was denied. (38RT 6497.)

d. The Marital Privilege Revisited

Codefendant Sanders's attorneys announced that he would testify on his own behalf and sought a ruling as to whether his general testimony constituted a waiver of his martial privilege. The trial court indicated that, in the interests of public policy and fairness to appellant, if codefendant Sanders testified that he witnessed appellant shoot the victim, his alleged admission to his wife would be admissible. (38RT 6499-6503.)[19]

The prosecution then informed the court that it would not use Carolyn's testimony regarding the inculpatory admission supposedly made by codefendant Sanders. However, the prosecution observed that the issue still remained as to whether appellant would be permitted to elicit that testimony. Appellant maintained that any testimony from codefendant Sanders that she was the shooter compelled admissibility of his admission to his wife that he murdered Melvin Thompson. (38RT 6505-6508.) The court pondered severing the case at that point. (See 38RT 6513.) The prosecution asked the court to defer ruling until the parties had an opportunity to conduct further research and the court agreed. (38RT 6515-6516.)

When the parties returned to the issue the following Monday, the prosecutor argued that any martial privilege was waived because the admission by codefendant Sanders to his wife was in furtherance of a conspiracy, making it admissible under Evidence Code, section 981. (39RT 6541-6551.) Appellant's attorneys disagreed with the prosecution's theory of admissibility, but nevertheless maintained that the statement was admissible, and if not, then the cases had to be severed. (39RT 6551-6554.) The court ruled that the

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19. Codefendant Sanders's attorneys then suggested severance might be appropriate to allow him to maintain his marital communications privilege. (38RT 6504-6505.)

statement was not in furtherance of a conspiracy, so the marital privilege applied. (39RT 6564.)

In terms of whether either the prosecution or appellant would be permitted to ask codefendant Sanders whether he admitted to his wife that he committed the murder, appellant's attorneys felt foreclosed from doing so, since Carolyn's attorney had specifically indicated that Carolyn would refuse to testify. Appellant's attorneys did not believe that the question could be asked unless there was a good faith basis upon which to prove codefendant Sanders made the statement if he denied doing so. (39RT 6573-6575.) Appellant's attorneys believed the only way to ensure fairness was to sever the cases at that point. (39RT 6576.) The trial court deferred ruling on the renewed severance motion until codefendant Sanders actually testified. (39RT 6581-6582.)

However, the court then altered the order of proof so that, following codefendant Sanders's testimony, the prosecution would cross-examine him prior to appellant's attorneys doing so. (39RT 6583.)

Following a short recess, pursuant to an agreement reached with the prosecution, codefendant Sanders waived his marital communications privilege. In exchange, the prosecution agreed that, should there be a penalty phase, the prosecution would not actively advocate for the death penalty against codefendant Sanders, and would simply submit the issue to the jury. The People likewise agreed to take no position if the death penalty was imposed and codefendant Sanders sought reduction of that penalty. (39RT 6591-6595.)

e. The Jennifer Lee Letters Revisited

While being cross-examined by the prosecution, codefendant Sanders explained that, as he received letters from appellant, he would turn them over to his attorneys. (40RT 6904.) He furthered explained how, on his attorneys' advice, he continued to correspond with appellant in the hopes she would write

more letters and provide additional evidence which codefendant Sanders could use in his defense. (40RT 6929-6930.) Appellant sought severance on the grounds that she wanted to call codefendant Sanders's attorneys as rebuttal witnesses, but knew that they would assert the attorney-client privilege. The severance motion was denied. (40RT 6947-6948.)

3. Post-Conviction Motions

Following guilty verdicts and true findings as to the alleged special circumstance, codefendant Sanders moved for severance with respect to the penalty phase. His attorneys argued that, for him to get the benefit of his agreement, which was that the prosecution would remain silent on whether it believed codefendant Sanders deserved the death penalty, his penalty trial had to be separate from appellant's. Codefendant Sanders argued that there would be unavoidable spillover, in terms of victim impact evidence, that would be prejudicial to him and breach his deal with the prosecution. Both appellant and the prosecution objected to severance. Appellant believed that fairness could only be insured if the relative culpability of both defendants was assessed at the same time. The trial court indicated its understanding that the agreement contemplated that no argument on the prosecution's part would be made as to whether codefendant Sanders should receive the death penalty, but that all relevant evidence was subject to admission. In light of meetings appellant and codefendant Sanders had scheduled to attempt to persuade the District Attorney to forego the death penalty, the trial court deferred ruling on the motion. (54RT 8857-8870.)

After exploring the issue further, the trial court became convinced that a bifurcated penalty phase, where the jury would reach a decision as to codefendant Sanders first, and then to appellant, would not operate fairly. (55RT 8999-9023.) Appellant then requested that a mistrial be granted as to

her, and that she and Sanders receive separate juries for the penalty phase. (55RT 9024-9025.)

The trial court contemplated granting mistrials as to both defendants. (55RT 9025.) The prosecutor then argued that appellant had no right to a mistrial, since she had no right to even have codefendant Sanders be included in the penalty phase, in the sense that the prosecution had the discretion to stop seeking the death penalty against him at any time. (55RT 9026-9027.) Appellant's motion for mistrial was denied, and a mistrial was declared as to codefendant Sanders. (56RT 9046-9054.) Appellant's penalty phase proceeded and the jury returned a verdict of death. The prosecution opted not to proceed with the penalty phase as to codefendant Sanders, and he received a sentence of life in prison without the possibility of parole. (68 RT 9704.2; 12CT 3429.)

B. The Applicable Law

Under section 1098, "[w]hen two or more defendants are jointly charged . . . they must be tried jointly, unless the court order[s] separate trials." Thus, under section 1098, a trial court must order a joint trial as the "rule" and may order separate trials as an "exception." (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; *People v. Alvarez* (1996) 14 Cal.4th 155, 190.) "Joint trials are favored because they promote economy and efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (*People v. Coffman, supra,* 34 Cal.4th at p. 40 [internal quotations omitted].) A "classic case" for joint trial is presented when defendants are charged with common crimes involving common events and victims. (*People v. Cleveland, supra,* 32 Cal.4th at p. 726.)

"In light of this legislative preference for joinder, separate trials are usually ordered only in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on

multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Box* (2000) 23 Cal.4th 1153, 1195 [internal quotation omitted]; *People v. Cleveland, supra,* 32 Cal.4th at p. 726.) However, antagonistic defenses alone do not compel severance. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.)

In *Coffman*, this Court set forth the applicable law regarding severance and conflicting defenses:

> In [*People v. Hardy* (1992) 2 Cal.4th 86, 168], we said: Although there was some evidence before the trial court that defendants would present different and possibly conflicting defenses, a joint trial under such conditions is not necessarily unfair. [Citation.] Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, *none has found an abuse of discretion or reversed a conviction on this basis*. [Citation.] If the fact of conflicting or antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials would appear to be mandatory in almost every case. We went on to observe that although it appears no California case has discussed at length what constitutes an antagonistic defense, the federal courts have almost uniformly construed that doctrine very narrowly. Thus, [a]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other. [Citation.] Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty. [Citation.] When, however, there exists sufficient independent evidence against the

moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation.] (*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42 [internal quotations omitted; emphasis in original].)[20]

A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. (*People v. Box, supra,* 23 Cal.4th at p. 1195; *People v. Alvarez, supra,* 14 Cal.4th at p. 189.) Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Coffman, supra,* 34 Cal.4th at p. 41.) Also, the reviewing court may reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law. (*People v. Cleveland, supra*, 32 Cal.4th at p. 726.)

C. Neither Judge Weisberg Nor Judge Trammell Abused Her/His Discretion In Denying The Multiple Severance Motions Made By Appellant Before And During Trial; In Any Event, Any Error Was Harmless

Appellant attacks the rulings of both trial judges, offering numerous reasons why she believes they consistently abused their discretion in refusing to grant her numerous severance motions. The primary problem with all of

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20. *Coffman*, decided just three years ago, is one of this Court's most recent cases concerning the relationship between severance and antagonistic defenses. The law explained in *Coffman* was affirmed as accurate and applicable by this Court just last year in *People v. Avila* (2006) 38 Cal.4th 291, 575-576. Appellant fails to cite either case in her severance argument. Instead, appellant relies heavily on the decisions of many lower federal courts, which this Court is not obligated to follow. (See *People v. Williams* (1997) 16 Cal.4th 153, 190 ["Decisions of lower federal courts interpreting federal law are not binding on state courts"] .)

appellant's arguments in this regard is that a critical aspect of the applicable law is completely overlooked. Appellant fails to account for the indisputable legal reality that antagonistic defenses – alone – do not warrant severance, especially when independent evidence makes it abundantly clear that both defendants are guilty. (*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42). The notion that appellant was only convicted of capital murder because of the version of events provided by codefendant Sanders inappropriately overlooks the other overwhelming evidence presented by the prosecution. Accordingly, based on the law as explained by this Court many times in the past, neither trial judge abused his/her discretion in denying appellant's severance motions.

1. Judge Weisberg Did Not Abuse Her Discretion In Denying Appellant's Severance Motions

Appellant first contends that Judge Weisberg abused her discretion in denying both the initial pre-trial motion for severance and the renewed motion that followed. Appellant's theory is that the trial court was not operating with a clear understanding of the applicable law, making the denial of the motion necessarily an abuse of discretion. (AOB 71-77.) As appellant specifically complains, ". . . the court did not regard the existence of conflicting defenses as a potential reason to sever and further, that she did not appreciate that the defenses in this case were not merely inconsistent but particularly antagonistic and mutually exclusive." (AOB 72.) Appellant is wrong.

Initially, appellant's contention that Judge Weisberg did not consider the applicable law is simply refuted by the record. In denying appellant's first motion, which followed an in camera presentation of evidence, the trial court explained:

> I realize the People weren't privy to this offer of proof, but I'm not convinced. I heard the offer of proof as to these allegedly inconsistent defenses, and these problems arise always

> when you have a joint trial. I don't see anything here that is any different from what happens in many situations, and nothing that would preclude [appellant] from having a fair trial with the cases joined as it is, and it's thoroughly within the court's discretion, and I am exercising my discretion in denying the motion to sever on that basis.

(3RT 315.)

Contrary to appellant's contention, Judge Weisberg's denial was entirely consistent with the law. Though she did not go into extended detail in explaining why appellant's theory of antagonistic defenses – alone – did not justify severance, she was not required to do so in order to demonstrate her application of the correct legal standard. It is beyond debate that she considered appellant's antagonistic defenses argument as the basis for severance, and exercised "discretion" to deny the motion. (3RT 315.)

Thus, appellant's argument on appeal should be rejected on that basis alone. But in any event, it is clear that the trial court did not abuse its discretion in this instance. As stated above, appellant's argument must fail because she failed to recognize a critical aspect of the applicable law. This Court's prior explanation in this respect deserves repeating.

> [T]o obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty. [Citation.] When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation.]

(*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42 [internal quotations omitted; emphasis in original].)

Initially, it is an incorrect proposition that appellant was convicted solely because of the fact that her defense was antagonistic to codefendant Sanders's. The prosecution's theory – which was supported by overwhelming evidence – was that appellant conspired with and hired codefendant Sanders to murder her husband in order to recover insurance money. In this regard, the prosecution demonstrated – without any help from either defendant – the following: appellant, who handled all of her and the victim's personal finances, as well as the victim's business finances, allowed their home to go into foreclosure. (23RT 3902-3903; 24RT 4108-4109; 26RT 4477-4480; 4631-4632; 36RT 6258-6260.) In the attempt to dig herself out of financial catastrophe, without the victim's knowledge, she: lied about the victim's health to explain his unavailability for financial meetings with the company who purchased the Hillary home out of foreclosure (24RT 4113); lied about having a trust fund to convince the Hillary property owner that she had the money to repurchase the property (24RT 4116-4117); procured fraudulent loans against the property the victim and his ex-wife owned together, by posing as the victim's ex-wife, and by having codefendant Sanders pose as the victim (28RT 3898, 3949-3954, 3980-3981.) Further, in order to perpetrate her financial fraud, appellant utilized others to falsely verify her fraudulent identity, and to pose as pretend bank employees of fictional banks to verify her fictional financial status. (23RT 3981, 3955-3964, 4049-4050, 4059.) When appellant continued to experience financial difficulties, she began applying for credit in her maiden name, procuring a new driver's license and social security number in order to create "Catherine Bazar." (24RT 4135, 4139-4140, 4170-4172; 26RT 4522; 33RT 5770-5771.) The victim's business was placed in appellant's name just eight days prior to the murder. (33RT 5774; Peo's. Exh. 116.) After the murder,

appellant assigned the rights to the proceeds of Melvin's life insurance to Tony DeGreef of Bid Properties so she could re-purchase the Hillary property. (24RT 4122.)

The prosecution further proved that when appellant could not obtain enough money based on her fraudulent loan schemes, she planned and executed the murder of her husband for insurance proceeds. To this end, the prosecution's evidence demonstrated that, prior to the murder, she repeatedly called codefendant Sanders and Carolyn Sanders at their home. (29RT 5087.) Christine Kuretich, who lived with codefendant Sanders and his wife, specifically heard several discussions concerning the murder of Melvin Thompson for insurance proceeds, and was specifically told by Carolyn Sanders that she and codefendant Sanders had been hired by appellant to murder the victim. (29RT 5087-5089, 5095; 32RT 5522-5533.) Supporting Ms. Kuretich's testimony was evidence of numerous telephone calls from appellant to codefendant Sanders at his place of employment (27RT 4696-4700), and more than 30 telephone calls between the Sanders residence and Kayser Service between May 4 and June 14, 1990. Despite codefendant Sanders's contention that the calls concerned the potential purchase of a car by appellant's son, indisputable evidence showed that virtually all of the calls came after appellant's son purchased a vehicle from another dealership. (40RT 6776-6778; Peo's. Exh. 144.)

Moreover, codefendant Sanders and Robert Jones, Carolyn Sanders's son, were witnessed leaving the crime scene shortly after the fatal gunshots were fired. (25RT 4348-4359, 4361, 4363-4365, 4370, 4380.) Appellant was witnessed coming from the shooting scene right after that. (25RT 4367-4368.)

Appellant also told several lies following the murder. She told Detective Wachter that she left the victim's shop at 5:45 p.m. on the night of the murder to recycle cans, but the detective found two large bags of aluminum cans on the

premises. (33RT 5814-5815, 5817.) Appellant claimed that a Rolex watch was stolen from the victim, but such a watch was found hidden in appellant's bedroom. (33RT 5818-5820; 34RT 6006.) Appellant told her friend, Rene Griffin, that an individual in possession of the victim's Rolex watch had been arrested by San Francisco police, but San Francisco authorities denied that such an arrest or watch recovery ever occurred. (34RT 5941, 5943-5945.)

Appellant told several additional lies that squarely supported her guilt. Appellant told Rene Griffin that she saw a tall man she did not recognize come around the corner and almost bump into her right before discovering her husband's lifeless body. After codefendant Sanders was arrested in connection with the murder, Ms. Griffin saw his picture in the paper. She asked appellant if it was codefendant Sanders who she had almost bumped into, but appellant said he was not the man. (34RT 5945-5947.) Appellant provided the same story of seeing a tall Black man after the murder to Patricia Ceaser, also denying to her that the man was codefendant Sanders. Instead, appellant told Ms. Ceaser that Greg Jones must have been the killer. (34RT 5965-5969; Peo's. Exh. 123.)

And, appellant all but confessed to her participation in the conspiracy and murder. In the car on the way home from the hospital after Melvin was pronounced dead, appellant said, "I didn't mean for it to happen this way," or "it wasn't supposed to happen this way." (34RT 5975-5976.) When she was taken into custody, appellant was informed that she was under arrest for hiring someone else to murder her husband. In response, appellant stated, "I didn't know Phil at all. I only met him once and that was about the sale of a car." (27RT 4717.) Prior to appellant making that statement, neither Detective Kingsford nor Detective Fullerton had ever mentioned the name Phillip Sanders or "Phil" to appellant. (27RT 4714.)

Thus, appellant's contention that the *only* reason she was convicted was because codefendant Sanders claimed complete innocence and placed the gun in appellant's hand is inconsistent with the overwhelming evidence presented by the prosecution. Had codefendant Sanders never testified at all, appellant was sure to have been convicted on the strength of the People's evidence alone. This was not a close case.

Further, in light of the compelling case the prosecution presented, it is highly likely that the jury viewed both appellant's and codefendant Sanders's defenses as patently ridiculous. Neither of them dealt with in any way the undisputed evidence that showed them to be operating together in this heinous murder-for-hire venture. Thus, appellant and codefendant Sanders were not convicted because they presented inconsistent, antagonistic defenses. They were convicted because they were undeniably guilty based on the compelling evidence presented by the prosecution.

For essentially the same reasons, any error made by Judge Weisberg in denying appellant's severance motions was harmless, in that it is not reasonably probable that appellant would have received a more favorable result in a separate trial. (*People v. Coffman, supra,* 34 Cal.4th at p. 41.) As the foregoing discussion indicates, the prosecution most convincingly established appellant's guilt without any assistance from codefendant Sanders's defense. As she would have been convicted of capital murder without any help from codefendant Sanders's defense case, any error was utterly harmless.

2. Judge Trammell Did Not Abuse His Discretion In Denying Appellant's Pre-Trial Motion For Severance

Appellant next argues that Judge Trammell erred in denying the renewed pretrial motion to sever the cases once the matter had been reassigned to him. According to appellant, Judge Trammell operated under the incorrect legal premise that he was somewhat bound by Judge Weisberg's earlier decisions

denying this exact request. Because, according to appellant, Judge Trammell actually had full authority to decide this issue anew, and he failed to acknowledge that reality, he too abused his discretion in denying the severance motion. (AOB 77-81.) Appellant is incorrect.

Initially, if Judge Trammell had conclusively ruled that Judge Weisberg's ruling on the severance issue was the law of the case – which he did not – there would have been legal support for such a ruling. Appellant is correct that a trial judge generally has the authority to reconsider his or her *own* rulings. (AOB 78-80 and cases cited; *In re Alberto* (2002) 102 Cal.App.4th 421, 426-427.) But the law is different when it comes to a trial judge reconsidering the ruling of *another* trial judge. In this instance, "the power of one judge to vacate an order made by another judge is limited." (*In re Alberto*, at p. 427 citing *Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588.) The reason for this restriction was explained in *In re Alberto*:

> For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court. "The Superior Court of Los Angeles County, though comprised of a number of judges, is a single court and one member of that court cannot sit in review on the actions of another member of that same court." (*People v. Woodard* (1982) 131 Cal.App.3d 107, 111.)

(*In re Alberto, supra*, 102 Cal.App.4th at pp. 427-428.)

The *In re Alberto* court acknowledged two exceptions to the general rule that a trial judge should not reconsider the ruling of a co-equal trial judge. The

exceptions are: (1) where the original judge is unavailable; or (2) where the first order was made through "inadvertence, mistake, or fraud." (*Id.* at p. 430.)

Appellant seizes on the first exception, arguing that Judge Weisberg became unavailable when the case was reassigned, so Judge Trammell's reconsideration of the severance issue was proper. (AOB 79-80.) But Judge Weisberg was not unavailable in the sense that the lawyers wanted to bring the motion to her but could not. She was simply no longer the judge presiding over this case. Her ruling, however, was still in full force and in effect.

More importantly, even if unavailability were present here, appellant failed to consider the remainder of the law relevant to this first exception. Reconsideration of previous orders, or a party's renewal of a previous motion, must be based on new or different facts, circumstances, or law. (See, e.g., Code Civ. Proc., § 1008, subd. (a).)[21] Here, appellant's renewed motion to Judge Trammell was based on the precise arguments and evidence previously made and presented to Judge Weisberg. Nothing had changed but the judge hearing the motion. For that reason alone, Judge Trammell would have been justified in denying the same severance motion that had already been denied twice.

Regardless, as a factual matter, appellant is simply wrong about the manner in which Judge Trammell evaluated the renewed severance motion. Appellant emphasizes certain aspects of the trial court's ruling, while overlooking other parts that refute this claim. While it is true that Judge Trammell did provide some indication that he would have approached the issue differently if confronted with it as a matter of first impression, he also made very clear that he was not denying the motion merely out of deference to Judge Weisberg. In this regard, Judge Trammell specifically stated:

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21. There does not appear to be a specific code section concerning renewal or reconsideration motions in criminal cases. However, there likewise does not appear to be any logical reason why the rule would be different.

> I am not in a way hiding behind [Judge] Weisberg's decision because if I felt in my mind that it was an abuse of discretion, I certainly would – I am not about to have all of us go through a trial where in my mind it would be an act of futility, because first as a matter of law, I feel it's discretionary and I choose to allow the prior rulings to remain.

(4RT 560.)

Judge Trammell further explained that the in camera offer of proof was insufficient to warrant severance, and that the "new data" offered was insufficient to warrant reconsideration of Judge Weisberg's earlier denials. (*Ibid.*) Clearly, Judge Trammell dealt with the renewed motion precisely as the relevant authority commands. He determined that whatever "new data" existed did not warrant reconsideration, and explained that he was exercising his discretion to deny the motion. Judge Trammell's proper handling of the request when made to him dictates that appellant's instant claim of error must be denied.

Finally, even if the motion had been properly raised before Judge Trammell, it failed on the merits for the same reasons if failed before Judge Weisberg. Appellant was not convicted of capital murder as a result of codefendant Sanders's defense case, or more specifically, because it was antagonistic to hers. She was convicted because the prosecution's case was comprised of overwhelming, and in most cases indisputable, evidence that she hired codefendant Sanders to kill her husband for insurance money. Thus, there was no abuse of discretion in denying any of the severance motions. (*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42 [internal quotations omitted] ["When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance"] [Citation.].) For the same

reasons, any error in failing to server appellant's trial from codefendant Sanders's was harmless. (*People v. Coffman, supra,* at p. 41.)[22]

3. The Jennifer Lee Evidence Did Not Warrant The Granting Of Severance

Appellant next contends that Judge Trammell abused his discretion in denying a renewed severance motion based on the in camera hearing where codefendant Sanders's lawyers sought permission to withhold some discovery from the prosecution. Specifically, codefendant Sanders's attorneys wanted to withhold the identity of Jennifer Lee as well as the letters she wrote to codefendant Sanders under appellant's directions primarily to protect Ms. Lee from intimidation by appellant. (5RT 762.) According to appellant, the trial court abused its discretion in not granting severance when the in camera hearing concerning the Lee evidence took place. (AOB 82-85.) Appellant is wrong.

Appellant first seems to argue that the evidence unfairly surprised her and her attorneys, which prevented her attorneys from effectively representing her. (AOB 80.) Appellant fails to realize, however, that she created this evidence. She wrote the letters and then had Ms. Lee copy them in her handwriting for purposes of being ineffectively deceptive. If appellant's attorneys were surprised to learn about these letters, they have only their client to blame. Appellant indisputably knew that these letters existed, and any reasonable person had to know that they would be used against her by

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22. Appellant separately argues that Judge Trammell abused his discretion in denying appellant's alternative motion for dual juries if severance was not to be granted. Again, appellant argues that the record fails to reflect that Judge Trammell applied applicable legal principles in rejecting the request, which necessarily equates with an abuse of discretion. (AOB 81-82.) Because Judge Trammell did not abuse his discretion in denying the severance motion, he did not abuse his discretion in rejecting this proposed alternative to severance. Because the considerations are necessarily identical (or virtually identical), the validity of the rulings must be the same as well.

codefendant Sanders or the prosecutors if they discovered them. No law of which respondent is aware supports the granting of a severance motion based on a defendant's failure to inform her lawyers that she created inculpatory evidence that could be used to her detriment. The claim that severance was warranted based on unfair surprise is therefore meritless.[23]

Appellant is extremely vague as to how else this evidence might have supported a severance motion, essentially arguing only that the trial court was obligated to protect her rights. (See AOB 84-85.) But appellant does not dispute that the evidence was admissible. It was admissible as evidence in support of codefendant Sanders's defense at the joint trial, and would have been equally admissible against appellant had she been tried alone.[24]

In any event, for reasons previously discussed, any error in the court's refusal to grant a severance motion was utterly harmless. Appellant can only speculate as to whether this evidence would have been used against her at a separate trial, and such speculation is simply based on prosecutorial access to it. The prosecution's case, which did not include the Lee letters, was utterly compelling. Appellant was certain to be convicted regardless of whether she was tried with codefendant Sanders. Appellant's argument to the contrary should be rejected.

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23. The Jennifer Lee letters are the subject of an independent substantive claim of error in Argument II. (AOB 103-127.) The shortcomings of appellant's "unfair surprise" argument are discussed in more detail in response to that argument.

24. The fact that the prosecution was seemingly unaware of this evidence until informed of its existence by codefendant Sanders is irrelevant. Whether the prosecution was aware of probative, admissible evidence cannot be a factor that would support severance. The bottom line is that the evidence would have been admissible against appellant under any circumstances.

4. The Trial Courts' Denial Of Appellant's Repeated Requests For Severance And/Or Dual Juries Did Not Render Her Trial Unfair

In appellant's final section of Argument I, she essentially rehashes earlier arguments in an attempt to emphasize her beliefs as to why she supposedly was deprived of a fair trial. In this respect, she essentially focuses on the "Phillip was an extra prosecutor" aspect of the argument in an effort to illustrate how her trial would have been dramatically different had she been tried alone (and then together or in front of a different jury at the penalty phase). (AOB 88-102.) For the previous reasons, and those that follow, appellant's argument is still without merit.

First, it is important to accentuate that the argument that codefendant Sanders acted as a second prosecutor is simply an offshoot of the argument that appellant and her codefendant had antagonistic defenses. In other words, a necessary consequence of having antagonistic defenses was that codefendant Sanders would blame appellant for the murder (and vice versa). So, the same legal principles explained by the Court in *Hardy* and *Coffman*, and discussed by respondent previously, govern. As this Court has unambiguously indicated:

> [a]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other. [Citation.] Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty. [Citation.] When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation.]

(*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42 [internal quotations omitted; emphasis in original].)

Appellant argues that her trial would have been different, in that much of the evidence that was admitted to her detriment as a result of codefendant Sanders's participation in the trial would not have been admitted had she been tried alone. While that prospect is dubious at best, it is also irrelevant. Because the prosecution's case alone – without any of the evidence admitted during or as a result of codefendant Sanders's defense case – was utterly overwhelming, appellant's trial was not unfair. Respondent discussed in great detail the prosecution's case for guilt against appellant (see pp. 51-54, *supra*), and it need not be repeated here. Suffice it to say the highlights include all the evidence showing the financial problems appellant created for herself, and all the fraudulent acts and lies – some of which were performed with codefendant Sanders – she was involved in to remedy her dire situation. The evidence further included all the unexplainable telephone calls between appellant and codefendant Sanders, and Christine Kuretich's testimony that appellant and codefendant Sanders (and Carolyn Sanders) were planning to murder appellant's husband. Appellant was witnessed walking away from the crime scene, as was codefendant Sanders. Also, appellant lied repeatedly to police and her friends in an effort to divert attention from herself, and essentially admitted to her personal involvement in the murder. Accordingly, without any consideration for how appellant's trial might have been different from an evidentiary perspective had codefendant Sanders not been tried with her, this Court's jurisprudence on severance mandates that the claim of error be rejected.

In any event, appellant's arguments as to how her trial would have been different are unsupported and speculative at best. Appellant first argues that, if she had been tried separately, codefendant Sanders would not have testified to her detriment. (AOB 89-90.) This contention overlooks the reality that his

testimony was unnecessary to secure appellant's conviction. As discussed multiple times already, the prosecution's case *alone* was more than sufficient to secure appellant's conviction for capital murder. Under *People v. Coffman, supra,* that ends the inquiry.

In any event, appellant can only speculate as to whether codefendant Sanders would have testified to her detriment had the trials been severed. The prosecution suggested that codefendant Sanders could have been offered a deal in exchange for his testimony. (4RT 554.) Appellant's contention that "[t]here is no evidence in the record to show that it was likely or even possible that Phillip would have agreed" (AOB 90) overlooks the fact that codefendant Sanders was later offered a deal to waive his marital communications privilege, *which he accepted*. (39RT 6591-6595.) And all he received in return was a promise from the prosecution that they would not argue to the jury that he deserved to die, and would simply let the penalty phase evidence speak for itself. Thus, it is unrealistic to posit that Sanders would have refused a plea agreement that included a sentence other than death.

Regardless, there is no way to know whether codefendant Sanders would have testified against appellant at a separate trial. Appellant's speculation that he would not have cannot possibly be sufficient to warrant a determination that the trial court abused its discretion in rejecting her severance motion, or that she suffered the type of prejudice that would warrant overturning her conviction and/or sentence.

Appellant next argues that, "in the absence of Phillip's testimony, appellant would have had no reason to call Carolyn Sanders." (AOB 90.) This argument, too, results in appellant speculating as to how matters would have proceeded at a separate trial. Initially, it may be true that, if codefendant Sanders did not testify that appellant was the shooter, appellant would not have needed to call Carolyn Sanders to testify that codefendant Sanders admitted to

being the gunman. But that testimony was not harmful to appellant – it helped her to demonstrate that codefendant Sanders's version of events was untrue.

Moreover, appellant cannot establish that Carolyn Sanders would not have testified as a prosecution witness against her at a separate trial. Assuming codefendant Sanders did not testify at a separate trial that appellant was the shooter, Carolyn's testimony that codefendant Sanders had admitted to being the gunman would have been unnecessary and irrelevant. Accordingly, the marital privilege would not have been an issue. As a prosecution witness, Carolyn would have been free to offer whatever relevant, admissible testimony she had against appellant. Carolyn waived her Fifth Amendment rights to testify at the joint trial because she believed that assisting the prosecution would garner her a deal. (31RT 5429; 45RT 7772-7773.) There is little reason to believe her motivation in this respect would not have been equally present had appellant been tried alone. So, any testimony offered by Carolyn Sanders at the joint trial would have been equally available and admissible at a separate trial, making all complaints about Carolyn Sanders's testimony meritless.[25]

In any event, appellant is again resting her argument of harm and prejudice on pure speculation. Excepting the marital communications issue, Carolyn Sanders's testimony, in terms of her knowledge of appellant's involvement in the plan and actual murder, would have unquestionably been admissible against appellant if she had been tried alone. It is unclear whether

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25. During one of the discussions concerning the impact of the marital communications privilege, when the trial court was contemplating severing the cases, Carolyn Sanders's availability as a witness was restricted by her lawyer to a joint trial, and he insisted he would advise her to assert her Fifth Amendment privilege against self-incrimination and refuse to testify if appellant was tried separately. (32RT 5711-5713.) However, as the trial court pointed out, because Carolyn Sanders had already been advised of her Fifth Amendment rights, waived them and testified to a certain extent at the joint trial, that right would not be available to her if severance were granted and appellant was tried alone. (33RT 5720.)

or not the prosecution would have opted to call Carolyn Sanders at such a trial, as they ultimately opted not to call her here. It is just as unclear as to whether, if called, Carolyn Sanders would have testified or asserted some privilege, and whether such a privilege assertion would have succeeded. The speculation required for appellant to make any type of viable prejudice argument in connection with Carolyn Sanders's participation is so extreme that it cannot possibly demonstrate that the trial court abused its discretion in refusing to sever the case, or that appellant suffered prejudice from the lack of severance.[26]

Appellant next continues her speculation as to how a separate trial would have been different even if codefendant Sanders testified against her. According to appellant, if codefendant Sanders made a deal with the prosecution in exchange for testimony, his testimony would have been different, in that he would have accepted responsibility for the actual shooting and only testified as to appellant's true level of participation. Appellant adds that codefendant Sanders would have been subject to impeachment in various additional respects and that she would have received the benefit of an accomplice instruction informing the jury to distrust codefendant Sanders's testimony. (AOB 91-92.) Appellant again misses the mark.

First, it is patently clear that appellant Sanders's testimony in this case was not believed by the jury. His testimony was designed to demonstrate that

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26. Appellant also briefly argues that the Jennifer Lee letters and testimony would not have been used at a separate trial against appellant because that evidence was obtained by codefendant Sanders. (AOB 91.) Appellant again can only speculate in this regard. It is unknown whether the prosecution would have independently discovered that evidence, or whether codefendant Sanders would have supplied it anyway, in exchange for a hypothetical deal. What is an absolute certainty is that the evidence would have been admissible. It is contrary to logic and law that appellant's trial was unfair because relevant, probative, admissible evidence might not have been discovered or used by the prosecution at a separate trial. Respondent is unaware of any authority that specifically supports such a proposition.

he had no involvement whatsoever in the murder. According to codefendant Sanders, he went to meet Melvin Thompson about a loan and just happened to witness appellant shoot him to death at that time. Appellant's defense was, in essence, that codefendant Sanders must have killed Melvin Thompson over money or anger. And the prosecution's theory was that appellant hired codefendant Sanders to kill Melvin Thompson for insurance money. If the jury believed codefendant Sanders, he would have been acquitted. The only evidence showing his involvement in the murder was as the actual gunman. Neither the prosecution nor appellant presented evidence suggesting that codefendant Sanders was involved in any other type of aiding and abetting capacity. That fact that the jury nevertheless convicted codefendant Sanders of first degree murder with special circumstances demonstrates a patently reliable implied finding that he was the gunman.

Thus, suggesting that codefendant Sanders's testimony would have been different at appellant's separate trial is a non-starter. The prosecution's evidence would have been the same, and it was the prosecution's overwhelming case for guilt that the jury obviously rested its verdict on. Accordingly, appellant's argument that codefendant Sanders would have testified differently at a separate trial is meaningless in assessing whether the trial court erred in denying severance.

Appellant next argues that codefendant Sanders's participation as a witness for the prosecution in a separate trial would have meant that appellant would have learned of the Jennifer Lee evidence much sooner because the prosecution would have been obligated to disclose it immediately. (AOB 92-95.) How this development would have been critical is unclear. Appellant does not indicate how she would have addressed the evidence differently had she known about it sooner. In any event, since a major basis for withholding Jennifer Lee's identity was Ms. Lee's security (see 5RT 762), the prosecution

could have taken similar steps in a separate trial. And, significantly, appellant keeps overlooking that she was well aware of this evidence at all times *because she created it.* This contention is meritless.[27]

Finally, appellant contends that the mishandled severance issue resulted in prejudice at the penalty phase, which "independently compels reversal of the death judgment." (AOB 99.) According to appellant, being forced to proceed to the penalty phase before the jury that convicted her without codefendant Sanders seated next to her was prejudicial to the point that her death sentence must be reversed. (AOB 99-102.) Appellant felt that, without codefendant Sanders's participation, she "would now become the sole focus of the jury's 'aggregated feelings of hatred.'" (AOB 100.) This claim, too, lacks merit.

Appellant seems to rely on general fairness principles, rather than any established legal authority, for this particular argument. Penal Code section 190.4, subdivision (c), provides in pertinent part:

> If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, *the same jury shall consider* . . . the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn.

(Emphasis added.)

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27. Appellant then repeats her argument that the prosecution and codefendant Sanders's attorneys ganged up on her at trial (AOB 95-97), which is the same recycled, repeated antagonistic defenses argument. This argument is short-circuited and defeated because of the power of the independent prosecution evidence which was responsible for appellant's conviction. (*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42.) Also, appellant's arguments that the trial took longer because of joinder (AOB 97) and involved some admonitions to the jury (AOB 98) fail to support, let alone even explain, any legitimate reason for severance.

Thus, there is a strong presumption for utilizing the same jury to decide guilt and penalty.

Initially, this Court has clearly said that there is no presumptive due process right to a separate penalty jury. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1280, citing *People v. Horton* (1995) 11 Cal.4th 1068, 1094.) And as to what might constitute "good cause" for a discretionary new jury, this Court has further explained that:

> Good cause to discharge the guilt phase jury and to impanel a new one must be based on facts that appear "'in the record as a demonstrable reality,'" showing the jury's "'inability to perform'" its function. (*People v. Earp, supra,* 20 Cal.4th at p. 891, 85 Cal.Rptr.2d 857, 978 P.2d 15; *People v. Bradford* (1997) 15 Cal.4th 1229, 1354, 65 Cal.Rptr.2d 145, 939 P.2d 259, and cases cited.)

(*People v. Prince,* supra, 40 Cal.4th at p. 1280.)

Here, appellant returns to her consistent and unavailing theme of relying on speculation rather than on actual facts and law. Appellant's contention that the jury would focus its "aggravated feelings of hatred" towards her based on codefendant Sanders's absence has no evidentiary support. There is no reason to believe that the jury based its penalty decision on pure emotion rather than on an impartial assessment of aggravating and mitigating evidence. (See § 190.3.) There is not a scintilla of evidence in the record indicating that the jury was unable to assess appellant's penalty impartially, in accordance with the law, as a result of codefendant Sanders's absence. Absent such evidence, it is impossible to classify the trial court's ruling as an abuse of discretion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1353.)

The only authority upon which appellant relies here is *People v. Kritzman* (Fla. 1988) 520 So.2d 568, a Florida case bearing no resemblance to

this one at all. In *Kritzman*, three prison escapees committed a robbery and then a murder. At a joint trial, one of the defendants entered a guilty plea to first degree murder before the trial began. In exchange for his plea and testimony, the defendant received sentencing consideration. However, he was for some reason still permitted to participate in selection of the jury that would decide the fate of the other two defendants. Under these circumstances, the Florida Supreme Court ruled that refusing to sever Kritzman from the other remaining defendant was error. As the court explained:

> It is difficult enough for a jury to sift through the complicated issues surrounding a murder case; it is nearly impossible to do so when the lines between who is on trial and who is not are unclear.

(*Kritzman*, *supra*, 520 So.2d at p. 570.)

It was the former defendant's participation in jury selection that was prejudicial to Kritzman. That is clearly not what happened here. *Kritzman* is clearly distinguishable.

In the end, this was a "classic case" for a joint trial in that the defendants were charged with common crimes involving common events and a common victim. (*People v. Cleveland, supra,* 32 Cal.4th at p. 726.) That they had antagonistic defenses was hardly a unique circumstance. This Court has made clear that when the asserted basis for severance is antagonistic defenses, the moving party must show that the conviction resulted specifically and *solely* because of the conflict. However, where independent evidence sufficiently establishes guilt, the denial of the severance motion is not an abuse of discretion. (*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42.)

The prosecution's evidence demonstrating appellant's guilt was overwhelming. Thus, without consideration of any evidence admitted as a result of codefendant Sanders's inclusion in this case, appellant was certain to

be convicted of capital murder. Moreover, appellant has failed to offer any actual, discernable evidence that the jury was incapable of rendering an unbiased and lawful penalty phase verdict following the removal of codefendant Sanders from the case. Accordingly, the trial judges did not abuse their discretion in denying appellant's multiple motions for severance and mistrials at either the guilt or penalty phases.

II.

APPELLANT HAD NO RIGHT, STATUTORY OR OTHERWISE, TO DISCOVERY OF EVIDENCE CODEFENDANT SANDERS PLANNED TO USE IN HIS DEFENSE

Though conceding that no existing authority supports the contention (AOB 119-120), appellant nevertheless argues that she had an absolute right to obtain certain discovery possessed by, and used at trial by, codefendant Sanders in his own defense. Despite the fact that the relevant statutory scheme refutes the instant contention, and despite the fact that this Court has resolved this issue adversely to appellant's current position, albeit in a penalty-phase context,[28] appellant is adamant that both state statutory law, as well as state and federal constitutional mandates, require reciprocal discovery between codefendants. (AOB 103-127.) Appellant is wrong.

A. Relevant Procedural History

While in jail, appellant wrote several letters to codefendant Sanders, who was incarcerated awaiting trial as well. Appellant wrote the letters and then had another inmate, Jennifer Lee, copy the letters in her handwriting before they were sent to codefendant Sanders. Appellant did this to protect her identity as

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28. *People v. Ervin* (2000) 22 Cal.4th 48, 101; *People v. Coffman*, *supra*, 34 Cal.4th at pp. 112-113.

the author. (See 40RT 6811-6818.) Codefendant Sanders collected the letters and continued to correspond with appellant in the hopes of obtaining more of them, as the letters were inculpatory for appellant, and deemed by codefendant Sanders and his attorneys as helpful to his defense. (See 40RT 6825, 6831, 6929-6930.)

During an in camera hearing, codefendant Sanders's attorneys sought permission from the trial court, with the agreement of the prosecutors, to withhold from the prosecution the Jennifer Lee evidence, including all the letters and the identity of the witness. If the prosecutors came into possession of the evidence, they would have been obligated to disclose it to appellant. Codefendant Sanders's attorneys wanted to avoid disclosing the evidence to appellant because they feared for Jennifer Lee's safety and security in jail if appellant learned that Ms. Lee was going to testify at the trial. (5RT 760-761.) As counsel explained, "We will not turn over that witness because if they go see her, we will not have a witness. [Ms. Lee] has told us that she is frightened." (5RT 762.) The trial court ruled that codefendant Sanders could withhold the Jennifer Lee evidence until later in the trial. (5RT 765-767.)

B. The Applicable Law

The applicable law is straightforward and uncomplicated. Proposition 115 (§§ 1054-1054.7), which provision the electorate passed in June 1990, provides for reciprocal discovery between the prosecution and the defense in criminal cases. (See also *Wardius v. Oregon* (1973) 412 U.S. 470 [93 S.Ct. 2208, 37 L.Ed.2d 82] [requiring criminal discovery to be reciprocal between prosecution and defendant(s)].) Section 1054.1 requires prosecutors to disclose specified categories of information "if it is in the possession of the *prosecuting attorney* or if the prosecuting attorney knows it to be in the possession of the *investigating agencies*." (Emphasis added.) Section 1054.3 sets forth the defense disclosure requirements, which apply only with respect to the

"prosecuting attorney." Disclosures must be made at least 30 days prior to trial, unless good cause is shown why a disclosure should be denied, restricted or deferred. (§ 1054.7.)

The criminal discovery statutes have been construed to require a party to disclose "'all witnesses it reasonably anticipates it is likely to call. . .'" to the opposing party. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 376, fn. 11.) Sections 1054.1 and 1054.3 "reasonably should be interpreted to require both the prosecution and the defense to disclose the names and addresses of persons whom they intend to call as witnesses at trial, if such information is known or is reasonably accessible." (*In re Littlefield* (1993) 5 Cal.4th 122, 135-136.) These disclosures give defense counsel the opportunity to interview witnesses. (*Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1332-1333.) To establish that the prosecutor failed to disclose a witness in violation of section 1054.1, subdivision (a), "the record must affirmatively demonstrate that a specific witness or witnesses were known to and intended to be called *by the prosecutor*, but were undisclosed to the defense as required by the discovery chapter." (*People v. Tillis* (1998) 18 Cal.4th 284, 292, emphasis added.) In criminal proceedings, all court-ordered discovery is governed by (and is precluded except as provided by) section 1054 et seq. (*In re Littlefield*, *supra*, 5 Cal.4th at p. 129)

Although Proposition 115 has been interpreted as prohibiting counsel from failing to learn or acquire information to avoid disclosure (*In re Littlefield*, *supra*, 5 Cal.4th at p. 133), that requirement has never been expanded beyond actual witnesses the party intends to call. In fact, in the context of penalty-phase trials in capital cases, this Court has twice affirmed that there is no right to discovery between codefendants. In *People v. Ervin*, *supra*, 22 Cal.4th 48, Ervin argued that his trial attorney performed at an unconstitutionally deficient level for failing to obtain certain discovery in the possession of Ervin's

codefendant. Specifically citing the discovery provisions of sections 1054-1054.7, this Court explained that "no statutory basis exists for the discovery of codefendant's penalty phase witnesses." *Id.* at p. 101.

More recently, in *People v. Coffman*, *supra*, this Court reaffirmed that same principle. Again in the penalty-phase context, the defendant was complaining about not receiving discovery from a codefendant. As this Court explained, "The statute thus contemplates that the prosecution will give notice of the aggravating evidence it will present, but omits any mention of a codefendant's obligation to provide notice of penalty phase evidence." (34 Cal.4th at pp. 112-113.)[29]

C. Appellant Had No Right Under State Law Or The Federal Constitution To Discover Evidence Obtained By Her Codefendant's Attorneys Through Their Investigation In Preparation To Defend Codefendant Sanders

Appellant argues error in three different but related ways. First, she argues that the trial court erred in allowing codefendant Sanders's lawyers to withhold from the prosecution the letters written by appellant, most of which were rewritten by Jennifer Lee. (AOB 109-117.) Second, appellant contends that the prosecution's agreement to forego receiving early discovery of the appellant/Lee letters was a violation of section 1054, as well as the Constitution. (AOB 117-119.) And finally, in what operates essentially as a concession that the foregoing arguments lack any legal support, appellant argues that section 1054 should be construed to require reciprocal discovery between codefendants who present "mutually irreconcilable" defenses. (AOB 119-124.) None of these arguments withstand scrutiny.

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29. This Court was referring to section 190.3, which specifically covers penalty-phase evidence, rather than the general discovery provisions. (*Ibid.*)

Initially, as this Court has explained, "section 1054.7 establishes that a trial court has discretion to deny, restrict, or defer disclosure for good cause. Good cause, as defined in the statute, expressly includes 'threats or possible danger to the safety of a victim or witness.'" (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1134.) Thus, even if the prosecution, and not codefendant Sanders, possessed the evidence in issue, the trial court would have acted well within its discretion to allow the withholding of Jennifer Lee's identity to protect her safety. For this reason alone, appellant's argument must fail.

But it was not the prosecution who possessed the evidence. Instead, it was a codefendant who had no discovery obligations to appellant. And, it must be remembered that the letters were not withheld indefinitely, and the prosecution explicitly agreed to defer acceptance of discovery of the evidence in issue until a later point in the trial. While section 1054.3 makes mandatory a defendant's obligation to produce discovery to the prosecution, it must necessarily be assumed that this mandatory requirement applies only if the prosecution seeks to enforce it. In other words, the discovery right belongs to the prosecution, who is unquestionably entitled to expressly waive, forfeit or defer enforcement of this right. If the prosecutors do not want discovery from a defendant, it would make absolutely no sense to force it upon them in any event.

Granted, it would likely be the rare case where the prosecution declined discovery in the possession of a defendant. But neither that likely fact, nor the reason why the prosecution might decline or defer discovery, would permit this Court to insert a requirement into section 1054.3 that is not currently there, i.e., that the prosecution must take discovery at a particular time, or ever, should the prosecution forego enforcement of its right in that respect. Lost on appellant is the undeniable fact that the evidence in question was not used by the

prosecution to prove appellant's guilt. Rather, it was used by codefendant Sanders in his defense. That the evidence likewise proved beneficial in terms of adding to the mountain of material already showing appellant to be guilty of capital murder does not make appellant's argument here any more credible.

Similarly, neither did the prosecution's agreement to defer discovery violate any conceivable right possessed by appellant. Appellant cites this Court's *In re Littlefield* decision at great length, mostly for the undisputed proposition that the prosecution cannot avoid disclosure obligations by intentionally failing to obtain information it would otherwise have to disclose. (AOB 117-118.) But *Littlefield* concerns the prosecution's obligations connected with information it obtains through its investigation, and the defendant's obligations to the prosecution that arise when information is obtained by the defense. Nothing in *Littlefield*, or any other case of which respondent is aware, imposes *Littlefield*-type obligations on codefendant. And opting to forego immediate discovery obtainable from a defendant in the case is patently not the same as failing to obtain a witness's address to avoid having to disclose it to the defense. The prosecution finally came into possession of the evidence in issue on the evening of August 13, 1992, and provided it to appellant's attorneys the following morning in court. (38RT 6481, 6487.) Thus, under *Littlefield*, section 1054, and any other discovery authority, the prosecution complied with its disclosure obligations.

But appellant knows that his first two contentions of error lack merit, which is why he ultimately argues that this Court should infer obligations from statutory language the legislature declined to include in section 1054. More specifically, appellant argues that section 1054 "should be construed to require reciprocal discovery among jointly tried codefendants whose defenses are mutually irreconcilable." (AOB 119 & 120-124.) As touched on above, this argument has already been rejected by this Court in *People v. Ervin*, *supra*, and

People v. Coffman, supra. Both cases involved discovery obligations of codefendants during the penalty phase of a capital trial. It is beyond debate that the discovery provisions of section 1054 *et. seq.* apply equally to penalty phases. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 956-957; *People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1232.) In both cases, this Court specifically held that codefendants have no right to discovery from each other. (*People v. Ervin, supra,* 22 Cal.4th at p. 101; *People v. Coffman, supra,* 34 Cal.4th at pp. 112-113.) There is no logical reason, and appellant certainly does not provide one, why the rule that codefendants have no right to discovery from each other should apply in the penalty phase, but not in the guilt phase of a capital trial.

Appellant seems to suggest that there is some significant distinction that would mandate reciprocal discovery between codefendants during the guilt phase of a trial. However, she never identifies what that distinction is. She argues that when codefendants have antagonistic defenses, the trial becomes "three-sided," mandating three-sided discovery. (AOB 120-121.) But the same is true during the penalty phase of a trial. If part of a capital defendant's mitigation case should be lingering doubt, with an emphasis that the codefendant was the actual killer, the penalty phase becomes "three-sided" as well. Even when the time has come for the jury to determine whether death is the appropriate penalty, this Court, based on the only reasonable reading of the requirements of section 1054, has stated that there is no entitlement to reciprocal discovery between codefendants.

Appellant then argues that "the plain language of section 1054 subdivision (b) supports" reciprocal discovery between codefendants during the guilt phase. (AOB 121-122.) But there is no reason to read that section as applying to the guilt phase of a trial, and not the penalty phase. Because this Court has already held that this provision does not require reciprocal discovery

between codefendants at the penalty phase, appellant's claim must be rejected. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 101; *People v. Coffman*, *supra*, 34 Cal.4th 112-113.)

Finally, appellant contends that the continued refusal to mandate reciprocal discovery between codefendants results in constitutional problems. (AOB 122-124.) Again, though, she proffers no explanation as to how the state and federal Constitutions are not violated at the penalty phase, where reciprocal discovery between codefendants is not required. If codefendants may constitutionally avoid discovery between each other during the penalty phase, then it is difficult to see how the state and federal Constitutions are offended by application of the same rule during the guilt phase.

D. Any Error Was Harmless

In any event, any conceivable error was patently harmless under any standard of prejudice. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) ["it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"]; *People v. Pinholster* (1992) 1 Cal.4th 865, 941 ["any failure to timely disclose the witness was harmless and did not undermine the reliability of the proceedings"]; *People v. Bell* (1998) 61 Cal.App.4th 282, 291 [applying *Watson* test to alleged discovery violation].) Appellant's contention that she suffered unfair prejudice by not receiving notice that codefendant Sanders planned to introduce the letters written to him by appellant and Jennifer Lee on appellant's behalf in his defense is meritless. She could not have been surprised by this evidence because *she wrote the letters*. Appellant knew what the letters said, and had to know that there was a high likelihood that codefendant Sanders would use them. If appellant opted to keep this information from her lawyers, she has no one to blame but herself.

Moreover, even without the letters, the evidence of appellant's guilt was truly overwhelming. As explained in detail in addressing Argument I, *supra* (see pp. 51-54), the prosecution's case involved nothing less than compelling evidence of appellant's guilt. All the evidence pointed to appellant as the ring leader of the conspiracy to murder Melvin Thompson. It is inconceivable that, but for the admission of the letters written by appellant and Jennifer Lee, appellant would have been acquitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant's argument to the contrary should be rejected.[30]

III.

BECAUSE APPELLANT HAD NO RIGHT TO DISCOVERY OF EVIDENCE CODEFENDANT SANDERS PLANNED TO USE IN HIS DEFENSE, APPELLANT'S RIGHTS WERE NOT VIOLATED BY HER EXCLUSION FROM DISCOVERY-RELATED EX PARTE HEARINGS INVOLVING THE TRIAL COURT AND CODEFENDANT SANDERS

Appellant next claims that her rights were violated under state law and the federal Constitution when she and her attorney were excluded from, and received no notice of, certain ex parte, in camera hearings, where discovery issues involving codefendant Sanders and the prosecution were addressed. (AOB 128-142.) As discussed when addressing Argument II, *supra*, appellant had no right to receive discovery from codefendant Sanders. Because appellant had no rights to discovery from codefendant Sanders, it is not possible that her rights were violated when she and her attorney were excluded from

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30. Appellant erroneously relies on the harmless-beyond-a-reasonable-doubt standard, as explained in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (AOB 126.) In light of the profound evidence of guilt, any error would nevertheless be harmless under this standard as well.

participating in discovery hearings concerning codefendant Sanders. Accordingly, this contention is without merit.

A. The Federal Constitutional Claim

Appellant begins her discussion by pointing to United States Supreme Court cases standing for the propositions that, under the federal Constitution, criminal defendants have the right to be present during all critical stages of trial, and have the right to be represented by counsel at all such stages as well. (AOB 128-129, citing *Gideon v. Wainwright* (1963) 372 U.S. 335; *United States v. Wade* (1967) 388 U.S. 218; *Memphis v. Rhay* (1967) 389 U.S. 128; *United States v. Gagnon* (1985) 470 U.S. 522; *Snyder v. Massachusetts* (1934) 291 U.S. 97; *Kentucky v. Stincer* (1987) 482 U.S. 730.)[31] However, appellant never really explains how these constitutional rights were violated.

As discussed when addressing Argument II, *supra*, appellant had no recognized right to receive discovery from codefendant Sanders -- her discovery relationship was with the prosecution. This Court has expressly said so. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 101; *People v. Coffman*, *supra*, 34 Cal.4th at pp. 112-113.) Because appellant had no right to receive discovery from codefendant Sanders, there is no basis -- especially one grounded in the federal Constitution -- for her complaint about being excluded from discovery hearings that did not concern her. All the discovery hearings referenced by appellant involved the Lee letters that appellant wrote and sent to codefendant Sanders, which he planned to use in his defense at trial. (5RT 759-767.) The subject of the hearings was whether those letters could be withheld from the prosecution for a certain time period. (See AOB 129-130.) Regardless of whether the discovery arrangement between the prosecution and codefendant

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31. Appellant also cites decisions of this Court endorsing and applying those federal constitutional principles. (AOB 128-129.)

Sanders had an impact on appellant, and even regardless of whether the discovery arrangement between codefendant Sanders and the prosecution was *intended* to have an impact on appellant, all the hearings at issue indisputably concerned the discovery rights and obligations of the prosecution and codefendant Sanders. Appellant had *no rights or obligations* with respect to the evidence that was the subject of the hearings. The exclusion of herself and her attorneys from these hearings, therefore, could not possibly have violated any federal constitutional rights related to the right of defendants and their attorneys to be present.

In any event, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 23; *People v. Davis* (2005) 36 Cal.4th 510, 532 [defendant's absence can be harmless]; *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-30 [absence of counsel from proceedings subject to harmless error review].) To show error, appellant must show actual prejudice (*Calderon v. Coleman* (1998) 525 U.S. 141, 146 [119 S.Ct. 500, 142 -L.Ed.2d 521]), and she has not done so. As stated previously, the evidence that was the subject of the hearings conducted in the absence of appellant and her attorneys were the letters sent by appellant to codefendant Sanders, some of which were in Jennifer Lee's handwriting. Appellant clearly knew all about these letters. She wrote them. Any reasonable person would realize that they would likely be used at trial. In light of her actual knowledge of this evidence, it is inconceivable that she was harmed in any way by being excluded from the hearings that resolved when this evidence would be disclosed to the prosecution. If appellant's attorneys were surprised by this evidence, it is only because appellant failed to inform them of its existence. Thus, appellant suffered no prejudice.

B. The State Law Claim

Though appellant initially discusses federal constitutional rights, her contention of error focuses primarily on state statutory discovery rights. Specifically, appellant argues that provisions of section 1054 did not permit ex parte discovery hearings without providing notice to her and allowing her defense team to participate in the hearings in some capacity. (AOB 130-135.) Appellant is mistaken.

Section 1054.7, entitled "Disclosure of information; time limitations," provides as follows:

> The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.
>
> Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, *to be made in camera*. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

(Italics added.)

Section 1054.7 specifically authorizes the use of "in camera" proceedings, necessarily meaning proceedings that exclude one of the parties.[32] California courts – including this one – have specifically recognized that some proceedings may be held ex parte without offending notions of fairness or due process. (See, e.g., *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430 [permitting a confidential defense motion for the appointment of a second attorney to avoid disclosure of defense strategy]; *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1092-1093 ["We are mindful that ex parte proceedings may be necessary to protect the constitutional rights of a defendant or to protect the attorney's work product"].) The Legislature, in drafting section 1054.7, seemingly contemplated a party's potential need for complete confidentiality when requesting leave to stray from general discovery disclosure obligations.

Nevertheless, citing this Court's decision in *Miller v. Superior Court* (1999) 21 Cal.4th 883, 896, appellant states, "While the trial court may hold an ex parte hearing on a discovery matter, the hearing must comport with general principles of due process." (AOB 131.) Appellant's claim misses the mark because the premise of the argument is flawed.

First, *Miller v. Superior Court* was not a discovery case – there is no mention of section 1054. Rather, the case concerned California's media shield law, and whether a news organization could be forced to produce its work

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32. Appellant contends that "in camera" does not mean "ex parte." (AOB 130.) While Black's Law Dictionary may provide appellant with ammunition to draw this distinction, the text of the applicable statute makes clear that the Legislature contemplated the exclusion of a party from the "in camera" discovery proceedings, since the express purpose of the "in camera" procedure is to keep information like "threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement" from the opposing party. No such protection would be available if "in camera" did not mean "ex parte" in this specific context.

product. Moreover, in discussing the significance of due process, what this Court actually said was, "Elsewhere, particularly in California cases, the *prosecution's right* to due process has been invoked to affirm its right to be heard in various preliminary or collateral proceedings and to oppose a defendant's claim of right to be heard ex parte and in camera." (*Miller v. Superior Court, supra*, 21 Cal.4th at p. 896.) Thus, this Court was explaining what the prosecution's "due process" rights involved, as compared to those enjoyed by criminal defendants. This Court clearly was not saying that a codefendant in a criminal action has a due process right to participate in an in camera proceeding concerning discovery issues between the other defendant and the prosecution. In fact, this Court went on to cite several cases, none of which alluded to a codefendant's due process rights to notice of discovery hearings that did not concern her. Instead, they all involved instances where the *prosecution* was excluded from a hearing by a defendant. (See *People v. Huston* (1989) 210 Cal.App.3d 192, 212; *Department of Corrections v. Superior Court, supra*, 199 Cal.App.3d at pp. 1092-1093; *People v. Dennis* (1986) 177 Cal.App.3d 863, 873; *People v. Sahagun* (1979) 89 Cal.App.3d 1, 25-26. And, the lone discovery case of the bunch – *Department of Corrections v. Superior Court* – implicitly acknowledged that ex parte proceedings that *completely* excluded the other party might be appropriate in certain circumstances. Such circumstances simply were not present in that case.[33]

Hence, the foregoing authority, upon which appellant bases her argument, stands for the proposition that the prosecution has due process rights

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33. In stating the issue to be resolved, the Court of Appeal said, "We are confronted with the question whether under the circumstances of this case the court was justified in issuing its order on an ex parte basis without the participation of the District Attorney's office." (*Department of Corrections v. Superior Court, supra*, 199 Cal.App.3d at pp. 1091-1092.) This issue statement clearly suggests the possibility that some circumstances would justify the complete exclusion of the prosecution from a discovery hearing.

that can be infringed upon when it is excluded from certain proceedings. This rule hardly helps appellant here. Here, the ex parte / in camera proceedings were initiated by codefendant Sanders. Thus, in light of the foregoing authority, any notice due was to the opposing party -- the prosecution -- who is not complaining.

While this Court has never said so, one lower appellate court has included "interested third parties" among those entitled to notice and some ability to participate in discovery proceedings that include in camera or ex parte aspects. (See *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1130.) Assuming arguendo that appellant would qualify as such an interested party, there was still no remediable error. Initially, section 1054.7 approves of the confidential proceedings if necessary to maintain the safety of a witness or preserve evidence. If appellant had significantly advanced notice that codefendant Sanders planned to call Jennifer Lee as a witness and admit the letters she wrote on appellant's behalf, both Lee's safety and her value as a witness could have been potentially compromised. (See 5RT 759-767.) If Sanders was compelled to disclose this evidence to the prosecution pursuant to the general discovery timetable, the prosecution would have been forced to turn it over to appellant, who then would have had a month to compromise Lee's value as a witness. Hence, even if appellant is the type of "interested third party" to whom notice might be due, there was no error under state law under these specific circumstances in completely excluding appellant from the proceedings.

Finally, even if appellant was entitled to notice and to participate to some extent in these discovery hearings, she could never show prejudice under any standard. Appellant unconvincingly alleges prejudice by suggesting that, had her attorneys been present at the discovery hearings, "they certainly would have objected to the nondisclosure order" and would have interviewed Lee prior to

trial. (AOB 141-142.) That representation is probably true, but it does not come remotely close to demonstrating that appellant suffered harm. This argument neglects the undeniable fact that appellant was personally aware of the existence of this evidence. All she had to do was let her attorneys know that she enlisted the services of a jail inmate to copy letters appellant had written to codefendant Sanders, which further implicated appellant in these horrible crimes. Thus, if appellant had disclosed this information to her lawyers, they would not have needed to be present at any discovery hearings concerning the Lee letters. Appellant simply is not permitted to argue she was prejudiced by exclusion from hearings concerning evidence she personally created; such a notion defies reason. As appellant has failed to demonstrate prejudice as to the state law aspect of this claim, her arguments must be rejected.[34/]

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34. Appellant also includes arguments that the trial court violated the Code of Judicial Ethics in permitting the ex parte hearings, and that appellant was denied the effective assistance of counsel by being excluded from the hearings. (AOB 135-137.) While neither contention warrants substantial attention, respondent notes the following. First, respondent is unaware of any authority – and appellant certainly does not cite any – standing for the proposition that a trial judge's alleged violation of a provision of an ethical code is sufficient to overturn a conviction on appeal. Thus, this argument is worthless to appellant, even if it were true, which it is not. Second, the notion that appellant was denied the effective assistance of counsel by counsel being excluded from the discovery hearings is the same discovery claim made by appellant herein, but stated differently. In other words, counsel could not be ineffective if they had no right to appear at the hearing. And appellant could not have been prejudiced by any ineffectiveness when she personally was aware of the evidence that was the subject of the hearings *because she created it.* Accordingly, these "claims" are entirely without merit as well.

IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PROSECUTION HAD NOT VIOLATED DISCOVERY OBLIGATIONS CONCERNING DISCLOSURE OF WITNESS STATEMENTS

Appellant next argues that the trial court committed prejudicial error "by permitting the prosecution to withhold numerous statements made by its witnesses." (AOB 143, 144-149.) The allegation is somewhat misleading, to the extent that it suggests the prosecution received judicial approval to withhold certain discovery. In actuality, the trial court ruled that the prosecution had not violated any discovery rules by not disclosing a few unrecorded, oral statements of some of the prosecution's witnesses prior to the witnesses testifying. The trial court's ruling that the prosecution did not violate any discovery rules did not constitute an abuse of discretion. Moreover, given the overwhelming amount of unchallenged evidence pointing to appellant's guilt, appellant cannot demonstrate that any alleged discovery violation was prejudicial.

A. The Applicable Law

Penal Code section 1054.1 provides in pertinent part:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] . . . (b) Statements of all defendants.

The prosecution may not avoid the disclosure requirement by refraining to obtain readily available information. (*In re Littlefield*, *supra*, 5 Cal.4th at pp. 134-135.) The California Court of Appeal for the Third District has held that, under section 1054.1, subdivision (b), unrecorded oral statements must also be

disclosed, so as to prevent "gamesmanship" by the parties.[35] (See *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165-167.)

During trial, the trial court may make "any order necessary" to enforce the statutory discovery scheme, including "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b); see also *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203 [upholding exclusion of testimony as sanction for nondisclosure].) Also, the trial court may advise the jury of any failure to disclose. (§ 1054.5) But, because a continuance is an obvious potential remedy for a late disclosure, a defendant on appeal is required to show that the prosecution's violation could not have been cured by a continuance. (*People v. Carpenter* (1997) 15 Cal.4th 312, 386.)

Should a defendant be able to demonstrate error on appeal, the remedies available for violation of the discovery rules are governed by article VI, section 13 of the California Constitution, which provides in part that:

> [n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence . . . or for any error as to any matter of procedure, unless, after examination of the entire cause, including the evidence, the [reviewing] court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

This Court has repeatedly reaffirmed the general proposition that "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*,

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35. This Court has never specifically resolved this issue.

supra, 46 Cal.2d at p. 836; see also *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 210 [following *Watson*].) California courts have required this showing of prejudice in claims of discovery violations on appeal. (E.g. *People v. Pinholster* (1992) 1 Cal.4th 865, 941 ["any failure to timely disclose the witness was harmless and did not undermine the reliability of the proceedings"]; *People v. Bell, supra,* 61 Cal.App.4th at p. 291 [applying *Watson* test to alleged discovery violation]. Assuming, without conceding, that *Roland* constitutes an accurate statement of the law, and oral statements are in fact contemplated by section 1054.1, subdivision (b), it is not reasonably probable that appellant suffered they type of prejudice that would warrant overturning her conviction and/or death sentence.

B. The Alleged Discovery Violations

Appellant alleges four examples where the prosecution violated statutory discovery rules by failing to disclose a few unrecorded, undocumented oral statements made by prosecution witnesses before they testified. Each contention of error is without merit.

1. Carolyn Thompson Jones

Appellant claims that Ms. Thompson Jones testified at a hearing conducted outside the jury's presence about conversations she allegedly had with the victim about his business affairs, and that the defense never received any discovery concerning this alleged discussion. (AOB 144.) As appellant concedes, this evidence was ultimately ruled inadmissible on relevance grounds, so the jury never heard any of this testimony. (AOB 144; 23RT 4079.) If the evidence was never presented to the jury, it is impossible that appellant suffered any prejudice whatsoever from not having received earlier notice of the ultimately excluded testimony.

Appellant also contends that she did not receive discovery of Ms. Thompson Jones's representation while testifying that she received "special training in observing people and their reactions." (AOB 145; 43RT 7497-7498, 7507-7508.) Ms. Thompson Jones offered this testimony in conjunction with her observation that, when at the hospital on the night of the victim's murder, appellant appeared calm most of the time. According to Ms. Thompson Jones, appellant never displayed any tears, and only displayed any emotion when someone was watching her. (43RT 7507-7508.)

The defense objection at trial was not simply that discovery of this statement had not been produced. Rather, defense counsel argued that "we've had no discovery that they intend to call this person as an expert," and that "we have no statement from the person as an expert which we're supposed to receive under 115." Ultimately, the defense argued that it "should at least be entitled to some oral discovery of the *expertise of the person* and their *expert opinion*." (43RT 7499.) The trial court overruled the objection, determining that Ms. Thompson Jones was not being called as an expert. (43RT 7500-7503.)

Appellant's claim on appeal is clearly different from the objection raised below, and the ruling of the trial court to that objection. In other words, the trial court did not have occasion to determine whether there was a discovery violation in terms of the defense not receiving notice of the oral statement at issue, because that objection was not specifically raised. Appellant's failure to raise the instant claim below means it is waived on appeal. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1264 [discovery violation-based claim waived on appeal when objection at trial was based on different grounds].)

In any event, appellant cannot not show error because she cannot show that a continuance would not have cured any harm caused by late disclosure of the statement. (*People v. Carpenter, supra,* 15 Cal.4th at p. 386.) In fact,

appellant does not address the issue at all. And, with respect to Ms. Thompson Jones, appellant does not even attempt to demonstrate that the supposed violation was prejudicial. (See AOB 149 [making general allegations of unfairness, and only specifically discussing statements made by witnesses DeGreef and Lee].) Appellant's failures in the foregoing respects precludes any finding of error.

Regardless, any error in not providing the defense with the oral statement in issue was harmless under any standard of prejudice. First, Ms. Thompson Jones's ability to recollect events was impeached. Appellant called two witnesses on surrebuttal (Charles and Isabel Kayser) at the guilt phase. The testimony provided contradicted Carolyn Thompson Jones's recollection that Charles Kayser had been at the hospital on the night Melvin Thompson was murdered. (43RT 7515, 44RT 7567, 7570.) Finally, appellant was not convicted of capital murder because she did not receive advanced notice of the special training Ms. Thompson Jones received concerning observation of others. Rather, she was convicted because the prosecution's case overwhelmingly demonstrated that she was the ringleader in a conspiracy to commit murder, and in the actual murder itself, of her husband. Thus, any error was harmless. (See *People v. Memro* (1985) 38 Cal.3d 658, 684; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

2. Tony DeGreef

Appellant next claims discovery violations in connection with oral statements made by Tony DeGreef, which the defense was not made aware of prior to his testifying at trial. Mr. DeGreef testified that appellant claimed that the victim was not participating in the discussions to repurchase the Hillary home after foreclosure because he was ill and because appellant did not want him to know what was happening. (24RT 4113.) Appellant argues that these statements were never produced during discovery. (AOB 145.)

At trial, appellant objected on the grounds that these precise statements had not been disclosed and moved for a mistrial. The prosecution explained that everything written had been turned over, and the defense was well aware that the prosecution planned to prove that the victim knew nothing of the Hillary home foreclosure and appellant's plan to repurchase it. Appellant's mistrial motion was denied. (24RT 4114-4116.)

Again, even if oral statements are subject to the pertinent discovery rules, and Mr. DeGreef's oral statements about appellant's representations that the victim was ill and that she wanted him in the dark with respect to the Hillary home situation, appellant's failure to show that a continuance would not have cured any harm mandates rejection of this claim. (*People v. Carpenter, supra,* 15 Cal.4th at p. 386.) Appellant fails to discuss or explain how Mr. DeGreef's testimony would have been different had the statements at issue been disclosed earlier, or how appellant's trial attorneys would have cross-examined him differently on these statements if they knew about them in advance. Appellant's failure to address this question mandates rejection of the instant claim of error.

In any event, any error was patently harmless. A plethora of other evidence unambiguously demonstrated appellant's fraudulent financial antics, which were taking place without the victim's knowledge. For example, appellant and codefendant Sanders posed as Melvin and Millie Thompson to secure a loan against the Sycamore property the victim still owned with his ex-wife. (23RT 3898, 3949-3952.) To execute this fraud, appellant went so far as to have someone who identified herself as "Rene," and who claimed to work for Kayser Service, verify that appellant and codefendant Sanders had temporary driver's licenses because their permanent licenses were recently stolen. (23RT 3981.). Thus, Mr. DeGreef's testimony was hardly the entirety of the evidence presented to conclusively demonstrate that appellant conducted

her fraudulent, unlawful conduct without the victim knowing. Accordingly, any error was harmless under any standard of prejudice.

3. Tommy Thompson

Appellant next argues that the prosecution failed to disclose an oral statement of Tommy Thompson, whereby he explained how grief-stricken appellant once was when her cat died. (AOB 146.) The prosecution intended to present this evidence to show the contrast in her emotional reaction following the victim's death in this case. (26RT 4503-4504.) At trial, when appellant's defense attorneys objected to this evidence on the ground that they had received no discovery relating to it, the prosecutor explained that she had just learned about it herself. (26RT 4504.) Appellant's attorneys moved that the evidence be excluded as a sanction, but the trial court explained that no discovery order or rule had been violated. As the court ruled,

> The sanction of not letting it in, I'm not going to exercise my discretion at this point because I don't think that a half hour or hour lapse had affected trial or preparation.

(26RT 4505.)

In other words, the prosecution was not obligated to immediately find defense counsel and relay oral statements of prosecution witnesses every time such a statement was discovered. Disclosure of such a statement within an hour was certainly permissible. And, the defense learned about the statement before Tommy Thompson testified. Thus, assuming oral statements are subject to section 1054.1, the prosecution complied with that rule in this case.

In any event, any error was clearly harmless. Evidence of appellant's lack of an emotional response to her husband's death is hardly what persuaded the jury to convict her. Rather, the jury was likely convinced of appellant's guilt based on the overwhelming, and in large part uncontroverted, evidence

demonstrating her involvement in and financial motive to murder her husband. (See Harmless Error section in Argument I, *supra,* at pp. 51-54.)

4. Jennifer Lee

Finally, appellant argues that Jennifer Lee's testimony concerning appellant's jailhouse claims of wealth was evidence not produced to the defense during discovery. (AOB 146.) As explained in great detail in Arguments II and III, *supra*, Jennifer Lee was not a prosecution witness; she was called by codefendant Sanders as part of his defense case. And, as explained previously, there is no right to discovery between codefendants. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 101; *People v. Coffman*, *supra*, 34 Cal.4th at pp. 112-113.) Accordingly, there was no error with respect to this evidence.

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE ADDRESS OF PROSECUTION WITNESS CHRISTINE KURETICH TO REMAIN CONFIDENTIAL

Appellant next argues that the trial court erred by allowing the prosecution to withhold disclosure of prosecution witness Christine Kuretich's address from the defense. (AOB 150-157.) This claim lacks merit.

The prosecution is generally required to disclose to the defense the names and addresses of persons the prosecution intends to call as witnesses at trial. (§ 1054.1, subd. (a).) Such disclosure is made only to defense counsel. Counsel may disclose such information only to those employed by counsel or appointed by the court to assist in preparation of the defense. (§ 1054.2, subd. (a)(1), (2).)

On a showing of good cause a court may deny, restrict or defer any disclosure required by the code. "Good cause" is defined as "threats or possible danger to the safety of a victim or witness, possible loss or destruction of

evidence, or possible compromise of other investigations by law enforcement." (§ 1054.7.) Upon the request of any party the court may allow the showing of good cause to be made in camera.

The task for the trial court is to balance the need for information helpful to the defense against the safety of witnesses and the protection of the judicial process. (See *Alvarado v. Superior Court, supra,* 23 Cal.4th at pp. 1149-1151; *Reid v. Superior Court, supra,* 55 Cal.App.4th at pp. 1332-1339; *People v. Ramirez* (1997) 55 Cal.App.4th 47, 56-57; *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 768-772.) The trial court has broad discretion in effecting that balance and absent abuse its determinations will not be disturbed on appeal. (See *Alvarado v. Superior Court, supra*, 23 Cal.4th at pp. 1134-1136; *Reid v. Superior Court, supra*, 55 Cal.App.4th at p. 1339.)

Here, appellant cites to very little in support of her contention that Ms. Kuretich's address was wrongly kept from the defense. In essence, she relies on a motion and supporting declaration from trial counsel that was filed in an effort to obtain Ms. Kuretich's address. (AOB 151-152, citing to 7CT 2121-2129.) Though appellant fails to cite to any portion of the record, she further contends that the prosecution had no justification for withholding the information, and that the trial court erred in allowing the prosecution to withhold the information under those circumstances. (AOB 154-157.)

The trial record itself quite clearly explains the nature of the ex parte hearing that took place, and the reason the trial court allowed the prosecution to keep Ms. Kuretich's address confidential. While testifying during the guilt phase of appellant's trial, Ms. Kuretich explained that, while living with codefendant Sanders and Carolyn Sanders during the time of the crimes, she was abusing alcohol and taking drugs. She further explained that she met a man, got sober, became a Christian, got pregnant, and moved out of the state with her boyfriend to start a family in a new environment. She moved to

Arizona, and then after testifying at the preliminary hearing in this case, she secretly moved to Kansas so that she would not be located by anyone associated with this case. (29RT 5101-5102.) When asked at trial her reason for leaving, Ms. Kuretich said:

> Actually, I was – – see I testified in the preliminary hearing and I was very much afraid of the defendants in this case, and I was afraid, I'm afraid of public speaking, and I was afraid something would happen to me if I was to testify in the trial against them, and I had a great deal of fears.

(29RT 5103.)

Ms. Kuretich then admitted that she hid from the prosecutors in Kansas, despite her promise to maintain contact with the District Attorney's Office. When Los Angeles authorities finally located her, she was taken into custody as a material witness. (29RT 5104.)

It appears obvious from the record that the prosecution sought leave to withhold Ms. Kuretich's address from the defense based on her fears of appellant, codefendant Sanders and his wife. This fear was patently reasonable, considering that these three individuals participated in the planning of and commission of a cold-blooded murder, of which Ms. Kuretich had direct knowledge. These factors constitute the precise type of "good cause" under section 1054.7 that permits the prosecution to withhold witness identifying information from the defense. Clearly, the trial court did not abuse its discretion under these circumstances.

Moreover, because the defense had all the statements Ms. Kuretich had ever made to law enforcement in connection with this case, and because the defense had Ms. Kuretich's preliminary hearing testimony, and because Ms. Kuretich was subjected to full cross-examination at trial, appellant does not, nor

could she, establish any prejudice.[36] Amazingly, all appellant argues with respect to prejudice is that, because Ms. Kuretich once had a drug and alcohol problem, and because she denied still having such problems by the time of trial, "information about her current address was necessary to investigate her reputation for alcohol and drug use at the time of trial." (AOB 157.) In other words, appellant admits that she was quite aware of what Ms. Kuretich's testimony would be, and that no surprises would be forthcoming. Appellant admits that she had no desire, nor any need, to *interview* Ms. Kuretich before trial, which is the primary purpose of the witness information disclosure provisions of the Penal Code. (See, e.g., *Reid v. Superior Court, supra*, 55 Cal.App.4th at pp. 1332-1333 [prosecution must produce witness identification information to defense because defense has "the right to directly contact those [witnesses] to request pretrial interviews as part of the defense investigation"].) Those provisions do not exist to permit defendants to conduct entirely speculative investigations into collateral matters. Accordingly, appellant's failure to allege a recognized basis of prejudice mandates that this argument be rejected

Moreover, when the only information withheld from the defense is the witness's address, and the address is "inconsequential to the defendant's right to a fair trial under the facts presented," there is no error in even permanently withholding that information from the defense. (*Alvarado v. Superior Court, supra,* 23 Cal.4th at pp. 1142-1143, citing *Montez v. Superior Court, supra,* 5 Cal.App.4th at p. 771 [where "the facts raise no issue of [the witness']reputation in their community for veracity," witness' addresses need not be disclosed]; *People v. Watson* (1983) 146 Cal.App.3d 12, 20 [no violation of defendant's rights when witness's address withheld because "ample evidence

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36. Appellant concedes that she had all of this information before trial. (AOB 150-152.)

. . . to place the witness . . . in his proper setting and accurately to evaluate his credibility"]; *People v. Castro* (1979) 99 Cal.App.3d 191, 200- 204 [witness's address not necessary for defense impeachment investigation where witness had already been impeached as a drug addict, felon, and cheat].)

Here, the defense had plenty of ammunition to impeach Ms. Kuretich's credibility. Ms. Kuretich admitted during cross-examination that she initially lied to police when questioned in connection with the murder of Melvin Thompson. (29RT 5110.) She further admitted that, even though she possessed a wealth of information indicating that appellant, codefendant Sanders and his wife were involved in the murder of Melvin Thompson, she did not initially provide that information to law enforcement. (29RT 5112-5115.) And, the jury was informed that she was abusing drugs and alcohol at the time of the crimes, and even at the time of the preliminary hearing (alcohol only). (29RT 5103-5106, 44RT 7622-7623.) Being prevented from trying to conduct an investigation for clues as to whether Ms. Kuretich was still abusing alcohol and/or drugs at the time of trial, even though she denied it, did not violate appellant's substantial rights. Thus, no error occurred under either state law or the federal Constitution.

VI.

THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE PERMITTED CHRISTINE KURETICH TO TESTIFY ABOUT STATEMENTS MADE BY CODEFENDANT SANDERS AND CAROLYN SANDERS CONCERNING THE PLAN TO MURDER AND THE ACTUAL MURDER OF MELVIN THOMPSON

Appellant next argues that the trial court erred by allowing Christine Kuretich to testify about certain statements made by codefendant Sanders and Carolyn Sanders related to the murder. The trial court admitted these statements pursuant to the co-conspirator exception to the hearsay rule, and

appellant argues that doing so constituted reversible error. (AOB 158-165.) Respondent disagrees.

A. Relevant Procedural History

Prior to trial, appellant filed a motion to exclude as hearsay certain statements made by codefendant Sanders and Carolyn Sanders to or in the presence of Christine Kuretich, concerning the plans to murder Melvin Thompson for insurance money. (3CT 891-935.) In response to the motion, the prosecution argued that the statements in issue were admissible pursuant to Evidence Code section 1223, which makes admissible statements made by a declarant while participating in a conspiracy. (7CT 1846-1852.) Appellant argued that this exception to the hearsay rule was inapplicable because the prosecution had failed to establish a prima facie case that a conspiracy existed when the subject statements were made. (3CT 891-935.) At the conclusion of a pre-trial hearing on appellant's motion, the trial court ruled that statements made by codefendant Sanders, Carolyn Sanders and Robert Jones, between June 1, 1990 and June 14 (the day of the murder) 1990, concerning details of the murder plan were admissible under Evidence Code section 1223. (29RT 5007 ["Statements 2 and 3, that is Groups 2 and 3, I find there is sufficient evidence to show a prima facie showing that in fact both parties were part of said conspiracy"].)[37] Ms. Kuretich then testified during trial in great detail as

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37. The prosecution divided the potential statements into four groups. The first group, which was a single statement, involved Carolyn Sanders inquiring of Christine Kuretich whether she knew anyone who would commit murder for some insurance money. (9CT 2663.) The trial court ruled this statement inadmissible. (29RT 5007.) The second group of statements were explained by the prosecution as:

> . . . statements . . . after the first statement and before the murder. They were related in conversations between Phillip Sanders and Carolyn Sanders in which Christine Kuretich was present in plain view listening to the statement. During these statements Carolyn

to statements made by codefendant Sanders, Carolyn Sanders and Robert Jones. (See 29RT 5084-5108.) Appellant failed to object to any of Ms. Kuretich's testimony on hearsay grounds. (See *id.*)

B. The Applicable Law

Hearsay evidence is generally inadmissible. (Evid. Code, § 1200, subd. (b).) However, "Evidence Code section 1223 provides an exception to the hearsay rule as to statements made during the existence of a conspiracy that are in furtherance of its objective." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 59.) As one court has explained,

> The admission-of-a-coconspirator hearsay exception, set forth in Evidence Code section 1223, is a type of authorized admission. The justification for the exception is that, by reason of the conspiracy

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> Sanders and Phillip Sanders were discussing finding someone to do the killing. They further discussed the details of the murder. Finally, they also discussed that they could not find anyone to do the killing. They decided they would have to do the killing themselves since they had already been paid and had used the money for their rent.

(9CT 2663.)

> The third group of statements were:
> . . . statements [that] involved Robert Jones, Phillip Sanders and Carolyn Sanders. Christine Kuretich was present in plain view when they were made. In these statements the details of the murder were also discussed. Further, it was discussed that Phillip Sanders would do the shooting and Robert Jones would drive the car and provide the gun. One to two days before the murder, Robert Jones said that he found the gun.

(9CT 2663.)

The final group was comprised of post-murder statements concerning Robert Jones having destroyed the gun. (*Ibid.*) The trial court ruled admissible, under Evidence Code section 1223, Groups Two and Three, and inadmissible Groups One and Four. (29RT 5007-5012.)

> between the declarant and a party, the party authorizes the coconspirator to do, and say, everything that would further the objectives of the conspiracy. Thus, the authority from a party to the declarant to speak about the subject of the conspiracy is derived from the fact of the existence of the conspiracy. Proof of the existence of the conspiracy constitutes proof of authorization to the declarant to speak in furtherance of the objectives of the conspiracy.

(*People v. Perez* (1978) 83 Cal.App.3d 718, 729.)

"Hearsay statements by coconspirators . . . may nevertheless be admitted against a party if, at the threshold, the offering party presents 'independent evidence to establish prima facie the existence of . . . [a] conspiracy.' [Citations.]" (*People v. Hardy, supra,* 2 Cal.4th at p. 139.) The existence of a conspiracy at the time the statement is made is the preliminary fact to the admissibility of the coconspirator's statement. (*People v. Herrera*, *supra*, 83 Cal.App.4th at p. 61.) As the *Herrera* court further explained,

> [T]he proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a coconspirator's statement under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made.

(*Herrera, supra*, at p. 63.) In this regard, there must be independent evidence of the conspiracy, and the conspiracy cannot be proved by the coconspirator's hearsay statements. (*Id.* at p. 65; *In re David B.* (1978) 81 Cal.App.3d 806, 810.)

A conspiracy exists when one or more persons have the specific intent to agree to conspire to commit an offense, as well as the specific intent to

commit the elements of that offense, together with proof of the commission of an overt act by one or more of the parties to such agreement in furtherance of the conspiracy. (§§ 182, 184; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 599-600; *People v. Belmontes* (1988) 45 Cal.3d 744, 789.) These facts may be established through the use of circumstantial evidence. (*People v. Longines* (1995) 34 Cal.App.4th 621, 626; *People v. Towery* (1985) 174 Cal.App.3d 1114, 1131-1132.) They may also be "'inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135, quoting *People v. Cooks* (1983) 141 Cal.App.3d 224, 311.)

The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. (*People v. Herrera, supra,* 83 Cal.App.4th at p. 63.) For purposes of the foundational finding, however,

> it is not necessary to prove the alleged co-conspirators met and actually agreed to perform the unlawful act or that they previously arranged a detailed plan for its execution. The requisite agreement may be inferred from conduct of the conspirators mutually carrying out a common purpose to commit a crime or tort. I.e., "the very crux of the conspiracy . . . may be shown also by circumstantial evidence." [Citations.]

(Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2005) ¶ 8:1188, p. 8D-46.) Moreover, the admissibility of the challenged statements is not affected by the fact that no conspiracy was charged. (*In re David B., supra,* 81 Cal.App.3d at p. 810.)

Generally, the foundation must be established before the hearsay evidence may be introduced. However, the court has discretion to conditionally receive the co-conspirator's declaration subject to introduction, at a later point in the trial, of adequate evidence on the preliminary fact of the conspiracy.

(*People v. Hinton* (2006) 37 Cal.4th 839, 895; *In re David B.*, *supra*, 81 Cal.App.3d at p. 810; *People v. Perez*, *supra*, 83 Cal.App.3d at p. 728.)

> Once the existence of the conspiracy has been independently established, the offering party must then make three additional showings in order for the trier of fact to consider the content of the co-conspirator's statement: (1) the declarant (who may or may not be the defendant) was participating in a conspiracy at the time of the declaration; (2) the declaration was made in furtherance of the objective of the conspiracy; and (3) at the time of the declaration the party against whom the evidence is offered was participating, or would later participate, in the conspiracy.

(*People v. Herrera*, *supra*, 83 Cal.App.4th at p. 64, citing *People v. Sanders* (1995) 11 Cal.4th 475, 516; *People v. Hardy*, *supra*, 2 Cal.4th at p. 139.)

C. This Claim Is Forfeited On Appeal

Appellant has forfeited this claim for purposes of appeal by failing to properly preserve it below. As this Court has explained,

> The general rule is that "when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal" [Citation], although a sufficiently definite and express ruling on a motion in limine may also serve to preserve a claim [Citation].

(*People v. Brown* (2003) 31 Cal.4th 518, 547.)

Here, appellant moved to exclude groups of statements she contended were inadmissible hearsay. The trial court ruled that relevant statements made during a particular time frame would be admissible pursuant Evidence Code section 1223. However, when Christine Kuretich actually testified at trial, and explained the actual specific statements made by the conspirators, appellant failed to object to any of them on hearsay grounds. Respondent submits that,

because the actual statements were not revealed until Ms. Kuretich actually testified, appellant was required to proffer specific and timely objections at that time to preserve any evidentiary issues for appeal. Her failure to do so forfeits this claim now.

D. Even If This Claim Had Been Properly Preserved, It Is Nevertheless Without Merit

Even had appellant properly preserved this claim for appeal, it is nevertheless without merit. The prosecution's burden was minimal, needing only to produce evidence showing it more likely than not that a conspiracy to murder Melvin Thompson existed at the time the subject statements were made. But the evidence demonstrating the conspiracy was compelling, and was comprised of the following:

Michael Lutz saw codefendant Sanders and Robert Jones approach the victim's shop in the rented Acclaim just prior to the murder. Mr. Lutz testified that the passenger, who he identified as codefendant Sanders, got out of the car and went into an alley. Shortly thereafter, gunshots were heard, and codefendant Sanders then reemerged from the alley, got back in the car, and left with the driver of the Acclaim, who Mr. Lutz identified as Robert Jones. Mr. Lutz recorded the license plate number of the Acclaim. (25RT 4348-4359, 4361, 4363-4365, 4370, 4380.) This evidence supported the reasonable inference that codefendant Sanders and Robert Jones were directly involved in the actual shooting of Melvin Thompson.

The license plate number recorded by Mr. Lutz allowed police to trace the Acclaim to codefendant Sanders and Carolyn Sanders' residence. (33RT 5763-5764.) The keys for the white Acclaim were found on a table inside the residence. Underneath the keys was a piece of paper with appellant's phone number on it. (33RT 5765-5768.) This evidence further established

codefendant Sanders's involvement in the murder, and now implicated that he was in contact with appellant.

Further investigation revealed that dozens of telephone calls were made between appellant and codefendant Sanders and Carolyn Sanders. Between May 4, 1990, and June 14, 1990, the date of the murder, numerous telephone calls occurred between locations regularly attended by appellant and codefendant Sanders. Specifically, 11 calls were made from codefendant Sanders's home to Kayser Service. Nineteen calls were made from Kayser Service to the Sanders' home. Three calls were made from appellant's home to Barrish Chrysler-Plymouth, codefendant Sanders's place of employment. And two calls were made from Barrish Chrysler-Plymouth to appellant's home. Codefendant Sanders acknowledged that many of the calls were between himself and appellant, but claimed the conversations concerned the prospective purchase of an automobile for appellant's son. However, sales documents showed that Girard Jaquet never purchased a car from codefendant Sanders, and instead purchased an automobile from a Ford dealership well before any of the calls were made that codefendant Sanders claimed related to Girard's potential purchase of a car from him. (40RT 6776-6778; Peo's. Exh. 144.) According to Sanders, some of the other calls concerned a $1,500-loan from appellant. He did not recall some of the other calls, or contended that he was not a party to them. (39RT 6636-6658, 6683-6703.) Despite the wealth of evidence showing an ongoing dialogue between appellant and codefendant Sanders and/or Carolyn Sanders, when she was eventually arrested for the murder of her husband, appellant stated, "I didn't know Phil at all. I only met him once and that was about the sale of a car." (27RT 4717.) Prior to appellant making that statement, neither Detective Kingsford nor Detective Fullerton had ever mentioned the name codefendant Sanders or "Phil" to appellant. (27RT 4714.) More significantly, undisputed telephone records demonstrated that

appellant was untruthful about her knowledge of and contact with codefendant Sanders.

Additionally, a post-murder search of the victim's repair shop revealed a letter written by appellant describing in detail the victim's appearance and work schedule. (26RT 4512-4516, 4523-4524.) A reasonable inference to draw from this evidence is that appellant wrote the description for the actual killer, so that the victim could be unmistakably identified. Appellant would not have needed to write the description for herself, indicating she had enlisted the services of at least one other person to participate in the killing of Melvin Thompson.

Also, the evidence demonstrated that, months before the murder, appellant, codefendant Sanders and Carolyn Sanders participated in a scheme to secure a fraudulent loan in order to help appellant get her home out of foreclosure. In November 1989, two months after losing her West Hills home in foreclosure, appellant and codefendant Sanders, posing as Mellie and Melvin Thompson, met with mortgage broker, Dorothy Reik, in an attempt to obtain a loan on the South Sycamore property. (23RT 3949-3952.) To facilitate the fraud, appellant and codefendant Sanders produced temporary driver's licences which purported to identify them as Mellie and Melvin Thompson. Ms. Reik observed that the temporary licenses had been issued that very day. In response to the observation, appellant and codefendant Sanders claimed that their actual licenses had been stolen. Ms. Reik also observed that codefendant Sanders's weight was inconsistent with the weight listed on the Melvin Thompson temporary driver's license. (23RT 3949-3954, 3980-3981.)

Because appellant and codefendant Sanders were unable to produce photo identification (the temporary licenses had no photographs), Ms. Reik required witnesses to formally identify appellant and codefendant Sanders as actually being Mellie and Melvin Thompson. Isabelle Sanders was one of the

witnesses, and Carolyn Sanders was the other. Appellant and codefendant Sanders signed the loan documents for the Sycamore property in Ms. Reik's presence. (23RT 3955-3959.) Appellant and codefendant Sanders signed an authorization to release $25,000 of the funds prior to the close of escrow, and that money was given to appellant and codefendant Sanders. Additional funds were used to pay off a first trust deed and outstanding property taxes. The remainder of the $98,000 was later given to appellant and codefendant Sanders as well. Ms. Reik eventually discovered that appellant and codefendant Sanders had been imposters. (23RT 3960-3964, 4059.) The foregoing evidence established that appellant had serious financial problems, that she was willing to commit crimes to resolve them, and that she had enlisted codefendant Sanders and Carolyn Sanders, among others, to participate in the crimes.

Finally, appellant was never delinquent on the life insurance premiums for Melvin Thompson. Upon Melvin's death, appellant immediately assigned the proceeds of the insurance policy to Tony DeGreef of Bid Properties so she could re-purchase her foreclosed property. (24RT 4122.)

In sum, the foregoing evidence demonstrates that appellant was in desperate financial condition, and was willing to commit criminal acts to obtain money she needed to reacquire the Hillary home she permitted to go into foreclosure. The evidence showed that she enlisted the help of codefendant Sanders and Carolyn Sanders to participate in the fraudulent loan scheme that preceded the murder. The evidence further demonstrated that Melvin Thompson was murdered, with the proceeds of his life insurance policies going to appellant's reacquisition of the Hillary property. And the evidence demonstrated that codefendant Sanders and Robert Jones were likely participants in the murder. (24RT 4122, 26 RT 4435-4443, 4469.) Even without any of the statements attributed to codefendant Sanders, Carolyn Sanders and/or Robert Jones, the foregoing evidence easily established a prima

facie existence of a conspiracy, if not a conspiracy beyond a reasonable doubt, between appellant and the foregoing individuals to murder Melvin Thompson for insurance money. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 139.) The prosecution was required to do nothing more to warrant admission of the statements attributed to the conspirators by Christine Kuretich.[38/39/]

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38. Actually, after establishing a prima facie case of conspiracy, the prosecution is obligated to show: that the declarant was participating in a conspiracy at the time of the declaration; that the declaration was made in furtherance of the objective of the conspiracy; and that at the time of the declaration the party against whom the evidence is offered was participating, or would later participate, in the conspiracy. (*People v. Herrera*, *supra*, 83 Cal.App.4th at p. 64; *People v. Hardy*, *supra*, 2 Cal.4th at p. 139.) But appellant necessarily concedes that these three factors were satisfied because her argument is solely that the prosecution failed to establish the existence of a conspiracy by a preponderance of the evidence. (AOB 158-164.) Having demonstrated that appellant is wrong in this respect, this claim of error must be rejected.

39. Though not critical to the resolution of this claim of error, respondent notes that appellant misinterprets the record in an important way. In attempting to bolster her claim that the prosecution failed to meet its burden, appellant argues that the trial court relied, in part, on statements made by codefendant Sanders to determine the existence of a conspiracy, and his participation in it. As argued in her Opening Brief, appellant contends:

> The court impermissibly relied on these statements themselves to establish Sanders was part of the conspiracy. ["[C]learly by his own statements he was part of the conspiracy during those statements in which he, his wife and at times Kuretich discussed the murder." (RT29:5007.) The existence of a conspiracy must be established by evidence independent of the proffered declaration.

(AOB 163.)

Instead, what the trial court actually ruled in this instance was that there was insufficient evidence to establish a prima facie case of conspiracy for purposes of the Group One statement the prosecution sought to admit. The court noted that codefendant Sanders's own statements established that he was part of the conspiracy, but that the court could not consider those statements, and the remaining evidence, while sufficient for purposes of the statements in Groups Two and Three, was not sufficient for the Group One statement. (29RT

In any event, any error was harmless, in that it is not reasonably probable that a different verdict would have been reached absent the alleged error. (*People v. Duarte* (2000) 24 Cal.4th 603, 619 [*Watson* sets forth "the standard applicable to state law error in the admission of hearsay"].)[40] It is undeniable that Christine Kuretich's testimony, particularly her discussion of the inculpatory statements made by all the conspirators, was helpful. But as the foregoing evidence illustrated, the only logical inference to draw from it is that codefendant Sanders, Carolyn Sanders and appellant were working together. There is no other rational way to explain codefendant Sanders's role as the gunman. Based on strong evidence that demonstrated that codefendant Sanders actually shot and killed Melvin Thompson, along with the evidence showing that appellant was in dire need of money – including her earlier fraudulent loan scheme that included codefendant Sanders and Carolyn Sanders' participation – the jury would have concluded that a conspiracy existed to murder Melvin Thompson for insurance proceeds, regardless of Christine Kuretich's testimony. Accordingly, any error was harmless.

5007.) In other words, the trial court applied the law precisely as it was obligated to, and considered no improper evidence in determining that the prosecution met its burden as to the statements ultimately admitted pursuant to Evidence Code section 1223.

40. The erroneous admission of a hearsay statement that results in a Confrontation Clause violation requires reversal unless the error is harmless beyond a reasonable doubt. (See, e.g., *People v. Houston* (2005) 130 Cal.App.4th 279, 295-296.) Here, though, both codefendant Sanders and Carolyn Sanders testified at trial and were subject to cross-examination. Accordingly, the alleged error is one of state law only, resulting in the application of the *Watson* harmless error standard.

VII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY TO DISREGARD QUESTIONS ASKED OF CHRISTINE KURETICH CONCERNING POLYGRAPH EXAMINATIONS

Appellant next argues that the trial court erred by instructing the jury that polygraph questions asked of Christine Kuretich by both appellant's trial attorney and the prosecutor were improper. (AOB 166-174.) Appellant is wrong.

A. Relevant Factual And Procedural History

Christine Kuretich was not initially truthful with police when she was questioned about her knowledge of Melvin Thompson's murder. Instead, she attempted to place the blame on Gregory Jones, who actually had nothing to do with the killing or the planning. (29RT 5095-5097.) Ms. Kuretich was re-interviewed in August 1990, when she finally told the truth, informing police that codefendant Sanders and appellant were involved in the murder. (29RT 5097; 32RT 5591.)

On cross-examination, when Ms. Kuretich explained that the reason she finally told the truth to police and prosecutors, she said, "I was nervous. It was just time that I told the truth, and they mentioned a lie detector so I knew they would know anyway." There was no objection from the prosecution to the mention of a lie detector. (29RT 5118.) As cross-examination continued, the following exchange occurred between defense counsel and Ms. Kuretich:

> Q. Ms. Kuretich, you just told us a couple of minutes ago that it was your own self-interest, the fact that you were afraid of the polygraph examination, you were afraid of the police that prompted you to change your story?

A. That was, those were two of the main factors but also I was feeling terrible. I couldn't sleep. I thought about it every day.

Again, there was no objection to the mention of a polygraph exam. (29RT 5122.)

Finally, near the end of the first part of cross-examination, defense counsel asked, "Ms Kuretich, from August 27 until today, have the police administered a polygraph exam to you?" Ms. Kuretich responded that they had not. The prosecution did not object to this exchange. (30RT 5265-66.)

On redirect examination, in response to the defense questions concerning whether Ms. Kuretich was truthful with police, the following exchange took place:

Q. [PROSECUTOR] You were also asked a question with respect to your decision to tell the truth and the police officers asking you whether or not you were willing to take a polygraph. [¶] Do you remember that?

A. Yes.

Q. Would you be willing to take a polygraph today?

(32RT 5581.)

The defense objected to the question and the objection was sustained. Both parties then approached and a discussion with the trial court took place. The prosecutor explained that the polygraph question was in response to similar questions asked by the defense. The trial court ultimately determined that questions from both sides specifically inquiring to the witness's past or present willingness to take a polygraph examination were improper, but that the defense questions that led Ms. Kuretich to explain that she changed her version of events when interviewed by police and prosecutors was in part due to the threat of a polygraph examination were permissible. (See 32RT 5583-5586.) The

trial court explained that it would instruct the jury to disregard the inappropriate polygraph references,[41] and did so instruct as follows:

> I think one of the worse things the jury [sic] likes to do in the middle of a trial is give a cautionary comment. [¶] At the very end of [appellant's attorney's] cross-examination of this witness, he asked her whether or not she had ever taken a polygraph examination. [¶] [The Prosecutor] has countered with a question that she just asked a minute ago. [¶] Both those questions are improper. Polygraphs in my opinion and I think in the opinion of a lot of people are inherently unreliable. [¶] That's why they're not admissible in a court of law in California and you shouldn't take that into consideration at all, whether someone takes a polygraph or they don't. [¶] Now, the one area that it may – it's a good investigative tool that the police use. Sometimes the threat of using or requesting a polygraph can have a salutary effect. [¶] That portion of the questioning [appellant's attorney] dealt with that was proper but whether or not this witness has ever taken a polygraph or would take a polygraph or wouldn't take a polygraph is totally irrelevant. You should put that out of your mind.

(32RT 5588-5589.)

There were no objections to the substance, content or sufficiency of the court's cautionary instruction. (*Ibid.*)

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41. Defense counsel asked that the trial court not instruct the jury at all. The trial court explained that if it did not, that the prosecution would be permitted to ask whether Ms. Kuretich was willing to take a polygraph, in response to the defense's question as to whether Ms. Kuretich had ever been polygraphed. The trial court then instructed the jury. (30RT 5586-5587.)

B. The Trial Court's Timely And Legally Accurate Cautionary Instruction Rendered Any Impropriety Non-prejudicial

The law concerning polygraph evidence is uncomplicated and straightforward. Under Evidence Code section 351.1, subdivision (a), the results of a polygraph test or any reference to it "shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results." (Evid. Code, § 351.1; see also *People v. Schiers* (1971) 19 Cal.App.3d 102.) "Polygraph evidence is inadmissible because of the lack of scientific certainty about the results and also because lay persons tend to invest such evidence with an inordinately high degree of authority." (*People v. Lee* (2002) 95 Cal.App.4th 772, 792 fn. omitted.) Even before codification of the common law rule in section 351.1, this Court rejected the argument "that evidence of [the accused's] willingness to take such a test should be admissible as 'a badge of innocence.'" (*People v. Thornton* (1974) 11 Cal.3d 738, 763-764, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 685 fn. 12, and abrogated on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 232-238.) Polygraph results simply "do not scientifically prove the truth or falsity of the answers given during such tests." (*People v. Jones* (1959) 52 Cal.2d 636, 653.) The accused's willingness or lack of willingness to take a polygraph examination is "without enough probative value to justify its admission." (*People v. Carter* (1957) 48 Cal.2d 737.)

However, this Court has "held that a trial court's timely admonition, which the jury is presumed to have followed, cures prejudice resulting from the admission of such evidence." (*People v. Cox* (2003) 30 Cal.4th 916, 953.) Prejudice in this evidentiary respect is measured under the familiar standard of *People v. Watson, supra*, 46 Cal.2d at p. 836. (See *People v. Basuta* (2001) 94 Cal.App.4th 370, 391.)

Initially, to the extent appellant's claim of error focuses on the adequacy of the trial court's cautionary instruction, such a claim is waived on appeal based on the absence of any objection at trial. Appellant objected to the prosecutor's question about whether the witness would submit to polygraph, and initially asked that no cautionary instruction be given. But, appellant never objected to the wording, content or adequacy of the instruction ultimately given by the trial court. Accordingly, appellant's current objection to the sufficiency of the instruction itself is untimely and therefore forfeited. (*People v. Bolin* (1998) 18 Cal.4th 297, 326-327.)

In any event, the claim is patently meritless. The trial court handled the situation in precisely the legally appropriate manner. In the trial court's view, all questions concerning whether the witness had been polygraphed, or was willing to submit to a polygraph examination, were improper. That view is clearly supported by the applicable law. On the other hand, the trial court also felt that some of the testimony by the witness concerning lie detectors – specifically the testimony as to why the witness ultimately decided to be truthful with police – did not offend the authorities rendering inadmissible most polygraph-related questions and testimony. This view, too, was supported by the applicable law.

Accordingly, the trial court responded exactly as it should have; by issuing a cautionary instruction to the jury addressing which aspects of the polygraph subject matter were admissible, and which aspects the jury was obligated to disregard. (32RT 5588-5589.) This timely response by the trial court cured any possible prejudice. (*People v. Cox*, *supra*, 30 Cal.4th at p. 953.)

Aware of the remedial impact of a timely cautionary instruction, appellant attacks the sufficiency of the instruction itself to show error. (AOB 172-173 ["The [trial] court sustained the defense objection, but did not

immediately tell the jurors to disregard the answer, but rather, at a later point, the court delivered an erroneous, confusing and rambling instruction which failed to tell the jury which evidence was admissible and which evidence could properly be considered."].) Appellant's attack on the trial court's action in this respect is misguided. The court told the jury that the specific questions asked by both defense counsel and the prosecutor as to whether Ms. Kuretich had actually taken a polygraph examination, or was willing to submit to one at the time of her testimony, were improper, and that those questions should be disregarded. The trial court also told the jury that other questions by defense counsel concerning the threat of a polygraph examination being a reason why the witness changed her story during police questioning were permissible. (32RT 5588-5589.) No juror expressed confusion with respect to these instructions. That is not surprising, since there is nothing confusing about them. Clearly, the trial court's utterly appropriate response to the evidence at issue cured any conceivable harm.

Even if the instruction was somehow deficient, any error was still harmless under any standard of prejudice. Granted, Christine Kuretich was an important witness. But the prosecution's case was overwhelming with or without her testimony. Ms. Kuretich did not provide the testimony that established appellant's dire financial condition. (23RT 3902-3903; 24RT 4108-4109; 26RT 4477-4480; 4631-4632; 36RT 6258-6260.) Ms. Kuretich did not provide the testimony that established, in the attempt to dig herself out of financial catastrophe, without the victim's knowledge, appellant: lied about the victim's health to explain his unavailability for financial meetings with the company who purchased the Hillary home out of foreclosure (24RT 4113); lied about having a trust fund to convince the Hillary property owner that she had the money to repurchase the property (24RT 4116-4117); procured fraudulent loans against property the victim and his ex-wife owned together, by posing as

the victim's ex-wife, and by having codefendant Sanders pose as the victim (28RT 3898, 3949-3954, 3980-3981.) Neither did Mr. Kuretich provide the testimony that established that, in order to perpetrate her financial fraud, appellant utilized others to falsely verify her fraudulent identity, and to pose as pretend bank employees of fictional banks to verify her fictional financial status. (23RT 3981, 3955-3964, 4049-4050, 4059.) All of the foregoing evidence was admitted independently of that provided by Ms. Kuretich.

Moreover, Ms. Kuretich did not provide the evidence establishing that appellant applied for credit in her maiden name, and procured a new driver's license and social security number in order to create "Catherine Bazar." (24RT 4135, 4139-4140, 4170-4172, 26RT 4522, 33RT 5770-5771.) Nor did Ms. Kuretich testify that the victim's business was placed in appellant's name just eight days prior to the murder (33RT 5774; Peo's. Exh. 116), or that after the murder, appellant assigned the rights to the proceeds of Melvin's life insurance to Tony DeGreef of Bid Properties so she could re-purchase the Hillary property. (24RT 4122.)

Ms. Kuretich did not provide the evidence showing the numerous telephone calls from appellant to codefendant Sanders at his place of employment (27RT 4696-4700), and more than 30 telephone calls between the Sanders residence and Kayser Service between May 4 and June 14, 1990. And an eyewitness, who was not Christine Kuretich, saw codefendant Sanders and Robert Jones leaving the crime scene shortly after the fatal gunshots were fired. (25RT 4348-4359, 4361, 4363-4365, 4370, 4380.) Appellant was witnessed coming from the shooting scene right after that. (25RT 4367-4368.)

Further, appellant also told several lies following the murder. She told Detective Wachter that she left the victim's shop at 5:45 p.m. on the night of the murder to recycle cans, but the detective found two large bags of aluminum cans on the premises. (33RT 5814-5815, 5817.) Appellant claimed that a

Rolex watch was stolen from the victim, but such a watch was found hidden in appellant's bedroom. (33RT 5818-5820; 34RT 6006.) Appellant told her friend, Rene Griffin, that an individual in possession of the victim's Rolex watch had been arrested by San Francisco police, but San Francisco authorities denied that such an arrest or watch recovery ever occurred. (34RT 5941, 5943-5945.)

And, appellant all but confessed to her participation in the conspiracy and murder. In the car, on the way home from the hospital after the murder, appellant said, "I didn't mean for it to happen this way," or "it wasn't supposed to happen this way." (34RT 5975-5976.) When taken into custody, appellant was informed that she was under arrest for hiring someone else to murder her husband. In response, appellant stated, "I didn't know Phil at all. I only met him once and that was about the sale of a car." (27RT 4717.) Prior to appellant making that statement, neither Detective Kingsford nor Detective Fullerton had ever mentioned the name codefendant Sanders or "Phil" to appellant. (27RT 4714.)

Christine Kuretich was not responsible for any of the foregoing evidence, all of which convincingly established appellant's guilt. Accordingly, any error was harmless.

VIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE SHOWING APPELLANT'S FRAUDULENT ACTS, MOTIVE FOR FINANCIAL GAIN AND LACK OF REMORSE

Appellant next argues that the trial court erred on numerous occasions by admitting inadmissible evidence. In essence, this evidence included proof that appellant had committed fraud, that she had jewelry removed from the victim's corpse at his funeral, which she sold shortly thereafter and used the proceeds to gamble in Laughlin, Nevada, and that she showed little remorse for

her husband's death. (AOB 175-206.) Admission of the challenged evidence was proper.

A. The Applicable Law

Character evidence is generally inadmissible when offered to prove conduct on a specific occasion. (Evid. Code, § 1101, subd. (a) .) However, this rule "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Evidence Code section 1101, subdivision (b), specifies that evidence of other misconduct is admissible when relevant to prove such issues as intent, motive, knowledge, identity, or common plan or design. (Evid. Code, § 1101, subd. (b); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) "Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Kipp, supra*, 18 Cal.4th at p. 369.) Motive, or the cause or reason which induced a person to commit a criminal act, is an intermediate fact which may be probative of intent. (*People v. Thompson* (1980) 27 Cal.3d 303, 319-320, fn. 23.) A prior uncharged incident need not be highly similar to the charged offense to be probative of motive, but "there must be a nexus or direct link between the commission of the prior misconduct and the charged crime." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017-1019.) In other words, the uncharged misconduct must be logically relevant to prove the defendant's motive or intent on the charged offense.

"On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp, supra*, 18 Cal.4th at p. 369.) Under an abuse of discretion standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not

required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

Finally, even if otherwise admissible, Evidence Code section 352 gives trial courts discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "'Evidence is substantially more prejudicial than probative (see Evid. Code, § 352) if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." [Citation.]' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

B. The Trial Court Did Not Abuse Its Discretion In Admitting The Challenged Evidence

The trial court did not abuse its discretion in admitting the evidence about which appellant now complains. Accordingly, the instant claim of error should be rejected.

1. The Fraud Evidence Was Relevant And Admissible To Prove Motive

All of the fraud evidence to which appellant now objects was relevant and admissible to prove motive. In general, evidence of a motive to commit a crime is relevant. (*People v. Harris* (2005) 37 Cal.4th 310, 337 [test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive].) "[E]vidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable. 'Motive is not a matter whose existence the People must prove or whose nonexistence the defense must establish. [Citation.] Nonetheless, "[p]roof of the presence of

motive is material as evidence tending to refute or support the presumption of innocence.'" [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 705.)

Appellant's motive here was complicated. It would be an understatement to suggest that her motive for killing her husband was simply to recover insurance money. It is certainly true that she planned and participated in Melvin Thompson's murder for that reason, but her motivation for the murder was far more convoluted, and the jury was entitled to a clear picture.

The prosecution astutely explained to the trial court during the motion to exclude this evidence that, "this is not necessarily a murder case that involves these incidentally fraudulent acts regarding the Hillary address. [¶] Rather, it could be viewed as a fraud case that incidentally involves murder. . . ." (8RT 1067.) Appellant's motive was to reacquire the house she lost, and to do so without Melvin Thompson ever discovering the foreclosure. To understand that, the jury needed to understand how the foreclosure came about in the first place, and that appellant had promised the victim that her fraudulent ways were over. In other words, evidence of the genesis of appellant's fraud in relation to the eventual murder was patently relevant.

Chronologically, then, the first important evidence of motive now challenged by appellant (AOB 190-193) concerns a debt she incurred of over $33,000 to Edith Ann's Answering Service, a former employer. Appellant embezzled this money from Edith Ann's and was caught. The company promised not to take legal action against appellant if she agreed to repay the money.[42] In order to effectuate repayment, appellant fraudulently gave Edith Ann's a lien on the Hillary property where she and the victim lived by forging

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42. As appellant concedes, the trial court excluded evidence of the embezzlement itself. (AOB 190-191, citing 14RT 1543; 20RT 3710-3712; 22RT 3837.)

the victim's signature on a deed of trust. (25RT 4334, 4336; 33RT 5769; Peo's. Exh. 63-A.) The jury also learned of a letter written by appellant to the victim, in which appellant admitted her fraud in this instance, asked for forgiveness, and promised never to act in such a manner again. (26RT 4517 [showing letter recovered during search of the victim's shop]; 8RT 1086 [describing contents of the letter].)

This evidence was critically important to demonstrating appellant's motive for murdering her husband for two reasons. First, appellant failed to repay the debt. (25RT 4335 [she repaid about $7,500 and then stopped].) It was her failure in this respect that sent the property into foreclosure. The foreclosure triggered all subsequent criminal efforts to obtain money, as appellant needed money to reacquire the property. As discussed in greater detail below, these efforts included: posing with codefendant Sanders as Melvin and Mellie Thompson to secure a loan against property appellant did not own; creating false identities for herself and a fictional bank to secure a loan; and ultimately, murder for insurance money. The only way to adequately understand the reason for appellant's charged crimes was to understand the uncharged ones which triggered them.

Second, appellant's apology letter to the victim included a promise that she would never engage in this type of conduct again. However, absent confessing to the financial catastrophe she created for herself and the victim, which was out of the question, appellant could not remedy the foreclosure situation without breaking her promise. Knowing there would almost certainly be severe consequences for her marriage if the victim discovered that his home had been lost in foreclosure because his wife failed to repay the debt to Edith Ann's, appellant opted to break her promise and do everything without the victim's knowledge. Her subsequent conduct is only completely explainable and understandable, then, in light of the foregoing evidence.

Against that backdrop, the 1989 fraud about which appellant now complains is put into context. Because appellant required money – a lot of money – and needed to obtain it without her husband finding out, she joined forces with codefendant Sanders for the first time to obtain a fraudulent loan against the Sycamore property owned by Melvin Thompson and his ex-wife, Mellie. (23RT 3949-3954, 3980-3981.) To obtain more money toward that end, she assumed the identity of "Catherine Bazar", obtained a driver's license and social security number for that person, and created a fictional financial institution in which she fictionally held millions of dollars in assets. She did this to secure a loan to repurchase the foreclosed property. (23RT 4047-4050.)

All the challenged fraud evidence was permissible – and in fact necessary – to accurately explain why appellant murdered her husband. She was responsible for losing the home in which they lived. That happened because she failed to repay a debt where she had fraudulently provided a lien on the property as security against the debt. She also promised her husband that she would not engage in such fraudulent conduct again. Her only way to obtain the kind of money she needed to repurchase the property was through fraud – or worse – and she had to do it without Melvin Thompson ever discovering the problem she created, or how she was seeking to remedy that problem because of her earlier promise. Her motive, then, was not just about obtaining money. It was about obtaining money without her husband ever knowing why or how. And when she ran out of options, in terms of engaging in fraud to secure funds, the victim was sure to find out about what had been going on. Rather than have that happen, appellant arranged for and participated in his murder. That way, she would be able to maintain the relatively affluent lifestyle to which she had become accustomed, and the victim would never know, obviously, what happened.

When the type of evidence at issue is relied upon as evidence of motive, the law requires "a nexus or direct link between the commission of the prior misconduct and the charged crime." (*People v. Scheer*, *supra*, 68 Cal.App.4th at pp. 1017-1019.) That link clearly exists. Again, appellant only committed the murder to obtain the money she was otherwise unable to obtain through fraud, and to keep the victim from discovering what she had done. The murder *only* makes sense in light of this evidence that appellant claims does not matter. Thus, the challenged fraud evidence was admissible to prove motive.

Moreover, the evidence was not more prejudicial than probative, within the meaning of Evidence Code section 352. First, the uncharged instances of fraud were no more inflammatory than the offense for which appellant was being tried, which was murder. (*People v. Kipp, supra,* 18 Cal.4th at p. 372.) That none of the challenged conduct here even involves violence is reason alone to reject appellant's undue prejudice contention.

In any event, even without the evidence that explained precisely why the murder occurred, the evidence independently explaining appellant's involvement was utterly compelling. As explained comprehensively previously (see Argument I, *supra*), the multitude of documented phone calls from appellant to codefendant Sanders were never explained by appellant. Christine Kuretich testified about the conspiracy between appellant, codefendant Sanders and his wife to murder Melvin Thompson. Appellant was witnessed at the crime scene, as were codefendant Sanders and Robert Jones. Appellant told numerous lies, both to police and her friends, in an effort to cover up her involvement in the murder. And, appellant all but confessed to her participation in the conspiracy and murder when she told friends, "I didn't mean for it to happen this way," or "it wasn't supposed to happen this way" (34RT 5975-5976), and told police that she "didn't know Phil at all" when police had not provided appellant with Phil's name. (27RT 4717.) It is unrealistic to presume

appellant was convicted because the jury knew she had committed financial fraud, and not because other evidence indisputably demonstrated her involvement in the murder. The challenged evidence was not unfairly prejudicial.

2. The Jewelry And Dead Cat Evidence Was Relevant And Admissible

Appellant also complains about admission of evidence that she had the jewelry removed from the victim's corpse after the funeral and that she pawned it and gambled the proceeds in Laughlin, Nevada, and that she expressed more emotional sorrow following the death of a cat than she did following her husband's murder. (AOB 195-201.) The trial court did not abuse its discretion in admitting this evidence.

a. The Jewelry

Appellant did not attend the victim's funeral because she had been taken into custody for his murder. But she instructed her friend, Rene Griffin, to make sure all the jewelry put on Melvin's body by the mortician was removed and returned to appellant. (35RT 6113-6114.) Appellant later pawned Melvin's jewelry and used the money to go on a gambling vacation in Laughlin, Nevada. (35RT 6130.)

Appellant objected to admission of evidence showing that she pawned the jewelry, arguing that the evidence was inflammatory and more prejudicial than probative. The trial court ultimately ruled the evidence admissible in light of the presentation of defense evidence that appellant and the victim had a loving relationship. (24RT 4240-4246; 35RT 6124-6126.) The trial court did not abuse its discretion.

Appellant presented evidence designed to convince the jury that she had a loving relationship with the victim. (27RT 4731-4733, 4735 [Patricia Caesar

testifying they appeared happy and were never seen fighting]; 35RT 6104 [Rene Griffin testifying that appellant and the victim got along well]; 36RT 6302 [Girard Jacquet (appellant's son) testifying that appellant and the victim appeared to have a good relationship].) This evidence was clearly designed to leave the jury with the impression that appellant would not have murdered a man whom she loved. The prosecution was entitled to present evidence in rebuttal. To that end, showing that appellant had her husband's corpse stripped of all jewelry, and that she then pawned the jewelry to go on a gambling vacation was highly probative because this evidence suggested to the jury that appellant, in fact, did not think very much of her husband, contrary to the evidence she presented. As the prosecutor aptly argued:

> . . . It's one thing to take the jewelry off your husband's body to pawn it because if you are really desperate for money as she obviously was and you need the money to pay the rent, it is one thing. [¶] But to pawn the jewelry. You look at the dates of the pawn and you look at the date of the gambling slip to pawn the jewelry to use the money to go to Laughlin and gamble. That is just really cold . . . .

(51RT 8670.)

The trial court did not abuse its discretion in allowing the prosecution to rebut appellant's evidence that she and her husband enjoyed a good relationship. In any event, considering the overwhelming evidence of guilt, appellant was not convicted of murder and conspiracy to commit murder because she pawned some jewelry. She was convicted because, as explained in detail numerous times previously, the evidence overwhelmingly demonstrated her planning of and participation in the murder of Melvin Thompson. This claim of error should be rejected.

b. Lack Of Emotion Following Her Husband's Death

Finally, appellant argues that the trial court erred in admitting evidence essentially establishing that appellant displayed more grief when her cat died than she did when her husband was murdered. According to appellant, the evidence was inadmissible lay opinion and irrelevant. (AOB 199-201.) Respondent disagrees.

During the prosecution's case-in-chief, while cross-examining prosecution witness Charlotte Wark, the defense elicited testimony specifically designed to show that appellant was upset following her husband's murder. Ms. Wark, who lived near the repair shop and was friendly with appellant and the victim, accompanied appellant to the hospital after the shooting. In direct response to defense cross-examination questions about appellant's emotional state, Ms. Wark testified that appellant appeared "very distraught," was "visibly upset," and cried when she was informed that her husband did not survive the shooting. (25RT 4313-4314.) Similarly, during cross-examination by the defense, prosecution witness Michael Lutz responded to a question and testified that when he saw appellant right after the shooting occurred, she appeared distraught. (25RT 4392.)

Later during the prosecution's case, Tommy Thompson, the victim's son, testified that appellant did not cry at all at the hospital or at her home later on. (26RT 4498.) Tommy also explained that on a prior occasion where her cat of 12 years died, she cried and was so upset that she did not come to work for three or four days. (26RT 4508-4509.) It is this testimony about which appellant complains. (AOB 199-201.)

This Court has held that evidence of the type challenged here is admissible following admission of defense evidence about grief. In *People v. Jones* (1998) 17 Cal.4th 279, the defendant cried during his testimony. He also testified that he felt remorse when confessing his crimes to police. The

prosecution sought to counter the display of grief and evidence of earlier remorse with evidence that the defendant actually appeared remorseless while confessing his crimes to the police. Over a defense objection, the trial court admitted the evidence. This Court held that admission of the evidence was proper. As this Court explained, though evidence of lack of remorse is typically inadmissible during the guilt phase of a trial, that changes when the defendant presents evidence raising the issue, thus opening the door to a response. (*Id.* at pp. 306-307; see also *People v. Clark* (1993) 5 Cal.4th 950, 1016.) That is precisely the scenario here.

While cross-examining two prosecution witnesses, the defense took the opportunity to elicit testimony about appellant's emotional appearance following the murder. Both Ms. Wark and Mr. Lutz, in response to questions asked by the defense, testified that appellant appeared distraught and upset. *Jones* and *Clark* make clear that the presentation of this evidence opened the door to a response. So, it was entirely permissible for the prosecution to present evidence from another percipient witness showing that appellant did not appear upset when viewed by him during the same essential time period. Tommy Thompson was able to support his observations by comparing what he observed following the murder of Melvin Thompson with what he had previously observed when appellant's cat died, where she truly appeared grief stricken. The trial court did not abuse its discretion in admitting this evidence.

In any event, any error was harmless under any standard of prejudice. Appellant was not convicted of murder because she might have cried harder over the death of a pet. She was convicted because of the state of the evidence. *All* the evidence presented by the prosecution supported the conclusion that appellant was guilty. Appellant most certainly would have been convicted regardless of Tommy Thompson's testimony on this point.

IX.

THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHTS BY IMPROPERLY COMMENTING ON HER RIGHT NOT TO TESTIFY ON HER OWN BEHALF

Appellant next argues that the trial court violated her state and federal constitutional rights by supposedly improperly commenting on her right not to testify on her own behalf. (AOB 207-217.) This argument is patently meritless.

Near the end of appellant's defense case, the subject of her testifying was contemplated. Outside the presence of the jury, with full knowledge of her rights, appellant declined to testify on her own behalf. (37RT 6428-6430.) Appellant then presented her final defense witness and rested. (37RT 6466-6470.) The trial court inquired, "You are resting without calling your client?" (37RT 6470.) Appellant moved for a mistrial, arguing, "Your Honor, with all due respect, I believe the court committed *Griffin* error by asking me in the jury's presence whether I was going to rest without calling my client." (37RT 6472.) The trial court denied the motion. (37RT 6473.)

It is well established that a defendant cannot be compelled to testify against him or herself. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) In *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], the United States Supreme Court ruled the Fifth Amendment prohibits "comment by the prosecution on the accused's silence." (*Id.* at p. 615.) Thus, it has evolved that in order not to penalize a defendant who exercises his or her right to silence, "the prosecutor may neither comment [directly or indirectly] on a defendant's failure to testify nor urge the jury to infer guilt from such silence. [Citation.]" (*People v. Hardy*, *supra*, 2 Cal.4th 86, 154; *People v. Medina* (1995) 11 Cal.4th 694, 755.) Although comment on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses is proper, "[w]hen improper comment on a defendant's silence occurs, the error requires reversal of the judgment unless a reviewing court

concludes the error was harmless beyond a reasonable doubt. [Citations.]" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 157; *People v. Vargas* (1973) 9 Cal.3d 470, 475.)

In reviewing a claim of *Griffin* error, an appellate court must determine whether there is a reasonable likelihood that the jurors understood the comment as referring to defendant's failure to testify. (*People v. Bradford, supra,* 15 Cal.4th at p. 1339.) *Griffin* error does not result in reversal of a conviction if the error was harmless beyond a reasonable doubt. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 994 [prejudicial effect of violations of defendant's Fifth Amendment rights must be evaluated under *Chapman v. California, supra,* 386 U.S. at p. 24 harmless-beyond-a-reasonable-doubt standard].) And, as this Court explained in *People v. Hovey* (1988) 44 Cal.3d 543, 572, "indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." [43]

Here, the trial court was not improperly commenting on appellant's right not to testify, and certainly was not urging the jury to infer guilt from her silence. Rather, the court was taking steps to protect appellant's constitutional rights. Just prior to asking the question, the parties and court had discussed that, if appellant decided not to testify, and codefendant Sanders later took the stand, appellant might be precluded, or at least severely limited, in testifying later. (37RT 6428-6430.) The trial court was doing nothing other than providing appellant one last opportunity to consider her option. Neither *Griffin* nor any of its progeny hold that the trial court's actions under these circumstances constituted error.

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43. While virtually all of the authority concerning *Griffin* error is directed at what the prosecution if prohibited from doing, including *Griffin* itself, this Court has acknowledged that the same restrictions apply to the trial court. (*People v. Morris* (1988) 46 Cal.3d 1, 34.)

In any event, any conceivable error was plainly harmless beyond a reasonable doubt. At worst, the trial court's remarks were "indirect, brief and mild," and there was no suggestion whatsoever that guilt should be inferred from appellant's decision to not testify. (*People v. Hovey, supra*, 44 Cal.3d at 572.) And, as explained several times already, to describe the evidence of appellant's guilt as compelling and overwhelming would be an understatement. Appellant's argument here should be rejected.

X.

THE JURY INSTRUCTIONS DID NOT PERMIT THE JURY TO FIND GUILT BASED SOLELY ON MOTIVE, AND DID NOT SHIFT THE BURDEN OF PROOF TO APPELLANT

Appellant contends that the trial court improperly instructed on motive with CALJIC No. 2.51 because this instruction: (1) impermissibly allowed the jury to find her guilty based solely upon motive; and (2) placed the burden on her to show absence of motive to prove innocence. (AOB 218-225.) Respondent disagrees, as appellant waived any error by failing to object or request clarifying language for this instruction. Moreover, this Court has repeatedly rejected the same claim on the merits, holding that CALJIC No. 2.51 neither impermissibly permits motive to suffice as guilt nor inappropriately places a burden on a defendant to prove innocence.

Initially, appellant's contention that the trial court erred in reading CALJIC No. 2.51 to the jury is waived. If appellant "believed the instruction was unclear, [she] had the obligation to request clarifying language." (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1191-1192.) Appellant fails to specify where in the trial record she objected to or requested clarifying language for CALJIC No. 2.51. Accordingly, she has forfeited the opportunity to complain about the instruction on appeal.

Moreover, the claim lacks merit. This Court has repeatedly rejected the same challenges to CALJIC No. 2.51. (*People v. Crew* (2003) 31 Cal.4th 822, 848; *People v. Prieto* (2003) 30 Cal.4th 226, 254; *People v. Snow* (2003) 30 Cal.4th 43, 57.) As read to the jury, CALJIC No. 2.51 provides as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(9CT 2699; 51RT 8703-8704.)

As this Court has explained, "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) In *People v. Snow,* the defendant argued CALJIC No. 2.51 suggested to the jury that proof of motive alone could establish guilt as the instruction did not further caution the jury that proof of motive alone was insufficient to establish guilt. (*People v. Snow, supra*, 30 Cal.4th at p. 97.) This Court disagreed, explaining:

> If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of the murder. When CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC No.

> 8.10), there is no reasonable likelihood (*People v. Frye*, *supra*, 18 Cal.4th at p. 958) it would be read as suggesting that proof of motive alone may establish guilt of murder.

(*People v. Snow, supra*, 30 Cal.4th at p. 97.)

Soon after *Snow*, in *People v. Prieto*, this Court rejected the contention that the phrase "tend to establish innocence" in CALJIC No. 2.51 led the jury to believe that the defendant had to establish his innocence. (*People v. Prieto, supra,* 30 Cal.4th at p. 254.) This Court reasoned:

> "CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle -- motive." [Citation.] "The instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions." [Citation.] Thus, no reasonable juror would misconstrue CALJIC No. 2.51 as "a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." [Citation.] Accordingly, the instruction did not violate defendant's right to due process.

(*Ibid*; accord, *People v. Crew, supra,* 31 Cal.4th at p. 848.)

Here, there is no reasonable likelihood the jury read CALJIC No. 2.51 as suggesting that proof of motive alone was sufficient to establish guilt of the first degree, special circumstance murder. First, the instruction told the jury that motive was not an element of the crimes charged, "which leaves little conceptual room for the idea that motive could establish all the elements" of the charged crimes. (*People v. Snow, supra*, 30 Cal.4th at p. 43.) Second, the instructions regarding murder outlined their elements and advised the jury every single element had to be proved. (9CT 2719-2723; 48RT 8181-8189.) Third, CALJIC No. 3.31 (concurrence of act and specific intent) instructed the jury

that, for murder, there had to be a concurrence of the act with a specific intent. (9CT 2706; 48RT 8189.) Finally, the jury was instructed on reasonable doubt with CALJIC No. 2.90 (9CT 2686), so there is no reasonable likelihood the jury would construe CALJIC No. 2.51 as a burden of proof instruction. In light of this, there is no reasonable likelihood the jury read CALJIC No. 2.51 as appellant suggests.

Appellant acknowledges that this issue has already been resolved by this Court, but asks that the issue be revisited. Appellant points to instructions on other categories of evidence, where the jurors were admonished that these categories were insufficient to establish guilt. (AOB 219-222, citing CALJIC Nos. 2.03, 2.04, 2.06.) As persuasively explained by one Court of Appeal, however, CALJIC No. 2.51 is justifiably worded differently than the other referenced instructions.

> The motive instruction is similar to the referenced instructions in that it gives the jury guidance as to the significance of particular evidence. But the motive instruction differs from the others because it is given for the additional purpose of clarifying that motive is not an element of a crime. "Motive describes the reason a person chooses to commit a crime." [Citation.] It is not synonymous with intent. Although in law we recognize this distinction, in common usage the terms are often used interchangeably. CALJIC No. 2.51 points out that motive (unlike intent) need not be proved. Considering that the instruction is different in this way from the instructions to which defendant refers, there is nothing particularly startling or anomalous about the fact that it is phrased differently than the others.

(*People v. Petznick* (2003) 114 Cal.App.4th 663, 685.)

Thus, appellant offers no good reason to revisit this Court's recent rejections of this claim in *Crew, Snow,* and *Prieto.*

XI.

THE TRIAL COURT PROPERLY EXCUSED SEVEN PROSPECTIVE JURORS FOR CAUSE

Appellant contends her death sentence must be reversed because the trial court erroneously excused for cause seven prospective jurors – Kusum P., Brenda M., Peter B., Nancy N., Betty F., Maria G.-A., and Yolanda N. – who were equivocal about whether their attitudes about the death penalty would affect their penalty phase deliberations. (AOB 226-252.) Appellant argues that "equivocal responses do not satisfy the state's burden of proving substantial impairment" and reversal is required "because none of the dismissed jurors stated they would not consider death as an option under proper jury instructions from the trial court with the requisite degree of certitude." (AOB 226, 242.) Respondent submits appellant's claim is meritless because, as demonstrated below, her position regarding equivocal responses is incorrect and the record contains substantial evidence under the *Witt* standard supporting each of the seven for-cause excusals.

A. The Applicable Law

A prospective juror may be excluded for cause if the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and juror's oath. (*People v. Harrison* (2005) 35 Cal.4th 208, 227; *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Heard* (2003) 31 Cal.4th 946, 958; see *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) A prospective juror is properly excluded if he or she is unable to consider all of the sentencing alternatives, including the death penalty. (*People v. Stewart, supra*, 33 Cal.4th at p. 441; *People v. Heard, supra*, 31 Cal.4th at p. 958.) The critical question in each challenge is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case*

before the juror." (*People v. Bradford, supra,* 15 Cal.4th at pp. 1318-1319, italics in original; *People v. Hill* (1992) 3 Cal.4th 959, 1003.)

A juror's bias against the death penalty need not be proved with unmistakable clarity. (*People v. Haley* (2004) 34 Cal.4th 283, 306; *People v. Jones* (2003) 29 Cal.4th 1229, 1246.) Instead, it is sufficient that the trial court is left with the definite impression that the prospective juror would be unable to faithfully and impartially apply the law. (*People v. Haley, supra*, 34 Cal.4th at p. 306; *People v. Jones, supra,* 29 Cal.4th at pp. 1246-1247.)

A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 975; *People v. Bradford, supra*, 15 Cal.4th at p. 1319; *People v. Mayfield* (1997) 14 Cal.4th 668, 727; see also *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 986-987.) Furthermore, a trial court possesses wide discretion to excuse for cause a prospective juror (*People v. Jones, supra,* 29 Cal.4th at p. 1246), and such a decision must be upheld if supported by substantial evidence (*People v. Holt* (1997) 15 Cal.4th 619, 651).

B. *Adams v. Texas* And *Gray v. Mississippi*

Before analyzing the evidence supporting the excusal for cause of the seven prospective jurors, it is important to discuss appellant's misplaced reliance on the answers given by the excused jurors in *Adams v. Texas* (1980)

448 U.S. 38 and *Gray v. Mississippi* (1987) 481 U.S. 648. Appellant has combed the Appendix of the voir dire of the excused jurors in *Adams* and *Gray* to find similar or comparable answers given by those jurors to the excused jurors in the instant case. She maintains that if the excused juror in the instant case gave similar or comparable answers to the improperly excused juror in *Adams* or *Gray*, then the trial court in the instant case erred in excusing the juror. (AOB 241-252.) As explained by appellant:

> the teaching of *Adams* and *Gray* is that a prospective juror's equivocal responses do not satisfy the state's burden of proving substantial impairment. Absent an affirmative showing that a juror's views would either preclude death as an option, or otherwise prevent him or her from following the law, the juror may not be excluded for cause. Simply holding a belief or opinion which would make it very difficult for a juror to impose the death penalty is also an insufficient basis to show impairment. Indeed, a comparison of the responses of prospective jurors B., N., Gary-A., M., P., F., N. and P. with the jurors held to have been improperly excluded in *Adams* and *Grey* [sic] removes any doubt that the exclusions in this case were improper.

(AOB 242.)

Unfortunately for appellant, this Court has squarely rejected this approach in *People v. Schmeck* (2005) 37 Cal.4th 240, 262-263:

> Defendant acknowledges that numerous decisions of this court have held that when a prospective juror's statements are conflicting or equivocal, the trial court's determination as to the juror's actual state of mind is entitled to deference. [Citations omitted.] Defendant contends, however, that this long and well-established line of authority is inconsistent with the United States Supreme Court decisions in *Gray, supra,* 481 U.S. 648, 107 S.Ct. 2045, and *Adams v. Texas* (1980) 448

US. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (*Adams*) and should be overruled. Relying in substantial part upon the transcripts of the jury voir dire and the arguments advanced in the briefs that were filed in *Gray* and *Adams,* defendant contends that those cases "made clear that when a prospective capital case juror gives equivocal responses, the state has not carried its burden of proving that the juror's views would 'prevent or substantially impair the performance of his duties as a juror.'" On this basis, defendant contends that the trial court improperly excused the four prospective jurors.

We reject defendant's contention. In its decision in *Witt, supra,* 469 U.S. 412, 105 S.Ct. 844 – decided several years after *Adams* – the high court clearly explained that despite "lack of clarity in the printed record . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." (*Witt, supra,* 469 U.S. at pp. 425-426, 105 S.Ct. 844; *id.* at p. 428, 105 S.Ct. 844 [a trial court's finding concerning a prospective juror's state of mind "is based upon determinations of demeanor and credibility that are peculiarly within a trial court's province. Such determinations [are] entitled to deference . . . on direct review . . . ." (fn. omitted)].) Nothing in the high court's subsequent decision in *Gray, supra,* 481 U.S. 648, 107 S.Ct. 2045, purports to depart from or alter *Witt's* holding with regard to the deference that properly must be accorded to a trial court's finding concerning a prospective juror's state of mind; indeed, the issue before the court in *Gray* did not involve the determination of the correct standard for excusing a prospective juror under *Witt* at all, but rather the standard of prejudice that applies when a prospective juror improperly

has been excused for cause under *Witt.* (*Gray, supra,* 481 U.S. at pp. 659-668, 107 S.Ct. 2045.) Accordingly, there is no basis for reconsidering this court's uniform line of decisions on this point.

Thus, appellant's reliance on specific voir dire answers given by the improperly excused jurors in *Adams* and *Gray*[44] is misplaced. As will be demonstrated below, there is substantial evidence in the instant case supporting each of the seven for-cause excusals on the ground that under *Witt* each challenged juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath.

C. Substantial Evidence Supports The For-Cause Excusal Of Seven Prospective Jurors

1. Kusum P.

a. The Jury Questionnaire

Prospective juror Kusum P., a 34-year-old maintenance administrator, acknowledged in her jury questionnaire that she did not believe in the death penalty and would not vote for it: "I don't believe that death penalty is good. I won't go for that [and] instead [will] give some punishment that will change other people." (26ACT 7300, 7301, 7323.) Kusum P. stated her opinion regarding the death penalty was based on the fact that the "[death penalty is] not going to change other peoples committing crimes." Her views regarding the

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44. The Supreme Court has very recently limited the persuasive value of *Gray* even more:

> *Gray* represents a rare case [] because in the typical situation there will be a state court finding of substantial impairment; In *Gray*, the state court found the opposite, which makes that precedent of limited significance[.]

(*Uttecht v. Brown* (2007) 127 S.Ct. 2218, 2224.)

death penalty had not changed in the last few years. (26ACT 7323.) She also believed that life imprisonment without the possibility of parole was a severe punishment. (26ACT 7323, 7324.)

Kusum P. answered "none" to the following three questions on the questionnaire: (1) What purposes, if any, do you feel the death penalty serves; (2) In what type of cases/offenses, if any, do you feel the death penalty should be imposed; and (3) If this questionnaire has not provided you with an opportunity to fully express your views concerning the death penalty, please add whatever it is that you would like the Court to know about your views. (26ACT 7324, 7327.)

Kusum P. "agreed somewhat" on the questionnaire with the following statements: (1) anyone who intentionally kills another person should always get the death penalty; (2) anyone who intentionally kills another person should never get the death penalty; (3) anyone who intentionally kills more than one person should always get the death penalty; and (4) anyone who intentionally kills more than one person should never get the death penalty. In response to number (1), Kusum P. wrote in the space below the question: "Death penalty is not going to change anybody else. It's not going to teach lesson." (26ACT 7324-7325.)

Kusum P. disagreed on the questionnaire to the following four questions: Are your feelings for or against the death penalty so strong that regardless of the evidence presented at the time of trial (1) you would always vote against a finding of guilty, or against a finding of special circumstances just so that the jury would not have to address the question of the death penalty; (2) you would always vote against sentencing the defendant to death; (3) you would always vote in favor of the guilt and the truth of the special circumstances just so that the jury can address the question of the death penalty;

and (4) you would always vote <u>in favor</u> of sentencing the defendant to death. (26ACT 7325-7326; emphasis in original.)

Kusum P. stated on the questionnaire that she felt she could be an impartial juror because "I will go over the evidence so it can't be unfair to defendant." (26CT 7328.)

b. Voir Dire

During voir dire, Kusum P. related the following in response to questions by the trial court: the death penalty does not have a place in our society (18RT 3107-3108); she could not personally vote to impose the death penalty in any kind of case (18RT 3108); she could not vote to send somebody to the gas chamber and execute them (18RT 3108-3109); she favors life imprisonment over the death penalty (18RT 3109); and that "maybe" she could impose the death penalty in a case where five small children were tortured to death (18RT 3109). Kusum P. then stated that there were "some" cases where she could vote for the death penalty but that she favored life imprisonment over death. (18RT 3109.)

In response to questions by the prosecutor during voir dire, Kusum P. reaffirmed her strongly held views against the death penalty, explaining that the death penalty did not serve as a deterrent because "like if you give somebody [the] death penalty, it's not going to stop everybody else to, like, doing crimes like that." (18RT 3113.) She related that if she was setting up a new system of laws she would not have a death penalty. (18RT 3109). The following colloquy then appears in the record near the end of the questioning by the prosecutor:

> [PROSECUTOR]: Now, some people while they might think that in a very unusual case – like the judge said, five children were murdered or something like that – that maybe in that case they could vote for the death penalty. In most cases they could not.

And my question of you is: you think that in an extreme case, you personally – even though you think that it might be okay in some instances – but could you personally look at the defendants, the man seated between the two lawyers with the gold glasses and the woman there with the flowered outfit on – *could you personally look at [the defendants] in the eye, and say: It's my decision that you should die?*

[KUSUM P.]: *No.*

[PROSPECTOR]: It's something that you could not do?

[KUSUM P.]: It depends. When I go to after all the facts, like what happened and everything, then I might change my mind, but it's like it depends on what happened and what were the circumstance.

[PROSECUTOR]: If the circumstances were really terrible, could you actually look at this individual, and say it's my decision that you should die?

[KUSUM P.]: *No.*

[PROSPECTOR]: *So what you are basically telling us is that not only are you against the death, but that you personally could not be the person to impose the death penalty?*

[KUSUM P.]: *Yes.*

(18RT 3113-3114; emphasis added.)

c. The Trial Court Ruling

The trial court upheld the prosecution's for-cause challenge to prospective juror Kusum P. stating, "The court finds based on the answers to the questionnaire, answers in court, she's substantially impaired." (18RT 3119.)

d. Analysis

Substantial evidence was presented below to support the trial court's finding of bias and excusal for cause of this prospective juror. In her jury questionnaire, Kusum P. clearly indicated an unalterable preference against the death penalty when she stated she did not believe in the death penalty and would not vote for it because "it's not going to change other peoples committing crimes" and "it's not going to change anybody" and "it's not going to teach a lesson." Instead, Kusum P. believed some other penalty should be given which "will change other people." (26ACT 7300, 7301, 7323, 7324-7325.) She also indicated on the questionnaire that the death penalty served no purpose and should not be imposed in any case. (26ACT 7324, 7327.) Kusum P. also gave the identical answer ("agreed somewhat") to the contradictory statements (1) anyone who intentionally kills another person should always get the death penalty and (2) anyone who intentionally kills another person should never get the death penalty. (26ACT 7324-7325.)

Although Kusum P. indicated in voir dire that "maybe" there was a case where she could impose the death penalty (i.e., five small children tortured to death) depending on the circumstances, she effectively contradicted that statement when she told the trial court the following: the death penalty does not have a place in our society (18RT 3107-3108); she could not personally vote to impose the death penalty in any kind of case (18RT 3108); and she could not vote to send an individual to his or her death (18RT 3108-3109). Kusum P. reaffirmed those beliefs yet again when she told the prosecutor she could not make the decision that another individual should die. (18RT 3113-3114.) And, significantly, when the prosecutor asked, "So what you are basically telling us is that not only are you against the death penalty, but that you personally could not be the person to impose the death penalty," Kusum P. responded, "Yes." (18RT 3113-3114.)

The views expressed by Kusum P. on her jury questionnaire and during the voir dire examination demonstrate an unalterable preference against the death penalty. Such views – especially that she opposed the death penalty and could not personally vote to impose the death penalty in any type of case – are sufficient and ample evidence to support the trial court's excusal for cause of this prospective juror since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228 [trial court properly excused juror who said she could not impose the death penalty, but later said that "maybe" she could]; *People v. Haley, supra,* 34 Cal.4th at p. 307 [based on juror's "admitted inability to impose the death penalty, the trial court properly excused" her]; *People v. Griffin* (2004) 33 Cal.4th 536, 558-561 [although at some point, each prospective juror "may have stated or implied that she would perform her duties as a juror," this did not prevent the trial court from finding, on the entire record, that each nevertheless held views that substantially impaired her ability to serve]; *People v. Welch* (1999) 20 Cal.4th 701, 747.)

And, to the extent Kusum P. gave conflicting answers on either the jury questionnaire and/or during voir dire, the trial court specifically resolved those differences adversely to appellant by finding her "substantially impaired" and granting the challenge. (18RT 3119.) The trial court's determination as to this prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Stewart, supra,* 33 Cal.4th at pp. 440-441; *People v. Jones, supra,* 29 Cal.4th at p. 1247; *People v. Bradford, supra,* 15 Cal.4th at p. 1239; *People v. Carpenter, supra,* 15 Cal.4th at p. 357.)

Finally, for the reasons discussed earlier, appellant's reliance on answers given during voir dire by the excused jurors in *Adams* and *Gray* (see AOB 246-248) is misplaced.

2. Brenda M.

a. The Jury Questionnaire

Prospective juror Brenda M., a 30-year old administrative analyst, stated in her jury questionnaire that imposition of the death penalty "is right in a few cases – a very few cases" because if "a verdict is wrong there is no way of righting the wrong." She underlined the words "a very few" four times. Her views on the death penalty had not changed in the last few years. (4ACT 998, 999, 1021.) She believed that life in prison without the possibility of parole was a severe punishment. (4ACT 1021, 1022.) When asked what purposes, if any, do you feel the death penalty serves and in what types of cases/offenses, if any, do you feel the death penalty should be imposed, Brenda M. wrote, "When the person has irreversible problems [and] is up for multiple life sentences." (4ACT 1022.)

Brenda M. "agreed somewhat" on the questionnaire with the following statements: (1) anyone who intentionally kills another person should never get the death penalty; (2) anyone who kills more than one person should always get the death penalty; and (3) anyone who intentionally kills more than one person should never get the death penalty. After "agreeing somewhat" to statement number (2), prospective juror Brenda M. wrote on the questionnaire: "There could be mental problems that need to be reviewed." (4ACT 1022-1023.)

Brenda M. "disagreed somewhat" with the statement that anyone who intentionally kills another person should always get the death penalty because "there are circumstances that are not always known." (4CT 1022.)

Brenda M. disagreed on the questionnaire to the following four questions: Are your feelings for or against the death penalty so strong that regardless of the presented at the time of trial (1) you would always vote against a finding of guilty, or against a finding of special circumstances just so that the jury would not have to address the question of the death penalty; (2) you would always vote against sentencing the defendant to death; (3) you would always vote in favor of the guilt and the truth of the special circumstances just so that the jury can address the question of the death penalty; and (4) you would always vote in favor of sentencing the defendant to death. (4ACT 1023-1024; emphasis in original.)

b. Voir Dire

During voir dire, Brenda M. answered the trial court's question of whether she felt that in all cases involving an intentional killing for the purpose of financial gain she "would always, in all cases vote to impose the death penalty, irrespective of what the evidence might show" with the following: "There's very few cases that I would go for death penalty." (13RT 2039-2040.) When asked if it was conceivable she could vote for the death penalty in a case involving an intentional killing for financial gain, Brenda M. stated: "I don't think that I would vote for the death penalty, but I know so very little about this case. So it's hard to say, but, umm, no. I don't think I would." (13RT 2040.) When the trial court asked whether she could ever vote for the death penalty in a special circumstance case, Brenda M. responded, "I can't say for sure right now, but I think that I would have a very hard time voting for it yes." (13RT 2041.)

Brenda M. acknowledged to defense counsel that in her jury questionnaire she represented that there are a few types of cases in which the death penalty might be possible. But, Brenda M. told defense counsel that "a lot of times I believe they should go with the life imprisonment without parole."

(13RT 2042.) She also told defense counsel that if instructed by the judge that she could set aside her personal feelings about the death penalty and follow the law. (13RT 2044-2045.)

Brenda M. told the prosecutor that she did not like the death penalty because it was irreversible and if a mistake was made in imposing it that there was no way to change it. (13RT 2046.) The following colloquy then appears in the record:

> [PROSECUTOR]: So while you are saying there might be a very few cases, which you underlined five times in your questionnaire, where the death penalty might be appropriate, and the vast majority of cases it would not be?
>
> [BRENDA M.]: Well, there's [sic] a few cases where people declare their guilt, right?
>
> I think these people are saying that they're not guilty, so we have to prove their guilt or innocence, and then once it goes to the penalty phase, that is the phase where I would have probably a hard time voting for a death penalty, just because *it's not within my values*.
>
> An eye for an eye, a life for a life is *not appropriate in my heart*. So –
>
> [PROSECUTOR]: So what you are saying is if somebody comes in and tells you they're guilty, then it might be a littler easier later because that way you wouldn't be troubled by the fact that something new could come out later.
>
> But if the person is obviously saying I'm not guilty, and you're going to have another trial and you have to make a decision whether or not they're guilty, you wouldn't know what would come up down the line, *and you wouldn't want to make the decision of death*? *Am I correct*?

[BRENDA M.]: *You are correct in what you are saying, yes.*

[PROSECUTOR]: Is there anything else that I haven't said with respect to your attitudes about the death penalty? Because it's real important for us now to understand you.

[BRENDA M.]: I'm just saying that I – just in the small amount that I know about the case, *I don't think I would go for the death penalty, even not knowing anything -- any evidence or even knowing what they did.*

[PROSECUTOR]: That's fine.

[BRENDA M.]: I'm trying to think of a case that I would say the death penalty is appropriate. I can't offhand think of any.

(13RT 2046-2048; emphasis added.)

Thereafter, the trial court resumed questioning Brenda M. and the following appears in the record near the end of the court's questioning:

What I want to ask you is do you feel knowing there were so many variations with respect to the person, a lot of different factual scenarios where intentional killing for financial gain comes about, do you feel in a penalty phase in that type of a special circumstance, that you would always just because of the type of special circumstance it is, that you would always vote for life imprisonment without the possibility of parole and never be able to vote the death penalty?

Is that what you are telling me?

[BRENDA M.]: I just – I honestly don't want to make a decision on someone's life or death, and I'm – it's hard to say, but almost in any case, I would probably go for the life without possibility of parole just because *I can't do that. Okay*?

THE COURT: *Do you feel you could personally impose the death penalty yourself in the appropriate case*?

[BRENDA M.]: *I don't think so. No.*

THE COURT: It's one thing to say all right, there are times society would be able to do it. Let somebody else do it.

[BRENDA M.]: Yeah.

THE COURT: When it gets down to – do you understand in a death penalty case, when the penalty of death is voted, all 12 jurors must agree that the death penalty be imposed. Therefore if one person says no, life imprisonment, there cannot be a death penalty.

Do you understand that and appreciate that?

[BRENDA M.]: I understand that.

THE COURT: So it's not a matter of a juror – when they vote for the death penalty, everybody votes for it – to say I was just one of 12, because every single juror has the ability to stop in that particular trial a verdict of death because it takes all 12, since if one person says no, you do not have a death verdict.

So in the instance the death verdict is returned by each and every juror. Knowing that, do you feel you personally could impose the death penalty in an appropriate case?

[BRENDA M.]: You need to deliberate with the jury, and if somebody could give me a good enough reason why I would have to change my own personal feelings on the case, maybe, maybe I could go for the death penalty.

But like I said, I very much doubt it.

(13RT 2049-2052; emphasis added.)

c. The Trial Court Ruling

The trial court upheld the prosecution's for-cause challenge stating, "My feeling is if there ever was a situation that is *Witt*, this is it. The woman is

tortured. Both sides attempting to drag her from one side of the line to the other. I feel there is substantial impairment. . . ." (13RT 2056.)

d. Analysis

Substantial evidence was presented below to support the trial court's finding of bias and excusal for cause of this prospective juror. Although in her jury questionnaire and voir dire Brenda M. indicated there were "very few cases" where she could "maybe, maybe" impose the death penalty, the balance of her answers clearly demonstrate an inability to consider or actually vote to impose the death penalty in any case. For example, during voir dire, Brenda M. reaffirmed her strong opposition to imposition of the death penalty especially in a case involving the intentional killing for the purpose of financial gain. When asked whether she would always vote for the death penalty, regardless of the evidence, in a case involving an intentional killing for the purpose of financial gain, Brenda M. responded, "There are very few cases where I would go for the death penalty." When asked if it was *conceivable* she could vote for the death penalty in a case involving an intentional killing for purpose of financial gain, Brenda M. responded, "I don't think that I would vote for the death penalty . . . it's hard to say, but, umm, no. I don't think I would." When asked if she could ever vote for the death penalty in a special circumstance case, Brenda M. stated, ". . . I think I would have a very hard time voting for it yes." (13RT 2039-2041.) Brenda M. also acknowledged to the prosecutor during voir dire that in a case where the guilt of the defendant had to be proved she "wouldn't want to make the decision of death." Brenda M., in response to a question asked by the trial court, stated "*I honestly don't want to make a decision on someone's life or death*" and that in any case she would vote for life without possibility of parole "*because I can't do that* [*vote for the death penalty*]." When asked if she could impose the death penalty in an appropriate case, Brenda M. responded, "*I don't think so. No.*" Brenda M. explained that

voting for the death penalty was "*not within my values*" and "*not appropriate in my heart.*" (13RT 2046-2051; emphasis added.)

The views expressed by Brenda M. on her jury questionnaire and during voir dire demonstrate an unalterable preference against the death penalty and an inability to vote for the death penalty in any case. Such views –especially her answers during voir dire that she did not want the responsibility of making a decision regarding the life or death of another individual and her inability to personally vote to impose the death penalty in an appropriate case – are sufficient and ample evidence to support the trial court's finding of bias and excusal for cause of this prospective juror since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228; *People v. Haley, supra,* 34 Cal.4th at p. 307; *People v. Griffin, supra,* 33 Cal.4th at pp. 558-561; *People v. Welch, supra,* 20 Cal.4th at p. 747.)

And, to the extent Brenda M. gave conflicting answers on either the jury questionnaire and/or during voir dire, the trial court resolved those differences adversely to appellant by specifically finding Brenda M. biased and granting the challenge. The trial court's determination as to this prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Stewart, supra,* 33 Cal.4th at pp. 440-441; *People v. Jones, supra,* 29 Cal.4th at p. 1247; *People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Carpenter, supra,* 15 Cal.4th at p. 357.)

Finally, for the reasons discussed earlier, appellant's reliance on answers given during voir dire by the excused jurors in *Adams* (see AOB 245-246) is misplaced.

3. Peter B.

a. The Jury Questionnaire

Prospective juror Peter B., age 65, believed that imposition of the death penalty "must fit the crime" and he had not changed his views on the death penalty in the last few years. (5ACT 4057.) Peter B. believed the purpose of the death penalty is that "it removes from society a very bad person who is a danger to kill all" and that the death penalty should be imposed in cases involving "mass killings." He also believed that life in prison without the possibility of parole was a severe punishment. (5ACT 4058.)

Peter B. "disagreed somewhat" on the questionnaire with the following statements: (1) anyone who intentionally kills another person should always get the death penalty; (2) anyone who intentionally kills another person should never get the death penalty; and (3) anyone who intentionally kills more than one person should always get the death penalty. After "disagreeing somewhat" with statement (1), prospective juror Peter B. wrote: "Depends. Like applying self defense." After "disagreeing somewhat with statement (3), prospective juror Peter B. wrote: "It's a feeling." (5ACT 4058-4059.) When asked for his view on the statement that anyone who intentionally kills more than one person should never get the death penalty, prospective juror Peter B. responded, "Depends on how many." (5ACT 4059.)

Prospective juror Peter B. disagreed on the questionnaire to the following four questions: Are your feelings for or against the death penalty so strong that <u>regardless of the evidence presented</u> at the time of trial (1) you would always vote <u>against</u> a finding of guilty. or <u>against</u> a finding of special circumstances just so that the jury would not have to address the question of the death penalty; (2) you would always vote <u>against</u> sentencing the defendant to death; (3) you would always vote <u>in favor</u> of the guilt and the truth of the special circumstances just so that the jury can address the question of the death

penalty; and (4) you would always vote in favor of sentencing the defendant to death. (5ACT 4059-4060; emphasis in original.)

When asked what is about himself that makes him feel he could be an impartial juror, Peter B. responded, "It's just a feeling." (5CT 4062.)

b. Voir Dire

During voir dire examination, Peter B. had difficulty answering the court's question of whether he could personally vote to impose the death penalty in an appropriate case. He explained that "It's hard to answer that" because he never faced that situation previously and "you don't know until you face it." (18RT 2996, 2997.) Peter B. indicated that if he thought the defendant was guilty in a murder case for financial gain that he would not vote not guilty in order to avoid a penalty phase. (18RT 2997-2998.) When the trial court asked additional questions regarding how he would vote in the guilt and penalty phases of a case involving an intentional murder for financial gain, Peter B. indicated he did not understand the court's questions and attempted to provide his own answers to questions not asked. (See 18RT 2998-300.) When asked by the trial court if he would always vote to impose life imprisonment without the possibility of parole an d never vote for the death penalty in a case involving an intentional murder for financial gain, Peter B. indicated that he "would favor imprisonment for life." And when asked if he would *always automatically vote to impose life imprisonment,* Peter B. responded, "*Yes.*" (18RT 3000-3001.)

Thereafter, the trial court asked Peter B. if he felt that he could never vote to impose the death penalty. He responded by indicating it would be "awfully difficult" based on his training to kill people in the military. The trial court again asked if he could never vote to personally impose the death penalty. Peter B. responded, "I wouldn't say never; I wouldn't use the word never. The potential is there. It would be hard for me to vote somebody—." (18RT 3001.)

On a scale of 1 to 10 regarding whether he would never or always vote for the death penalty, Peter B. placed himself "in the center, being that it's safe ground, and I have the option of going each way." (18RT 3002.)

Peter B. acknowledged to the prosecutor that he had "some really strong feeling against killing people." (18RT 3003.) Peter B. explained his feelings as follows:

> [PETER B.]: Well, I spent my adult life in the armed forces. All my training has been geared to protect the United States, and you do that by killing people. I've been trained to kill.
>
> I've seen these slaughters in Vietnam. I never killed anybody. I never came close to being killed, but the danger was always there.
>
> You see all these pictures, and training is brutal in the armed forces. The things that they show you, the things you go through, the public doesn't see. And I come back, and I don't like that any more.
>
> And I see people that are being sentenced to death, and I sort of sympathize with them.
>
> I understand some of them deserve it, and I said that they got what they should have, but overall the thought of people being put to death sometimes doesn't go well with me. It would have to be very vicious crime for me to do it.
>
> [PROSECUTOR]: You wrote, I believe, mass killings in your questionnaire.
>
> [PETER B.]: That would be something that would qualify.
>
> [PROSECUTOR]: Are we talking about like Nazi war crimes? That type of mass killings?
>
> [PETER B.]: I think we should relate it to the civilian life. I was thinking of somebody who just went into a dormitory, and killed like seven nurses, something like that.

That I would have no problem deciding to put that person to death, but I don't know if I would put a person to death for killing one on one, you know, in a one-on-one situation.

(18RT 3003-3004.)

In the "one-on-one" situation, Peter B. stated a sentence of life imprisonment would be "a just sentence" and that it would take "more than [a one-on-one murder] for me to vote death." (18RT 3004.) As explained by Peter B., "On a one-on-one situation . . . the chances are that I would favor a sentence for life, and it would not be a sentence for death." (18RT 3005.) On a scale of 1 to 100 with 1 representing someone who would never vote for the death penalty in a one-on-one murder, Peter B. placed himself in the "bottom 10." (18RT 3006.)

c. The Trial Court Ruling

The trial court upheld the prosecutions for-cause challenge noting as follows:

THE COURT: With the exception of where he put himself at a 5, and I don't reconcile that with the rest of his answers, other than he seems to be a man who wants to answer his own questions, rather than questions that are put to him, I find he is substantially impaired.

Again, the scale I don't think is a total litmus test, but he sure puts himself in the 1 to 10 down at the – I think every one of his answers, but for the 5 – that's a conflict with his scale of one to 100.

I find he's substantially impaired.

(18RT 3008-3009.)

d. Analysis

Substantial evidence was presented below to support the trial court's finding of bias and excusal for-cause of prospective juror Peter B. The trial

court excused Peter B. for cause only after his answers revealed the following: It was "hard [for him] to answer" the court's question of whether he could personally impose the death penalty in an appropriate case because "you don't know until you face it" (18RT 2996, 2997); it was difficult for him to answer the court's questions and provided answers to his own questions not asked (18RT 2998-3000); it was not difficult, however, for Peter B. to respond "Yes" to the question of whether he would "always automatically vote to impose life imprisonment" in a case of murder for financial gain (18RT 3000-3001); based on his military experience, it would be "awfully difficult" and "hard" for him to vote for the death penalty and that he had "some really strong feelings against killing people" (18RT 3001-3003); he "sympathized" with individuals sentenced to death and "the thought of people being put to death sometimes doesn't go well with me" and for him to impose the death penalty it would have to be a "very vicious crime" (18RT 3003-3004); and it would take more than a in a one-on-one situation for him to impose the death penalty because in that situation he "would favor a sentence of life, and it would not be a sentence for death" (18RT 3004-3005).

The views expressed by Peter B. clearly demonstrate an unalterable preference against the death penalty. Such views – especially that he would always automatically vote to impose life imprisonment rather than death in a case of murder for financial gain – respondent submits, are sufficient and ample evidence to support the trial court's finding of bias and excusal for cause of this prospective juror since his views concerning capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228; *People v. Haley, supra,* 34 Cal.4th at p. 307; *People v. Griffin, supra,* 33 Cal.4th at pp. 558-561; *People v. Ayala* (2000) 24 Cal.4th 243, 275.)

To the extent Peter B. gave conflicting answers on either the jury questionnaire and/or during voir dire, the trial court expressly resolved those differences adversely to appellant by making the bias finding and granting the challenge. The trial court's determination as to this prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Stewart, supra,* 33 Cal.4th at pp. 440-441; *People v. Jones, supra,* 29 Cal.4th at p. 1247; *People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Carpenter, supra,* 15 Cal.4th at p. 357.)

Finally, for the reasons discussed earlier, appellant's reliance on answers given by the excused jurors in *Adams* (see AOB 242-243) is misplaced.

4. Nancy N.

a. The Jury Questionnaire

Prospective juror Nancy N., a 54-year-old librarian, stated on the jury questionnaire "I am opposed to capital punishment" because "the ratio of human error seems to indicate that the jurors may convict an innocent person." When asked what purpose, if any, the death penalty served, she responded, "Very little – persons who would kill aren't concerned with society's approval." Prospective juror Nancy N. did not believe the death penalty should be imposed in any case. Her views regarding the death penalty had not changed in the last few years. Nancy N. believed that life in prison without the possibility of parole was a severe sentence. (5ACT 1158, 1159, 1181, 1182.)

Nancy N. "disagreed somewhat" with the proposition that anyone who intentionally kills another person should always get the death penalty because "the 2nd killing would seem to reinforce . . . (the crime) for persons with such tendencies." (5ACT 1182.) She "strongly agreed" that anyone who intentionally kills another person should never get the death penalty because "we do not hear the victims story & cannot be sure of cause [sic]." (5ACT

1182.) She likewise "strongly agreed" that anyone who intentionally kills more than one person should never get the death penalty because "society has a responsibility to all of its parts." (5ACT 1183.)

Nancy N. also "strongly disagreed" that anyone who intentionally kills more than one person should always get the death penalty because "they should receive mental health services before they reach such a point." (5ACT 1183.)

Nancy N. indicated on the questionnaire that regardless of the evidence presented at trial she would "always" vote against sentencing the defendant to death. (5ACT 1183.) She disagreed on the questionnaire with the following three questions: Are your feelings for or against the death penalty so strong that regardless of the evidence presented at the time of trial (1) you would always vote against a finding of guilt, or against a finding of special circumstances just so that the jury would not have to address the question of the death penalty; (2) you would always vote in favor of guilt and the truth of the special circumstances just so that the jury can address the question of the death penalty; and (3) you would always vote in favor of sentencing the defendant to death. (5CT 1183-1184; emphasis in original.)

When asked on the questionnaire why makes her feel she could be an impartial juror, Nancy N. responded: "I do not think any human person can be totally impartial." (5ACT 1186.)

b. Voir Dire

Prospective juror Nancy N. stated during voir dire that she opposed capital punishment, did not believe the death penalty had a place in our society, and could not personally vote to impose the death penalty. She advised the trial court that she did not believe there would "ever" be a case which would warrant the death penalty in her mind. (15RT 2233.) When asked by the trial court if the "Dahmer" case was appropriate for the death penalty, Nancy N. stated that it "might be" and "could be" appropriate. She than stated that she could vote

for the death penalty in an appropriate case. (15RT 2234-2235.) When asked by the trial court that if in a case involving an intentional murder for financial gain she would automatically impose life imprisonment without parole rather than the death penalty, Nancy N. stated "*I think that I would*." (13RT 2236-2237; emphasis added.)

When defense counsel asked if there were circumstances (i.e., as explained by the trial court) where the death penalty was warranted, Nancy N. replied, "Well, it was a very extreme case stated. I would say that probably in one out of 100 situations that [the death penalty] might be warranted." (13RT 2237-2238.) Defense counsel then asked ". . . but there are some rare situations you feel that the death penalty would be warranted; is that right?" Nancy N. stated, "I don't feel that the death penalty is warranted. But [the trial court] did state a case and maybe that case happens one out of 100 times, and at that point I think one would have to make a really definite search of one's values" and in such a case she would be willing to consider the death penalty. (13RT 2237-2238.) Defense counsel then asked a series of questions regarding the two penalties at the penalty phase and Nancy N. repeatedly stated she would consider life without possibility of parole over the death penalty. (13RT 2238-2242.)

Nancy N. reaffirmed her disapproval of the death penalty when the prosecutor commenced her questioning. Her disapproval was based on the possibility of human error with the jury convicting an innocent person. Nancy N. also advised the prosecutor that society must assume some responsibility for the actions of individuals and that she would be "extremely uncomfortable being a participant in a process in which the death penalty would be imposed." (13RT 2242-2243.)

c. The Trial Court Ruling

The trial court upheld the prosecution's for-cause challenge. The court stated, "The court finds the prospective juror is substantially impaired. I don't think she even comes close. She'll be excused." (13RT 2245.)

d. Analysis

Substantial evidence was presented below to support the trial court's finding of bias and excusal for cause of this prospective juror. In her jury questionnaire, Nancy N. stated "I am opposed to capital punishment," there was "very little" purpose in having a death penalty, the death penalty should not be imposed in any case, and that regardless of the evidence presented at trial that she would "always" vote against sentencing the defendant to death. Her opposition to the death penalty was based on the possibility of "human error" by the jury convicting an innocent person. (5ACT 1158, 1159, 1181, 1182, 1183.) During voir dire, Nancy N. reaffirmed her strong opposition to the death penalty when she informed the trial court that she opposed capital punishment, did not believe the death penalty had a place in our society, and could not personally vote to impose the death penalty. She also advised the trial court that she did not believe there would "ever" be a case which would warrant the death penalty in her mind. (15RT 2233.) Nancy N. also stated during voir dire that society must assume some responsibility for the actions of individuals and that she would be "extremely uncomfortable being a participant in a process in which the death penalty would be imposed." (15RT 2242-2243.)

The views expressed by Nancy N. in her jury questionnaire and during her voir dire examination clearly demonstrate an unalterable preference against the death penalty. Such views – especially that she could not personally vote to impose the death penalty and that she would "always" vote against sentencing a defendant to death – respondent submits, are sufficient and ample

evidence to support the trial court's excusal for cause of the prospective juror since her view concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228; *People v. Haley, supra,* 34 Cal.4th at p. 307; *People v. Griffin, supra,* 33 Cal.4th at pp. 558-561; *People v. Barnett* (1998) 15 Cal.4th 795, 823.)

And, to the extent Nancy N. gave conflicting answers on the jury questionnaire and/or during voir dire, the trial court resolved those differences adversely to appellant by specifically finding her biased and granting the challenge. The trial court's determination as to this prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (See *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Jones, supra,* 29 Cal.4th at p. 1247; *People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Carpenter, supra,* 15 Cal.4th at p. 357.)

Finally, for the reasons discussed earlier, appellant's reliance on answers given by the excused jurors in *Adams* and *Gray* (see AOB 244) is misplaced.

5. Betty F.

a. The Jury Questionnaire

Prospective juror Betty F., a 54-year-old federal employee, believed the death penalty was "necessary to deter the increase in unnecessary killing of sometime innocent people." She held this opinion "because of the innocent lives that have taken so [carelessly]." When asked what type of cases should the death penalty be imposed, Betty F. responded, "crimes that leave mentally ill people [and] children due to horror [and] nature of crime [and] death because someone feel you should die." Her views regarding the death penalty have changed over the last few years and she currently believed "more strongly" in the death penalty "because jail is not stopping the criminal. They come more

angry." Betty F. did not believe that life in prison without the possibility of parole was a severe sentence. (16ACT 4377, 4378.)

Betty F. "strongly disagreed" with the following statements: (1) anyone who intentionally kills another person should always get the death penalty; (2) anyone who intentionally kills another person should never get the death penalty; (3) anyone who intentionally kills more than one person should always get the death penalty; and (4) anyone who intentionally kills more than one person should never get the death penalty. As for statements (1) and (2), prospective juror Betty F. explained, "I feel special circumstances [and] reasons should be reviewed." As for statement (3), she explained, "I do not feel strongly about the anyone being used." And, as for statement (4) prospective juror Betty F. explained "circumstances require extensive review." (16ACT 4378-4379.)

Betty F. disagreed on the questionnaire to the following four questions: Are your feelings for or against the death penalty so strong that <u>regardless of the evidence presented</u> at the time of trial (1) you would always vote <u>against</u> a finding of guilty, or <u>against</u> a finding of special circumstances just so that the jury would not have to address the question of the death penalty; (2) you would always vote <u>against</u> sentencing the defendant to death; (3) you would always vote <u>in favor</u> of the guilt and the truth of the special circumstances just so that the jury can address the question of the death penalty; and (4) you would always vote <u>in favor</u> of sentencing the defendant to death. (16ACT 4379-4380; emphasis in original.)

b. Voir Dire

Prospective juror Betty F. "kind of" thought the death penalty served a proper purpose but when asked by the trial court if she "personally could vote to have somebody executed in a proper case," she responded as follows: "I am not – I don't think so. I wouldn't want to have the full responsibility." (19RT

3347.) Betty F. then changed her opinion and told the trial court that there "might" be situations where she could personally vote to have someone executed "after all the evidence is in." (19RT 3347.) In a case involving a murder for financial gain, Betty F. related that she would not do any of the following: vote not guilty just to avoid a penalty phase; find a special circumstance true for the opportunity to have a penalty phase; automatically vote for death given the type of case involved; and always vote for life imprisonment in a case involving murder for financial gain regardless of the facts. (19RT 3349-3353.) On a scale of 1-10 of never or always voting for the death penalty, Betty F. placed herself at 2 in terms of imposing the death penalty in a case of murder for financial gain. (19RT 3354.)

Betty F. responded to defense counsel's question and indicated that in an appropriate case she personally could impose the death penalty. An appropriate case for the death penalty would be a "horrible, horrible" case such as slaughtering children or torturing children. In other types of murders, Betty F. related that she would look to life without the possibility of parole as a potential reasonable alternative to death. (19RT 3356-3357.)

Betty F. attempted to explain her earlier answer to the trial court that she could not personally vote for the death penalty to the prosecutor as follows: "Because then, the first question, I really wasn't prepared to – I didn't think I was going to be able to explain why I felt I could go for the death penalty, but with him I did explain whether or not kind of – what had to be a horrible, and could in those instances, that I could separate from some of them." (19RT 3357-3358.) Betty F. explained to the prosecutor that she placed herself at 2 on the scale in a case of murder for financial gain because "I would have a hard time voting for death if all of the circumstances led me to believe it wasn't horrible, horrible." (19RT 3358-3359.) Betty F. indicated it would be "extremely" unlikely for her to vote for death in a case of murder for financial

gain. In almost all of the cases such as the instant one Betty F. would vote for life imprisonment without the possibility of parole. (19RT 3359.) And that is because in her mind Betty F. reserves the death penalty for "gross murders," "dismemberments, and anything harmful against children that causes them death." (19RT 3359-3360.) When asked by the prosecutor to describe the types of cases in which she could impose the death penalty, Betty F. responded "for sure kids that have been brutally murdered, raped and sodomized." (19RT 3361.)

The following colloquy then appears in the record:

> THE COURT: Let me – here you are not dealing with a child and dismemberment, and you are not dealing with a situation of torture, you are not dealing with a number of murders. *One murder that's deliberately done, intentionally done for the purpose of getting money.*
>
> *Can you see yourself imposing the death penalty in that type of case?*
>
> [BETTY F.]: *No.*
>
> THE COURT: *No matter what the facts were? It's not as gruesome as what you were talking about.*
>
> *Would you always vote for life imprisonment?*
>
> [BETTY F.]: *Yes, without parole.*

(19RT 3362; emphasis added.)

c. The Trial Court Ruling

The trial court upheld the prosecution's for-cause challenge and found Betty F. was "substantially impaired." As explained by the trial court, "I think she's honest. I think this is the difficulty we have with a lot of these people. They just don't comprehend the subject." (19RT 3365.)

d. Analysis

Substantial evidence was presented below to support the trial court's finding of bias and excusal for-cause of this prospective juror. During voir dire, Betty F.'s inability to impose the death penalty in the instant case was made clear. She told the trial court that she "kind of" thought the death penalty served a purpose but when asked if she personally could vote to have somebody executed in a proper case, Betty F. started: "I am not – I don't think so. *I wouldn't want to have the full responsibility*." (19RT 3347; emphasis added.) Although she then changed opinion and told defense counsel that she would be able to impose the death penalty in a "horrible, horrible" case such as slaughtering or torturing children (19RT 3356-3357), Betty F. told the prosecutor that it was "extremely" unlikely she would vote for the death penalty in a case of murder for financial gain because the death penalty in her mind was reserved for cases involving "kids that have been brutally murdered, raped and sodomized," and "gross murders," "dismemberments, and anything harmful against children that causes them death." (19RT 3361.) Significantly, Betty F. responded to the trial court's questions indicating that she could see herself imposing the death penalty in a case of murder for financial gain "no matter what the facts were" and that she "would always vote for life imprison[ment]" without parole. (19RT 3362.)

The views expressed by Betty F. during her voir dire examination clearly demonstrate an unalterable preference against the death penalty. Such views – especially that she did not want the responsibility of imposing the death penalty and that in a case of murder for financial gain she would "always" vote for life in prison without the possibility of parole "no matter what the facts were" – are sufficient and ample evidence to support the trial court's finding of bias and excusal for-cause of this prospective juror since her views concerning capital punishment would "prevent or substantially impair the performance of [her]

duties as a juror in accordance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; See *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228; *People v. Haley, supra,* 34 Cal.4th at p. 307; *People v. Griffin, supra,* 33 Cal.4th at pp. 558-561; *People v. Ayala, supra,* 24 Cal.4th at p. 275; *People v. Welch, supra,* 20 Cal.4th at p. 747.)

To the extent Betty F. gave conflicting answers on either the jury questionnaire and/or during voir dire, the trial court specifically resolved those differences adversely to appellant by finding her biased and granting the challenge. The trial court's determination as to this prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Stewart, supra,* 33 Cal.4th at pp. 440-441; *People v. Jones, supra,* 29 Cal.4th at p. 1247; *People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Carpenter, supra,* 15 Cal.4th at p. 357.)

Furthermore, appellant's assertion that the exclusion of Betty F. was "improper based on the reasoning" in *People v. Heard, supra,* 31 Cal.4th at p. 946 is misplaced. Appellant maintains that "[u]nder *Heard*, the voir dire of [Betty F.] would not have been sufficient to exclude her, as there was nothing in her responses indicating that she was unable to follow the law as set forth by the court, and there was no evidence that the trial court attempted to clarify her alleged inability to follow the law with additional questions." (AOB 249, 250.) Appellant is incorrect.

In *Heard*, this Court found reversible error from the dismissal of a prospective juror on *Witt* grounds, holding there was no substantial evidence supporting the trial court's determination that the juror's views on capital punishment would prevent or substantially impair the performance of his duties. The prospective juror in *Heard* unequivocally indicated "that he would not vote 'automatically'" for life without parole or death. (*Id.* at pp. 964-965.) The prospective juror also "indicated he was prepared to follow the law and had no

predisposition one way or the other as to imposition of the death penalty." (*Id.* at p. 967.) Here, by contrast, Betty F. not only gave equivocal and conflicting answers on her ability to impose the death penalty, but made statements indicating that she could not vote for death in a case of murder for financial gain. (19RT 3347, 3362; see *People v. Lancaster* (2007) 41 Cal.4th 50, 80.) And, unlike *Heard*, the trial court did, in fact, clarify Betty F.'s inability to impose the death penalty by asking additional questions. (See 19RT 3362.) Thus, unlike the situation in *Heard*, there was substantial evidence that Betty F.'s views on capital punishment would prevent or substantially impair the performance of her duties as a juror, and thus the trial court properly excused her for cause under *Witt*.

Finally, for the reasons discussed earlier, appellant's reliance on the answers given by excused jurors in *Adams* (see AOB 248-249) is misplaced.

6. Maria G.-A.

a. The Jury Questionnaire

Prospective juror Maria G.-A., a 36-year-old secretary, stated on the jury questionnaire that her views on the death penalty were "50/50" because "it would depend on the circumstances involving the case." When asked the purpose of the death penalty, she responded, "In the case of [Jeffrey] 'Dahmer.' If we cannot be protected from the instability of this individual the purpose would be to protect." In response to the question regarding what type of cases, if any, should the death penalty be imposed, Maria G.-A. responded, "similar to 'Dahmer.'" She believed that life in prison without the possibility of parole was a severe punishment and her views regarding the death penalty had not changed over the last few years. (16ACT 4386, 4387, 4409, 4410.)

Maria G.-A. "disagreed somewhat" with the following statements: (1) anyone who intentionally kills another person should always get the death

penalty; (2) anyone who intentionally kills another person should never get the death penalty; (3) anyone who intentionally kills more than none person should always get the death penalty; and (4) anyone who intentionally kills more than one person should never get the death penalty. For each question, prospective juror Maria G.-A. explained that it "would depend on the circumstances." (16ACT 4410-4411.)

Maria G.-A. disagreed on the questionnaire to the following four questions: Are your feelings for or against the death penalty so strong that regardless of the evidence presented at the time of trial (1) you would always vote against a finding of guilty, or against a finding of special circumstances just so that the jury would not have to address the question of the death penalty; (2) you would always vote against sentencing the defendant to death; (3) you would always vote in favor of the guilt and the truth of the special circumstances just so that the jury can address the question of the death penalty; and (4) you would always vote in favor of sentencing the defendant to death. (16ACT 4411-4412; emphasis in original.)

Maria G.-A. responded "yes" to the question of whether she belonged to any group or organization including a church or religion that advocates either the increased use or the abolition of the death penalty. She also noted that she belonged to the Catholic Church and that "I'm not in total agreement with the church." (16ACT 4412; emphasis in original.)

b. Voir Dire

Prospective juror Maria G.-A. Stated that she generally believed that the death penalty has a place in society and if she "had the proper facts and depending on the circumstances" she thought she could vote for the death penalty. (19RT 3391.) When asked by the trial court whether "in every instance in a penalty phase where we're dealing with a *murder for financial gain, would you always vote to impose the death penalty without regard to the*

underlying facts of the case," Maria G.-A. answered, "*I would favor life without possibility of parole*" and it would be "*a difficult decision on my part*" to vote for the death penalty in that type of case. When asked if she "might vote for the death penalty" in that type of case, she responded "*possibly*" depending on the facts. (19RT 3396-3397; emphasis added.) Maria G.-A. placed herself at a 2 ½ on the scale of 1 to 10 regarding her views on imposing the death penalty. (19RT 3397-3398.)

Maria G.-A. responded "yes" to the prosecutor's question that the reason she placed herself at 2 ½ on the scale because was of "the fact that there are Jeffrey Dahmer-type situations occasionally around where you could see yourself voting for the death penalty?" She also thought she could "possibly" impose the death penalty in a "rape or murder situation of a child." When asked by the prosecutor if there were other types of situations where she could see herself imposing the death penalty, Maria G.-A. responded, "*No*." (19RT 3398; emphasis added.) After questions regarding what type of evidence she would need to hear in a case of murder for financial gain in order to impose the death penalty, Maria G.-A. told the prosecutor "*it's unlikely*" she would impose the death penalty in this type of case. She also stated, "In this situation, it would probably be a *slim chance for the death penalty*" and "I was going to say possibility. There's always a possibility, but I lean towards more not." (19RT 3399-3400; emphasis added.)

c. The Trial Court Ruling

The trial court upheld the prosecution's for-cause challenge noting that the words "slim" and "it's unlikely" demonstrated substantial impairment. (19RT 3402.)

d. Analysis

Substantial evidence was presented below to support the trial court's finding of bias and excusal for-cause of this prospective juror. In her jury questionnaire, Maria G.-A. stated that her views on the death penalty were "50-50" and that the death penalty should be imposed in cases "similar to "[Jeffrey] Dahmer.'" (16ACT 4386, 4387, 4409, 4410.) During voir dire, Maria G.-A. informed the trial court that in a case of murder for financial gain she would "favor life imprisonment without possibility of parole" and, depending on the facts of the case, she might "possibly" be able to impose the death penalty. But, she readily acknowledged that it would be "a difficult decision on my part" to vote for the death penalty in that type of case. (19RT 3396-3397.) Maria G.-A. informed the prosecutor that she could "possibly" impose the death penalty in a "rape or murder situation of a child." When asked by the prosecutor if there were other types of cases where she could imposed the death penalty, Maria G.-A. responded, "*No*." (19RT 3398.) Maria G.-A. also informed the prosecutor that it was "*unlikely*" she could impose the death penalty in a case of murder for financial gain. As explained by Maria G.-A., in the case of a murder for financial gain "it would probably be a *slim chance* for the death penalty." (19RT 3399-3400; emphasis added.)

The views expressed by Maria G-A. on her jury questionnaire and during the voir dire examination demonstrate that she would be substantially impaired from considering the death penalty as a sentencing alternative in a case of murder for financial gain. She thought the death penalty should be applied in the "Dahmer" type cases. Maria G.-A. indicated that believed she could "possibly" impose the death penalty in a case involving the rape or murder of a child but then readily acknowledged that she did not think the death penalty was warranted in any other type of situation. Indeed, when asked if she could impose the death penalty in a case of murder for financial gain, Maria G.-

A. stated it was "unlikely" and that there was a "slim chance" of her voting for the death penalty in that type of case. (19RT 3399-3400.)

Given Maria G.-A.'s limited view of the applicability of the death penalty to certain types of selected cases (i.e., Jeffrey Dahmer, rape or murder of a child) and her clear expression that she could not see herself imposing the death penalty in other types of cases, coupled with her responses of "slim" and "unlikely," it is clear she was substantially impaired in performing the duties of a juror in case of murder for financial gain. Such views – especially that she did not believe the death penalty should be applied in a case of murder for financial gain and that it was "unlikely" and a "slim chance" of her voting for the death penalty in that type of case – are sufficient and ample evidence to support the trial court's finding of bias and excusal for-cause of this prospective juror since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228; *People v. Haley, supra,* 34 Cal.4th at p. 307; *People v. Griffin, supra,* 33 Cal.4th at pp. 558-561; *People v. Welch, supra,* 20 Cal.4th at p. 747.)

And, to the extent Maria G.-A. gave conflicting answers on either the jury questionnaire and/or during voir dire, the trial court resolved those differences adversely to appellant by finding her biased and granting the challenge. The trial court's determination as to this prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Stewart, supra,* 33 Cal.4th at pp. 440-441; *People v. Jones, supra,* 29 Cal.4th at p. 1247; *People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Carpenter, supra,* 15 Cal.4th at p. 357.)

Finally, for the reasons previously discussed, appellant's reliance on the answers given by the excused jurors in *Adams* is misplaced.

7. Yolanda N.

a. The Jury Questionnaire

Prospective juror Yolanda N., a 54-year-old female, stated on the jury questionnaire that she did not know her opinion of the death penalty: "Very hard to say. Although I believe that if a person is dangerous to others should be put away, but to kill him, I don't know." (CT 7811.) She also stated on the questionnaire that although she thought the death penalty should be imposed in cases of child molesters and rapists since they were the "worst," she still did not know if they deserved the death penalty. (CT 7811-7812.) Yolanda N. also indicated that it was "very hard" for her to state her views about the death penalty because she did not "know to what point a human being deserves the death penalty." (CT 7811.) She believed that life imprisonment without the possibility of parole was a severe punishment. (CT 7811.)

Yolanda N. "agreed somewhat" with the following statements: (1) anyone who intentionally kills another person should always get the death penalty; and (2) anyone who intentionally kills more than one person should always get the death penalty. She "disagreed somewhat" with the following statements: (1) anyone who intentionally kills another person should never get the death penalty; and (2) anyone who intentionally kills more than one person should never get the death penalty. (CT 7810-7811.)

Yolanda N. answered "No" on the questionnaire to the following four questions: Are your feelings for or against the death penalty so strong that regardless of the evidence presented at the time of trial (1) you would always vote against a finding of guilty, or against a finding of special circumstances just so that the jury would not have to address the question of the death penalty; (2) you would always vote against sentencing the defendant to death; (3) you would always vote in favor of the guilt and the truth of the special circumstances just so that the jury can address the question of the death penalty;

and (4) you would always vote in favor of sentencing the defendant to death. (CT 7811-7812.)

b. Voir Dire

Prospective juror Yolanda N. was uncertain whether the death penalty has a place in society. She told the trial court, "Depends. I think sometimes yes, sometimes no." (16RT 2996.) She thought she could impose the death penalty in a proper case "if there is enough evidence, I think I would." (16RT 2697.) Yolanda N. stated she would not vote not guilty or find the special circumstance not true in a murder for financial gain case simply to avoid the penalty phase. (16RT 2699-2700.) Yolanda N. also indicated that in the penalty phase of a murder for financial gain she would not always, without regard to the evidence, vote for the death penalty or life imprisonment without the possibility of parole. (16RT 2701-2702.)

Defense counsel asked Yolanda N. whether she considered herself "a leader or a follower" because on her jury questionnaire she stated her only leader was Jesus Christ. Yolanda N. advised defense counsel she could be a leader or a follower depending on the situation. (16RT 2702-2703.) Yolanda N. indicated she had no preference whether the death penalty existed in California. When asked by defense counsel, "So if we didn't have a death penalty law, you would be perfectly happy," Yolanda N. answered, "Yes, I think so." (16RT 2703-2704.) Yolanda N. also told defense counsel that in a murder case for financial gain that she would impose the penalty of life imprisonment without the possibility of parole over death "because of my Christian roots." (16RT 2705.)

Yolanda N. told the prosecutor that there are "maybe" some type of murder cases for financial gain where she could see herself imposing the death penalty. She told the prosecutor that she felt "very" strongly about her answer on the jury questionnaire that the death penalty should be imposed in the type

of cases involving "child molesters and rapists." (16RT 2705-2706.) She explained that the death penalty was warranted in those types of cases because "I think that's the most horrendous crime that you can commit. It's like a cardinal sin." She also stated that "I feel a child is more innocent than any victim" and that she would have a harder time voting to impose the death penalty in murder involving an adult victim than a child victim. (16RT 2707.) When asked for an example of the type of case involving an adult victim where she could impose the death penalty, Yolanda N. answered, "It's very hard for me to say, to tell you." She was "not sure" if the death penalty was appropriate in the Dahmer case. She could not provide any case she might have read about involving the murder of one person where she felt the death penalty might be appropriate. (16RT 2708-2709.)

Yolanda N. indicated she had a "strong preference" for life imprisonment without the possibility of parole over the death penalty because she believed "a person should be given a chance to repent." (16RT 2708-2709.) The following then appears in the record:

> [PROSECUTOR]: That is a little bit consistent with what you were telling us before about your religious beliefs.
>
> Now you are talking about a person having a chance to repent.
>
> Is your feeling in which you prefer life in prison *based on your religion*?
>
> [YOLANDA N.]: *I think so.*
>
> [PROSECUTOR]: What does your religion say?
>
> [YOLANDA N.]: We are all equal. We all deserve life. We don't have any right to kill, although this person killed somebody.
>
> [PROSECUTOR]: But an eye for an eye or a tooth for a tooth. That's not the way you function?
>
> [YOLANDA N.]: No.

[PROSECUTOR]: *So in order to give somebody the death penalty, you being able to take that position yourself would be contrary to what your personal beliefs are?*

[YOLANDA N.]: *Very much.*

[PROSECUTOR]: So if we asked you then whether or not personally you could ever vote for the death penalty, *could you ever vote for the death penalty?*

[YOLANDA N.]: In which case?

[PROSECUTOR]: *In any case of murder?*

[YOLANDA N.]: *99.9 percent, no.*

THE COURT: Let me pursue this just a little bit further.

Without knowing anything about the facts of the murder or anything about the defendant, just knowing that it's one charge of murder of an adult which was intentionally, deliberately, premeditatedly done for financial gain, *do you feel you could ever see yourself voting for the imposition of the death penalty if you felt the facts surrounding the crime or the facts surrounding the defendant would call for it?*

[YOLANDA N.]: *Very hard that I would vote for death.*

THE COURT: You said – let me see on the computer what you said.

(Pause in the proceedings.)

You said that you would 99.9 percent never vote for the death penalty.

PROSPECTIVE JUROR [YOLANDA N.]: *Yes.*

THE COURT: All right.

I want to thank you very much.

(16RT 2709-2711; emphasis added.)

c. The Trial Court Ruling

The trial court upheld the prosecution's for-cause challenge. The trial court stated:

> THE COURT: The fact that a juror favors in the abstract one or the other doesn't disqualify.
>
> It's the point whether or not it's to the point of substantial impairment.
>
> Frankly she exceeded the nine or the one or zero on our scale when she said she's 99.9 percent. God help anybody if she ever gets on a rape case.
>
> So she's excused. She should go back to the jury assembly room.

(16RT 2710.)

d. Analysis

Substantial evidence was presented below to support the trial court's finding of bias and excusal for cause of prospective juror Yolanda N. The trial court excused Yolanda N. for cause only after her answers revealed the following: she "very" strongly believed that the death penalty should only be imposed in the type of cases involving "child molesters and rapists" (16RT 2705-2706); she would have a more difficult time voting for the death penalty in a case where the victim was an adult and even then she was "not sure" if the death penalty would be appropriate (16RT 2707); based on her religious views (i.e., "We are all equal. We all deserve life. We don't have the right to kill, although this person [the defendant] killed somebody"), she had a "strong preference" for life without possibility of parole rather than death because "a person should be given a chance to repent" and that her voting for the death penalty would be contrary to her personal beliefs and be "very hard" for her to do (16RT 2709-2711); and that she did not believe she could ever vote for the death penalty in any type of murder case 99.9% of the time (16RT 2709-2711).

The views expressed by Yolanda N. clearly demonstrate an unalterable preference against the death penalty. Such views – especially that 99.9% of the time she would never be able to personally vote for the death penalty in any type of murder case – respondent submits, are sufficient and ample evidence to support the trial court's finding of bias and excusal for cause of this prospective juror since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Harrison, supra,* 35 Cal.4th at pp. 227-228; *People v. Haley, supra,* 34 Cal.4th at p. 307; *People v. Griffin, supra,* 33 Cal.4th at pp. 558-561; *People v. Ayala, supra,* 24 Cal.4th at p. 275.)

To the extent Yolanda N. gave conflicting answers on either the jury questionnaire and/or during voir dire, the trial court specifically resolved those difference adversely to appellant by finding her biased and granting the challenge. The trial court's determination as to this prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Stewart, supra,* 33 Cal.4th at pp. 440-441; *People v. Jones, supra,* 29 Cal.4th at p. 1247; *People v. Bradford, supra,* 15 Cal.4th at p. 1329; *People v. Carpenter, supra* 15 Cal.4th at p. 357.)

Finally, for the reasons previously discussed, appellant reliance on the answers of the excused jurors in *Adams* (see AOB 250-251) is misplaced.

XII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING CERTAIN CROSS-EXAMINATION AND IN ADMITTING CERTAIN REBUTTAL EVIDENCE TO PENALTY PHASE MITIGATION TESTIMONY THAT APPELLANT WAS TRUSTWORTHY

Appellant next contends that the trial court erred during the penalty phase by permitting the prosecutor to cross-examine a mitigation witness concerning appellant's character for trustworthiness and honesty, and in allowing rebuttal evidence directed at those same character traits. According to appellant, because the mitigation witness never testified about appellant's character for trustworthiness, it was improper to admit the evidence designed to accentuate appellant's honesty issues. (AOB 253-262.) Here, appellant's recollection of the witness's testimony is incorrect, in that the witness testified that appellant was trustworthy.

A. Relevant Facts

Two of the witnesses appellant called to offer mitigating evidence at the penalty phase of the trial were jailhouse chaplains. The first, Lelia Miotzek, testified to her regular contact with appellant in jail in the context of church services and Bible study. (57RT 9143-9144.) Appellant's attorney then asked the witness whether she had formed any opinions about appellant's character. In this respect, the witness specifically testified as follows:

> Cathy is a person who I could *trust* to be consistent in Bible study, in church, in any type of activity that I might assign to her.

(57RT 9145, emphasis added.)

In addition, both Chaplain Miotzek and Chaplain Karen Brudney testified that appellant was dependable, faithful and reliable. During the two years appellant was there, she came to church every Sunday and attended Bible study every week. Appellant was helpful, demonstrated compassion for others

and was selfless. She was very caring, and had a good rapport with other inmates, who all seemed to like her. If sent to prison, appellant would be a positive influence on other inmates. She never demonstrated any character trait for violence or ill temper. (57RT 9143-9145, 9180-9183.)

On cross-examination of Chaplain Miotzek, who testified first, the prosecutor asked whether soliciting perjured testimony from another inmate violated the jail's rules. Defense counsel objected, but the objection was overruled.[45] (57RT 9150.) The prosecutor also inquired whether the chaplain knew it to be against jail rules for inmates to apply for credit cards. At this point, the trial court permitted a side bar discussion. (57RT 9150-9151.)

Defense counsel then argued that the prosecutor's line of inquiry was improper because the witness was only asked "about the defendant's character about lack of violence or dangerousness" on direct examination. Counsel also objected on foundational and statutory (§ 190) grounds. (57RT 9152-9153.) The prosecution responded that the inquiry on direct examination about appellant's general character traits opened the door for the disputed cross-examination question. After some additional back-and-forth discussion, defense counsel stated:

> Well, there is nothing in which [Chaplain Miotzek] offered a character trait for honesty. All she said was she was dependable and it is not the question but it is the answer which opens up the cross-examination. I had specifically asked that witness ahead of time not to discuss anything that concerned a character trait for honesty and she refrained from doing so.

(57RT 9156.)

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45. Defense counsel asked to approach, but the trial court overruled the objection and indicated that counsel could make his record at the recess. (57RT 9150.)

The prosecutor responded, "She said she was trustworthy." (57RT 9156.)

The court sustained the objection to the credit application, but ruled that the prosecutor could explore the witness's knowledge of appellant's character, and that "how much the door is open is limited by the answers of the witness." Because the witness said that appellant was trustworthy, the court ruled that the "questions dealing with the perjury are proper." (57RT 9156.) The court ultimately ruled admissible the evidence appellant challenges now, including:

- a 1972 embezzlement from Aetna Sheet Metal Company;
- a 1973 embezzlement from Franklin Sheet Sales;
- a 1986 embezzlement of $33,000 from Edith Ann's Answering Service;
- a 1989 incident where appellant posed as Melvin Thompson's ex-wife, Millie to obtain a loan on property owned by Millie and the victim;
- her obtaining a driver's license in the name of Catherine Bazar in 1990;
- her obtaining a new identification card and new social security number;
- the creation of a fraudulent letter from a fictional guarantee trust company for purposes of obtaining a fraudulent loan to repurchase the Hillary home;
- the conversion of a Rolls Royce; and
- a letter to the court in 1974 asking for leniency by falsely claiming she had a kidney removed and was on dialysis.

(57RT 9159-9160, 9174-9176; AOB 254-255.)

Additionally, the prosecutor cross-examined Chaplain Brudney about the Jennifer Lee incident, where appellant convinced Lee to copy in her

handwriting letters appellant wrote in jail to codefendant Sanders in which appellant attempted to manipulate his trial testimony. (57RT 9187-9188.) Some similar evidence was admitted during the prosecution's rebuttal case. (See 9214-9247.)[46]

B. The Applicable Law

In large part, the law concerning the admissibility of character evidence and evidence of prior bad acts was previously discussed in connection with Argument VIII. In addition to those legal principles previously explained, in the specific context of the penalty phase of a capital trial, this Court has made clear that:

> By introducing evidence of good character, a defendant places his or her character in issue, thus opening the door to prosecution evidence tending to rebut that "specific asserted aspect" of the defendant's character. (*People v. Rodriguez, supra,* 42 Cal.3d 730, 791-792, and fn. 24; see *People v. Burton* (1989) 48 Cal.3d 843, 860 [258 Cal.Rptr. 184, 771 P.2d 1270].) Generally, the scope of bad character evidence offered in rebuttal must relate directly to the particular character trait concerning which the defendant has presented evidence. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 792, fn. 24; see *People v. Siripongs* (1988) 45 Cal.3d 548, 576-578 [247 Cal.Rptr. 729, 754 P.2d 1306].)

(*People v. Mitcham* (1990) 1 Cal.4th 1027, 1072.)

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46. On appeal, appellant contends that this supposed error violated her state and federal constitutional rights. It appears, by objecting on state law grounds, appellant preserved for appeal her claims of state law error. But appellant never objected to the admission of the challenged evidence on federal constitutional grounds. (See 57RT 9148-9172.) Accordingly, appellant's complaints about federal constitutional error (AOB 262) are waived. (*People v. Williams, supra,* 16 Cal.4th at p. 250.)

C. The Trial Court Did Not Abuse Its Discretion In Admitting The Challenged Evidence

The entire basis of appellant's assertion on appeal that the trial court erred is the mistaken assertion that the defense witness never testified about appellant's character for trustworthiness. In fact, appellant spends almost a page of her brief explaining the differences between trustworthiness and reliability. (AOB 259.) In this regard, appellant concedes that, had there been defense evidence concerning appellant's trustworthiness, cross-examination and rebuttal evidence related to appellant's honesty would have been proper. (*Ibid.* ["The character traits for honesty or dishonesty associated with trustworthiness thus are different than those associated with the character traits of dependability or reliability;" "The witness' answers were clearly limited to dependability and reliability and did not address the character traits for honesty and dishonesty"].) The primary problem with appellant's argument is that the factual premise from which it flows – that there was no testimony about appellant's trustworthiness – is incorrect.

As discussed earlier, in response to a question from appellant's attorney on direct examination, Chaplain Miotzek unmistakably said: "Cathy is a person who I could *trust* to be consistent in Bible study, in church, in any type of activity that I might assign to her." (57RT 9145, emphasis added.) There is simply no denying that evidence of appellant's supposed trustworthiness was admitted as part of the case in mitigation. Even appellant concedes, as she must, that such evidence made admissible and proper the evidence the prosecution presented to rebut that character evidence. (AOB 259.) Appellant is entirely correct in this regard. Because she presented evidence of her trustworthiness, the prosecution was allowed to present evidence raising questions about that trait and her honesty, and to ask the witnesses whether their

opinions changed as a result. (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1072). Clearly, there was no error here.

D. Any Error Was Harmless

In any event, any error was patently harmless under any standard of prejudice. Much of the evidence about which appellant complains (that appellant posed as Melvin Thompson's ex-wife, Millie to obtain a loan on property owned by Millie and the victim; that she procured a driver's license in the name of Catherine Bazar to facilitate fraud; that she obtained a new identification card and new social security number in a different name to facilitate fraud; that she created fraudulent letter from a fictional guarantee trust company for purposes of obtaining a fraudulent loan to repurchase the Hillary home; etc.) was already before the jury because it was properly admitted during the guilt phase of the trial. (23RT 3949-3954, 3980-3981; 26RT 4522; 33RT 5770-5771.) The jury was well aware of appellant's proclivity for fraud and dishonesty. It is practically inconceivable that the jury determined the death penalty appropriate in light of a few more instances of dishonesty. Clearly, any error was utterly harmless.

XIII.

THE JURY'S RESPONSIBILITY OF SELECTING THE PROPER PUNISHMENT WAS NOT DIMINISHED IN ANY WAY BY THE TRIAL COURT INSTRUCTING ON THE ALTERNATIVE METHODS OF EXECUTION

Appellant next argues that the trial court erred by instructing the jury on alternative methods of execution. As a result, continues appellant, the jury's responsibility for selecting the appropriate sentence was diminished, in violation of *Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S. Ct. 2633, 86 L. Ed. 2d 231]. (AOB 263-269.) Appellant is wrong.

A. The Relevant Facts

During discussions concerning penalty phase evidence, the defense observed that the jury was told at some point during the trial that, should appellant be sentenced to death, she would be executed in the gas chamber at San Quentin. Appellant's attorney wanted to present evidence to explain how execution by lethal gas occurred. The trial court observed that the law had changed, and that on the upcoming January 1, condemned inmates would have the choice between execution by lethal gas and lethal injection. (54RT 8940-25-26.)

The prosecution responded that such evidence was inadmissible. Further, the prosecution also argued that if such evidence were admitted, then the door would have been opened to permit the People to introduce evidence concerning the meaning of life without the possibility of parole for a female prisoner in the California. The trial court indicated its feeling that all the aforementioned evidence was inadmissible, but that if the parties agreed, the court would allow the evidence to be presented. (54RT 8940-26-28.)

During closing argument during the penalty phase, the prosecutor was explaining the insignificance of the defense evidence that appellant was a compassionate person. The prosecution demonstrated that simply because appellant might have been observed by the jail chaplains as exhibiting compassion did not mean that she was actually compassionate. To make this point, the prosecutor drew the following analogy:

> So what kind of compassionate, caring person are we really dealing with in this case? I kept trying to think of an analogy to try to place this whole thing in a different context because it is so unusual that we're confronted with this type of person, and the analogy that comes to mind is: is it really any different than trying to understand how during World War II that some of the Nazis who worked in the gas chambers could go

to concerts at night and listen to Mozart and enjoy the beautiful music? The same brutal people who could work in crematoriums and gas chambers. They would kiss their wife and children in the morning. They would say goodbye. They would do their work, and they'd come home at the end of the day after they killed scores of people and they would go to a concert at night and listen to this wonderful music. [¶] Does that make the people any less evil the fact they could enjoy music? Does it make Catherine Thompson any less evil, the fact she could show compassion to a fellow prisoner, for example, that was given to us as example by one of the ministers who testified?

(58RT 9366-9367.)

During appellant's closing argument, her trial attorney responded to the comparison to the Nazis, saying:

> I found it exceptionally ironic that [the prosecutor] talks about an analogy of Cathy Thompson and Nazis who gas Jews in World War II since that is precisely what they want to do with Cathy Thompson is death by lethal gas.

(59RT 9423.)

Appellant returned her focus to death by lethal gas, despite the ruling that such evidence was inadmissible barring a stipulation of the parties, by discussing the Gulf War:

> I leave for your consideration and thought even in the war, even in the Gulf War where the task is to kill your enemy. The one thing that we think of as unconscionable is the use of lethal gas.

(59RT 9423.)

Finally, defense counsel attempted to dissuade the jury from voting for death by describing the actual execution process:

> Perhaps it's beneficial to ask yourself if you vote for death, would you travel to San Quentin to witness the execution? If you vote for death, would you have the guts to push the button to drop the Cyanide pellets?

(59RT 9425.)

After argument concluded, the prosecution asked that the trial court equalize defense counsel's references to lethal gas injection, since the law would shortly change to allow a choice between lethal gas and lethal injection. The trial court agreed that an instruction to the jury was an appropriate remedy, and, over a defense objection, instructed as follows:

> During the defense argument reference was made to the death penalty being carried out by lethal gas. Effective the 1st of January, 1993, the law will change allowing the condemned to select between lethal gas or lethal injection.

(59RT 9447-9453.)

Defense counsel then moved for a mistrial on the grounds it was improper for the court to instruct on future law. The motion was denied. (59RT 9453-9454.)

B. No Error Occurred

The trial court did not err in instructing the jury as to the alternative methods of execution, in light of the change in law and appellant's repeated references to death by lethal gas. Appellant's specific and only claim of harm is that:

> By instructing the jury that appellant would be able to elect an arguably less painful method of execution – lethal injection – the trial court diminished the jurors' sense of responsibility for their sentencing decision in violation of the appellant's Eighth Amendment right to a reliable penalty determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.)

(AOB 265.) The United States Supreme Court has made abundantly clear that *Caldwell* does not extend as far as appellant is attempting to stretch it here.

In *Caldwell*, the prosecutor explicitly and affirmatively urged the jury not to view themselves as the final decisionmaker: he told them their decision was "not final" and that it was "reviewable" by the state supreme court; and the trial court specifically interjected that the decision would be "automatically reviewable." The high court held that these representations diminished the jury's sense of responsibility for a death penalty verdict and were therefore improper. (*Caldwell*, *supra*, 472 U.S. at pp.328-341.)

But the Supreme Court has since limited the scope of *Caldwell*-type error. As the Court has explained, a valid *Caldwell* claim requires an "affirmative" mis-description of the jury's role as a matter of state law. *Jones v. United States* (1999) 527 U.S. 373, 381 [119 S. Ct. 2090, 144 L. Ed. 2d 370]; *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S. Ct. 2004, 129 L. Ed. 2d 1]; *Dugger v. Adams* (1989) 489 U.S. 410 [109 S. Ct. 1213, 103 L. Ed. 2d 435].) The instruction at issue here comes nowhere close to satisfying that standard. The instruction said nothing about the jury's role in deciding the appropriate penalty. Rather, it accurately informed the jury that, pursuant to a law that was about to take effect, condemned inmates would have a choice between execution by lethal gas or by lethal injection. No rational interpretation of that instruction could lead to a conclusion that the jury felt less responsibility in rendering its decision on penalty.

In short, the jury was never "affirmatively" told that the ultimate penalty decision rested with some other authority. It is that – and only that – type of representation that raises a *Caldwell* issue. Appellant does not claim that the jury was so instructed here. This claim of error must be rejected.

XIV.

CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL

Appellant next argues that California's death penalty statutory scheme violates the federal Constitution in several respects. (AOB 270-310.) Each of appellant's claims have already been repeatedly rejected by this Court, and should be rejected again now.

A. Penal Code Section 190.3, Subdivision (a), Is Constitutional

Appellant first attacks the constitutionality of section 190.3, subdivision (a). She concedes, as she must, that the United States Supreme Court rejected a constitutional challenge to this provision in 1994. (AOB 271, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 975 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Nevertheless, appellant argues that the prosecution's practical use of the this section, as opposed to its facial validity, is what constitutes the violation. Appellant's claim that the instruction set forth on section 190.3, factor (a), as applied, allowed arbitrary and capricious imposition of the death penalty has been repeatedly rejected by this Court. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1165; *People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Maury* (2003) 30 Cal.4th 342, 439; *People v. Hughes* (2002) 27 Cal.4th 287, 404-405; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [explaining that section 190.3, factor (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). It should be rejected again in this case on this point.

B. The Jury Was Not Constitutionally Required To Find Beyond A Reasonable Doubt The Existence Of Aggravating Factors, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Sentence

It is well-settled that "jurors need not find beyond a reasonable doubt that a particular factor in aggravation exists, that the aggravating factors

outweigh the mitigating factors, or that death is the appropriate penalty." (*People v. Hinton, supra*, 37 Cal.4th at p. 913; see also *People v. Boyer* (2006) 38 Cal.4th 412, 485.)

Appellant nevertheless asserts that the United Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], compel a different conclusion. (AOB 278-284.) However, this Court has consistently rejected that argument as well. (See *People v. Boyer, supra,* 38 Cal.4th at p. 485; *People v. Ward* (2005) 36 Cal.4th 186, 221 ["We have also reexamined these conclusions in light of *Apprendi*[], *Ring*[], and *Blakely*[], and determined that their holdings have not altered out conclusions"]; *People v. Cornwell* (2005) 37 Cal.4th 50 ["Nor, contrary to defendant's claim, do the high court's decisions in *Apprendi*[], *Ring*[], or *Blakely*[], alter this conclusion"]; *People v. Blair* (2005) 36 Cal.4th 686, 753 [same]; *People v. Stitely* (2005) 35 Cal.4th 514, 573 [same]; *People v. Hinton, supra,* 37 Cal.4th at p. 913 [the decisions in *Apprendi* and *Ring* "have not altered our conclusions regarding the standard of proof or unanimity"]; *People v. Prieto, supra,* 30 Cal.4th at p. 275 [*Ring* "does not undermine our previous holdings that (1) the jury need not find the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt; (2) the jury need not find each aggravating factor beyond a reasonable doubt; (3) juror unanimity is not required"].) In addition, there is neither a federal nor state constitutional requirement that the jury find death is the appropriate penalty beyond a reasonable doubt. (See *People v. Boyer, supra,* at p. 485; *People v. Hinton, supra,* at p. 913; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151; *People v. Crittenden* (1994) 9 Cal.4th 83, 152-153.) The argument therefore lacks merit.

C. The Prosecution Is Not Constitutionally Required To Bear A Burden Of Proof At The Penalty Phase

Appellant also claims that the prosecution is constitutionally obligated to bear some burden of proof at the penalty phase under the Sixth, Eighth and Fourteenth Amendments. (AOB 285-287.) However, there is no federal or state constitutional requirement that a burden of proof be placed on the prosecution at the penalty phase. (*People v. Boyer, supra,* 38 Cal.4th at p. 485; *People v. Hinton, supra*, 37 Cal.4th at p. 913; *People v. Jenkins, supra,* 22 Cal.4th at pp. 1053-1054.)

D. Juror Unanimity On A Particular Aggravating Factor Is Not Constitutionally Required

Appellant further contends that jurors must unanimously agree on the aggravating factors (AOB 287-291), but this Court has repeatedly held that juror unanimity is not constitutionally required. (*People v. Boyer, supra,* 38 Cal.4th at p. 485; *People v. Hinton, supra*, 37 Cal.4th at p. 913; *People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Gutierrez, supra*, 28 Cal.4th at pp. 1101-1151.)

E. The Jury Is Not Constitutionally Required To Make Written Findings

Appellant further claims that the jury was constitutionally required to make written findings. (AOB 291-294.) This Court has similarly and repeatedly rejected this claim as well. (*People v. Boyer, supra,* 38 Cal.4th at p. 485; *People v. Hinton, supra,* 37 Cal.4th at p. 913; *People v. Gutierrez, supra,* 28 Cal.4th at pp. 1150-1151; *People v. Crittenden, supra,* 9 Cal.4th at p. 153.)

F. Intercase Proportionality Review Is Not Constitutionally Required

Appellant claims that California's failure to provide intercase proportionality review in capital cases violates his right to be protected from the arbitrary and capricious imposition of the death penalty under the Eighth and

Fourteenth Amendments. (AOB 294-297.) This Court has repeatedly rejected this claim, and should do so again here. (See *People v. Boyer, supra,* 38 Cal.4th at p. 484; *People v. Hinton, supra,* 37 Cal.4th at p. 913 ["intercase proportionality is not required"]; *People v. Prieto, supra,* 30 Cal.4th at p. 276 ["the absence of intercase proportionality review does not make imposition of death sentences arbitrary or discriminatory or violate the equal protection or due process clauses"]; *People v. Crittenden, supra,* 9 Cal.4th at p. 156 ["intercase proportionality review is not required by the federal Constitution"], citing *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29].)

G. The Prosecution May Use Unadjudicated Criminal Activity As Aggravation, And Such Activity Need Not Be Unanimously Found True Beyond A Reasonable Doubt

Appellant raises several issues regarding the use of unadjudicated criminal activity as aggravation at the penalty phase. (AOB 298-306.) These claims (i.e., the use of such evidence and the failure to require a unanimous jury finding on the use of the unadjudicated act of violence) have been previously rejected by this Court. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 912; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Smith*, *supra*, 35 Cal.4th at p. 374; *People v. Morrison* (2004) 34 Cal.4th 698, 729; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Maury*, *supra*, 30 Cal.4th at p. 439; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138.) These claims should be rejected again in the instant case.

H. The Alleged Absence Of The Procedural Safeguards Discussed In Sections A Through G Above Did Not Violate Appellant's Equal Protection Rights

Lastly, appellant asserts that the alleged denial of the procedural safeguards discussed in sections A through G above violated her equal protection rights. (AOB 306-310.) However, as this Court explained in *People*

v. Blair, *supra*, 36 Cal.4th 686, this Court has "rejected the notion" that the availability of "certain procedural safeguards such as intercase proportionality review in noncapital cases" means that "the denial of those same protections in capital cases violates equal protection principles under the Fourteenth Amendment." (*Id.* at p. 754.) In addition, because "capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing . . . the availability of procedural protections such as jury unanimity or written factual findings in noncapital cases does not signify that California's death penalty statute violates equal protection principles." (*Ibid.*; see also *People v. Cornwell* (2005) 37 Cal.4th 50, 103 ["The giving of CALJIC No. 8.85, the pattern instruction concerning the factors in aggravation and mitigation to be considered by the jury in imposing penalty, did not violate defendant's state and federal constitutional rights under the Eighth Amendment or state and federal constitutional guaranties of due process of law or equal protection of the laws."].) Accordingly, appellant's equal protection claim fails.

XV.

CALJIC NO. 8.88 IS CONSTITUTIONAL

Appellant raises a variety of challenges to CALJIC No. 8.88. (AOB 311-326.) As with his previous complaint's about California's death penalty scheme, this Court has previously rejected each of them.

Appellant's argument that CALJIC 8.88's use of the phrase "so substantial" is too amorphous to guide the jury in its penalty phase decision has been rejected in *People v. Prieto, supra*, 30 Cal.4th at p. 273, and *People v. Boyette* (2002) 29 Cal.4th 381, 465. Appellant's assertion that the instruction fails to make clear the standard of appropriateness for imposition of the death penalty because it contains the word "warrants" has also been squarely rejected. (See *People v. Boyette, supra,* at p. 465; *People v. Breaux* (1991) 29 Cal.4th

381, 465.) Appellant's claim that the trial court's failure to adequately instruct the jury on the meaning of "mitigating" has been rejected. (*People v. Hughes*, *supra*, 27 Cal.4th at 404-405; *People v. Samayoa* (1997) 15 Cal.4th 795, 862.) Similarly, appellant's contentions that the trial court was constitutionally compelled to instruct the jury that it shall impose a sentence of life without parole if it finds that the mitigating circumstances outweigh the aggravating circumstances, and that CALJIC No. 8.88 reduced the prosecution's burden of proof required by section 190.3, have been rejected. (See *People v. Gurule* (2002) 28 Cal.4th 557, 662.) Accordingly, appellant's attack on CALJIC No. 8.88 and the law that instruction encompasses is without merit.

XVI.

APPELLANT'S SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant claims that his death sentence violates international law. (AOB 327-331.) In *People v. Boyer, supra,* 38 Cal.4th at p. 489, this Court squarely rejected this claim, stating that the Court has "consistently held that international law does not prohibit a death sentence rendered in accordance with state and federal constitutional and statutory requirements." (See also *People v. Hinton, supra,* 37 Cal.4th at p. 913; *People v. Smith, supra,* 35 Cal.4th at p. 375; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) This claim is without merit.

XVII.

THERE WAS NO CUMULATIVE ERROR RESULTING IN PREJUDICE

Finally, appellant argues that the cumulative effect of the alleged errors rendered her trial unfair, with respect to both guilt and penalty. Specifically,

appellant points to the severance ruling, the use of evidence showing appellant to have honesty issues and the trial court's alleged comment on appellant's right not to testify. (AOB 332-334.) As discussed in connection with the specific arguments, there was no error at all. It goes without saying, then, that there can be no cumulative error.

Regardless, and contrary to appellant's assessment, this was not a close case. The evidence of appellant's direct participation in the cold-blooded murder of her husband was utterly compelling. She was not convicted of murder and sentenced to death because she was tried with codefendant Sanders. She was not convicted and sentenced to death because cried harder for a dead cat than for the victim. She was convicted of capital murder because there was no question about her culpability. And she was sentenced to death because the evidence in mitigation paled in comparison to the brutal nature of this murder, and the other aggravating evidence that showed appellant to be a vicious, heartless, dishonest person. No combination of errors in this case would have made any difference in the guilt and penalty verdicts.

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CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: July 20, 2007

Respectfully submitted,

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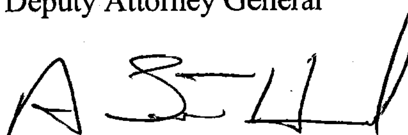

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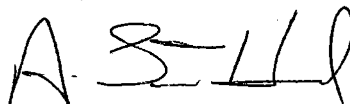
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 57009 words.

Dated: July 20, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Catherine Thompson**

No.: **S033901 [CAPITAL CASE]**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 20, 2007, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 20, 2007, at Los Angeles, California.

Sandra Fan
Declarant

Signature

LA1994XS0001
50175597.wpd

Case Name: **People v. Catherine Thompson**

No.: **S033901 [CAPITAL CASE]**

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