In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JAMELLE EDWARD ARMSTRONG,** Defendant and Appellant.	**CAPITAL CASE** Case No. S126560

Los Angeles County Superior Court Case No. NA051938
The Honorable Tomson T. Ong, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant was charged with murder (count I; Pen. Code,[1] § 187, subd. (a)), second degree robbery (count II; § 211), kidnapping to commit another crime (count III; § 209, subd. (b)(1)), forcible rape while acting in concert (count IV; § 264.1), forcible rape (count V; § 261, subd. (a)(2)), sexual penetration by foreign object while acting in concert (count VI; §§ 289, subd. (a)(1), 264.1), sexual penetration by foreign object (count VII; § 289, subd. (a)(1)), and torture (count VIII; § 206). As to count I, the following special circumstances were alleged: the murder was committed while appellant was engaged in the commission of (1) robbery (§ 190.2, subd. (a)(17)(A)); (2) kidnapping (§ 190.2, subd. (a)(17)(B)); (3) kidnapping for purposes of rape (§ 190.2, subd. (a)(17)(B)); (4) rape (§ 190.2, subd. (a)(17)(C)); and (5) rape by foreign object (§ 190.2, subd. (a)(17)(K)). It was further alleged that the murder was intentional and involved the infliction of torture within the meaning of section 190.2, subdivision (a)(18). As to counts IV to VII, it was further alleged that that the victim was kidnapped and tortured within the meaning of section 667.61, subdivisions (a) and (d). (2CT 306-313; 3CT 683; 3RT 290-291.)

Appellant pleaded not guilty and denied the allegations. (2CT 315-316; 3RT 291-292.) On January 27, 2004, the People's motion to exclude the victim's toxicology information and report was granted. (3CT 671.) On February 2, 2004, the People motion to exclude and redact appellant's statement to the police was granted. (3CT 683-684; 3RT 293-300.) Trial was by jury. (3CT 717-718, 727.) On April 1, 2004, the presentation of evidence on the guilt phase began. (3CT 728.) At 11:00 a.m. on April 19,

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[1] Unless stated otherwise, all further statutory references are to the Penal Code.

2004, the jury deliberations on the guilt phase began. (3CT 885.) At 10:30 a.m. on April 23, 2004, the jury found appellant guilty of counts I to VIII and all the special allegations, except for the allegation that the murder was committed while appellant was engaged in the commission of kidnapping within the meaning of section 190.2, subdivision (a)(17)(B), to be true.[2] (4CT 906-918, 931.) On count I, the jury found appellant was "[a]n Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life." (4CT 906.)

On April 29, 2004, jury trial in the penalty phase began. (4CT 961-962.) At 3:00 p.m. on May 6, 2004, jury deliberations began. (4CT 1068.) At 1:40 p.m. on May 10, 2004, the jury reached a verdict of death. (4CT 1071, 1074-1075.)

On July 16, 2004, the court denied appellant's motion to modify the death penalty verdict. (78CT 22747.) On the same day, the trial court sentenced appellant to death on count I. As to the remaining counts, the trial court sentenced appellant to 30 years plus life with the possibility of parole plus 25 years to life in state prison.[3] The court ordered appellant to

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[2] The abstract of judgment incorrectly indicates appellant's convictions on counts V to VII were pursuant to a plea. (78CT 22770, 22772.) This Court should order the abstract of judgment amended to reflect appellant was convicted by a jury on these counts. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["Courts may correct clerical errors at any time, and appellate courts (including [the California Supreme Court]) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.]"].)

[3] Appellant was sentenced to 8 years on count VI for a total determinate term of 30 years. (78CT 22748.) The abstract of judgment, however, indicates appellant was sentenced to 9 years on count VI for a total determinate term of 56 years. The abstract of judgment should be amended to reflect appellant was sentenced to 8 years on count VI, for a total determinate term of 30 years. Also, the abstract of judgment does not

(continued...)

pay a $10,000 restitution fine (§ 1202.4), and a parole revocation fine (§ 1202.45) in the same amount was imposed and stayed. The court granted appellant 2,016 days of presentence custody credits. (78CT 22747-22762.)

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Evidence

At about 6:00 p.m. on December 29, 1998, appellant, also known as "June," visited Monte Gmur's home in Long Beach with his older brother Warren Hardy, also known as "No Good," "Chris," and Kevin Pearson,[4] who lived next door to Gmur and was also known as "Scrappy." (20RT 4361-4363, 4483; 21RT 4423.) Pearson, who was six feet tall and weighed 170 pounds, wore black ankle high work boots, dark brown Dickies pants, and a light brown long-sleeved shirt. (20RT 4376; 22RT 4826.) Appellant, who was five feet 10 inches tall and weighed 160 pounds, wore black Converse tennis shoes, blue corduroy pants, and a blue and gold long-sleeved University of Michigan shirt. (20RT 4376-4377; 22RT 4826.)

(...continued)
reflect that the trial court sentenced appellant to 25 years to life on counts IV, VI, and VII pursuant to section 667.61, subdivisions (a) and (d), which was then stayed under section 667.61, subdivision (g). (78CT 22757-22758, 22770.) The abstract of judgment should be amended to reflect that the enhancement under section 667.61, subdivisions (a) and (d), was stayed on these counts.

[4] Pearson was also convicted and sentenced to death in connection with the crimes in the instant case. On appeal, this Court affirmed the guilt phase but reversed the penalty due to error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] and *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841].

Hardy, who was five feet four inches tall and weighed 130 pounds, wore dark pants, a black leather jacket, and possibly a black leather fisherman-type hat. (20RT 4377; 22RT 4826.) While at Gmur's house, appellant and his friends drank various wines. (20RT 4363-4364.) Appellant did not slur his speech and did not have trouble walking around. (20RT 4365-4366.) When appellant left Gmur's house for about 15 to 20 minutes and returned around 9:30 p.m., he appeared the same as he did before. (20RT 4366.) Appellant did not stagger or otherwise appear to be off balance. (20RT 4380.)

Sometime between 10:00 and 10:30 p.m., Penny Keptra left her house in Long Beach to buy some cereal and milk for Joseph O'Brien, who lived with Keptra and her family. (20RT 4350-4351, 4353.) O'Brien gave her a book of food stamps for the purchase. He never saw Keptra again. (20RT 4351-4352.) O'Brien had previously purchased the food stamps on Christmas Eve from Nix's Check Cashing Store located at Artesia and Atlantic. (20RT 4351.)

In the early morning of December 30, 1998, appellant, Pearson, and Hardy arrived at Tiyarie Felix's house in Los Angeles. Felix and Hardy had two sons together. (21RT 4573-4575, 4577.) Pearson brought a blue duffle bag and took it to the back of the house. (21RT 4576.) Later in the day, Felix went with Hardy and Pearson to Hardy's mother's house. (21RT 4576-4577.)

On the same day, a Cal Trans worker found Keptra's dead body on the side of the embankment of the 405 freeway near Long Beach Boulevard and Wardlow in Long Beach. (20RT 4250; 22RT 4808-4809, 4813.) The triangular shaped area was fenced in, bordered by a six feet tall chain link fence and a shorter four feet tall cinder block wall. A drainage ditch ran on the other side of the fence towards Long Beach Boulevard. (22RT 4811-4812, 4824-4825.) Someone running into the leafy area would have to

jump over the chain link fence or the retaining wall to escape. (21RT 4714, 4746; 22RT 4824.) Some areas on the top of the fence were pulled down. (22RT 4812.) There was a large amount of dried blood in the drainage ditch about 15 feet away from Keptra and blood splatters all over the sides of the ditch. (22RT 4810-4811.) Blood splatter was also found on the back wall of the business located next to the pool of blood. (22RT 4811.) A blood smear mark was found on the chain link fence. (22RT 4815.) There was a drag mark in the mulch area. (22RT 4838-4839.)

Evidence collected at the scene included a disposable lighter near Keptra's head and a woman's shoe on the embankment on the drainage ditch side of the fence. (21RT 4705-4710; 22RT 4815, 4817-4818.) There was a broken stake at the base of the mesh fencing, and the police collected samples of the wooden sticks. (22RT 4815-4816.) Keptra had a bite mark on her right leg above the thigh. (22RT 4822.) Keptra was five feet four inches tall and weighed 113 pounds. (22RT 4825-4826.) Shoe impressions found near Keptra's body were similar to Hardy's and Pearson's shoes. (22RT 4832.)

On December 30, 1998, Pearson told Keith Kendrick that he, appellant, and Hardy went looking for a girl, found one, and had sex with her in the bushes. Pearson said appellant and Hardy also beat her and hit her with a stick. (20RT 4418-4419, 4430, 4447.) At about 5:00 p.m. the next day, Kendrick was watching the news on television with appellant, Pearson, and Gmur. When a report of a murdered woman being found by a freeway aired, Kendrick said, "Oh, I know who did that. Killer Kev did it." Kendrick meant Pearson. Appellant whispered to Pearson, "How did he know?" (20RT 4415-4418, 4429, 4448.) When Kendrick asked what was going on, Pearson said, "You know, what I told you." (20RT 4431-4432.) Kendrick asked Pearson to tell him again, and he did. (20RT 4451-4452.)

On January 7, 1999, Long Beach Police Detective Richard Birdsall interviewed Kendrick at the county jail. (20RT 4419, 4422, 4468-4469.) An audio tape of the interview was played to the jury. (20RT 4421 [Peo.'s Exh. 30].) In the interview, Kendrick told Detective Birdsall the following: sometime on the 30th, Pearson told Kendrick that he, Hardy, and appellant got drunk one night and found a prostitute. After Pearson had sex with her in the bushes, they took her clothes off, and appellant and Hardy had sex with her as well. Then Hardy and appellant beat "the shit out of her." (Supp. 5CT 16-18, 22; see 20RT 4453.) The next day, Kendrick was with Pearson, appellant, and Gmur when a news update reported about a dead person being found on the freeway. When Kendrick said, "I know who did that," appellant turned and said, "How did he know." Kendrick asked for details. Pearson repeated what he had told Kendrick before. Appellant did not say anything. (Supp. 5CT 17-19.) When Pearson said, "They beat the shit out of her," he looked at appellant. (Supp. 5CT 22; see 20RT 4443-4444.)

On the same day, appellant was arrested and interviewed by Long Beach Police Detective Steven Lasiter. (21RT 4598, 4603, 4620-4625.) Appellant was "quiet, but nice, cooperative" during the interview. (21RT 4626.) Initially, appellant said that he stayed with Hardy in Los Angeles between December 26 and December 29, 1998, and then at Gmur's house from December 29, 1998, to January 1, 1999. (21RT 4626-4627.) On the evening of December 29, 1998, appellant stated he was at Gmur's house with Pearson, Pearson's two brothers Harold and Daniel, and "Gerard." (21RT 4627.) Sometime between 10 and 10:15 p.m., Pearson's brothers left, while appellant, Pearson and "Gerard" continued to hang out, and eventually fell asleep. (21RT 4627-4628.)

When Detective Lasiter told appellant that he did not believe him, and that they had talked to Pearson and Hardy, who were in custody, about the

events on December 29, appellant said he would tell the truth and stated as follows. (21RT 4628-4629.) Appellant was at Gmur's house with Hardy, Pearson, Pearson's two brothers Harold and Daniel, "Gerard," and "Chris." Appellant was drinking and felt its effect, but was not "falling down drunk." (21RT 4629-4630.) Sometime between 10 and 10:15 p.m., Harold, Daniel, and Gerard left. Shortly thereafter, appellant, Hardy, Pearson and Chris walked to Anaheim and Long Beach Boulevard. Chris left on a bus. Appellant and his cohorts walked to Pacific Coast Highway and tried to have someone buy them alcohol. When they were unsuccessful, they decided to take the Blue Line to Hardy's girlfriend's house in Los Angeles. They were on the train for a short while before the train came to a stop and they had to get off. (21RT 4630-4631.) They decided to walk to Long Beach and catch a bus to Los Angeles instead. (21RT 4632.) They were near a freeway overpass when appellant turned around and saw Hardy cross the street and Pearson follow Hardy. Appellant followed. (21RT 4632, 4636.)

Hardy and Pearson approached a lady. The woman said, "I hate you." Hardy offered her money for oral sex. When the woman walked past appellant, she said, "No," and spun around, brushing appellant's cheek with her hand. (21RT 4636-4638, 4772-4773.) The woman ran to a leafy area, turned around, gestured her middle fingers at them, and yelled, "I hope they kill you all." Pearson ran towards the woman and said, "I'm fixing to BKC this bitch." "BKC" was a rap term for "bitch killer connect," used against people they did not like and indicated they were going to get beat up. Pearson began punching her. Appellant jumped over a retaining wall so that passing traffic would not see him. When the woman fell to the ground, Pearson went through her pockets and demanded money. Pearson found food stamps in her left pants pocket. After she told him to take the food stamps, Pearson said he was going to take her pants off. Appellant jumped

back to the leafy area. When she struggled, Pearson had appellant and Hardy hold her down. Appellant held her arms while Hardy held her feet. One of her shoes came off and she began screaming. Pearson tore off her clothes, stomped on her chest area and said, "This ain't over yet bitch. Let's kill the bitch." (21RT 4638-4645.) She continued to struggle. When she pulled away from appellant's grasp, appellant regained control over her, and Pearson stomped on her face and neck area. The woman gasped for air. (21RT 4645-4646.) Appellant kicked the victim two or three times in the abdomen. (22RT 4781, 4794-4795.)

As they discussed what to do with her body, Pearson told appellant to jump over a chain link fence and pull down the top so they could put her body on the other side of the fence. Appellant did so, and Pearson and Hardy threw the victim over. She landed head and shoulders first on the concrete drainage ditch. Pearson dragged her body about 20 to 25 feet down the ditch. (21RT 4647, 4657-4659.) At some point, Pearson tripped and fell down, breaking a wooden stick about three feet long and two inches in diameter. As Hardy and appellant gathered around the woman, who was moaning, Pearson beat her upper body and face with the stick. After Pearson struck her about five to fifteen times, Hardy took the stick and handed it to appellant. Appellant set the stick down by the fence where they had climbed over. (21RT 4659-4663, 4666, 4677.)

After appellant climbed over the fence back to the leafy area, Pearson called him back to help move the body. When appellant returned, Pearson gave him a piece of cloth, with which they wrapped the victim's legs and arms. As they dragged the victim's body up an embankment, they dropped her body about three quarters of the way, and she rolled down the hill. (21RT 4667-4668.) Appellant and Hardy returned to the leafy area and walked to a bus bench on Wardlow and Long Beach Boulevard. Pearson joined them a few minutes later carrying a bag. Pearson had appellant put

the cloth he used to wrap the victim's body into the bag. The bag contained the victim's clothes. The three men boarded a bus to Los Angeles. (21RT 4668-4672.) After they got off the bus, appellant bought a cigar at a gas station. The three men spent the night at Hardy's girlfriend's house. (21RT 4672-4673.) The next morning, appellant learned that Hardy and Pearson used the food stamps to buy some cookies and soda at a liquor store. (21RT 4673-4674.)

When Detective Lasiter asked appellant if anyone had sexually assaulted the victim, appellant sad Pearson raped her in the leafy area while appellant held her arms. Pearson later put a stick inside the victim's vagina. (21RT 4674-4676.) Before Pearson raped her, he asked Hardy and appellant for a condom. After he was finished, Pearson said, "I should have fucked her in the ass." (21RT 4678-4679.) Pearson then got on his knees next to the woman's head, pulled out his penis and appeared to be manipulating it. (21RT 4676-4677.) Before throwing the victim over the fence, appellant stomped on her chest area two or three times. (21RT 4682.) Appellant denied having sex with the victim or using the stick on her. (22RT 4780.)

Upon further questioning, appellant admitted that he did not leave the stick by the fence but said he put it in a trash can near the bus bench. (21RT 4682.) Appellant also clarified that the three men met at the leafy area before they boarded the bus and collected the victim's clothes together. When Pearson noted that they were missing a shoe, they looked for it. Unable to find the shoe, they headed to the bus bench. (21RT 4683-4684.) While they were on the bus, Hardy and another passenger had a verbal altercation. When the bus driver threatened to call the police, Pearson told the driver they would calm Hardy down. (21RT 4684.) After they got off the bus, appellant threw the bag of clothing into a dumpster. (21RT 4685.) When Detective Lasiter told appellant that Hardy had admitted to raping the

victim with the stick, appellant admitted that Hardy took the stick from Pearson and also put it inside the victim's vagina before handing it to appellant. (21RT 4685-4688.)

An audiotape of Detective Lasiter's January 7, 1999, interview with appellant was played to the jury. (21RT 4701-4705 [Peo.'s Exh. 37].) In the interview, appellant stated as follows. When Hardy offered Keptra $50 "for the three of us," she ran past appellant and slapped him. Appellant "looked at her like she was stupid." (Supp. 5CT 41, 57-59.) When Pearson said, "bitch killer connect," appellant believed Pearson was going to punch her. (Supp. 5CT 60-61.) When appellant and Hardy held Keptra down while Pearson "inserted himself," Keptra tried to free herself. Keptra looked at appellant, and appellant looked at her. (Supp. 5CT 42-43, 64, 67-70, 74-75.) When Pearson began stomping on her, appellant held Keptra down by her elbows then put his feet on her chest area. As Pearson kicked Keptra, she let out "a real low help me sound." Keptra's noise sounded like someone being electrocuted. She appeared to be in a lot of pain. (Supp. 5CT 43, 70-73.) After appellant "stomped" on Keptra's stomach two or three times, he stood by a brick wall. (Supp. 5CT 77-80.)

After Pearson got off of Keptra, he had appellant hold down the chain link fence while he and Hardy threw her over. Keptra landed on the bottom of a concrete drainage ditch on her shoulders. (Supp. 5CT 76-79, 83-85.) After Pearson dragged her about 25 feet, he repeatedly hit her with a stick. (Supp. 5CT 85-86.) Pearson also inserted the stick in Keptra's vagina. The stick was "in the groin area being beat like they were like trying to make a batch of butter." (Supp. 5CT 87-88.) Appellant stood by "the gate," about 20 to 25 feet away, but saw Keptra was blinking during the beating. (Supp. 5CT 86-87.) Hardy took the stick away from Pearson and inserted it in Keptra's vagina. Appellant took the stick from Hardy, put it by a gate, returned to where Keptra was, and pulled out his lighter to see her.

Standing by her head, Keptra had "bubbles of blood coming out of facial area." She also had "a strain [*sic*] look" in her eyes. (Supp. 5CT 89.) Appellant and Pearson used some clothing to hold on to her arms and legs, and they moved her up a hill before her body rolled down. (Supp. 5CT 90-92.) Pearson put some wood chips on Keptra's body. Pearson picked up loose clothing from the leafy area before joining Hardy and appellant, who were at the bus stop. (Supp. 5CT 93-96.) Appellant took the stick and threw it in a trash can by the first bus stop. (Supp. 5CT 98-99.)

Appellant wore blue overalls with a white T-shirt and a gray sweater. He wore Converse All Stars low-top shoes. Pearson wore a dark jacket, brown pants and work boots. Hardy wore a long black leather or suede jacket. (Supp. 5CT 99-101.)

On the same day, Pamela Armstrong (Pamela), the mother of appellant and Hardy, told the police that appellant had spent a few nights at her house between Christmas 1998 and New Year's 1999. (20RT 4473-4477.) A couple of days after December 29, 1998, Hardy came to Pamela's house with Pearson and a woman to get some clothes for himself and appellant. (20RT 4477-4479.) After December 29, 1998, Jeannette Carter, appellant's girlfriend, kept calling Pamela to locate appellant. (20RT 4480; 21RT 4499.) Pamela did not see appellant until he came to her house on January 5, 1999. (20RT 4480.) Appellant was acting "sneakily" because he was not keeping in touch with Carter. (20RT 4480; 21RT 4499.)

On January 8, 1999, Jeannette Carter, appellant's girlfriend and the mother of his son, was interviewed by Detective Lasiter. (21RT 4510-4511, 4604.) Carter did not see appellant from Christmas until after New Year's, but she had two telephone conversations with him on December 30, 1998, and another conversation on January 5, 1999. (21RT 4515, 4605-4606.) On December 30, 1998, appellant told Carter that he did "something very bad." When Carter asked appellant for details, he asked if

she had heard about the woman who had been left on the freeway. Carter asked appellant if he was involved in the incident, and he said he was. (21RT 4515-4516, 4606-4607.) Appellant sounded "kind of nervous and upset." (21RT 4608.) When she questioned him further, appellant said he was just kidding and that he was not involved. (21RT 4607.)

On January 5, 1999, Carter asked appellant about the freeway incident. Appellant told her that he was walking on the street with Pearson and Hardy when they encountered a woman. Pearson had an altercation with her, and they beat her. They stripped her clothes off, threw her over a fence, dragged her down a drainage ditch, and stomped on her. Pearson raped her while appellant and Hardy held her down. Pearson also stuck a stick inside her vagina while appellant held her arms. Hardy did so as well. After they beat her, they dragged her and left her. (21RT 4517-4518, 4521-4523, 4609-4612.) When Carter asked appellant if he was involved in it, he said yes, that he took the stick and twisted the stick in her vagina.[5] (21RT 4522-4523.) During the incident, Pearson said they should kill the victim. Pearson went through the woman's pockets. Appellant's only involvement was to hold the woman's arms while Pearson took her food stamps. (21RT 4526-4527.) They took three dollars in food stamps and six dollars in cash from her. (21RT 4611-4612.)

Carter's interview with the police was played to the jury. (21RT 4512 [Peo.'s Exh. 28].) In the interview, Carter told Detective Lasiter that appellant said "we" – meaning, Pearson, Hardy and appellant – dragged her, threw over the fence, stomped on her, and beat her. When speaking of

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[5] Carter gave conflicting testimony on whether appellant also inserted the stick in Keptra's vagina. After stating appellant was involved, Carter stated only Pearson and Hardy were involved in inserting the stick. (21RT 4522-4523.)

the rape and inserting the stick in her vagina, appellant said Pearson did it. (Supp 5CT 8-9.)

Long Beach Police Detective Paul Edwards and his partners revisited the crime scene and found a white sock from a small wooded area and a food stamp book cover by a building wall. (21RT 4586-4588, 4592.) The serial number on the food stamp book cover was F-02520550V. (21RT 4593.) According to Efrain Garcia of Lorena Market in Los Angeles, the food stamps were used at the market sometime around New Year's. (20RT 4383, 4392-4394.) In a six-pack photographic lineup, Garcia identified appellant as someone he had seen in the neighborhood. (20RT 4388-4390.)

Detective Edwards also searched Felix's home. (21RT 4575, 4593-4594.) He found a blue gym bag in the children's bedroom. The bag contained blue denim overalls (Peo.'s Exh. 12 A-C), brown pants (Peo.'s Exh. 12 E-G), and other items of clothing including a pair of black Redwood boots (Peo.'s Exh. 17 D-G). (21RT 4594-4595.) Another pair of shoes (Peo.'s Exh. 17 A-C) and a leather jacket (Peo.'s Exh. 13 A-G) was found in the master bedroom. (21RT 4577-4581, 4595-4596.)

The blue overalls belonged to appellant. (21RT 4538, 4546, 4584 [Peo.'s Exh. 12 A-C].) The shoes found in the bedroom were Hardy's. (20RT 4484; 21RT 4582-4583 [Peo.'s Exh. 17 A-C].) The leather jacket was also Hardy's. (21RT 4581-4582.) According to Gmur, the boots in People's Exhibit 17 D through F appeared to be Pearson's, and the leather jacket in People's Exhibit 13 D through G appeared to be Hardy's. (20RT 4378-4379.)

Detective Lasiter searched Pamela's house. A cream-colored shirt with black stripes (Peo.'s Exh. 12 D, H) was recovered from the closet floor of the northwest bedroom. (21RT 4598-4600; 22RT 4758.) Pamela told Detective Lasiter that appellant and Hardy spent the night at her house on December 28, 1998, and left the next morning. (21RT 4601-4602.) On

December 30, 1998, Hardy came to Pamela's house with Felix, Pearson, and another female to pick up some clothes. (21RT 4602-4604.) Appellant returned to Pamela's house on January 5, 1999, and spent the night. (21RT 4602.) He acted "unusually sneaky." (21RT 4603.)

Raffi Djabourian, Deputy Medical Examiner from the Los Angeles County Department of Coroner, conducted Keptra's autopsy. Keptra had multiple scrapes, contusions, lacerations and bruising throughout her body, including on her face, head, back, and chest area. (19RT 4156-4178.) She had a bite mark at her left breast area and on her right thigh close to her knee. (19RT 4162, 4176.) Her left eye and face showed petechia, which could occur from compression of the neck. (19RT 4165-4166.) She had multiple fractures to her right little finger, both cheek bones, cricoid cartilage near the trachea, hyoid bone in the neck, jaw, skull, and the orbit around both eyes. (19RT 4172, 4175, 4198-4199, 4219, 4225-4229.) Keptra's right ear was partially torn off. (19RT 4175.) Keptra had defensive injuries to her hands and forearm. (19RT 4235-4236.)

The long linear abrasion on her forearm was consistent with being thrown over a chain link fence. (19RT 4161.) The bruising on her head was consistent with being thrown over a chain link fence and landing on a concrete ditch. (19RT 4175.) The abrasions on her thighs could have occurred from being dragged. (19RT 4176.) The lacerations on her head and throat area, as well as a chipped tooth, an abrasion on her neck, and petechia were consistent with being beaten with a wooden stake. (19RT 4180-4187.) The injuries to her throat area could have been caused by impact or manual compression from being stomped on. (19RT 4188-4189.) The fracture to the cartilage underneath her larynx required significant amount of force. (19RT 4190-4192.)

The injuries around Keptra's external genitalia, which included lacerations, bruising and scrapes, were consistent with forcible intercourse

and use of a wooden stake. (19RT 4202-4205.) Keptra also sustained injuries consistent with the use of a wooden stake in her internal genitalia and anus area. (19RT 4204-4208.) A wood splinter was found deep within the vaginal tissue. (19RT 4211.) All of her injuries were premortem. (19RT 4172-4174, 4184-4185, 4191, 4208-4209, 4232.) Keptra's injuries, especially to her head and genitalia, would have been considerably painful. (19RT 4230, 4232-4233.) The sexual assaults were more likely to have occurred before the head injuries, which were fatal. (19RT 4233.) Dr. Djabourian opined that Keptra died of multiple traumatic injuries to the head and neck with a component of strangulation. (19RT 4233-4234.) Keptra had 114 injuries consisting of 94 external and 20 internal injuries, and 11 fractured bones, counting the shattered bones in three areas as a single fracture. (19RT 4237.)

The parties stipulated that human blood was found on a leather jacket, brown Dickies pants, Arizona blue overall jeans, black Guess shoes, and black Redwood boots (Peo.'s Exhs. 12, 13, 17). The items, along with the swab from the bite mark, were submitted for DNA analysis. (20RT 4245-4247.) The parties also stipulated that human blood was found on an extra large, short-sleeved, cream-colored T-shirt with black checked stripes (Peo.'s Exhs. 12, 13, 17). Swabs from the T-shirt were submitted for DNA analysis. (20RT 4247-4249.)

Senior criminalist Paul Coleman of Los Angeles County Sheriff's Crime Laboratory compared the items received for DNA testing with DNA samples of Keptra, appellant, Hardy, and Pearson. (20RT 4253, 4264-4265, 4268.) Hardy's DNA, along with Keptra's, was found on the bite mark. (20RT 4276, 4280.) The blood stain on the leather jacket contained Keptra's DNA and appellant could not be excluded as a contributor. (20RT 4276, 4301.) The blood stain on the brown Dickies pants contained Keptra's DNA. (20RT 4279-4280.) The probability of a random match for

appellant's DNA profile on the leather jacket was one in 4,600 Caucasians, one in 3,131 Blacks, and one in 10,900 Hispanics. (20RT 4295-4296.)

Forensic serologist Gary Harmor of Serological Research Institute also compared the samples for DNA testing with DNA samples of Keptra, appellant, Hardy, and Pearson. (20RT 4311, 4314-4316.) The stain on the inside abdomen area of the cream-colored shirt was a mixture of blood and semen. The amount of blood was insufficient to determine its donor. The semen contained appellant's DNA. (20RT 4322-4325, 4339-4341.) The blood stains on the black shoe, leather jacket, brown cloth, and overalls matched Keptra's DNA. (20RT 4331-4336, 4338.) The blood stain on the black boot was consistent with Keptra's DNA. (20RT 4336-4338.)

B. Defense Evidence

Appellant testified in his own behalf. (23RT 4915.) In the evening of December 29, 1998, appellant was at Gmur's house with his brother Hardy and his sister's ex-boyfriend Chris to use Gmur's music studio. (23RT 4905-4918.) They drank a mixture of "cheap wine." (23RT 4918-4919.) Appellant felt "real tipsy." (23RT 4919.) During the evening, appellant left the house to buy a cigar and returned. (23RT 4920.) At about 11:00 or 11:15 p.m., appellant, Hardy, Pearson and Chris left the house and walked to the train station on Anaheim and Long Beach Boulevard. Chris went on his way while appellant, Hardy and Pearson sought to buy more liquor. When they did not find any open stores, they took the train but had to get off at Wardlow as they were on the last train. (23RT 4920-4923, 4992.)

Appellant, Hardy and Pearson were walking on Wardlow when Keptra, who was on the other side of the street, yelled, "Fuck you niggers." (23RT 4925-4926, 4939.) Hardy, who was behind appellant, crossed the street. Keptra appeared to be on drugs. Hardy offered her $50 for oral sex "or something" with the three men. (23RT 4928-4930.) Knowing Hardy did not have $50, appellant believed he was joking and continued walking.

(23RT 4930-4932.) Keptra ran past Hardy and Pearson when Hardy grabbed her. Keptra's hand grazed appellant's cheek. She ran into a leafy area, stuck both middle fingers toward them and said, "Fuck you niggers. You niggers should die." (23RT 4932-4933.) Pearson ran up to her and began punching her in the face. She fell to the ground. Stating he was "going to BKC this bitch," Pearson continued to punch and stomp on her. (23RT 4934.)

At some point, Pearson had appellant hold Keptra down while he searched her pockets and asked her for money. (23RT 4935-4936.) Pearson found some food stamps and put them in his pocket. (23RT 4939-4940.) While holding her down, appellant had his foot over Keptra's chest at one point and pushed off of her to get up. (23RT 4967-4968.) Appellant let her go, and Pearson kicked and stomped on her chest and neck area. (23RT 4937, 4941.) Appellant jumped over a wall and told Pearson and Hardy to join him. (23RT 4937.) Appellant could not leave because he did not have any money for transportation and his home was too far to walk. (23RT 4937-4938.) Appellant did not try to stop Pearson because he believed Pearson was drunk and would have "turned on" him. (23RT 4938.) Pearson told appellant to come back and hold Keptra down. (23RT 4941.) Appellant returned and complied. Pearson went through Keptra's pockets again. (23RT 4941.)

While appellant stood by a wall, Pearson stripped Keptra of her clothes and had sex with her in the leafy area. Pearson asked appellant and Hardy for a condom, but they did not have one. (23RT 4941-4943.) Pearson then appeared to masturbate or have Keptra orally copulate him. (23RT 4943.) Pearson stood up and said, "I should fuck this bitch in her ass. I should have fucked this bitch in her ass." Appellant told Pearson they should leave. (23RT 4943-4944.) Appellant denied kicking Keptra in the stomach. (23RT 5031.)

Pearson and Hardy threw Keptra over the chain link fence while appellant held the fence down. (23RT 4944-4945, 5061.) Pearson tripped and broke a stick. He dragged Keptra down the drainage ditch. He then repeatedly struck Keptra with the stick and put it in her vagina. (23RT 4950-4953.) When Hardy put the stick inside Keptra's vagina, appellant took the stick from him. (23RT 4945-4946.) Appellant used a disposable lighter to see what Pearson had done to Keptra. (23RT 4954-4955.) Keptra was still alive. (23RT 5065.)

Pearson gave appellant a piece of a T-shirt, and they moved Keptra's body up the embankment. (23RT 4972, 5057.) Pearson gathered Keptra's clothes and put them in a plastic bag. (23RT 4972-4973.) Appellant took the bag on the bus and later threw it away at Pearson's direction. Appellant also threw away the stick in a vacant lot. (23RT 4973-4974.) After appellant got off the bus, he bought a cigar. (23RT 5073.)

Appellant wore black Converse shoes, blue overall jeans (Peo.'s Exh. A-C), a white T-shirt, and a gray sweater. While the cream colored striped shirt in People's Exhibit 12, D and H was appellant's, he did not wear it on December 29. Pearson wore black work boots and brown pants (Peo.'s Exh. 12, E-G). Hardy wore a black leather jacket (Peo.'s Exh. 12, D-G). Appellant had worn Hardy's jacket on previous occasions. (23RT 4966-4967, 4978-4981, 5090.)

Appellant discussed the incident with Carter twice. He told her that Pearson stomped on Keptra, took her property, used a stick against her, and had sex with her. He did not tell her that he did something very bad. (23RT 4956-4957, 4983-4984.) He also told her that Keptra had used racial slurs against them. (23RT 4958-4959.) Appellant was not present when Kendrick spoke with Pearson about this case. (23RT 4960.) Appellant did not try to stop what happened to Keptra because he was afraid that

Pearson's friends would beat him when he returned to Long Beach. (23RT 5076.) Appellant had bad eyesight. (23RT 5040-5041.)

C. Rebuttal Evidence

On December 29, 1998, Tiyarie Felix did not expect Hardy to come to her house because they previously had a fight, and there were no women at her house for Pearson, Hardy, or appellant. (23RT 5140-5141.)

Detective McMahon measured the triangular area, also known as the leafy area, of the crime scene. The area measured 47 feet along the block wall, 43 feet along the sidewalk from the chain link fence to the block wall, and 62 feet along the chain link fence. (23RT 5143-5144.) In 1998, a bus fare cost $1.35. (23RT 5148.)

On March 29, 2001, appellant went to the clinic at Men's Central Jail, complaining of an eye problem. He told a nurse that he had blurry vision since 1985. (24RT 5178-5183.) Appellant told Dr. Frederick Williams, an ophthalmologist, that he suffered from keratoconus. Appellant had difficulty seeing from a distance. He also had astigmatism which distorted his vision. (24RT 5183-5197.) According to Dr. Williams, a person with appellant's vision in 2001 would have difficulty seeing food stamps in someone's hand in a dark area from about 20 to 25 feet away. The person 40 feet away would have difficulty seeing someone unzip his pants and pull out his penis. The person 110 feet away might have a blurry vision of someone lifting the leg of another person who was on the ground. The person would be able to see all these activities from about one foot away. (24RT 5198-5202.) If the person said he could not see across the street at 30 to 31 feet, he would not be able to see any of these activities at 40 feet. (24RT 5210.)

II. PENALTY PHASE

A. Prosecution Evidence

About six months before December 29, 1998, Gmur's neighbor and friend Pearson introduced Gmur to appellant. On December 29, 1998, appellant came to Gmur's home and stayed for about three and a half hours. Pearson asked Gmur if he could use a back bedroom to put their friend Chris "on the block," that is to "jump" him into their gang. When Gmur refused, not wanting "some sort of violent ritual" to occur at his home, appellant, Pearson, Hardy and Chris went to a nearby park. (26RT 5618-5623.) Appellant was intoxicated when he left. (26RT 5626, 5632-5633.) They returned about 15 to 20 minutes later. Hardy phoned someone named "Capone" and said Chris was "cool" and that they were going to call him "Playboy." (26RT 5623-5625.) Appellant did not stumble or fall, or slur his words. He was not incoherent. (26RT 5626-5627.) Chris did not appear to have been in a fight, and he did not have any visible injuries to his face or arms. (26RT 5629, 5636.)

Janisha Williams and appellant grew up in the same neighborhood. They were friends and have known each other for seven years. At the time of trial, Williams was in custody because she did not come to court when she was subpoenaed in this case. (26RT 5640-5641.) Appellant belonged to "Capone Thug Soldiers," a gang. (26RT 5641-5643.) To become a member of Capone Thug Solders (CTS), one had to be "jumped in," that is, fight someone. When appellant became a member of CTS, he beat someone up and was also beaten up. (26RT 5643-5644, 5657-5658.) CTS had about 12 to 30 members. Williams did not know a CTS member called Chris or Playboy. (26RT 5656-5657, 5663.) On about ten separate occasions, appellant kicked someone off their bikes. (26RT 5644-5645.) A couple times, appellant hit people with a stick. (26RT 5646.) Williams had seen

appellant kick and stomp people in fist fights. (26RT 5647.) Appellant had an explosive temper. (26RT 5647-5648.) Once, appellant and Williams were with other members of CTS, including "No Good" and "Scrappy," when they saw a Hispanic woman on a bicycle. After some people in the group said, "Watch this," "Chocolate" pushed the woman off her bicycle and the paramedics arrived to assist her. "Chocolate" said he targeted the woman because she was Hispanic. They beat people up and kicked people off their bicycles for fun. They did not know their victims. These incidents occurred when Williams was about 14 years old. Appellant was five years older than Williams. (26RT 5648-5650, 5658-5660.)

In December 1999, Los Angeles Sheriff's Deputy Hugo Barajas was in charge of module 3800 at Men's Central Jail. Due to racial tension between the Blacks and Hispanic inmates, the cells were segregated. On December 10, 1999, Jose Jimenez, a Hispanic inmate from cell number 13, received a pass for a visit. As Jimenez walked, appellant and three other Black inmates, who had exited their cells to shower, attacked him. Deputy Barajas could not close the gates of cell number 13, which indicated the inmates were keeping the gates open by hand or with a sheet. (26RT 5672-5679, 5683-5684, 5695.) While Deputy Barajas radioed for assistance, Brian Barbosa, another Hispanic inmate, exited cell number 13 to help Jimenez and was also attacked by the Black inmates. Jimenez's left armpit was pierced with a sharpened metal wire. Barbosa sustained "bumps and bruises" on his face and body and a minor puncture wound to his chest. Appellant punched and kicked both Hispanic inmates. (26RT 5680-5681, 5685, 5695.) Medical records indicated that Jimenez had multiple puncture wounds to the body and arms. He also had a bruise and multiple puncture wounds on the back. A metal wire went through his left arm. (26RT 5749-5752.) Barbosa had a puncture wound on his chest. (26RT 5752-5753.) The metal shank was about seven to eight inches long and sharpened on

one end. (26RT 5709-5712.) Deputy Barajas could not identify the inmate who had shanked Jimenez. (26RT 5692.)

Teddy Keptra (Teddy) was Keptra's son. Teddy was in high school when Keptra, a stay-at-home mom, was murdered. After Keptra's murder, Teddy was unable to finish high school. Growing up, Teddy got along better with Keptra than with his dad and considered her to be a friend. (26RT 5755-5759.) Teddy learned about Keptra's murder when Detective McMahon came to his house. Teddy felt sad at Keptra's funeral. Since her death, holidays have been difficult, and Teddy has kept to himself. Keptra's murder has been difficult on Teddy's dad as well. Teddy thought about Keptra "all the time." Teddy felt a special bond with Keptra because they shared the same birthday. When he had his birthday recently, Teddy locked himself in his room and remained there the whole day. Keptra's murder made Teddy feel sad and lonely. He missed Keptra and thought about her every day. (26RT 5759-5761.)

B. Defense Evidence

In January 1999 Detective Lasiter interviewed appellant. At times appellant appeared to feel "badly about what was happening." Once, appellant said he "felt bad about what happened." (27RT 5793-5794, 5795.) During the interview, appellant was "emotionless, even keel, pretty matter of fact about everything." (27RT 5795.) When Detective Lasiter confronted appellant and said Pearson and Hardy were in custody and that they were cooperating, appellant became quiet and "more inverted" before speaking about the incident. (27RT 5795-5797.) Appellant never cried during the interview. (27RT 5798.) Near the end of the interview, appellant appeared remorseful. (27RT 5812-5813.)

Reverend Larry Clark was a minister at the Lord's Church in Bellflower, California. Reverend Clark first met appellant's family, including Hardy and their mother Pamela Armstrong, at First Shining Light

Church, where he was an assistant pastor. Appellant was about 10 years old at the time. (28RT 5818-5820.) Reverend Clark taught appellant about right and wrong. (28RT 5827, 5849-5850.) A couple of times, Reverend Clark and others went to appellant's home in the Carmelitas housing project in Long Beach to counsel Pamela. Pamela was "a struggling mom," having financial difficulties. The project had a lot of problems with drugs, prostitution, and gangs. (28RT 5821, 5824-5825, 5875-5876.) Appellant's father, James Armstrong (James), seldom attended church. Once, Reverend Clark observed James was intoxicated. James was "in and out" of the Armstrong household. (28RT 5838-5839, 5877.) Pamela, who was responsible for raising her children, struggled. (28RT 5878.)

Reverend Clark kept in touch with the family for about four to five years. Appellant liked to be with his older brother Hardy and followed him. (28RT 5822-5824.) Appellant showed "potential to be an artist." (28RT 5826.) Appellant was at church every Sunday and sometimes during the week as well. He sometimes helped clean the church and distribute food and gifts to "unfortunate" children in Carmelitas housing project. (28RT 5837.) Reverend Clark believed appellant was also an "unfortunate" child, as appellant's family was on welfare and "didn't have very much." (28RT 5838.) The church had an outreach program for gang members. Appellant was not in the program. (28RT 5839-5840.) Hardy was "secretive," "had his own little agenda," and "kind of like sneaky." (28RT 5840-5841.) Reverend Clark did not have any contact with appellant after he was about 15 years old. (28RT 5861.)

While Reverend Clark did not know appellant was a gang member and hung around people who kicked innocent people off their bikes, knowing that did not change his opinion of appellant. (28RT 5855.) Knowing appellant used sticks to hit people changed Reverend Clark's opinion of appellant. (28RT 5856.) Knowing appellant's mom described

appellant as being sneaky changed Reverend Clark's opinion of appellant. (28RT 5859-5860.) While about a third of the church congregation lived in Carmelitas and was also in a bad situation as appellant, they did not murder, rape, kidnap or rob people. (28RT 5858-5859.) Reverend Clark acknowledged that in the three years he had not seen appellant, appellant had changed for the worse. (28RT 5866-5867.) Reverend Clark had a "good opinion" of appellant before, but following appellant's conviction, his opinion changed to being sad that appellant "would do something like this." (28RT 5869-5870.) Looking at the crime scene photographs, Reverend Clark agreed that someone who committed such acts was a horrible person. (28RT 5886-5887.)

Appellant's father, James, testified. James and Pamela married on June 2, 1978. Appellant was 18 years old on December 29, 1998. James and Pamela separated in 1996. James raised appellant from birth until 1996, but he was in and out of appellant's life. James did not believe he raised any of his six children well and considered himself to be "a poor excuse of a father." (28RT 5896-5899, 5901.) When appellant was born, James did not have a job and sold drugs. Pamela was on welfare. (28RT 5921.) James did not teach appellant right from wrong, but taught appellant to be a "hustler" and to make money. (28RT 5900.) James made his living through drugs. (28RT 5901.) James told appellant about his illegal activities and exposed appellant to his lifestyle. (28RT 5904-5905.)

In the first six years of appellant's life, Pamela was an alcoholic. She drank in appellant's presence. She also used PCP and marijuana. (28RT 5923-5927, 5931-5932.) James often physically abused Pamela for not giving him money to buy drugs. Sometimes James beat Pamela in appellant's presence. When appellant was about five years old, the family moved to Monrovia. After about two years, Pamela left and moved in with a friend in Duarte. (28RT 5926-5928.) When appellant was in junior high

school, they moved to Carmelitas in Long Beach. (28RT 5929-5930.) During the time appellant was between age six and sixteen, James took appellant to school about five times. James never helped appellant with his homework. (28RT 5931.) During this period, James was "always loaded or in the streets." (28RT 5932.) James took money from appellant's piggy bank. (28RT 5932-5933.) Many times, James was violent with Pamela in appellant's presence. (28RT 5933.) Pamela was an alcoholic. (28RT 5934.)

During the first 16 years of appellant's life, James was legally employed for about a year. (28RT 5901-5902.) James used drugs, mostly cocaine, in appellant's presence every day. (28RT 5905, 5914.) James supplied appellant with marijuana and crack, as well as beer and wine. (28RT 5914.) In the summer of 1996, James took appellant and two women on a trip to Chicago. They stayed at a hotel. During their two month stay in Chicago, James bought marijuana, cocaine and liquor for appellant, and sold drugs in appellant's presence. (28RT 5901, 5916-5918, 5920, 5953.) Before the trip, James had received $21,000 in settlement from an accident. He used the money to buy drugs and a truck. He also gave some of the money to his family and used it to pay for his living expenses. (28RT 5915-5916, 5919.) James' mother paid for James and appellant's return bus trip to Long Beach. (28RT 5919-5920.)

During appellant's life, James was not home very much. (28RT 5935.) Once, appellant, who was about 15 years old, and his older brother held James down so Pamela could beat him. (28RT 5937-5938.) James started selling drugs when he was a teenager, but he had never been arrested or convicted for selling drugs. (28RT 5938-5939.) Growing up, appellant was bigger than Hardy. (29RT 5968-5969.) Appellant was a follower of Hardy. (29RT 5977.) Although James told a defense investigator on January 29, 1999, that Hardy and appellant did not see him

take drugs (29RT 5969-5971), appellant saw James take drugs at the house and while in Chicago (29RT 2979).

C. Rebuttal Evidence

On January 28, 1999, James unexpectedly came to the Alternate Public Defender's Office and spoke with investigator Cynthia Marcotte. James told Marcotte that his children never saw him take any drugs. (29RT 5983-5986.) James also said the children saw a lot of drinking, fighting and dysfunction. James used a lot of drugs and was under the influence while at the house. James' children knew James smoked crack and saw him associate with gangsters. (29RT 5987-5989.)

Pamela Armstrong testified that her family had special family dinners during the holidays. Pamela gave gifts to appellant at Christmas and on his birthdays. Pamela rewarded appellant for good grades. She did appellant's laundry, took care of his lunches, and took him to church. (29RT 5991-5996.) While appellant was growing up, Pamela held several jobs to support the family. On occasion, James watched the children while Pamela worked. When James wanted to do drugs, he had someone else watch the children. (29RT 5999-6003.) Pamela drank on a weekly basis and was abused by James. When James hit Pamela, she took the children to another room. Sometimes, the children were nearby when James hit Pamela. (29RT 6004-6007, 6049.) Once, Pamela took the children and fled after James bit her arm. Another time, James kicked the front door in and beat Pamela outside of the house while the children were watching. Sometimes, Pamela took the children to a neighbor's house when James was high on drugs and acted crazily. (29RT 6049-6050, 6054.) Life was "hell" for the children. (29RT 6051.)

Appellant was three years younger than Hardy. They shared a bedroom and were close. They had a television in their room and toys as well. When Hardy turned 13 years of age, he began hanging out with gang

members. Appellant began hanging out with gang members after the family moved out of Carmelitas projects when he was about 12 or 13 years old. (29RT 6008-6009.) Appellant associated with the Rolling 20's, a different gang with which Hardy associated. (29RT 6011-6012.) Appellant was influenced by Hardy. (29RT 6059.)

Pamela never physically abused appellant, but she spanked him on occasions when he did something wrong. When appellant was in 10th grade, he stopped going to school although Pamela wanted him to continue his education. (29RT 6014-6015.) Later, Pamela learned appellant was a member of Capone Thug Soldiers. (29RT 6016.) When appellant was about 16 or 17 years old, he had a girlfriend. At the time of Keptra's murder, appellant lived with his girlfriend and did not have a key to Pamela's house. Pamela did not want appellant in the house while she was away at work. (29RT 6020-6022.)

During the time Pamela and James were together, they were separated as much as they were together. On several occasions, they were separated for a year or two. Pamela made James leave the house because she did not want the children to see what he was doing. Appellant never lived with James. (29RT 6026-6028.) At times, James stole money, food, or Christmas gifts from the house. (29RT 6048, 6058.)

When appellant was born, they lived in an apartment in Monrovia. Later, they lived in Pasadena before returning to Monrovia. When appellant was about four years old, they moved to an apartment in Carmelitas in Long Beach. Appellant attended elementary school. Pamela worked and paid for the apartment. They also lived in a single family home on Fashion Avenue and an apartment on Redondo Avenue in Long Beach. Appellant moved out of the house when his girlfriend became pregnant. He was about 16 or 17 years old. (29RT 6031-6039.) They moved from Carmelitas when Pamela made too much money to live there. (29RT

6092.) After they moved from Carmelitas, they changed churches. (29RT 6039-6041.) When Pamela attended First Shining Light church and sought assistance, Reverend Miller Jackson, the main pastor, came to her house. Sometimes Reverend Clark came with Reverend Jackson. Reverend Jackson knew Pamela better than Reverend Clark. (29RT 6042-6043.) When Pamela and the children lived in Carmelitas, another family continually threatened them. They were also threatened by the gang members and drug dealers who claimed the area as their territory. Pamela constantly called the police. (29RT 6055.) When the family first moved to the house on Fashion Avenue, they were happy, but Pamela continued to have problems with James. During this time, appellant decided to drop out of school. Pamela called the police on numerous occasions to report appellant as a run-away. Appellant was rebellious and did not live at home. When appellant was arrested, Pamela tried to have the juvenile hall keep him. (29RT 6092-6094, 6097-6100.) Pamela and James separated before she moved to Redondo Avenue. (29RT 6100.)

On occasion, Pamela drank in front of appellant. She drank heavily. She tried not to do drugs in front of the children, but sometimes she was high on drugs while the children were around. (29RT 6046-6047, 6052.) Sometimes, Pamela received welfare. She was once convicted of welfare fraud. (29RT 6049.) When Pamela worked, she left the children in the care of neighbors or family members. Sometimes she came home and found the children hanging out in the apartment or playing in the heavy rain unsupervised. (29RT 6052-6054.) Pamela did not consider herself as a good role model for her children. Once she unsuccessfully tried to have appellant live in a boys' home. Other times, the police accused her of neglect. (29RT 6056-6057.)

Defense investigator Joe Brown testified. When Brown interviewed James, he said after he separated from Pamela, appellant came to a motel

where James was staying because Pamela had kicked him out of the house for smoking marijuana. (29RT 6233-6235.)

On March 30, 1995, appellant told Long Beach Police Sergeant Tom Keleher that he was a member of the Insane Crips gang. (29RT 6230-6232.) On March 7, 1996, appellant told Long Beach Police Officer John Bruce that he was a Rolling 20's gang member and was called "Big Young Dog." (29RT 6155-6156.) On July 26, 1996, Long Beach Police Officer Phil Candelaria, who was assigned to the juvenile division of the Long Beach Police Department, came into contact with appellant, also known as "Young Dog." At about 2:40 p.m., Pamela came to the juvenile detention facility to pick appellant up. (29RT 6218-6220.) On October 28, 1997, appellant told Officer Janet Cooper that he was a Rolling 20's gang member and was called "Young Dog." (29RT 6158-6159.)

Long Beach Police Detective Victor Thrash testified as the prosecution's gang expert. The Insane Crips and the Rolling 20's Crips are active gangs in Long Beach. Both of these gangs are different cliques of the Crip gang. While the Insane Crips and the Rolling 20's Crips gangs joined in fighting the Blood gangs, they sometimes experienced friction with each other. (29RT 6221-6223.) A person is "jumped in" as part of initiation into the gang by fighting two or three existing gang members. (29RT 6223.) The members of these gangs commit violent crimes, including murders, to increase their status within the gang. (29RT 6224-6227.) Appellant was a documented member of the Rolling 20's Crips gang. (29RT 6227-6229.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCUSED NINE PROSPECTIVE JURORS FOR CAUSE WHOSE VIEWS ON THE DEATH PENALTY SUBSTANTIALLY INTERFERED WITH THEIR ABILITY TO FUNCTION AS JURORS

Appellant contends that the trial court's excusal of nine prospective jurors for cause based on their death penalty views violated his rights to a fair trial under the Sixth and Fourteenth Amendments of the federal Constitution. (AOB 38-137.) Specifically, appellant argues the following: (1) G.P., L.B., S.R., M.M., and M.H. were improperly dismissed based on their responses to "factually irrelevant and/or legally flawed and confusing 'hypotheticals'" (AOB 45-101, 112-121); (2) O.S.'s comments were mischaracterized and the court failed to question the prosecutor's arguments (AOB 101-112); (3) L.M.'s belief that life without the possibility of parole ("LWOP") was a worse penalty than death did not indicate she was unable to set aside any personal feelings and follow the law (AOB 121-125); (4) the court failed to further inquire into K.G.'s belief that the defense had the burden to prove a defendant's innocence (AOB 125-131); and (5) C.C. did not express disqualifying death penalty views (AOB 131-137). Respondent disagrees.

A. Applicable Law

A prospective juror may be excluded if his views would prevent or substantially impair the performance of his duties as a juror in the case before the juror. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140); *People v. Wader* (1993) 5 Cal.4th 610, 652-653.) A personal opposition to the death penalty or "the mere *absence* of strong, definite views about the death

penalty," by itself, is not disqualifying. (*People v. Pearson* (2012) 53 Cal.4th 306, 331, italics original.)

If a juror gives conflicting or ambiguous answers to questions about his views on the death penalty, the trial court is in the best position to evaluate the juror's responses, so its determination as to the juror's true state of mind is binding on the appellate court. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 428-429; *People v. Phillips* (2000) 22 Cal.4th 226, 234; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1147.) "As noted in *Witt* itself, the trial judge may be left with the 'definite impression' that the person cannot faithfully and impartially apply the law even though he has not expressed his views with absolute clarity. [Citation.]" (*People v. Garcia* (2011) 52 Cal.4th 706, 743.) Any ambiguities in the record are resolved in favor of the trial court's assessment, and the reviewing court determines whether the trial court's findings are fairly supported by the record. (*People v. Crittenden* (1994) 9 Cal.4th 83, 122; *People v. Howard* (1988) 44 Cal.3d 375, 417-428.) "When there is no inconsistency, but simply a question whether the juror's responses demonstrated a bias for or against the death penalty, the trial court's judgment will not be set aside if supported by substantial evidence. [Citation.]" (*People v. Roybal* (1998) 19 Cal.4th 481 519.) " 'The real question is " ' "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror." ' " ' [Citations.]" (*People v. Heard* (2003) 31 Cal.4th 946, 958-959.)

B. The Trial Court Properly Excused Prospective Juror G.P. for Cause

According to his juror questionnaire, Prospective Juror G.P. (#2644) was a 64-year-old male high school teacher from Long Beach. (26CT 7374, 7377.) He had never served on a jury and was "apprehensive" about serving as a juror. (26CT 7381-7382.) He had taught a course called

"Understanding the Law" for about seven to eight years and had served as a mock trial advisor for about eight years. (26CT 7388.)

As to the death penalty portion of the questionnaire, G.P. felt death was "an appropriate punishment" in certain cases. (26CT 7410 [Q. 178].) He was "neither strongly for [n]or against" the death penalty. (26CT 7410 [Q. 179].) He was "a strong proponent" of the death penalty "at one time." (26CT 7410 [Q. 181].) Discussing the death penalty in class caused him to evaluate his opinion on the death penalty. (26CT 7410 [Q. 180].) He believed the death penalty should be imposed in cases where there was planning or premeditation. (26CT 7411 [Q. 191].) In punishment for murder, he believed LWOP "could be a replacement for the death penalty." (26CT 7411 [Q. 193].) He considered LWOP to be the worse penalty for a defendant and added, "To be locked up for 20-30 or more years would be worse." (26CT 7412 [Q. 198]; see 26CT 7416 [Q. 225].) Later, when asked to circle the more severe punishment between death and LWOP, he did not circle anything and explained, "I do not really know." (26CT 7417 [Q. 227].)

G.P. could see himself rejecting LWOP and voting for death in an appropriate case "[i]f the facts meet the criteria." (26CT 7414 [Q. 209].) As an example, death penalty would be appropriate where "someone has without any thought taken anothers [*sic*] life to gain money, property, or hunted down another to kill them." (26CT 7414 [Q. 209A].) He could also see himself rejecting death and voting for LWOP "[i]f the facts do not meet my ideas of use of the death penalty." As an example, LWOP would be appropriate for "someone who may have been with others in the murder." (26CT 7414 [Q. 210].) When asked to describe what he had seen, read, or heard about the death penalty, he stated, "[I]n some cases it was a very bad way to die. It is not a deterrent." When asked to describe any reactions to what he saw, read, or heard, he stated, "That is why I am torn between

death & life without parole." (26CT 7417 [Q. 228].) He did not have a preference to be a juror on this case and explained, "I think I could do my duty but it is a very great responsibility." (26CT 7417 [Q. 231], underscoring in original.)

During *Hovey* voir dire,[6] G.P. told defense counsel that he could have an open mind about punishment and evaluate all the circumstances presented. (7RT 1412.) When the prosecutor asked about his response to question number 179, that he was neither strongly for or against the death penalty, G.P. stated he would "probably be for it" in some circumstances but that "it would depend on the circumstances." (7RT 1415.) When the prosecutor asked under what circumstances he would be able to impose the death penalty, G.P. replied, "Well, I guess if all the evidence pointed to that, I guess, the something that calls for death, the circumstances that the crime was committed, the various things that maybe happened before, prior history, things like that, outweighs whatever good this person has done, then I think I could do it." (7RT 1415-1416.) G.P. stated he was "willing" to impose the death penalty. (7RT 1416.)

When the prosecutor asked about how he could impose LWOP or death if he did not know which punishment was worse (Q. 227), G.P. explained he could impose death "if the circumstances surrounding the crime and all the factors leading up to it called for the death penalty." (7RT 1417-1418.) Referring to G.P.'s comment that he was "torn" between death and LWOP (Q. 228), the prosecutor asked about his ability to impose death, and the following exchange ensued:

> [G.P.]: Well, I don't know how you would know. I really don't. Again, you have to take my word that I would listen to all the evidence and make the decision that I think is right. And since you are the prosecution side, you would have to convince

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[6] *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

me not maybe convince me like I'm resisting it, but show me that this man deserves the death penalty in this case.

[Prosecutor]: Okay. What is that I would have to do to convince you of that?

[G.P.]: Possibly show me a history of cruelty and maybe committing other crimes. I don't know what you will offer in evidence because I have never been on a trial like this. . . . Showing something that he has done this before.

[¶] . . . [¶]

[Prosecutor]: If I'm unable to show you that he has ever done anything like this before are you going to vote life without the possibility of parole?

[G.P.]: I don't know. There maybe other evidence there, one crime maybe because of the circumstances surrounding it and all the different charges, maybe that would be enough to impose the death penalty.

(7RT 1419.)

The prosecutor asked about G.P.'s ability to impose the death penalty depending on the different special circumstances proved:

[Prosecutor]: So my question to you, if the only thing I prove is that a robbery had occurred in the course of a first degree murder, can you impose the death penalty?

[G.P.]: If all the[,] if the circumstances require it, if the aggravating circumstances, if during the robbery whatever, I'm again[,] I'm not familiar with it, so I don't know.

[Prosecutor]: Okay. It never requires it. That's what I'm trying to tell you. You are never required to vote for the death penalty. That's what the court has told you.

[G.P.]: Right.

[Prosecutor]: What I'm asking is if you could impose the death penalty if all I prove to you was the robbery and first degree murder.

[G.P.]: I'm not sure, I think I could, but I'm really not sure.

(7RT 1421-1422.)

As to whether he could impose the death penalty if the prosecutor only proved kidnap for rape, G.P. stated, "I think I could, but I would just have to listen and you know try to make up my mind at that time." (7RT 1422.) If the prosecutor only proved rape with a stake, he stated, "Again, probably, but I would have to, again, listen to what took place." (7RT 1422.) If the prosecutor only proved kidnapping, he said, "I might be reluctant in that case." (7RT 1422.) If the prosecutor only proved torture, he replied, "Probably." (7RT 1422.)

Noting G.P.'s comment that he thought LWOP "could be a replacement for the death penalty" (Q. 193), the prosecutor asked if he believed LWOP "would be the better punishment," and the following exchange occurred:

> [G.P.]: No, I don't think the better punishment. I think it could be used. I know we are one of the few countries in the world that still uses the death penalty. And a lot of so-called industrial countries feel that a life in prison is good enough punishment for somebody.
>
> [Prosecutor]: Do you feel the same way?
>
> [G.P.]: No, I go back to thinking that the circumstances surrounding the crime call for the death penalty?
>
> [Prosecutor]: What circumstances can you think of call for the death penalty?
>
> [G.P.]: Maybe in case like this case, possibly, the charge the way the charges were read with torture and things like that rape with using the foreign object, the cruelty of this crime, possibly, assuming that this all took place, and the defendant committed these crimes, then it could call for the death penalty.

(7RT 1423.)

G.P. agreed with the prosecutor that he did not know how he felt about the death penalty, but stated that he would be able to impose it "[i]f the circumstances warrant it." (7RT 1424-1425.) In an assault hypothetical where a perpetrator was punching someone who was being held down by a coperpetrator and the person dies, G.P. said he could impose the death penalty on the coperpetrator if the aggravating factors substantially outweighed mitigating factors. (7RT 1428-1429.)

The prosecutor asked about G.P.'s response to question number 210:

> [Prosecutor]: Okay, on question no. [210], "Given the fact that you have two options available to you, can you see yourself, in the appropriate circumstance, rejecting death and voting for life in prison without the possibility of parole?" You answered, "Yes." And your explanation is, "If the facts do not meet my ideas of the use of the death penalty." So what are your ideas of the use of the death penalty?
>
> [G.P.]: I don't know if – I when I say the use of the death penalty, I think I'm still thinking of the circumstances the, again, using the aggravating and mitigating thing.
>
> Although the use of the death penalty, I'm not sure, maybe I did mean to say that. Do we use it as a punishment or as a deterent [*sic*].
>
> [Prosecutor]: What are your ideas when you wrote this answer down? You did not have in your mind aggravating and mitigating and that's what I'm asking you about.
>
> [G.P.]: I might have, but still I also think that the use of the death penalty in the United States at least, is not a deterent [*sic*], because most of the guys and women who are on death row, spend a long time there. So it can't be used as a deterent [*sic*] because it's not really a threat to anyone. It does keep the person off the street forever, but so does life in prison without the possibility of parole. I think maybe that's what I meant.
>
> [Prosecutor]: Okay, as I understand what you are saying, correct me if I'm wrong, because the death penalty is not a deterent [*sic*] and life without the possibility of parole does the same thing as the death penalty that is keep the person off the

street forever, you would impose life without the possibility of parole, am I correct?

[G.P.]: No. Not more so than I would impose the death penalty before if the circumstances, the aggravating circumstances outweighed the other. I think whether I believe, you know, that whether it's a deterent [*sic*] or not, I still could impose and make that ultimate choice.

[Prosecutor]: Okay. So, what you wrote is, if the facts do not meet my ideas of the use of the death penalty, and, as I understand what you have explained, it is not a deterent [*sic*]. It does keep people off the street, but then so does li[f]e without the possibility of parole.

[G.P.]: That's correct.

[Prosecutor]: So I don't see how you can impose the death penalty, when your ideas of the use of the death penalty is the same as life without the possibility of parole, it keeps a person off the streets forever.

[G.P.]: Well, I don't think that just because my idea is that death penalty is not a deterent [*sic*] doesn't keep me from imposing the death penalty.

[Prosecutor]: But that's what you said here. "If the facts do not meet my ideas of the death penalty then I will impose life without possibility of parole."

[G.P.]: What I said [is] if the circumstances surrounding the crime call for the death penalty, then I can make that decision.

[Prosecutor]: So we have a conflict here between the questionnaire and what you have said in court, right?

[G.P.]: That's a possibility. I know the questionnaire, that's probably towards the end of the questionnaire, after three hours or three and a half hours of writing maybe, but I still think that the use of the death penalty, is not a deterent [*sic*]. I think maybe that's what I meant when I wrote that.

(7RT 1429-1431.)

As to his answer to question number 210 that "someone who may have been with others in murder" might be an appropriate case for LWOP, G.P. further explained:

> Right, maybe that didn't take place, maybe they were with them, maybe they were driving the car, maybe they were standing over someplace and watching the crime take place. They were there, maybe you could convict them of being an accomplice and so on and so forth, maybe they don't deserve the death penalty. They didn't have any physical part of the crime.

(7RT 1432.)

The prosecutor followed up with a bank robbery hypothetical:

> [Prosecutor]: Let me give you another hypothetical. [¶] Three people one is outside in a car, one is standing at the door, and the other person goes in the bank and robs it. He has a gun. He kills somebody while he is in there. [¶] Do you think all three people are equally guilty.
>
> [G.P.]: I think equally guilty of murder.
>
> [Prosecutor]: And would you be able to impose the death penalty on the person in the car, if the aggravating circumstances substantially outweigh the mitigating circumstances.
>
> [G.P.]: Well, when you put it, if it outweighs.
>
> [Prosecutor]: That's the only situation in which you can impose the death penalty?
>
> [G.P.]: Right.
>
> [Prosecutor]: Even if you have that situation, you can still impose life without possibility of parole, that's what the court has told you. So knowing that was the – what penalty would you impose on the person in the car, who didn't go inside? He didn't shoot. He wasn't the actual killer.
>
> [G.P.]: I probably wouldn't impose the death penalty.

(7RT 1432-1433.)

Noting G.P.'s response to question number 198 that he believed LWOP to be the worse punishment for a defendant convicted of first degree murder and one or more of the special circumstances found true, the prosecutor asked if he would impose LWOP in this case if he found this case was "the worse case." (7RT 1433.) G.P. explained while LWOP was the worse punishment for him, it did not mean he would not impose the death penalty and that his decision on the penalty would depend on "whatever takes place and whatever evidence is shown to me." (7RT 1433-1434.) The prosecutor continued:

> [Prosecutor]: How can you impose the death penalty, if you believe that the worse possible punishment that you can give someone is life without possibility of parole? Because if you believe that this case is the worse case that you have heard of the evidence is horrible, and in your mind life without the possibility of parole is the worse, most horrible punishment that could be given, wouldn't that be the punishment that you would want to give to the person?
>
> [G.P.]: No.
>
> [Prosecutor]: Why not?
>
> [G.P.]: Because of the circumstances surrounding the crime.
>
> [Prosecutor]: Okay, but you have said that the worse possible punishment is life without the possibility of parole, right?
>
> [G.P.]: Right.
>
> [Prosecutor]: So why would you want to give someone the worse possible punishment?
>
> [G.P.]: I think –
>
> [Prosecutor]: Doesn't make sense to me.
>
> [G.P.]: Well, I think that what you are saying is I would go into any case, no matter what and I'm going to give life, life

without parole because that's the way I feel. I don't think it is the end of the world if I listen to all the circumstances and even though I might believe in certain things, I can still be open enough to make up my mind. I don't have a closed mind on it.

[Prosecutor]: But you don't know how you feel about the death penalty. I mean that's what you said. You said you don't know.

[G.P.]: Well, I don't know what I'm supposed to feel about the death penalty. I really don't, so –

[Prosecutor]: That's not a wrong answer.

[G.P.]: No, yeah, that's all I can say. I don't know how I feel about the death penalty.

(7RT 1434-1436.)

In further questioning by defense counsel, G.P. stated he would be open to both LWOP and death, would not favor one penalty over the other, would be fair and objective, and would be able to impose death if aggravating factors substantially outweighed mitigating factors. (7RT 1436-1437.)

The prosecutor challenged G.P. for cause. She argued that he did not know how he felt about the death penalty and that it could not be determined whether he would impose the death penalty. (7RT 1438.) She continued:

He says he will impose the death penalty, but on the other hand he says that he feels that life without the possibility of parole is a replacement for the death penalty. He also believes that the death penalty is not a deterent [*sic*] and yet if the facts don't meet his idea of the use of the death penalty, then he feels that life without the possibility of parole is what he [is] going to use.

He is torn between life without the possibility of parole and the death penalty. And on all the special circumstances, he indicated he thought so, probably, he was reluctant, possibly. He couldn't give me any circumstances in which he would

> impose the death penalty, not even to say for example, mass murder, 911. He couldn't come up with anything. He doesn't know how he feels about it.

(7RT 1438.) Defense counsel countered, "I believe the key to this inquiry is his statement based upon the charges read, this case would call for death. And it's quite fact specific[,] this case, based upon the charges, is such a case that would call for death." (7RT 1439.)

The court granted the People's challenge for cause and explained as follows:

> With respect to the state of mind under *People versus Cox* and *Bradford*, he teaches trial advocacy. He wants to serve on this jury, sort of like his laboratory to be able to serve.
>
> He indicates that in most civilized industrial countries there is no death penalty. There is only life without parole and they seem to be functioning well.
>
> If it does meet his idea of the death penalty that [*sic*] he [is] not going to impose the death penalty of the [*sic*].
>
> And he indicates the death penalty does not deter. If it does not deter neither idea of logic [*sic*] ipso facto, you could infer that he could not impose, but that's the inference that has to be drawn based on the state of mind.
>
> He also indicated there is also one other thing, when asked about the special circumstances, under which special circumstances would he consider as a potential for the death penalty. He is – he waivers [in] each one of them[.] [R]obbery, "I think I could," kidnap for rape, same answer, "I think I could," rape with a stake, "probably but," and then he made a qualifier kidnapping for torture[.] [P]robably there is not one[] [h]e said, yes, this is a special circumstance, I could consider as a factor. And we are talking about factor A issue here.
>
> He believes that life without [parole] is a replacement for the death penalty, I think intellectual. It's an intellectual thinking on his part because we have had quite a few jurors, pretty smart, and the way they answer the questions I consider to be some kind of intellectual sophistry.

> In this particular case, based even on the aider and abettor theory, he indicates that he could not, based on the aider and [abettor] theory, the person driving the car with the – if the aggravating circumstances substantially outweigh the mitigating circumstances, he indicates that he could not impose the death penalty. He flat out said he could not. And, if the theory of the People in this case is an aider and abettor theory[,] that would preclude consideration of a potential penalty.
>
> Therefore, based on *Wainwright versus Witt*, and the California case, that follow after that[,] this, in this court's view, based upon his state of mind, and the way he answers the questions, in this case, he is a substantially impaired person of his duties, the court – and I'm going to grant the cause.

(7RT 1439-1440.)

Here, substantial evidence supported the trial court's excusal of G.P. for cause. G.P. believed LWOP would be an appropriate penalty for "someone who may have been with others in the murder." (26CT 7414 [Q. 210].) He later elaborated, "[M]aybe they were standing over someplace and watching the crime take place. They were there, maybe you could convict them of being an accomplice and so on and so forth, maybe they don't deserve the death penalty. They didn't have any physical part of the crime." (7RT 1432.) When asked whether he could impose the death penalty on the driver/perpetrator who waited outside for the actual killer/coperpetrator who went inside the bank to rob it and killed someone, G.P. stated he "probably wouldn't impose the death penalty." (7RT 1433.)

The prosecutor never claimed appellant was the actual killer in this case. Appellant claimed that most of the brutal beating was perpetrated by Pearson. While he acknowledged that Hardy also participated in penetrating Keptra's vagina with a stick, appellant maintained he had not, that he was just an observer. He claimed his involvement was limited to just holding Keptra down and stomping on her a couple of times while Pearson raped her. Indeed, Pearson was the one who started to punch her,

who robbed her, who raped her, who decided to kill her, who beat her with a stick, and who stuck the stick inside her vagina. Although G.P. stated he could impose the death penalty in various scenarios – where there was premeditation (26CT 7411), or where the victim was killed "to gain money, property, or hunted down" (26CT 7414) – this was not that case.

Additionally, G.P. held views on the death penalty that could substantially impair the performance of his duties as a juror. He believed LWOP "could be a replacement for the death penalty." (26CT 7411.) He repeatedly stated that the death penalty was not a deterrent to crime, that LWOP served the same purpose. (26CT 7417; 7RT 1429-1431.) He admitted he was "torn between death & life without parole" because the death penalty "was a very bad way to die" in some cases and it did not serve as a deterrent. (26CT 7417.) G.P.'s views on the death penalty, coupled with his statements that he would not impose the death penalty in a case involving an aider and abettor, clearly supports the trial court's conclusion that G.P.'s views towards the death penalty would substantially impair his ability to sit as a juror in this case. (See *People v. Ervin* (2000) 22 Cal.4th 48, 69-71 [exclusion proper for prospective jurors unable to impose the death penalty on the hirer in a murder-for-hire case]; *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918 [exclusion proper for prospective jurors unable to impose the death penalty in felony-murder cases], overruled on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause,

whether or not the circumstance that would be determinative for that juror has been alleged in the charging document."].)

Contrary to appellant's claim, G.P. was not similarly situated as the excused juror C.O. in *People v. Pearson*, *supra*, 53 Cal.4th at pages 327-333. (See SAOB 6-8.) There, this Court found that C.O.'s possession of views on the death penalty, "more accurately described as vague, indefinite or uninformed did not itself disqualify her from service . . . , so long as she could follow her oath to conscientiously consider the death penalty." (*Id.* at p. 331.) On the other hand, G.P., as described above, held equivocal views on the death penalty, stating, for example, that he was "torn" between death and LWOP (26CT 7417) and that he could reject death and vote for LWOP "[i]f the facts do not meet my ideas of use of the death penalty" (26CT 7414).

Also, the trial court's reasoning for granting the challenge was not "factually incorrect." (AOB 61.) Rather, the trial court's restatement of G.P.'s comments were based on his answers to the juror questionnaire (Q. 83, 193, 210, 228) and his answers during voir dire (7RT 1421-1423, 1429-1431). Coupled with its observation of G.P.'s demeanor, the court's conclusion is supported by the record.

Further, the prosecutor properly used the bank robbery hypothetical to ascertain G.P.'s ability to return a death verdict in this case. (See AOB 65-69.) The information did not allege "direct, hands on, violent conduct by appellant." (AOB 65.) The prosecution never claimed that appellant was the actual killer. Rather, the prosecution proceeded on a theory that appellant was either a major participant or an aider and abettor. (24RT 5325.) Indeed, appellant testified that he observed Pearson's "sexual encounters" with Keptra while he stood by a wall. (23RT 4941-4942.) The prosecutor's bank robbery hypothetical focusing on the driver aider and abettor properly balanced the "competing principles" that the death-

qualification voir dire " 'must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case being tried. . . . [and] not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of mitigating and aggravating evidence likely to be presented.' " (*People v. Butler* (2009) 46 Cal.4th 847, 860, quoting *People v. Cash* (2002) 28 Cal.4th 703, 721-722.)

Additionally, the use of the bank robbery hypothetical did not "violate[] *Pearson* by assuring a venire panel unconstitutionally 'uncommonly willing' to impose the death penalty." (SAOB 10.) The prosecutor's hypothetical did not simply ask whether a prospective juror could impose the death penalty on the driver or the look out. Rather, the prosecutor asked whether the prospective juror could impose the death penalty on such a person "if the aggravating circumstances substantially outweigh the mitigating circumstances." (7RT 1432; see 7RT 1456; 8RT 1578; 11RT 2126, 2243.) Such hypothetical scenarios were not "of factual situations under which only the most ardent supporters of the death penalty could readily agree to impose that punishment." (SAOB 9.)

To the extent G.P. gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. Given G.P.'s equivocal statements about his views on the death penalty and how he would not impose death in an aider and abettor case, combined with the trial court's observations of his demeanor, the trial court's conclusions as to his true state of mind must be upheld since it is supported by substantial evidence. (See *People v. Griffin* (2004) 33 Cal.4th 536, 558-561, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32 [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 juror

nevertheless held views that substantially impaired her ability to serve]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [court permissibly excused a juror who said he did not know whether he could ever see himself feeling that death was the appropriate sentence].)

C. The Trial Court Properly Excused Prospective Juror L.B. for Cause

According to his juror questionnaire, Prospective Juror L.B. (#6179) was a 54-year-old male baker from San Pedro. (53CT 15433-15434, 15436.) He had previously served on a jury in three cases. (53CT 15440.) He had "mixed" feelings about whether he would "like or not like to sit on this case." (53CT 15460 [Q. 138].)

As to the death penalty portion of the questionnaire, L.B. stated he was for the death penalty. (53CT 15469 [Q. 178].) He believed California should have the death penalty and noted that death was "justified" where a "very violent crime is committed." (53CT 15470 [Q. 186].) When asked for type of cases where he thought the death penalty should be imposed, L.B. answered, "Premeditated, and brutal." (53CT 15470 [Q. 191].) As to his impressions about LWOP, L.B. commented, "I am afraid that the law can be changed." (53CT 15470 [Q. 193].) He stated it would be impossible for him to vote against the death penalty in "Self defense, and sickness." (53CT 15471 [Q. 195].) He sought clarification on whether an LWOP sentence could be overturned. (53CT 15473 [Q. 208A].) L.B. stated he would not automatically vote for death or LWOP regardless of the evidence presented. (53CT 15474 [Q. 214, 215].) He believed death was the more severe punishment. (53CT 15476 [Q. 227].)

During *Hovey* voir dire, L.B. told defense counsel that he did not lean against one punishment over the other without having heard the aggravating and mitigating factors and that he would be open-minded to consider the evidence presented. (11RT 2112-2113.) While concerned that a person

sentenced to LWOP could "get out" due to a change in law, L.B. stated he would not allow it to influence his decision on the penalty. (11RT 2114-2115.)

When the prosecutor explained the penalty phase and the weighing process, L.B. stated he could impose the appropriate penalty based on the aggravating and mitigating circumstances presented. (11RT 2115-2117.) L.B. explained his definition of "premeditation" and also stated he would be able to impose the death penalty in a hypothetical case lacking his understanding of premeditation. (11RT 2118-2119.) L.B. clarified that he meant he would not like to vote for death in cases of "self-defense and sickness" in question number 195. (11RT 2119-2120.) He explained "sickness" was an adult with a child's mind. (11RT 2120-2121.)

In the assault hypothetical where the victim's arms are being held by one person while another person beats up the victim, L.B. stated the person holding the arm was equally guilty as the one doing the beating. (11RT 2123.) When the prosecutor asked if L.B. could impose the death penalty on the person holding the arm if aggravating circumstances substantially outweighed the mitigating circumstances, the following colloquy occurred:

> [L.B.]: That's a little bit touchy, because I don't know, the guy was holding and he did not inflict the injury to the – I mean he is responsible for the crime. I don't know, but I don't think so. So I would be able to give him the death penalty in that case, the guy who is just helping.
>
> [Prosecutor]: Okay, the guy who was –
>
> [L.B.]: Holding the victim or the guy who is beating him is a different story.
>
> [Prosecutor]: The guy who is beating him could not beat him unless the guy held the arms. So the guy holding the arms is preventing the victim from escaping and defending himself. [¶] Does that change it for you?

[L.B.]: No, but I still assume that the guy who is holding him didn't probably know that he is going to be severely beaten.

[Prosecutor]: But he kept holding on to the arms, never let him go until he was dead.

[L.B.]: I am kind of undecided on that.

(11RT 2123-2124.)

In the bank robbery hypothetical where three people agree to use a gun and drive to the bank, one waits in the car, one stands as a lookout, and a third goes inside with the gun and kills someone during the course of the robbery, L.B. stated the three people were equally responsible if everyone knew the third person was taking the gun inside the bank. (11RT 2124-2126.) When L.B. said he could impose the death penalty on the person waiting in the car, the following colloquy occurred:

[Prosecutor]: Now, why is that different to you than the guy holding the arms of the victim?

[L.B.] I think it is because when you start beating on somebody, I don't think somebody you doing it with the intention that you are killing, but when you have a weapon then it's a different story. You have a weapon for one reason to hurt somebody, in my opinion.

[Prosecutor]: But the person in the car did not have the weapon.

[L.B.]: Yes, but he agreed, probably, with him that he knows what was going to happen in the action and that he is going to use that gun.

[Prosecutor]: So even though the person is actually preventing the victim from escaping or defending himself, you think that the person holding the arms should not get the death penalty, if he dies and the aggravating circumstances –

[L.B.]: No.

(11RT 2126-2127.)

The prosecutor challenged L.B. for cause, arguing that L.B. could not "apply the law with regards to aiding and abetting." (11RT 2127-2128.) When the court asked defense counsel for a response, he stated, "Only to say it does appear from the totality of his answers by the questions proposed by the court and counsel that he is opposed to the death penalty." (11RT 2128.) The prosecutor cited to *People v. Ervin*, *supra*, 22 Cal.4th 48, when the court asked for a citation on "aiding and abetting circumstances." (11RT 2128.) When defense counsel noted that L.B. stated he would be able to impose death in the robbery hypothetical, the court countered that the answer was qualified by the use of a gun. (11RT 2128-2129.)

The court granted the People's challenge for cause and explained as follows:

> You know, I'm reading from [the prosecutor's] stance if one of the jurors on the aiding and abetting theory, that the aiding and abetting theory is none [*sic*] weapon or none [*sic*] gun aiding and abetting theory and therefore that seems to be the predominate [*sic*] hypothetical that this court will be considering.

(11RT 2129.)

Here, substantial evidence supported the trial court's excusal of L.B. for cause. As noted above, the prosecutor proceeded on an aiding and abetting theory. (See *ante*, Arg. I.B.) L.B., however, stated he did not believe he could impose the death penalty on the person who holds down the victim's arms while another person beats the victim, even unto death. (11RT 2123-2124.) Indeed, defense counsel acknowledged that L.B. appeared to be "opposed to the death penalty." (11RT 2128.) While L.B. stated he could impose the death penalty on driver of a bank robbery where the parties agreed to use a gun (11RT 2124-2127), there was no allegation that a gun was used in the instant case.

Contrary to appellant's claim, L.B. was not similarly situated as C.O. in *Pearson*. (Supp. AOB 10.) Unlike C.O., who held vague views on the death penalty but repeatedly stated she could vote to impose it (*People v. Pearson, supra*, 53 Cal.4th at pp. 330-331), L.B. stated he did not think he could impose the death penalty on the aider and abettor from the assault hypothetical (11RT 2123-2124).

To the extent L.B. gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. Given L.B.'s clear statements about how he would not impose death in an aider and abettor case not involving a gun combined with the trial court's observations of his demeanor, the trial court's conclusions as to his true state of mind must be upheld since it is supported by substantial evidence. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1144 ["A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate."] quoting *People v. Rodrigues, supra*, 8 Cal.4th at p. 1146.)

D. The Trial Court Properly Excused Prospective Juror S.R. for Cause

According to his juror questionnaire, Prospective Juror S.R. (#3489) was a 31-year-old married male from Lakewood. (40CT 11633.) He had prior jury experience; he served as a foreperson. (40CT 11640.)

As to the death penalty portion of the questionnaire, S.R. felt the death penalty was "a big deter[r]ent." (40CT 11669 [Q. 178].) He believed California should have the death penalty because it served as a deterrent. (40CT 11670 [Q. 186].) He believed the death penalty should be imposed in cases "that are extremely cruel." (40CT 11670 [Q. 191].) He considered death was the worse punishment for a defendant convicted of first degree murder with one or more special circumstances found true. (40CT 11671 [Q. 198].) S.R. could see himself rejecting LWOP and voting for death in

an appropriate case "if the crime was horrendous enough." (40CT 11673 [Q. 209].) As an example, the death penalty would be appropriate in circumstances involving "mutilations, torture." (40CT 11673 [Q. 209A].) He could also see himself rejecting death and voting for LWOP in the appropriate case as "the crime may not have been horrible enough to warrant death." (40CT 11673 [Q. 210].) As an example, LWOP would be appropriate where "death was accidental, not premeditated." (40CT 11673 [Q. 210A].) While both LWOP and death by lethal injection are severe sentences (40CT 11675 [Q. 225, 226], S.R. believed death was the more severe punishment [40CT 11676 [Q. 227]).

During *Hovey* voir dire, S.R. told defense counsel that he could have an open mind about punishment and evaluate all the circumstances presented. (8RT 1565-1566.) The prosecutor gave the assault hypothetical and asked whether S.R. believed the person holding the arms was equally guilty as the one doing the hitting. S.R. said, "Maybe not equally, but close," and explained, "He's not actually doing the hitting, I mean, so it depends on what the charges are, if you're saying he's hitting him, he's not hitting him or her, which ever, it all depends on what you're being accused of doing." (8RT 1574-1575.) If the victim was unable to escape or defend themselves because of the person holding the victim's arms, S.R. stated the person holding the victim's arms was equally guilty. (8RT 1575.) The prosecutor continued:

> [Prosecutor]: Okay. So now looking at that, the person is holding the arms of the victim and the other person is beating them, are they both equally guilty? [¶] If you don't believe they are, that's fine.
>
> [S.R.]: It's something I'd really have to think about.
>
> [Prosecutor]: But we have to know your answer today.

[S.R.]: You know, I would still kind of say probably not equally.

[Prosecutor]: Okay. So let me ask you this additional fact. [¶] The victim, the person that was being beaten, dies. It's first degree murder and there is a special circumstance that's been found true.

Would you be able to impose the death penalty on the person holding the arms?

[Defense Counsel]: Objection. Incomplete hypothetical.

[Prosecutor]: – If the aggravating circumstances substantially outweigh the mitigating circumstances?

[S.R.]: Yes.

[Prosecutor]: Now, why can you impose the death penalty on that person, but yet you don't believe that person is equally guilty?

[S.R.]: You just said that the aggravating is more than the mitigating, so – I mean, when we were talking earlier I said right now I kind of didn't weigh it equal, but when you stated it that way, you're saying that the aggravating was far more than the mitigating, so that kind of is tipping the scale more.

[Prosecutor]: But the court has said that you do not have to impose the death penalty when the aggravating circumstances substantially outweigh the mitigating circumstances, so I don't understand what you are telling me. If you find that someone is not as guilty, how can you impose the death penalty on them?

[S.R.]: Actually, you asked if I could, if that was possible, if it was more. I could. I'm not saying I would, you know, you're saying could I.

[Prosecutor]: But what I don't understand is if you don't think that the two people are equally guilty, wouldn't you give them different punishments, because they weren't equally guilty?

[S.R.]: Well, when we were saying they weren't equally guilty, that was before you started saying the mitigating and the

aggravating was outweighing it. But now, I mean, if there was more stuff to it than what you've just said, you know, and you start saying they did this, they did this and this, that's starting to bump it up more than just holding on. That, to me, it's like raising the scale more than from being equal, from wherever, that would possibly be life. Now you're talking about it being far worse.

[Prosecutor]: I just said substantially outweighs, I didn't say that it was far worse. I just said it substantially outweighs. And the court says even if it substantially outweighs, you can still impose life without the possibility of parole.

[S.R.]: Yes.

[Prosecutor]: So in your mind, because the person holding the arms is not as guilty as the person actually doing the punching, wouldn't you impose life without the possibility of parole on him and give the other guy, the one actually doing the punching, the death penalty?

[S.R.]: I could do both in that. Like I said, you asked could I do either, so –

(8RT 1575-1577.)

The prosecutor then gave the bank robbery hypothetical:

[Prosecutor]: Three people. One person is waiting in a car, another person is waiting outside the bank as a lookout, the third person goes into the bank with a gun to rob it. They all know that that's what they're doing. The person inside the bank shoots and kills somebody.

Do you believe all three people are equally guilty?

[S.R.]: Did the person in the car know that the guy was going to go in there and kill somebody?

[Prosecutor]: Let's say he didn't.

[S.R.]: Then no, I don't think so. I don't think he's as guilty as the guy who pulled the trigger.

[Prosecutor]: Okay. Let's say he knew that the person that went in the bank had a gun, knew he was going to rob him, but didn't know he was going to kill somebody.

[S.R.]: No, I wouldn't say he was as guilty.

[Prosecutor]: Would you be able to impose the death penalty on the person in the car, if the factors in aggravation substantially outweighed the factors in mitigation?

[S.R.]: Are you saying like maybe somebody said that he knew that person was going to kill him – kill the person?

[Prosecutor]: No.

[S.R.]: Maybe not. Maybe not. Probably not.

[Prosecutor]: What about the lookout, the person standing outside the bank? Would you be able to impose the death penalty on him, under the same situation?

[S.R.]: Probably not. I would think that the person who actually did the killing –

[Prosecutor]: That that would be the person you would actually impose the death penalty on?

[S.R.]: Probably, if the other two people didn't know.

(8RT 1577-1579.)

When the prosecutor asked for a circumstance in which he would impose the death penalty, S.R. stated he would in "a truly horrible crime" where the person really tries to hurt the victim and inflict "more pain than . . . it would normally be." (8RT 1579-1580.) The prosecutor then questioned S.R. regarding the special circumstances. If robbery was the only special circumstance found true and the aggravating circumstances substantially outweighed mitigating circumstances, S.R. stated, "If it's just for a robbery, I can't see a death sentence for a robbery. Maybe I'm confused." (8RT 1581-1582.) The prosecutor continued:

[Prosecutor]: If the defendant was convicted of first degree murder and the special circumstance was only the rape, would you be able to impose the death penalty, if the aggravating circumstances substantially outweighed the mitigating circumstances?

[S.R.]: Could I or would I?

[Prosecutor]: Would you?

[S.R.]: I'm not sure.

[Prosecutor]: If the only special circumstance proved to be true was the kidnap for rape, would you impose the death penalty if the aggravating circumstances substantially outweighed the mitigating circumstances?

[S.R.]: Possibly.

[Prosecutor]: And assume the same hypothetical for the rape with a stake.

[S.R.]: Possibly.

[Prosecutor]: And the same circumstances, the same hypothetical for just a plain kidnapping.

[S.R.]: I'm not sure.

[Prosecutor]: And the same circumstances for a torture.

[S.R.]: Probably.

(8RT 1582-1583.)

The prosecutor challenged S.R. for cause based on the following: S.R. could not impose the death penalty on the driver or the lookout in the bank robbery hypothetical; S.R.'s statement that he could impose the death penalty on the person holding the victim's arms was inconsistent with his belief that the person holding the arms was not equally guilty as the person doing the hitting; and S.R. could not impose the death penalty if the only special circumstance found true was robbery while he was unsure about the

other special circumstances. (8RT 1585-1586.) Defense counsel countered that S.R. was not substantially impaired and that he had repeatedly stated he could consider both penalties and would be open-minded. (8RT 1587-1589.)

Noting the jurors' lack of knowledge on aider and abettor liability in answering the prosecutor's hypotheticals, defense counsel also asked the court to instruct the jury on aiding and abetting liability so that the jurors would know that an aider and abettor could be held responsible only when "he's aware that his conduct involves a great risk of harm or of death." (8RT 1589-1590.) Defense counsel disagreed with the court's comment that not instructing the jury on aiding and abetting liability would be a better way to test a juror's state of mind on whether they could impose the death penalty on an aider and abettor. (8RT 1592.) The prosecutor agreed with the court's view on the issue:

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

(8RT 1593.)

The court disagreed with defense counsel's claim that every juror to whom the prosecutor had presented the aider and abettor hypothetical responded the same, noting that Prospective Juror Nos. 6661 and 4376 differed in their responses. (8RT 1594-1595.) After further discussion, the court explained why it would not preinstruct the jury on aiding and abetting:

> Let me first say that the reason why the court does not pre-instruct anything with respect to specific laws like aiding and abetting, is because exactly of what [defense counsel] has articulated, and that is people – normal people that look in the

media, as he says, understand that the[re] should be different liabilities for an aider and abettor as there should be for the perpetrator.

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

And that's the reason why this court is not going to give a pre-instruction on aiding and abetting. I believe that that is a fair way to test the true state of mind of lay people, because that's exactly what we are trying to do.

We don't want to pre-instruct them just so that they can fit their answer with the law. The only pre-instruction that I do is with respect to aggravating and mitigating.

(8RT 1597-1598.)

As to S.R., the court granted the People's challenge for cause:

And based on this court's look at [S.R.] and his state of mind that this court is required to assess, based on *Bradford* and *Cox*, in applying *Witt versus Wainwright*, this court sees, in part, [S.R.] in the same way as [G.P.]. He picks and chooses the special circumstances that he believes he would be able to consider the penalty of death on, and that shifts and changes the burden of the People, because, you know, you have to fit the special circumstances for him.

The second thing is that in terms of an accomplice, or an aider and abettor, it is his true state of mind that they're not equally guilty, and even if they are guilty, they're not equally guilty. In other words, in these folks' eyes, the person is guilty, but there's a degree of guilt. And that is really the true test of whether or not they would be able to consider the penalty of death or automatically vote for life without parole.

> And this person is honest. He says probably not on the getaway driver and the lookout person, probably not, giving the state of mind to this court that that's really the right way we do aider and abettor questions.
>
> I didn't really know, and perhaps now I do, that the People's theory in this case probably is an aider and abettor theory. I didn't realize that, because I sit tabla rosa [*sic*] . . . . Now this court is being educated as to how this case probably will be presented, so that is a fair way to ask the questions.

(8RT 1598-1599.)

Here, substantial evidence supported the trial court's excusal of S.R. for cause. As noted above, the prosecutor proceeded on an aiding and abetting theory. (See *ante*, Arg. I.B.) S.R., however, stated that he probably would not impose the death penalty on the driver or the lookout even if the aggravating circumstances outweighed mitigating circumstances. (8RT 1578-1579.) He also believed the person holding the arms in the assault hypothetical was not equally guilty as the person doing the beating. (8RT 1575.) Additionally, S.R. stated he could not "see a death sentence" where the only special circumstances found true was robbery, even if the aggravating circumstances substantially outweighed mitigating circumstances. (8RT 1581-1582.) These responses also distinguish S.R. from C.O. in *Pearson*. (See SAOB 10-11.)

To the extent S.R. indicated he would consider all the circumstances, it was a statement in conflict with his earlier ones, and the court made a credibility and factual assessment regarding his true state of mind. "When a juror's views are conflicting or ambiguous, the trial court's determination as to his or her state of mind generally is binding on a reviewing court." (*People v. Roybal*, *supra*, 19 Cal.4th at p. 519, internal quotations omitted, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 822.) Since there was substantial evidence from which the trial court could have concluded that

this juror held disqualifying predetermined views on which types of cases warranted the death penalty, it properly excused him for cause.

E. The Trial Court Properly Excused Prospective Juror M.M. for Cause

According to her juror questionnaire, Prospective Juror M.M. (#2442) was a 60-year-old Hispanic female from San Pedro. (25CT 7324-7325.) As to the death penalty portion of the questionnaire, M.M. felt California should have the death penalty (25CT 7362 [Q. 186]) and that it should not be abolished as it served as a deterrent for some people (25CT 7362 [Q. 187]). M.M. believed the death penalty should be imposed in "repeat murders or other such cases." (25CT 7362 [Q. 191].) When asked which was the worse punishment, death or LWOP, M.M. stated they were equally bad. (25CT 7363 [Q. 198].) In the appropriate case, M.M. could see herself rejecting death and voting for LWOP (25CT 7365 [Q. 209]) and vice versa (25CT 7365 [Q. 210]).

During *Hovey* voir dire, M.M. told defense counsel she was neutral towards the death penalty. (7RT 1445.) If aggravating factors substantially outweighed mitigating factors, M.M. said she would be able to impose the death penalty. (7RT 1447.)

The prosecutor questioned M.M. about her ability to impose the death penalty if she was neutral towards the death penalty and LWOP as punishment. M.M. stated that having the aggravating and mitigating factors presented to her would help her make the decision. Although imposing the death penalty "would be a very difficult decision," M.M. stated she would if the case warranted it. (7RT 1448-1451.) Following up on question number 210, the prosecutor asked M.M. for an example of a case in which LWOP would be appropriate, and M.M. stated she could not answer having never served as a juror in a death penalty case. (7RT 1451-1452.)

In the assault hypothetical, M.M. stated the person holding the arm was equally guilty as the one doing the beating. If the victim died and the aggravating factors substantially outweighed mitigating factors, M.M. stated she could impose the death penalty on the person holding the victim's arms. (7RT 1455.)

In the bank robbery hypothetical, M.M. stated the person waiting in the car and the lookout were less guilty than the shooter. If the aggravating factors substantially outweighed mitigating factors, M.M. said she could impose the death penalty on the person waiting in the car. When the prosecutor reminded M.M. that she was never required to impose the death penalty, M.M. stated she would not impose death on the person waiting in the car. (7RT 1455-1458.)

In further questioning by defense counsel, M.M. stated she could find the person waiting outside in the bank robbery hypothetical guilty. (7RT 1459.) Defense counsel then asked about the penalty:

> [Defense Counsel]: And then the factors, the bad things, about the person outside outweigh the good things about the person outside. You could impose the sentence of death, is that correct?
>
> [M.M.]: No, in thinking about that again, she presented it again in that way I don't think he would be as guilty as the one that had shot and if I would. She said, I wouldn't be required by law to impose the death penalty. So I would be okay with saying life in prison without the chance of parole for the individual I thought was less guilty.

(7RT 1459.)

The prosecutor challenged M.M. for cause, arguing that she would not be able to impose the death penalty on the aider and abettor. She also stated that M.M. did not know her feelings towards the death penalty. (7RT 1460.) Noting that M.M. only stated she could not impose the death penalty after the prosecutor said she was not required to under the law,

defense counsel stated, "it was like suggesting to her okay you don't have to." (7RT 1461.)

The court granted the People's challenge for cause and explained as follows:

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

(7RT 1461-1462.)

Here, substantial evidence supported the trial court's excusal of M.M. for cause. As noted above, the prosecutor proceeded on an aiding and abetting theory. (See *ante*, Arg. I.B.) After stating she would be able to impose the death penalty if aggravating factors substantially outweighed mitigating factors (7RT 1447), M.M. stated she would not impose the death penalty on the person waiting in the car even if aggravating factors substantially outweighed mitigating factors (7RT 1457-1458). Indeed, as the trial court observed, even when defense counsel attempted to rehabilitate her, M.M. maintained that she would not impose death on the person waiting in the car as the law did not require her to do so. (7RT

1459.) These responses also distinguish M.M. from C.O. in *Pearson*. (See SAOB 11.)

To the extent M.M. indicated she would consider all the circumstances, it was a statement in conflict with her earlier ones, and the court made a credibility and factual assessment regarding her true state of mind. (See *People v. Roybal*, *supra*, 19 Cal.4th at p. 519.) Since there was substantial evidence from which the trial court could have concluded that this juror held disqualifying predetermined views on which types of cases warranted the death penalty, the trial court properly excused her for cause.

F. The Trial Court Properly Excused Prospective Juror O.S. for Cause

According to his juror questionnaire, Prospective Juror O.S. (#5849) was a 62-year-old married Hispanic male from Gardena. (21CT 5926-5927.) While he did not consider himself to be a religious person, O.S., a Catholic, considered religion to be "very important" to him. (21CT 5932-5933.) He had twice served on a jury. (21CT 5933.)

As to the death penalty portion of the questionnaire, O.S. did not hold any views on the death penalty. (21CT 5962 [Q. 179].) O.S. did not believe death or LWOP should be mandatory in all murder cases. (21CT 5963 [Q. 189, 190].) When asked which was the worse punishment, death or LWOP, O.S. stated LWOP was worse, noting "Death is quick, life is long, prison is hell." (21CT 5964 [Q. 198].) In the appropriate case, O.S. could see himself rejecting death and voting for LWOP (21CT 5966 [Q. 209]) and vice versa (21CT 5966 [Q. 210]). O.S. believed both LWOP and death by lethal injection are severe sentences (21CT 5968 [Q. 225, 226]) but that LWOP was the more severe punishment (21CT 5969 [Q. 227]). If he had a choice, O.S. preferred to serve as a juror in this case, noting that he had "a duty to [his] country and community" and the time to serve. (21CT 5969 [Q. 231].)

During *Hovey* voir dire, O.S. told defense counsel that he would be open to imposing either the death penalty or LWOP irrespective of his personal views. (6RT 1210.) The prosecutor questioned O.S. regarding his feelings about the death penalty. O.S. stated that he had not thought about the death penalty, that it was "something ugly," and that he did not "even want to think about." (6RT 1211-1214.) O.S. thought California had abolished the death penalty, and he did not feel that he was qualified to render an opinion on whether California should have the death penalty. (6RT 1213-1214.) When O.S. stated that he would be able to follow the law regardless of his personal feelings, or the views of the Catholic Church,[7] the prosecutor reminded him that the law never required him to impose the death penalty. (6RT 1214-1216.) O.S. responded that he could vote for the death penalty and explained:

> Because at this point, ma'am, at this point I don't have anything to go by. I don't have any hatred. I don't have any bad feelings against anybody, to be able to say, yeah, I'm going to vote for that.
>
> I have to sit through the whole thing and analyze it, and have at least a feeling of what's going on before I even – I'm

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[7] The prosecutor asked whether O.S. believed in the Catholic doctrine against the death penalty, and O.S. replied, "To a point. To a point." (6RT 1214.) When she asked, "What is that point?" O.S. replied, "If it's something so horrendous that it is probably – it calls for that. Again, I've never been in a position where I should decide one way or the other, this is why it is very difficult. [¶] But I believe that if the law states like, for instance, you're given a situation where they're giving you the instructions or what to do, you can follow the instructions without letting any beliefs or any feelings that I have – in other words, you hear the case, but at the end they're going to give you instructions and what to follow, how the law applies to that case. Well, I'm not supposed to let my own feelings interfere one way or the other then. [¶] If it's called for, then I have a feeling that, yes, it's my duty to go for that. If it doesn't call for that, you know, according to the instructions, I don't have any problem with saying no." (6RT 1214-1215.)

able – before I'm able to have any idea that I might want to go for the death penalty. I need to have enough – something to substantiate that decision.

You're asking me something without knowing anything, and at this point I only believe that the person being charged is innocent, as far as our law says. Up to this point, that's it.

Now, it's up to the district attorney or the state to prove differently, and then that's when you become aware of – okay, then it merits it.

(6RT 1216.) Reminding O.S. that they were working under the assumption that appellant had already been proved guilty of first degree murder and one of the special circumstances have been found true, the prosecutor asked if O.S. had to have "hatred or bad feelings" toward appellant in order to impose the death penalty. (6RT 1216-1217.) O.S. responded:

Perhaps I wasn't understanding that I had already sat through the whole case and they had already proven that the defendant was guilty. [¶] Okay. So he's guilty. Now, we're in the final phase, in deciding the sentence – [¶] . . . [¶] And if it is what the law says it should be, yes, of course.

(6RT 1217-1218.) After the prosecutor explained that the law did not require him to impose the death penalty, that he could always impose LWOP (6RT 1217-1220), the discussion continued:

[Prosecutor]: The judge never told you that if the aggravating circumstances substantially outweigh the mitigating circumstances, you must impose death; that's not what he said.

[O.S.]: No, but –

[Prosecutor]: So you're telling me that you're going to follow the law. The law says you have a choice.

[O.S.]: Yes.

[Prosecutor]: And I'm asking you if you are going to impose life without the possibility of parole, if the aggravating circumstances substantially outweigh the mitigating?

[O.S.]: No, ma'am. That's not – yes, you're right. Like I say, if the aggravating circumstances are more – are leaning toward, yes, of course, the death penalty is in order.

[Prosecutor]: Not necessarily. You can still impose life without the possibility of parole, and that's what I'm asking you. Is that what you're going to do?

[O.S.]: So this is what – I told you from the beginning that this is up to me to decide at the end, which way, if it's like – if it's death penalty or life in prison.

[Prosecutor]: Exactly.

[O.S.]: That's my decision.

[Prosecutor]: Correct.

[O.S.]: And that's what I'm agreeing with you, yes.

[Prosecutor]: But my question to you is, is if the aggravating circumstances substantially outweigh the mitigating circumstances, the court has told you that you can still impose life without the possibility of parole, and you have said you are going to follow the law.

[O.S.] Of course. You have enlightened the whole situation now, much precisely.

[¶] . . . [¶] See, I don't spend too much time in this, so I have to follow what I feel also, as to – I've got to do what's right. But you're explaining to me, you're educating me in a situation where when I get to that point, then I know exactly what to do.

[Prosecutor]: Now, you indicated a few moments ago that you don't know anything about the case and you haven't had any feelings developed for the defendant at this point in time; you don't know him, you don't have any bad feelings, you don't have any hatred for him. In order for you to impose the death penalty, are you going to have to have bad feelings or hatred toward the defendant?

[O.S.]: I'd like to think that I would not do the personal – not get involved personally, emotionally, on the person himself, only on what happened and what is my duty to do.

(6RT 1220-1222.)

Noting O.S. answered in question number 198 that LWOP was the worse punishment than death, the prosecutor asked the following:

[Prosecutor]: So my question to you is, if you feel that the circumstances in this particular case, that is, the bad factors substantially outweigh the good factors, are you going to impose life without the possibility of parole because you think it is a worse punishment?

[O.S.]: That would be – that probably was my own feelings. It probably would be my own feelings, being incarcerated for your life, in the conditions that they have in prison, I feel that sometimes to me – it's just my own personal feelings – I think it probably could be worse, life imprisonment.

[Prosecutor]: Okay. So my question to you is, would you impose life without the possibility of parole, if the aggravating circumstances substantially outweigh the mitigating circumstances, because you feel that life without the possibility of parole would be a worse punishment for this type of crime?

[O.S.]: Again, it's something that I wrote down as I was trying to understand the stack of – you know, there were very good questions. [¶] I wouldn't know, exactly, what to put down there until I sit through the whole case and see the whole situation. I think you have a better feeling, in order to answer those kind of questions, after you've been through the whole case; yes. [¶] Just by reading, it's like reading a book, it doesn't mean anything to me. I'm just expressing opinions.

(6RT 1222-1224.) O.S. explained further:

What I'm trying to feel in my conscience is not that I'm going to be a – what can I say – a person that will go for the death, you know. Some people are like, no, I don't even want to think about that much, because I take it very serious. But if it's called for and if it is one of the options, and if I sat on the case long enough to understand what's going on, I think that I am more equipped to have a very good answer at that time.

I'm not going to sit here and tell you, yeah, death, death, death; I'm not. I'm not for that. I'm for justice. And after sitting through the whole case and analyzing the situation, then I'd be better equipped to say, yeah, death or life imprisonment.

At this point I couldn't – I don't feel like – death, to me, is final, it's something that I'm not going to answer readily, just because somebody wants me to answer that way.

(6RT 1224-1225.)

The prosecutor followed up in her questioning:

[Prosecutor]: My question to you is, if you feel that life imprisonment is a worse penalty and you feel that this case deserves the worse possible penalty, are you going to vote for life without the possibility of parole?

[O.S.]: Well, then again, you see, there's opinions that I have.

[Prosecutor]: What is your opinion? That's what we want to know. We're not saying it's right or wrong, we just want to know it.

[O.S.]: Well, actually, the opinion was, to me – my personal feeling would be that life in prison would be worse. [¶] But, no, I think that the death penalty is final, it needs to be – yeah, it's a final thing, so I think – to put it – that's the end of it,

[Prosecutor]: You really want to be on this jury, don't you?

[O.S.]: Well, to me I can go home, I can play with the computers, it doesn't – you know, I'm not going to stay out of work. To me, it doesn't make a difference. To me, it would be very interesting to exercise what you're saying. I never had that feeling where I'm going to get to a point to decide that, and it's very difficult. What you're asking me right now is very difficult. I don't know one way or the other, unless, like I say, I have that – go through the whole case and like the whole situation.

[Prosecutor]: You just made that motion at your stomach. Are you talking about having some type of feeling, is that what that motion was?

[O.S.]: No. What I need to do is in order to answer the questions that you're asking me, I'm going to have to have a lot more, in order to say right now. It's kind of vague, death or life imprisonment. It's vague. It just like doesn't mean anything. It will mean something at the end of the case. You would see it more clearly, which way you could answer or which way you could feel, because it's an experience that not everybody has, you don't have it everyday, it's something that's unique in your lifetime.

[Prosecutor]: Okay.

[O.S.]: So I feel I only know at the end of the case, if understanding what happened or perhaps taking the whole –

[Prosecutor]: So you can't tell me at this point in time whether or not you could impose the death penalty if the circumstances were appropriate?

[O.S.]: No, [m]a'am, I can't say that. I can't tell you one way or another.

(6RT 1225-1227.)

The prosecutor presented the assault hypothetical where one person was holding the victim's arms while another beat the victim. O.S. believed both the person holding the arms and the one doing the beating were equally guilty. If the victim died and a special circumstance has been found true, O.S. stated he could impose the death penalty on the person holding the victim's arms and on the one who did the beating. (6RT 1227-1228.) When the prosecutor noted that O.S. could not answer her questions just moments before, O.S. explained that the hypothetical provided "a picture" based on which he could express his opinion. (6RT 1228-1229.)

The prosecutor challenged O.S. for cause:

First of all, he thought the death penalty was abolished. He had no feelings, one way or the other, concerning the death

penalty. He can't tell me whether or not life without the possibility of parole is – actually, he did tell me it was a worse sentence, and then he said, well, death is final. So I'm not sure that he meant that was worse, but he kept saying life without the possibility of parole is worse.

He indicated pretty much that he had to have hatred or bad feelings about the defendant, personally, in order to impose the death penalty, although he backed off on that a little while later.

I truly don't know where he stands. It appears to me that he is going to impose life without the possibility of parole, because he believes that life without the possibility of parole is the worse punishment, and someone should have to live with it, which is what he said on his questionnaire. It's question no. 227, which is, "Which do you believe is a more severe punishment, death or life without the possibility of parole?"

And he put, "Life without the possibility of parole. He'll live in hell for the rest of his life."

He said he doesn't even want to think about it. He doesn't want to think about the penalty. He's not qualified to say what the penalty should be. It's something ugly and I don't want to think about it.

And he also said that he follows the doctrines of the Catholic Church, in which they believe that you should not impose the death penalty, to a point. He couldn't tell me what point.

He says he doesn't want to think about it. He can not decide. He went back and forth. And I think he falls under *Cox*.

(6RT 1230-1231.) Defense counsel countered that though O.S. felt LWOP was worse than death, in the end, when given a concrete hypothetical, O.S. stated that he could impose death on the killer and the accomplice and that death was worse than LWOP. (6RT 1231-1232.)

The trial court granted the People's challenge for cause and explained as follows:

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

(6RT 1233.)

Here, substantial evidence supported the trial court's excusal of O.S. for cause. Although O.S. did not favor or oppose the death penalty (21CT 5962), he believed the death penalty was "something ugly" (6RT 1214), while LWOP was the worse punishment (21CT 5964). When the prosecutor told O.S. that he had a choice on the penalty and asked if he would impose LWOP where aggravating circumstances substantially outweighed mitigating circumstances, O.S. was vague, stating, "when I get to that point, then I know exactly what to do." (6RT 1221-1222.) When

the prosecutor followed up on his comment about having "hatred" or "bad feelings" against the defendant and asked if he needed such feelings to impose the death penalty against a defendant, O.S. was similarly vague, stating only that he would "like to think that [he] would not do the personal – not get involved personally, emotionally, on the person himself, only on what happened and what is [his] duty to do." (6RT 1216, 1222.) After acknowledging that his "own feelings" were that LWOP was worse than death (6RT 1223), O.S. failed to answer the prosecutor's question whether he would impose LWOP if aggravating circumstances substantially outweighed mitigating circumstances, repeating that he did not know until he had sat through the case first (6RT 1223-1225). Finally, when the prosecutor asked whether O.S. could tell her "at this point in time whether or not [he] could impose the death penalty if the circumstances were appropriate," O.S. answered, "No, a'am, I can't say that. I can't tell you one way or another." (6RT 1227.)

Contrary to appellants claim, O.S. was not similarly situated as C.O. in *Pearson*. (SAOB 11.) While C.O.'s views on the death penalty were "vague and largely uninformed," she was "definite and consistent" on whether she could vote to impose the death penalty. (*People v. Pearson*, *supra*, 53 Cal.4th at p. 331.) On the other hand, O.S. had a view on the death penalty: "Death is quick, life is long, prison is hell." (21CT 5964.) However, he was vague about which punishment he would impose, repeatedly stating that he would know only when it was time to make that decision.

To the extent O.S. gave conflicting answers (stating he could impose death on the killer and the accomplice in the assault hypothetical), the trial court made a credibility and factual assessment regarding his true state of mind. (*People v. Kaurish* (1990) 52 Cal.3d 648, 698-699 ["if the record of a juror's death qualification is ambiguous, the trial court's determination on

substantial evidence of the juror's fitness is binding on appellate courts."].) Since there was substantial evidence from which the trial court could have concluded that this juror held disqualifying predetermined views on which types of cases warranted the death penalty, it properly excused him for cause.

G. The Trial Court Properly Excused Prospective Juror M.H. for Cause

According to her juror questionnaire, Prospective Juror M.H. (#9961) was a 55-year-old married female from Long Beach. (22CT 6376-6377.) As to the death penalty portion of the questionnaire, M.H. stated her general feeling regarding the death penalty was that "sometimes it's appropriate." (22CT 6412 [Q. 178].) She also stated, "I am for the death penalty in some cases." (22CT 6412 [Q. 179].) She believed death was the worse punishment for a defendant, but stated she would prefer LWOP. (22CT 6414 [Q. 198].) When asked if she could see herself rejecting LWOP and voting for death in an appropriate case, she marked "yes." (22CT 6416 [Q. 209].) When asked for a circumstance in which the death penalty would be an appropriate, M.H. stated, "I probably will know it when I see it." (22CT 6416 [Q. 209A].) She also could see herself rejecting death and voting for LWOP in an appropriate case (22CT 6416 [Q. 210]), but she could not think of an example where it would be appropriate (22CT 6416 [Q. 210A]). M.H. believed both LWOP and death were severe punishments (22CT 6418 [Q. 225, 226]), but she believed death was the more severe punishment (22CT 6419 [Q. 227]). If she had a choice, she would rather not serve as a juror on this case because she believed the trial would be "too long." (22CT 6419 [Q. 231].)

During *Hovey* voir dire, M.H. told defense counsel that she was "equally open" to both LWOP and death depending upon the circumstances and that she would be able to impose death if the facts warranted it. (6RT

1253.) Noting M.H. did not have any views on whether California should have the death penalty and did not believe it was for her "to judge," the prosecutor asked how she could impose the death penalty. (6RT 1254-1255.) M.H. replied, "It depends o[n] the circumstances and the facts, if I think if it's really horrible crime and deserves probably deserves, it's every juror will probably judge the way they feel how it will affect them." (6RT 1255.) M.H. stated she could make a decision on the death penalty, that she could "look the defendant in the eye and say I'm going to kill you." (6RT 1255-1256.)

The prosecutor presented the assault hypothetical and asked if M.H. thought the person holding the arm was equally guilty as the one doing the hitting. M.H. replied, "It depends on the character of the person who is the most vicious person and the leader of that group, more guilty who was doing the beating actually." (6RT 1260-1261.) The prosecutor continued:

> [Prosecutor]: Okay[,] the person that is holding on to the person that is being beaten is preventing the person that is being beaten from getting away or defending themselves. Is that person equally guilty as the person punching?
>
> [M.H.]: I don't know how to answer.
>
> [Prosecutor]: Just tell us how you feel. If you don't feel he is equally guilty that's okay, as the court says, there is no right or wrong answer. We want to know how you feel. If you don't feel he is equally guilty, if you feel he is equally guilty then say that.
>
> [M.H.]: I don't think so.
>
> [Prosecutor]: Now if the person who is being beaten dies, now it is now murder in the first degree. Murder and the special circumstances have been found true. Could you impose the death penalty, if the aggravating circumstances substantially outweigh the mitigating circumstances on the person that is holding the person who died arms [*sic*]?
>
> [M.H.]: I should probably be –

The Court: I'm sorry.

[M.H.]: It should be more to it than just holding.

[Prosecutor]: So are you saying, "No, I cannot. I [*sic*] impose the death penalty on the person who is holding the arms"?

[M.H.]: If it's all the information I have.

[Prosecutor]: This is the information you have.

[M.H.]: No.

[Prosecutor]: And is that because you don't believe that he [*sic*] as guilty as the person who is doing the beating?

[M.H.]: Maybe he is guilty, but he is not the one who the [*sic*] is doing beating and he is probably not such a bad person compared to the other who was doing the beating.

[Prosecutor]: So do you think that someone has to be bad in order to have the death penalty imposed upon them?

[M.H.] It usually is.

[¶] . . . [¶]

[Prosecutor]: If the aggravating circumstances substantially outweigh the mitigating circumstances, do you believe that life without the possibility of parole would be the punishment that you would give to the person who was holding the person who died?

[M.H.]: No.

[¶] . . . [¶]

[Prosecutor]: [¶] Would you be able to impose the death penalty on that person the person holding the arms?

[M.H.]: Yes.

(6RT 1261-1263.) When the prosecutor stated that M.H. had changed her mind, she said she did not, that she either did not recall or hear the

prosecutor initially mentioning aggravating circumstances substantially outweighed mitigating circumstances. (6RT 1263-1265.) The prosecutor continued:

> [Prosecutor]: And you also said that someone has to be bad in order to impose the death penalty upon them, do you recall saying that?
>
> [M.H.]: Yes.
>
> [Prosecutor]: Are you changing your mind with respect to that?
>
> [M.H.]: No.
>
> [Prosecutor]: You still believe somebody has to be of bad character and have some history or some person who can do it to another person.
>
> [M.H.]: Yes, it's a bad person.
>
> [Prosecutor]: And that person, in order for you to impose the death penalty, you have to believe that that person is bad, correct?
>
> [M.H.]: Absolutely.

(6RT 1265.)

In further questioning by defense counsel, M.H. stated she did not favor one penalty over another and that the death penalty was the worse punishment. (6RT 1267.) Defense counsel continued:

> [Defense Counsel]: And if I understand you correctly, you feel that once you have convicted a person for these crimes and the special circumstances, that in your eyes that person is a bad person, is that right?
>
> [M.H.]: No, I have to believe that it's a bad person before I convict.
>
> [Defense Counsel]: Before you convict them?
>
> [M.H.]: Yes.

[Defense Counsel]: Once you convicted them, you would believe that he is bad, is that right?

[M.H.]: Right.

[Defense Counsel]: And you say you have to believe that he is bad before you convicted them?

[M.H.]: Right.

[¶] . . . [¶]

[Defense Counsel]: Now, if you concluded that the person was guilty, would you believe that he is bad for having participated in the crime?

[M.H.]: No.

[Defense Counsel]: You could find him guilty without that, is that correct, without believing him to be bad?

[M.H.]: No.

[Defense Counsel]: Could you find him guilty based upon the evidence?

[M.H.]: Yes.

[Defense Counsel]: Okay. And based upon the evidence, if you felt that the bad things outweigh the good things, could you give him death?

[M.H.]: Yes.

(6RT 1267-1269.)

The prosecutor challenged M.H. for cause based on her lack of opinion on the death penalty, her conflicting answers to the assault hypothetical, and her belief that someone had to be "bad" to receive the death penalty. (6RT 1270-1271.) The prosecutor stated that M.H. could not impose the death penalty, that because she believed LWOP was the worse penalty for herself, she would impose LWOP. (6RT 1271.) Defense counsel countered that M.H. was willing to impose the death penalty on the

accomplice and that the weighing of the aggravating and mitigating circumstances was essentially a finding whether the person was "bad." (6RT 1271.)

The court granted the People's challenge for cause and explained as follows:

> In particular she has indicated the following things. First of all her demeanor in this particular questioning, you know, I always start out the questioning by asking people to speak up so we could hear them because we want to have audible answers.[8] She refused to do so on tough questions. And I think that speaks volumes or perhaps lack of volumes as to whether or not she is being truthful with this court.
>
> But, specifically, the ones that I picked up is that she indicated in her questioning by [defense counsel] that if a person is found guilty of these charges meaning the 187(a) in this crime and also the special circumstances in this case, meaning the special circumstances that a person is a bad person so that you could consider the death penalty and she goes no, not a bad person. You need to have a bad character history before she would consider, so in other words we would need to have bad things.
>
> So in other words she would discount the entire of the factor eight.[9] I think that is one consideration although it's not exclusive the more the important consideration that this court has is that she is evasive with her answers, not audible with her answers and refused to answer the tough questions when asked over and over to answer, while the court reporter is much closer for lip reading purposes, this court has to read lips from a distance.

(6RT 1271-1272.)

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[8] At the start of the *Hovey* voir dire, the court twice asked M.H. to speak up. (6RT 1249-1250.)

[9] The trial court appears to have been referring to factor (a) of section 190.3.

Here, substantial evidence supported the trial court's excusal of M.H. for cause. As noted above, the prosecutor proceeded on an aiding and abetting theory. (See *ante*, Arg. I.B.) M.H., however, gave conflicting answers as to whether she could impose the death penalty on the aider and abettor, stating she could not impose the death penalty on the person holding the victim's arm if the aggravating circumstances substantially outweighed mitigating circumstances (6RT 1261-1262) and later stating she could (6RT 1263). Also, M.H. stated that she had to believe a person was "bad" before she could find the person guilty or impose the death penalty. (6RT 1262, 1265, 1269.) To the extent she required a defendant to have a prior criminal history (6RT 1265), this was not that case as appellant did not have any prior criminal history. Further, as the trial court noted, numerous times during the voir dire, M.H. could not be heard by the court or the reporter. (6RT 1249-1250, 1260, 1263, 1266-1268.) The trial court, having observed M.H.'s demeanor, determined that she was being evasive in her answers and possibly not being truthful.

These responses distinguish M.H. from C.O. in *Pearson*. (See SAOB 11.) Unlike C.O., M.H. gave conflicting answers on whether she could impose the death penalty on the aider and abettor. Also, the trial court made a finding on M.H.'s truthfulness based on her demeanor, which was supported by the record. (6RT 1272; Cf. *People v. Pearson*, *supra*, 53 Cal.4th at p. 332 [trial court made no finding about C.O.'s state of mind and the record indicated to the contrary].)

As the United States Supreme Court stated in *Witt*, a juror's bias need not be "proved with 'unmistakable clarity.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) *Witt* explained the difficulty in assessing juror bias:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked

> enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

(*Id.* at pp. 424-425, footnote omitted.) While the record might lack in clarity, *Witt* found that a trial judge could be "left with the definite impression" about a prospective juror's ability to faithfully apply the law. (*Id.* at pp. 425-426.)

That is the situation in this case. After considering M.H.'s answers, which the court found to be equivocal on her true state of mind given the totality of her voir dire and questionnaire responses as well as her demeanor, the trial court had a "definite impression" as to her true state of mind regarding the death penalty. As *Witt* concluded, "deference must be paid to the trial judge who sees and hears the juror." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 426.)

H. The Trial Court Properly Excused Prospective Juror L.M. for Cause

According to her juror questionnaire, Prospective Juror L.M. (#3058) was a 30-year-old Hispanic married female from Long Beach. (26CT 7474-7475.) She had never served on a jury. (26CT 7481.) She had previously sought to become a police officer in the Los Angeles Police Department. (26CT 7483, 7487.) Her husband and sister had also sought employment with law enforcement. (26CT 7488.)

As to the death penalty portion of the questionnaire, L.M. was "open minded" regarding the death penalty. (26CT 7510 [Q. 178].) She believed California should have the death penalty (26CT 7511 [Q. 186]) and that the death penalty should be imposed in child molestation cases, for example (26CT 7511 [Q. 191]). When asked which punishment was worse for a defendant, L.M. circled "Death" and explained, "The defendant has the rest

of his life to live with that." (26CT 7512 [Q. 198].) L.M. could see herself rejecting LWOP and voting for death in an appropriate case (26CT 7514 [Q. 209]), and vice versa (26CT 7514 [Q. 210]). In considering the punishment, L.M. stated she would consider the cost of keeping someone in prison for the rest of their life as a consideration. (26CT 7514 [Q. 213].) She believed LWOP was a severe sentence. (26CT 7516 [Q. 225].) In contrast, she did not believe death by lethal injection was a severe sentence, stating, "A easy way out." (26CT 7516 [Q. 226].) She believed LWOP was the more severe punishment because "That's for rest of his life to live every day." (26CT 7517 [Q. 227, 227A].)

During *Hovey* voir dire, L.M. told defense counsel that she could follow the court's instructions. (6RT 1062.) She also stated that her desire to join the Los Angeles Police Department 15 years ago would not cause her to favor the prosecution. (6RT 1063-1064.) L.M. told the prosecutor that she was neither for nor against the death penalty, but that she could impose the death penalty if there was sufficient evidence to support it. (6RT 1067-1068.) If the aggravating factors substantially outweighed mitigating factors, L.M. stated she could impose the death penalty. (6RT 1071-1072.)

When the prosecutor presented the assault hypothetical, L.M. stated the person holding the arms was equally guilty as the one doing the hitting and that she could impose the death penalty on the person holding the arms if aggravating factors substantially outweighed mitigating factors. (6RT 1072.) Referring to question number 204, where L.M. stated sentencing a person to death meant "nothing," the prosecutor asked how L.M. felt about sentencing appellant to death, and L.M. stated,

> How would I feel about that? Honestly, I can't – I'd have to put my feelings aside. I wouldn't be able to try and have any like guilt, or – I don't know. I can't try to say I'm going to put

him to death and go home and act like everything is hunky-dory. I don't know. I don't know how I would feel.

(6RT 1075.)

The prosecutor questioned L.M. about why she felt LWOP was the more severe punishment:

[L.M.]: Well, that person would have to live for the rest of their life in prison, and they wouldn't be able to see – I mean, they would live with the guilt of whatever they did, you know, whoever did it, if I was to sentence that person to that stage, but –

[Prosecutor]: Do you really think they would think about being guilty, or do you think they would think about it's too bad I got caught?

[¶] . . . [¶]

[L.M.]: I don't know.

[¶] . . .[¶]

[Prosecutor]: Now, you're saying that you believe that because they will live with it every day, that that is a more severe punishment.

[L.M.] Well, yes.

[Prosecutor]: But if they're dead, that's pretty severe.

[L.M.] It will be over and done with. I mean, there is two ways, it's over and done with or they can live with it every single day. I mean, there's two ways you could see it.

[¶] . . . [¶]

[Prosecutor]: So if somebody believes that they're not guilty, then they wouldn't be living with the guilt every day of their life, right? That's what I'm trying to get at.

[L.M.]: Oh, yeah.

(6RT 1079-1082.)

Noting L.M. stated death by lethal injection was not a severe punishment, the prosecutor asked if the defendant should get the most severe sentence if aggravating circumstances substantially outweighed mitigating circumstances. (6RT 1082.) The following exchange ensued:

[L.M.] If the bad outweighed the good, then he would have to – I would say he would have to face the sentence.

[Prosecutor]: Okay. What sentence would that be?

[L.M.]: Honestly, I guess if it's more on the bad, then I guess it would be the death.

[Prosecutor]: Okay. The law says you don't have to impose the death penalty, okay?

[L.M.]: Yes.

[Prosecutor]: That's always an option. If the good and bad are equal, the law says you must impose life without the possibility of parole. It's only when the bad outweighs the good, substantially, that you can impose the death penalty.

So you have said, in your opinion, that you believe life without the possibility of parole is the most severe sentence you can get, correct?

[L.M.]: Yes.

[Prosecutor]: Okay. If you believe that this is the most severe case and it deserves the most severe punishment, what punishment are you going to give?

[L.M.]: Life in prison.

[Prosecutor]: Even though the bad outweighs the good substantially?

[L.M.]: If the bad – yeah. I would have to say –

[Prosecutor]: You would still give life without the possibility of parole?

[L.M.]: Yes.

[Prosecutor]: And that's because you personally believe that that would be the worse possible punishment?

[L.M.]: Yes, that's my own opinion.

[Prosecutor]: And you would go with your opinion?

[L.M.]: Yes.

[Prosecutor]: And your belief?

[L.M.]: Well, yes.

(6RT 1083-1084.)

Defense counsel followed up with further questioning:

[Defense Counsel]: The D.A. just asked you if the bad outweighed the good, you would give life without the possibility of parole. Is that what you said?

[L.M.]: Yes.

[Defense Counsel]: When I asked you would you be – at one point she asked you if the bad substantially outweighed the good, you'd come back and give the person death; can you do that?

[L.M.]: If I could come back and give –

[Defense Counsel]: Give the person, death. Yes.

[L.M.]: Honestly, I would say probably no, because what I – I mean, it's hard to say. I can't say yes, I'm going to go ahead and give him death. I don't know. I mean, if the bad – I just think that living in prison would probably be a more severe punishment than death.

(6RT 1084-1085.)

Defense counsel explained that the law gave her the choice of imposing the death penalty if the aggravating factors substantially outweighed mitigating factors and asked if she could return a verdict of death. (6RT 1085-1086.) L.M. replied, "To sentence the person to death? It's hard to say. You know what, I don't know. I can't say. I can't sit here

and tell you yes, when what if I don't –." (6RT 1086.) Upon further questioning by defense counsel, L.M. stated she could return a verdict of death if the aggravating circumstances substantially outweighed mitigating circumstances. (6RT 1086-1087.)

The prosecutor challenged L.M. for cause, arguing that she could not impose the death penalty because she believed LWOP was the worse penalty. (6RT 1087.) Defense counsel countered that L.M. stated she could impose the death penalty and could follow the law. (6RT 1087-1088.) The trial court agreed with the prosecutor that L.M. was substantially impaired from performing her duties as a juror by her belief that LWOP was the most severe penalty and granted the People's challenge for cause. (6RT 1088-1089.)

Here, substantial evidence supported the trial court's excusal of L.M. for cause. She did not believe the death penalty was a severe sentence, stating that it was an "easy way out." (26CT 7516 [Q. 226].) If the aggravating circumstances substantially outweighed mitigating circumstances and the most severe sentence was warranted, L.M. repeatedly stated she would impose LWOP. (6RT 1083-1085.) She told defense counsel that she did not know whether she could sentence a person to death. (6RT 1086.)

To the extent L.M. gave conflicting answers, the trial court made a credibility and factual assessment regarding her true state of mind. (See *People v. Roybal, supra*, 19 Cal.4th at p. 519.) Since there was substantial evidence from which the trial court could have concluded that this juror held disqualifying predetermined views on whether she could impose the death penalty, it properly excused her for cause.

I. The Trial Court Properly Excused Prospective Juror K.G. for Cause

According to her juror questionnaire, Prospective Juror K.G. (#5354) was a 24-year-old African American female from Long Beach. (54CT 15882-15883.) She had no prior jury experience. (54CT 15889.) When asked about her opinion in general about prosecutors, she stated, "They are the[re] to prove guilt." (54CT 15890.) When asked about her opinion in general about criminal defense attorneys, she stated, "They are there to prove innocence." (54CT 15890.) In 1992 K.G. had a negative experience with the police in December 1992 when she was questioned about a burglary while walking home from a movie theater and then handcuffed and taken to the police station for a curfew violation. (54CT 15896.)

As to the death penalty portion of the questionnaire, K.G. believed California should have the death penalty "if the crime committed was proven." (54CT 15918 [Q. 186].) When asked whether she felt the same as some who say they support the death penalty but could not personally vote to impose it, K.G. checked "yes," and explained, "it depends on the case." (54CT 15918 [Q. 188].) As an example of a case where the death penalty should be imposed, K.G. wrote, "multiple murders h[ei]nous crimes." (54CT 15918 [Q.191].) She believed death as a punishment was worse for a defendant. (54CT 15919 [Q. 198].) She believed both LWOP and death were severe sentences (54CT 15923-15924 [Q. 225, 226]), but that death was the more severe punishment because "there is nothing after death" (54CT 15924 [Q. 227, 227A]).

During *Hovey* voir dire, K.G. told defense counsel that she would be able to follow the court's instructions and be open to both LWOP and death. (11RT 2214.) In a hypothetical where one person was holding the victim's wrists and another was stomping on the victim to death, K.G. stated she could find both persons to be guilty. (11RT 2217.) If the

aggravating circumstances substantially outweighed mitigating circumstances, K.G. stated she could impose the death penalty on the aider and abettor. (11RT 2217-2218.) She could also consider the death penalty in a case such as this one with special circumstances involving torture, rape, robbery, and kidnap. (11RT 2224.) She stated she would not be influenced by her negative experience with the police and that she would evaluate a police officer's testimony in the same way as someone else. (11RT 2221-2222.) When defense counsel asked K.G. to reread question number 188, K.G. stated her answer was the same. (11RT 2225.) Defense counsel asked her to explain:

> [K.G.]: Just, basically, the evidence presented in the case would[,] that would weigh in what I vote on, I guess.
>
> [Defense Counsel]: Well, now tell us what you mean.
>
> [Prosecutor]: May the record reflect that the prospective juror laughed at that question.
>
> The Court: I'm sorry?
>
> [Prosecutor]: Laughed at the question and answer.
>
> The Court: Yes.
>
> [K.G.]: I would say that if I had to – if I voted on if the, case you know, was to a factual basis every one came to the fact that the death penalty ought to be imposed, then if he was guilty could I vote on it, yes.
>
> [Defense Counsel]: If you felt death was appropriate, could you do that?
>
> [K.G.]: Yes.

(11RT 2226.)

After discussing K.G.'s negative experience with the police (11RT 2230-2232), the prosecutor questioned her on the issue:

[Prosecutor]: Are you going to hold a police officer to a higher standard?

[K.G.]: I wouldn't hold them to a higher standard than any other person just because of their status.

[Prosecutor]: On the other hand are you going to make them work harder, so to speak, in order to prove the case to you?

[K.G.]: No, not to certain extent but I would want them to because of the fact that they are officers of the law and they would have more to present to me, so, in that case they would have I would expect more because of the fact that they would have more to present than probably a witness or anyone else, so –

(11RT 2233.)

After explaining the penalty phase process, the prosecutor asked K.G. if she could impose the death penalty if the aggravating circumstances substantially outweighed mitigating circumstances, and she said she could. (11RT 2239-2241.) When the prosecutor presented the bank robbery hypothetical, K.G. stated the driver and the lookout was not as guilty as the shooter, that they would be guilty of robbery, but not of murder. (11RT 2242.) In her mind, there was no time where the driver would be equally guilty as the shooter. (11RT 2243.) The prosecutor continued:

[Prosecutor]: Now, let me add this, first degree murder because there was a robbery, there was a murder in the course of robbery with the bank robbery, okay. So, now we have the aggravating circumstances are outweighing the mitigating circumstances, could you impose the death penalty on the person waiting in the car?

[K.G.]: No.

[Prosecutor]: Why not?

[K.G.]: Because they were in the car, I'm sorry, as aiding and abetting and robbery, you know the robbery but, not for the death penalty for murder, no.

(11RT 2243.)

The prosecutor returned to the assault hypothetical. When K.G. stated the person holding the victim's arms was equally guilty as the one doing the beating (11RT 2243-2244), the prosecutor asked what the difference was with the bank robbery hypothetical:

> [K.G.]: The fact that the person that's holding with the beating they are equally participating in a force to harm the victim.
>
> [Prosecutor]: Okay. The person in the car knew that the person that was going into the bank had the gun, with the possibility that it could be used.
>
> [K.G.]: Yes.
>
> [Prosecutor]: Do you still believe the person out in the car is not as guilty as the person in the bank?
>
> [K.G.]: Yes.

(11RT 2244.)

When K.G. stated she could impose the death penalty on the person holding the victim's arm if aggravating circumstances substantially outweighed mitigating circumstances, the prosecutor asked how she could impose death to that person and not to the driver in the bank robbery hypothetical:

> [K.G.]: Because they both participated in the force of the victim and when the robbery, the guy was in the car and I mean if he was in the bank, I probably could maybe give him a little more, you know.
>
> [Prosecutor]: What about the lookout?
>
> [K.G.]: The lookout, no he is outside of the bank and he is not[–] they are participating. I would say at the – they all be charged with to a certain extent, but I think the person initially that pulls the trigger on a gun is responsible, but the beating with physical force with contact, I think is different than the weapon.

[Prosecutor]: Okay. So when you were saying earlier one who aids and abets should not be subject to the same penalty as the actual killer, that's what you were referring to?

[K.G.]: Yes.

(11RT 2245.)

Referring to question number 44, the prosecutor asked if K.G. was going to require the defense to prove appellant's innocence, and she said, "Yes." (11RT 2246.) Defense counsel further questioned K.G. on aiding and abetting. When defense counsel explained that "as a rule of law that all participants in the underlying felony are equally liable for crimes occurring during the course of the commission of that felony," K.G. stated that she could hold the person outside the car responsible for the killing. (11RT 2246-2247.) If the aggravating factors substantially outweighed mitigating factors, K.G. stated she could impose the death penalty on the person in the car and on the person inside the bank. (11RT 2248-2249.) K.G. stated she could follow the law on the felony murder rule, that the person in the car would be responsible for the murder as well. (11RT 2249-2250.)

When the prosecutor asked if K.G. would like to be on the jury, she said she would. She agreed with the prosecutor that "[i]t would be kind of exciting." (11RT 2251.) The prosecutor further questioned K.G. on aiding and abetting:

[Prosecutor]: [¶] . . . [¶]

Knowing that even if the aggravating factors substantially outweigh the mitigating factors, would you impose life without the possibility of parole on the person in the car?

[K.G.]: No.

[Prosecutor]: What has changed your mind since I asked you that?

[K.G.]: The law.

[Prosecutor]: But the law says you can always impose life without the possibility of parole. It does not say you must impose death.

[K.G.]: Okay.

[Prosecutor]: It says you can impose life without the possibility of parole even if the aggravating circumstances substantially outweigh the mitigating circumstances.

[K.G.]: Sorry, I didn't understand[.] I would probably impose life without parole.

(11RT 2251-2252.)

Defense counsel further questioned K.G. on the topic:

[Defense Counsel]: Now, in the – is the reason why you would impose life without the possibility of parole, does that relate to one of the factors that I mentioned to you that you could consider the relative participation of a party in the crime?

[K.G.]: Yes.

[Defense Counsel]: And you would really that – would really in your mind that would be a mitigating factor, is that correct?

[K.G.]: Yes.

[¶] . . . [¶]

[Defense Counsel]: Okay. Now, what the prosecutor was asking you, if from your evaluation of all the evidence, you found that the factors in aggravation substantially outweigh those in mitigation, when applied to the person who is the get-away driver in the car and the person who is the lookout. . . . If you found those factors to be substantially outweighed, substantially outweigh the factors in mitigation, could you impose death?

[K.G.]: Yes.

(11RT 2253-2254.)

The prosecutor challenged K.G. for cause, arguing that K.G would require the defense to prove appellant's innocence. (11RT 2254-2255.) Defense counsel countered that he did not "really bother to follow up on that particular point" because it was outside the range of *Hovey* voir dire, that he had focused on her impartiality as to the imposition of death or LWOP. (11RT 2256.) Defense counsel agreed that the court had instructed the jury on the burden of proof on the first day.[10] (11RT 2257.) Nonetheless, defense counsel argued that K.G.'s response was appropriate as a lay person, that it did not indicate she would require the defense in this case to prove appellant's innocence, and that it was irrelevant to the prosecution's burden of proof. He also requested that he should have an opportunity to clarify the issue with K.G. (11RT 2257-2260.) Noting that defense counsel also questioned K.G. on matters outside of *Hovey*, the prosecutor argued that that the idea a defendant is innocent until proven guilty was "pervasive" and that the court had instructed the jurors on the burden of proof. (11RT 2260-2261.) She also argued that K.G. gave conflicting answers on whether she would hold the person in the car responsible. (11RT 2261-2262.)

The court granted the People's challenge and explained as follows:

> One of the important things, of course, in assessing jurors in this case. If I don't grant the cause now, I'll grant the cause at the general voir dire. But we [*sic*] the question I keep coming back to, specifically, is when [the prosecutor] asked question no. 44, on whether or not the defense would have to prove the innocence of their client, and she said, "Yes." And that was after the court gave the instruction of reasonable doubt and the defendant's presumption of innocence.

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[10] Before K.G. completed her juror questionnaire on February 10, 2004, the trial court instructed the prospective jurors on presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. (4CT 1113-1114; 3RT 459-460, 462.)

> If I retain this juror, what will happen is one of two things, assuming an adverse decision is with Mr. Armstrong; either they will argue that this court kept a juror that it should not have kept, because justice demands. Or in the alternative, they will argue that that is what is going to happen, and I can't let it happen, because then we will have to do this all over again.
>
> In fairness to Mr. Armstrong, he is presumed innocent in my eyes until 12 people say otherwise, and he is presumed innocent. The burden is on the People. This juror sees it differently, that the burden is on the criminal defense attorney to prove the innocence of their client.
>
> Even after I instructed 2.90, at the very beginning, and this questionnaire was filled out on the day that I gave that instruction, which is fresh in her mind.
>
> I will grant the cause in the interest of Mr. Armstrong's presumption of innocence.

(11RT 2262-2263.)

Here, substantial evidence supported the trial court's excusal of K.G. for cause. The trial court repeatedly instructed the prospective jurors on the presumption of innocence and the prosecution's burden to prove appellant's guilt beyond a reasonable doubt before K.G. completed her juror questionnaire. (4CT 1113-1114; 3RT 455, 459-460, 462.) And yet, K.G. opined that criminal defense attorneys were "there to prove innocence." (54CT 15890 [Q. 44].) When the prosecutor reminded K.G. of question number 44 and asked if she would "require the defense to prove their client to be innocent," K.G. answered, "Yes." (11RT 2245-2246.) "A juror whose personal views on any topic renders him unable to follow jury instructions or to fulfill the jurors' oath is unqualified. [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 901.)

Further, K.G. gave conflicting answers on whether she could hold the person in the car as responsible as the person in the bank. (11RT 2242-2243, 2246-2250.) Initially, K.G. told the prosecutor that she could not

impose the death penalty on the person waiting in the car. (11RT 2243.) Then she told defense counsel that she could impose the death penalty on the person in the car. (11RT 2248-2249.) When the prosecutor reminded K.G. that the law permitted her to impose LWOP even when aggravating circumstances substantially outweighed mitigating circumstances, K.G. stated she would impose LWOP on the person in the car. (11RT 2252.)

To the extent K.G. gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. Given K.G.'s clear statements that she would require the defense to prove appellant's innocence and that she would impose LWOP on the person in the car, the trial court's conclusions as to her true state of mind must be upheld since it is supported by substantial evidence.

J. The Trial Court Properly Excused Prospective Juror C.C. for Cause

According to her juror questionnaire, Prospective Juror C.C (#9432) was a 25-year-old Black female from Long Beach. (18CT 5175-5176.) She did not have prior jury experience. (18CT 5182.)

As to the death penalty portion of the questionnaire, C.C. believed the death penalty was "cruel." (18CT 5211 [Q. 178].) C.C. felt California should not have the death penalty. (18CT 5212 [Q. 186].) Rather, she felt the death penalty should be abolished, stating, "There is always a possibility, that it is not the right person." (18CT 5212 [Q. 187].) When asked in what type of cases should the death penalty be imposed, C.C. wrote, "I don't know." (18CT 5212 [Q. 191].) When asked about her impressions on LWOP as a punishment for murder, C.C. stated, "I think that is enough punishment in itself, because you have lost your freedom." (18CT 5212 [Q. 193].) She did not feel it would be impossible for her to vote for death or LWOP under any circumstances. (18CT 5212-5213 [Q. 194, 195].) She believed LWOP was the worse punishment for defendant,

explaining, "You have lost your freedom for the rest of your life." (18CT 5213 [Q. 198].) C.C. believed in the adage "an eye for an eye." (18CT 5214 [Q. 201].) To C.C., the saying meant "If I do anything to you, you are going to try to get revenge." (18CT 5214 [Q. 201].) She stated her belief in the saying would influence her decision in a case in which the death penalty was a potential punishment. (18CT 5214 [Q. 202].)

C.C. stated sentencing a person to the death penalty meant "[i]n a way we are playing God" (18CT 5214 [Q. 204]; see 18CT 5217 [Q. 222]), and sentencing a person to LWOP meant "[i]t is punishment enough to lose your freedom" (18CT 5214 [Q. 205]; see 18CT 5217 [Q. 221]). C.C. stated she would not automatically vote for death or LWOP regardless of the evidence presented. (18CT 5216 [Q. 214, 215].) C.C. believed LWOP was a severe sentence, explaining, "You have lost your freedom." (18CT 5217 [Q. 225].) On the other hand, she did not believe death by lethal injection was a severe sentence, explaining, "You are not really tortured." (18CT 5217 [Q. 226].) When asked which she believed was the more severe punishment, C.C. circled "Death" and explained, "Playing God in a sense." (18CT 5218 [Q. 227, 227A].)

During *Hovey* voir dire, C.C. told defense counsel that she was open to considering both LWOP and death and that she had to first hear the evidence before determining whether to vote for death for LWOP. (4RT 685-686.) The prosecutor asked C.C. what she meant on question number 178 when she said the death penalty was "cruel," and she answered, "Well, I don't think it's right to take someone's life in your own hands, just because they perhaps, you know, killed someone else." (4RT 687.) When the prosecutor asked C.C. if she was against the death penalty, C.C. said she was not. (4RT 687-688.) When asked whether California should have the death penalty, C.C. replied, "No." (4RT 689.)

The prosecutor further questioned C.C. on her statement about sentencing someone to death was "playing God." While C.C. believed that only God should take another's life, she stated she was not sure whether she held those beliefs very strongly. She also stated she believed LWOP was a sufficient punishment for someone convicted of murder in the first degree. (4RT 690.) The prosecutor continued the voir dire:

> [Prosecutor]: And you would never vote for the death penalty, would you?
>
> [C.C.]: It depends on the evidence.
>
> [¶] . . . [¶]
>
> [Prosecutor]: What evidence would you require?
>
> [C.C.]: Well, the evidence that you have to prove is that without a reasonable doubt that the person did it, right?
>
> [Prosecutor]: I'm asking you, what evidence would you require in order to vote for the death penalty?
>
> [C.C.]: You would have to just prove to me that the person did it.
>
> [Prosecutor]: Is there something that you have, specifically, in mind that you would require?
>
> [C.C.]: DNA.
>
> [Prosecutor]: And what kind of DNA would you need?
>
> [C.C.]: Blood. Bodily fluids.

(4RT 690-691.) When the prosecutor asked, "And what are you going to require," she replied, "I have to have no doubt that the person did it." (4RT 692.)

The prosecutor asked C.C. about her comment in question number 226 that death by lethal injection was not torture:

> [C.C.]: They just inject fluid into you and you like go to sleep. So, I mean, I think if you sentence someone to life, that

they have longer to think about what they did, and they have to live with that everyday, when they wake up.

[Prosecutor]: And so you would always vote for life without the possibility of parole, because you believe that that would be the best way to torture somebody?

[C.C.]: Not necessarily.

[Prosecutor]: And on question no. 227, in the explanation, you put that if death is imposed as a more severe punishment, that you're playing God in a sense, correct?

[C.C.]: That's correct.

[Prosecutor]: And do you feel that you can play God?

[C.C.]: No.

[Prosecutor]: Under what circumstances would you vote for death?

[C.C.]: You would have to prove, in my mind, that the person did it.

[Prosecutor]: That's it? All I have to prove to you is that the person did it; that's it, nothing more or nothing less?

[C.C.]: And you would have to prove that they had planned it.

[Prosecutor]: Okay. And what if they didn't plan it, there was no planning involved at all, but I proved that they did it?

[C.C.]: (No audible response.)

[Prosecutor]: You're doing all these like shrugging your shoulders and shaking your head from side to side, indicating no. So I don't know what you mean by that, and the court reporter can't take that down.

[C.C.]: Okay. [¶] . . . [¶] I'm not sure what I would do. I've never been in a situation like this, so I don't know.

(4RT 692-694.)

When the prosecutor asked in what circumstances C.C. would impose the death penalty, she answered, "If you can prove to me that they planned it, and that's pretty much it, if it was planned." (4RT 695.) The prosecutor asked:

> [Prosecutor]: That's the only circumstance that you would consider in imposing the death penalty?
>
> [C.C.]: Yes.

(4RT 695.)

In follow-up questioning by defense counsel, C.C. stated she could follow the law regardless of how she felt about the death penalty and whether she was "playing God" and that she would not automatically vote for LWOP. (4RT 696.) Defense counsel continued:

> [Defense Counsel]: There are some situations, depending on the circumstances, that you could vote for death?
>
> [C.C.]: I believe so; yes.
>
> [Defense Counsel]: And something else you've talked about is it being planned?
>
> [¶] . . . [¶]
>
> [C.C.]: Yes.
>
> [Defense Counsel]: Are you saying that it was intentional on the defendant's part, something that was thought about beforehand?
>
> [C.C.]: Yes.

(4RT 696-697.)

The prosecutor further questioned C.C.:

> [Prosecutor]: Okay. You indicated that – when counsel asked you if you could vote for death, you indicated that you believe so. You hesitated, and then you said, "I believe so," and you nodded your head in the affirmative. Do you recall that?

[C.C.]: Yes, I do.

[Prosecutor]: Now, we need to know for sure whether or not you could impose the death penalty, not whether or not you believe or don't believe, but whether or not you could.

[C.C.]: Yes, I could.

[Prosecutor]: Now, taking that into consideration, all of the questions and answers on the jury questionnaire – because you personally believe that imposing the death penalty would be playing God, correct?

[¶] . . . [¶]

[C.C.]: That is what I put in my questionnaire, yes.

[Prosecutor]: And that's what you believe, correct?

[C.C.]: Yes.

[Prosecutor]: So do you believe you could play God?

[C.C.]: Yes.

(4RT 698-699.)

The prosecutor also questioned C.C. on her statement that she had visited a friend in prison (Q. 100) and her statement that she did not know anyone who had been convicted (Q. 98). C.C. explained that her answer in Q. 98 was inaccurate, that she did know someone who had been convicted. (4RT 699-701.) When the prosecutor asked if she knew anyone else who had been arrested, convicted, or charged with a crime, C.C. stated her cousin was arrested and currently in jail but that she did not know the reason for the arrest. (4RT 702-703.)

The prosecutor challenged C.C. for cause and stated as follows:

I don't think she's being truthful. She hesitated on numerous times, and especially on the last case – or the last question that I asked her before this last set of questions, when I asked her, "Do you believe you can play God," and she hesitated. And then I think she outright lied and said yes.

> I don't think she can ever impose the death penalty. I think she wants to be on this jury, she wants to go back in there and she wants to vote for life without the possibility of parole, and she wants to hang this jury.
>
> Based on the totality of the questions contained in the questionnaire, her mannerisms, her hesitations, her shrugging of the shoulders, and her body language, has all indicated that she has not told this court the truth, and that's evidenced by the fact that on the questionnaire she knew of people who had been arrested, convicted, and charged with a crime and didn't list them. And we're not talking it was recent, because her cousin, she said, has been in jail for five years.

(4RT 704-705.)

Defense counsel disagreed that C.C. was "trying to be evasive" and argued that her failure to answer completely was due to the questionnaire being "almost 50 plus pages." He argued that while there might have been some inconsistencies, C.C. stated that she could follow the law and would not automatically vote for LWOP. (4RT 705-706.)

After hearing further arguments by the attorneys (4RT 707-710), the court granted the People's challenge. The court found C.C. gave conflicting responses in her questionnaire and during her voir dire. Specifically, the court noted the following: she stated that there had to be "no doubt that the person did it" before she would vote for the death penalty; and she did not feel California should have the death penalty but that the death penalty should be abolished because "[t]here is always a possibility that it is not the right person" (Q. 186, 187). The court also noted that C.C. believed only God could take a life and she would have to "play God," though she stated she could. (4RT 710-712.) The court concluded:

> Based on these inconsistencies, based upon what this juror has provided to this court, and her state of mind, and her demeanor in this case, this court believes that this prospective juror – that it is not sufficient for this prospective juror to say

> that she can consider imposing the death penalty. The question is whether or not she can consider imposing the death penalty as a reasonable probability in this particular case, based on her state of mind. I don't believe that she can.

(4RT 712-713.) While the court agreed with defense counsel that lingering doubt was something a juror could consider, the court's conclusion regarding C.C. remained unchanged. (4RT 713-714.)

Here, substantial evidence supported the trial court's excusal of C.C. While a prospective juror's personal opposition to the death penalty did not require an automatic excusal, C.C.'s answers indicated "that predilection would actually preclude [her] from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) C.C. believed California should abolish the death penalty because of the possibility that the defendant is "not the right person" (18CT 5212 [Q. 187]; see 4RT 689) and that LWOP was sufficient punishment for murder (18CT 5212 [Q. 193]; see 4RT 690). She considered sentencing a person to death was akin to "playing God." (18CT 5214 [Q. 204].) Although she stated she would vote for death depending on "the evidence," the evidence she required from the prosecution was DNA evidence, and for her to "have no doubt that the person did it." (4RT 690-692.) Later, she added that the prosecution had to also prove that defendant "had planned it." (4RT 693; see 4RT 695.) Though she told defense counsel that she could "play God" and impose the death penalty (4RT 698-699), she had previously told the prosecutor that she could not "play God" (4RT 693).

To the extent C.C. gave conflicting answers, the trial court made a credibility and factual assessment regarding her true state of mind. Since there was substantial evidence from which the trial court could have concluded that this juror's views about capital punishment would substantially impair her ability to return a death verdict in this case, it properly excused her for cause.

K. In Any Event, Any Error Was Harmless

Assuming this Court were to find that any prospective jurors had been erroneously excluded, the error was harmless. As the Chief Justice recently observed in *Gray v. Mississippi* (1987) 481 U.S. 648, 666 [107 S.Ct. 2045, 95 L.Ed. 2d 622], the United States Supreme Court examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) The majority in *Gray* rejected only one of those theories, however; that is, it rejected the contention that an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury. *Gray* found that the exclusion necessarily had an effect on the jury composition, even if one assumed that the prosecutor in any circumstance would have exercised a peremptory challenge against the death-scrupled prospective juror. Thus, as the Chief Justice concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel '"as a whole"' [citations] by inscrutably altering how the peremptory challenges were exercised [citations]." (*Id.* at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) But as the Chief Justice also noted in *Riccardi*, one year after *Gray*, the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80], rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror, explaining that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*People v. Riccardi*, *supra*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding the Chief Justice's observations in *Riccardi*, this Court felt "compelled to follow that precedent that is most analogous to the

circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 845 (conc. opn. of Cantil-Sakauye, C.J.).) Respondent respectfully asks this Court to revisit this conclusion in light of the observation that in *Gray*, the State (as well as the dissent) had argued the error had *no effect* on the case. Here lies "a reasoned basis" (*id.* at p. 844 fn. 2), for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule only goes so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The state's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Here, however, the People now ask the Court to do so. The appropriateness of harmless error analysis, we submit, should take into account the "differing values" particular constitutional rights "represent and protect[.]" (*Chapman v. California* (1967) 386 U.S. 18, 44 [87 S.Ct. 824, 17 L.Ed.2d 705] (conc. opn. of Stewart, J.).)

Witherspoon protects capital defendants against the State's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Accordingly, "'*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors, and as this Court has recognized, no cognizable prejudice results simply from the absence of any viewpoint or the existence of any particular balance of viewpoints among the jurors. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178 [106 S.Ct. 1758, 90 L.Ed.2d 137].) Thus, exclusion of a juror through misapplication of the *Witherspoon-Witt* standard results

in mere "technical error that should be considered harmless[.]" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 666.)

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *WHEELER/BATSON* MOTIONS

Appellant claims the trial court violated his rights under the state and Sixth, Eighth, and Fourteenth Amendments of the federal Constitutions in denying his *Wheeler/Batson*[11] motions. Specifically, appellant argues that the prosecutor's peremptory challenges as to prospective jurors S.L. (#3385), R.C. (#3654), E.W. (#5883), and R.P. (#8871), four Black men, were racially discriminatory and that the court failed to undertake a sincere and reasonable evaluation of the prosecutor's explanations. (AOB 137-249.) Respondent disagrees.

A. Relevant Proceedings

During jury selection, the prosecutor used her seventh, eleventh, thirteenth, and seventeenth peremptory challenge to excuse prospective jurors S.L., R.C., E.W., and R.P. After each excusal, the defense made a *Wheeler/Batson* motion to declare a mistrial and dismiss the existing jury panel.

1. S.L.

According to his juror questionnaire, S.L. was a 34-year-old Black male. (6CT 1442.) As to his general feelings regarding the death penalty, S.L. stated, "In some cases maybe life in prison is best but there are some when death is just." (6CT 1478 [Q. 178].) He believed California should

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[11] *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]; *People v. Wheeler* (1978) 22 Cal.3d 258, overruled in part by *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].

have the death penalty (6CT 1479 [Q. 186]), but was "not sure" that California should abolish the death penalty (6CT 1479 [Q. 187]). When asked if he felt the same way as some people who say they support the death penalty but could not personally impose it, S.L. responded, "I'm not sure." (6CT 1479 [Q. 188].) When asked of type of cases or offenses where he thought the death penalty should be imposed, he again responded, "I'm not sure." (6CT 1479 [Q. 191].) S.L. believed LWOP was worse for a defendant and explained, "they have to live with it for the rest of their life." (6CT 1480 [Q. 198].) When asked if he could see himself rejecting LWOP and voting for the death penalty in the appropriate case, S.L. replied, "I'm not sure it depends on the facts and circumstances." He described the circumstances in which death would be appropriate: "If his background and what he did indicates that he will always kill people even in prison." (6CT 1482 [Q. 209].) S.L. stated he had not "thought about" what voting a person to be sentenced to LWOP or death meant to him. (6CT 1484 [Q. 221, 222].) S.L. believed LWOP was the more severe punishment and explained, "You have the rest of your life to be punished." (6CT 1485 [Q. 227].)

During *Hovey* voir dire, S.L. told the court that he would not automatically vote for the death penalty or for LWOP "without considering the bad and good factors." (9RT 1727-1728.) He told defense counsel that his decision on the penalty would depend on the aggravating and mitigating circumstances. (9RT 1729-1730.) If the charges in this case were found true and there was "anything" about appellant's background that S.L. felt "maybe he could be rehabilitated," S.L. would vote for LWOP. "[B]ut if not, yes, I would vote for the death penalty." (9RT 1730.)

The prosecutor asked S.L. why he believed LWOP was worse for a defendant. S.L. stated the defendant "would have the rest of their lives to pay for what they did," that they would think about what they did. (9RT

1732.) If the person did not have "a history of just hateful decisions" and the capital offense was the first "hateful decision," S.L. stated LWOP "would be better." (9RT 1732-1733.) Given the assault hypothetical, S.L. stated he could impose the death penalty on the person holding the arms if aggravating factors substantially outweighed mitigating factors. (9RT 1733-1734.) Given the bank robbery hypothetical, S.L. believed the participants were equally guilty and that he would be able to impose the death penalty on the person waiting in the car if the aggravating circumstances substantially outweighed mitigating circumstances. (9RT 1734-1735.) S.L. explained that "hateful decisions" referred to "cruel" and "abnormal unspeakable things that people would just decide to do," such as burning a dog or harming an animal or a person. (9RT 1735.)

S.L. initially stated he would require the prosecution to prove all six special circumstances before he would return a verdict of death. (9RT 1736.) But S.L. stated he could impose the death penalty if robbery, rape with a wooden stake, or torture was the only special circumstance proven. (9RT 1736-1737.) If kidnap was the only special circumstance proven, S.L. would not be able to impose the death penalty. (9RT 1737.) After clarification by prosecutor, S.L. stated he could impose the death penalty if only one of the six special circumstances were proved. (9RT 1738-1739.)

The prosecutor asked S.L. about question numbers 187 and 188. S.L. stated California should have the death penalty because some people could not be rehabilitated and "would commit the same type of crimes even in prison." (9RT 1740.) As to question number 187, S.L. changed his answer and stated California should not abolish the death penalty. (9RT 1741.) He also changed his answer to question number 188 and stated he could impose the death penalty in "[h]orrible cases . . . depending on the circumstances and the evidence." (9RT 1741.)

When the prosecutor asked about question number 227, S.L. maintained that LWOP was the worse punishment because the convicts "would have the rest of their lives to think about what they had done." (9RT 1744.) If there was no evidence that the person would commit the same types of crimes even in prison, S.L. stated he "probably would" vote for LWOP. (9RT 1745.) The discussion continued:

> [Prosecutor]: Would you always vote for life without the possibility of parole in that situation meaning that there is nothing to show that he is ever going to do this again?
>
> [S.L.]: I mean, I would say I have to see something in the background that this person is [*sic*] isn't just evil.
>
> [Prosecutor]: Let's say that the evidence shows that this is the only time this crime has been committed by him, first time.
>
> [S.L.]: Right.
>
> [Prosecutor]: There is nothing else in the background that shows that he will ever do it again. Would you, in that situation, always vote for life without the possibility of parole?
>
> [¶] . . . [¶]
>
> [S.L.]: Yeah, thinking that there was rehabilitation in California prison which know [*sic*] I know there is [*sic*] isn't, yes, I would have. I don't know I always – maybe some good will come out of the person being alive, you know.
>
> [Prosecutor]: And that's how you feel about people that way down there may be some good, correct?
>
> [S.L.]: Yes, that's the way I feel.
>
> [Prosecutor]: And that's why you would give him life without the possibility?
>
> [S.L.]: That's why I would give him life.

(9RT 1745-1746.)

When defense counsel asked S.L. if he could impose the death penalty on a person "with no background that he will do it again," S.L. pondered and stated he could because the person "made some hateful deliberate decisions to do those crimes." (9RT 1747.)

The prosecutor challenged S.L. for cause. (9RT 1752.) She noted S.L.'s hesitation in answering questions about the death penalty and his conflicting answers on the number of special circumstances he would require the prosecution to prove. She noted how S.L. stated he would vote for LWOP based on his belief in rehabilitation, if there was no evidence that the defendant would commit such crimes again, and his belief that the defendant "would have to live with it the rest of their lives." She stated S.L. had changed his answer to question number 188, whether he was someone who believed in the death penalty but could not personally impose it, and was unsure about whether he could reject death and vote for LWOP and vice versa in question numbers 209 and 210. The prosecutor argued that she did not know where S.L. stood on the death penalty, that she believed S.L. would not be able to impose the death penalty. (9RT 1752-1754.) Defense counsel countered that while S.L. "did not indicate an ultimate preference" on the penalty, S.L. stated that he could impose the death penalty even on a person whose background showed no indication of reoffending. (9RT 1754-1755.)

Although the court stated "it's a close call," the court denied the People's challenge for cause. The court found S.L. was "pretty thoughtful" in answering the questions and that while S.L. believed LWOP was the more severe punishment for himself, he stated he could impose the death penalty on "horrible" cases. (9RT 1755-1757.)

2. R.C.

According to his juror questionnaire, R.C. was a 64-year-old Black male. (6CT 1492.) He was a retired assistant principal. (6CT 1495.)

When asked about his general feelings regarding the death penalty, R.C. stated, "None." (6CT 1528 [Q. 178].) When asked whether California should have the death penalty today, R.C. stated, "I am neither opposed or for the death penalty." (6CT 1529 [Q. 186].) R.C. believed the death penalty should be imposed in murder cases. (6CT 1529 [Q. 191].) When asked to circle a punishment that was worse for a defendant, R.C. did not choose one and wrote, "Who knows!!" (6CT 1530 [Q. 198].) When asked if he could set aside religious, social or philosophical convictions and decide the penalty question based solely upon the aggravating and mitigating factors, R.C. crossed out "Cannot" and wrote "Will not" set aside beliefs. He explained, "My life is predicated upon my belief systems." (6CT 1530-1531 [Q. 200].) When asked which punishment he believed was more severe, R.C. stated, "No response." (6CT 1535 [Q. 227].)

During *Hovey* voir dire, R.C. told the court he would not automatically refuse to vote for LWOP or death. (11RT 2270.) R.C. told defense counsel that he was open on the question of possible punishment. (11RT 2271.) When the prosecutor asked R.C. if he remembered his answer to question number 200, how he had wrote "will not set aside beliefs" and explained "My life is predicated upon my belief systems," R.C. stated he did not. (11RT 2276-2277.) After looking at his questionnaire, R.C. told the prosecutor that "that" was his belief and "that" was what he would do. (11RT 2278.) But upon further questioning, R.C. stated he would follow the law. (11RT 2278-2279.) R.C. repeated his responses from question number 198, that he did not know which punishment was worse for a defendant, from question number 227, that he had no opinion on which punishment was worse, and from question number 178, that he had no "opinion" about the death penalty. (11RT 2279-2280.) The following exchange ensued:

[Prosecutor]: Okay. Here's my question to you. If you don't have an opinion regarding the death penalty, how will I know that you will be able to impose it, should it be appropriate?

[R.C.]: You may not know.

[Prosecutor]: Because you don't know what your opinion is regarding the death penalty, right?

[R.C.]: No, I didn't say that. I said, "I don't have a disposition about that."

[Prosecutor]: Okay. Do you have an opinion on the death penalty?

[R.C.]: Are we talking about the same thing? I said I don't have an opinion about the death penalty –

[Prosecutor]: Okay.

[R.C.]: — one way or the other.

(11RT 2280-2281.)

When the prosecutor stated R.C.'s answers were "kind of confusing," R.C. responded that he felt she was "coming at" him with her questions. (11RT 2281-2282.) R.C. reiterated that his opinion on the death penalty was that he did not have one. (11RT 2282-2283.) The prosecutor further inquired:

[Prosecutor]: So have you ever debated the death penalty with anybody, discussed it?

[R.C.]: No.

[Prosecutor]: Talked about it?

[R.C.]: No.

[Prosecutor]: Never in your whole life?

[R.C.]: No.

[Prosecutor]: Okay. I'm just asking.

[R.C.]: I'm just answering.

[Prosecutor]: All right. You've never had a class in which you talked about constitutional law or the rights of people who have been accused of crimes?

[R.C.]: If I did it's been so long ago that it's just something that's blended in with everything else, you know. So that's where I stand now, today.

[Prosecutor]: You were a teacher?

[R.C.]: Yes.

[Prosecutor]: What did you teach?

[R.C.]: Everything.

[Prosecutor]: You taught history?

[R.C.]: I taught all subjects.

[Prosecutor]: Okay. Well, what are all subjects to you? Because, see, I don't know what you taught, because I don't know you, and all subjects to you could just be math and English.

So that's why I'm asking, what subjects did you teach?

[R.C.]: You're amazing. You're amazing.

I taught history, English, art – I taught all of the classes that are taught in a regular curriculum on the elementary level and most of them on the second level.

[Prosecutor]: You said I was amazing. Did you mean that sarcastically?

[R.C.]: I don't think I was laughing.

[Prosecutor]: So why did you say I'm amazing?

[R.C.]: I think you are. It's simple to me.

[Prosecutor]: What does amazing mean to you?

(11RT 2283-2284.) Defense counsel objected that the issue did not go to cause. At a sidebar conference, the prosecutor asked to inquire further about what R.C. meant. She felt R.C. had "some type of personality conflict" with her, was sarcastic, and felt threatened by her for some reason.[12] She noted that she had asked the same questions to other prospective jurors without a problem, but stated that R.C. appeared biased against her. (11RT 2285-2286.) Defense counsel stated that the basis of his objection was that the matter was "outside the purview of *Hovey* questioning." (11RT 2286.) The court permitted the prosecutor to further question R.C. on the issue and stated R.C. was "really mad about being here." (11RT 2287-2288.)

When the prosecutor asked what R.C. meant by "amazing," he explained that he felt he was answering her questions "pretty clearly" but that she seemed "to be pushing for something, an answer that [she] somehow have in [her] mind" by repeatedly asking "more questions about the same thing." (11RT 2288-2289.) When the prosecutor asked if he was "upset about being here," R.C. replied:

> I am so happy to be alive I can not tell you about it. And this is another part of living, and to me it's really very interesting. No, I'm not upset about being here, I'm just concerned that I'm not – you know, either one of us is not being

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[12] The apparent communication problem between the prosecutor and R.C. was evident from the beginning. When the prosecutor began her questioning and she and R.C. spoke over each other, she asked him to wait until she finished her question so that the reporter could write down what they were saying. R.C. responded, "Did I interrupt you?" After the prosecutor explained that people often have overlapping conversations but that it was difficult for the reporter to transcribe the conversation, R.C. asked again, "Have I interrupted you?" She explained that it was not an interruption. R.C. stated, "What you're saying makes sense, I just didn't know whether or not I had interrupted you." The prosecutor reiterated that R.C. had not interrupted her. (11RT 2274-2276.)

clear, and I don't know which one, and I certainly don't know which one it is.

(11RT 2289-2290.)

Explaining that she kept asking these seemingly same questions because she was trying to determine whether he could impose the death penalty (11RT 2290-2291), the prosecutor continued:

[Prosecutor]: My question was to you, is how can I know whether or not you can impose the death penalty if you have no feelings one way or the other? I don't know how else to ask that question.

[R.C.]: You may not know.

[Prosecutor]: So now if you were me, would you want you as a juror, in the frame of mind that you are?

[R.C.]: I have no idea of what I would be thinking, if I were you.

[Prosecutor]: Okay. Well, put yourself in my position.

[R.C.]: Not today. I'm sorry.

[Prosecutor]: That's what we're here for.

[R.C.]: I'm sorry.

[Prosecutor]: Well, that's what we're here for.

[R.C.]: Well, I'm doing the best I can, but I'm not going to put myself in your position, you know, I'm just not ready to try to equip myself with that amount of information and knowledge and your whole educational background all of that. That's what I would have to, I think, ferret through in order to present answers to you, so I'm doing the best I can.

[Prosecutor]: Okay.

(11RT 2291-2292.)

When asked about question number 227, R.C. stated death was a severe punishment but that he did not know which punishment was more

severe. (11RT 2293.) When the prosecutor began giving a hypothetical, R.C. laughed and said he wanted the prosecutor to just ask a question, that he would answer and "move on." (11RT 2293-2294.) On the assault hypothetical, R.C. stated the person holding the arms was equally guilty as the one doing the beating, that he could impose the death penalty on him. (11RT 2294-2295.) When the prosecutor asked, "Now, based on your answers, would you say that you are for or against the death penalty," R.C. replied, "Lady, I keep telling you the same thing. I don't understand why you keep asking me the same thing." (11RT 2295.) R.C. also stated, "I just want some clear questions, so I can get some clear answers and get out of here." (11RT 2295.) R.C. reiterated that he had no opinion on the death penalty. (11RT 2296.) When the prosecutor asked how he could impose the death penalty if he did not have an opinion on the death penalty, he stated he would have an opinion by the time the question presented itself, after he had "experienced all of the information that you would bring to me." (11RT 2296.)

On the bank robbery hypothetical, R.C. stated all three participants were equally guilty of murder and that he could impose the death penalty on the person waiting in the car. (11RT 2297.) When the prosecutor stated that R.C. appeared to be for the death penalty in certain circumstances, R.C. replied, "I'm not for killing anybody, you know. If I have to be a juror, then I'm going to make decisions based upon the information given to me, and I don't mind doing that." (11RT 2298.) R.C. stated he could impose the death penalty even though he did not have an opinion. (11RT 2300-2301.)

When the prosecutor asked if R.C. could impose the death penalty on the defendant if aggravating factors substantially outweighed mitigating factors, R.C. stated, "I said that two or three times." (11RT 2303.) The prosecutor continued:

[Prosecutor]: And your answer is?

[R.C.]: Yes.

[Prosecutor]: Can you come out here, look him in the eye and say, "death"?

[R.C.]: Why are you asking me that?

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

[R.C.]: If you were the defendant, I could look you in your eye and say "death."

[Prosecutor]: So you'd like to kill me?

[R.C.]: That's what you are saying. See, that's what confused me earlier is you go around in these communicative circles and I don't know what you're talking about half of the time, or what you're saying. I just asked the question so I can try to be clear, you know, in what it is you're trying to get to.

(11RT 2303-2304.) The prosecutor reasked the question, and R.C. stated he could look defendant in the eye and say "death." (11RT 2304-2305.)

When the prosecutor asked what R.C. would require her to show to impose the death penalty, R.C. stated he did not know. When she asked, "You have nothing in mind," R.C. replied, "No. No. No." (11RT 2305.) R.C. did not know whether he would require the prosecutor to prove multiple victims, present an eyewitness, or show DNA evidence. (11RT 2305.) Explaining his answers to question numbers 129, 135, and 136 regarding biases, R.C. stated that having been called a "nigger" in the past would not cause him to be biased for or against African-Americans. (11RT 2305-2309.)

The prosecutor challenged R.C. for cause. She noted that R.C. would not state what his opinion on the death penalty was and yet stated he would not set aside his beliefs. R.C. also stated he did not know which punishment was worse but also stated he was "not for killing anyone." She also noted that R.C. made many gratuitous remarks, that she did not know what he meant by his comment, "I'm not willing to help you." (11RT 2318-2320.) Defense counsel countered that R.C. responded appropriately to the hypotheticals and did not have any biases towards either punishment. (11RT 2320.)

The trial court denied the People's challenge for cause. The court found that while R.C. was "not very keen to answering questions in the theoretical sense or in the abstract," he stated he could impose the death penalty in an aider and abettor case. Also, though R.C. stated he "will not set aside his beliefs," the court noted he also stated he would follow the law. The court stated R.C. was "more apt" to understand the death penalty in the context of hypotheticals rather than in the abstract, that he was an "appropriate juror" for the case. (11RT 2320-2322.)

3. E.W.

According to his juror questionnaire, E.W. was a 28-year-old Black male. (6CT 1542.) He was an "engineer/scientist." (6CT 1545 [Q. 7].) When asked about his general feelings regarding the death penalty, E.W. stated, "Ok w/ it – but current form is so slow that it's really useless. Justice delayed." (6CT 1578 [Q. 178].) Before coming to court, E.W. had thought about whether he was for or against the death penalty: "Ok w/ it in principle, but if it creates so much additional litigation, maybe should just let it go." (6CT 1578 [Q. 179].) E.W. believed California should have the death penalty and explained, "If it is executed in timely fashion, will deter crime." (6CT 1579 [Q. 186].) E.W. believed LWOP was worse for a defendant. He explained, "I would hate to be incarcerated that long –

useless." (6CT 1580 [Q. 198].) E.W. believed LWOP was the more severe punishment and explained, "To me, I'd rather die – but I can understand someone wants to live or is 'actually' innocent would not." (6CT 1585 [Q. 227].)

During *Hovey* voir dire, E.W. told the court that he would not automatically vote for death or LWOP without considering the good and bad factors. (12RT 2397-2398.) E.W. told defense counsel that he did not prefer one penalty over the other, that he would be able to follow the law and consider death, though he personally preferred death. (12RT 2399.) After defense counsel explained the law on aiding and abetting, E.W. stated he could follow the law and impose death on the aider and abettor if aggravating factors substantially outweighed mitigating factors. (12RT 2400-2402.)

E.W. told the prosecutor that he could impose the death penalty if aggravating factors substantially outweighed mitigating factors, that he could look defendant in the eye and say "death." (12RT 2408.) On the assault hypothetical, E.W. stated that the person holding the arms was equally guilty as the one doing the beating and that he could impose the death penalty on the person holding the arms. (12RT 2408-2409.) As to question number 178, E.W. stated his feeling about the lengthy appeal process making death tantamount to LWOP would not affect his penalty decision. (12RT 2409-2410.) As to question number 179, E.W. stated he would not vote for LWOP, even though he believed death was warranted, just because the death penalty caused "so much additional litigation." (12RT 2410-2411.)

E.W. stated he did not "have any feelings one way or the other" about the death penalty, that California should not abolish it, but that "it needs some reform just like affirmative action." (12RT 2411-2412.) E.W. stated he would not require an eyewitness or DNA evidence, that he could impose

the death penalty where there was only one victim. (12RT 2412-2414.) Referring to question number 227, E.W. stated he could impose the death penalty as the most severe punishment even though he personally believed LWOP was more severe. (12RT 2417.) On a bank robbery hypothetical, E.W. stated all three persons would be equally guilty of murder and that he would "lean towards" LWOP for "the people outside" the bank because they, unlike the person inside the bank, "did not have the intent." E.W. stated he could impose the death penalty on the driver if he gave the loaded gun to the person who went into the bank. (12RT 2417-2420.) E.W. explained the person holding the victim's arms, who is witnessing the beating but fails to stop it, "is a whole different level of lack of human compassion other than giving someone a gun and saying don't kill anybody." (12RT 2421.) The parties passed for cause. (12RT 2424.)

4. R.P.

According to his juror questionnaire, R.P. was a 56-year-old Black male. (6CT 1592.) As to his general feelings about the death penalty, R.P. stated, "Sometimes overused." (6CT 1628 [Q. 178].) R.P. believed the death penalty "has its place, but it is not to be used lightly." (6CT 1628 [Q. 179].) "The reversals of several people (innocent people) on death row" caused R.P. to evaluate his opinion on the death penalty. (6CT 1628 [Q. 180].) When asked how the recent executions of murder convicts affected his thinking about the death penalty, R.P. replied, "The whole process need[s] great scrutiny." (6CT 1628 [Q. 182].) He believed the death penalty was used "[t]oo often." (6CT 1628 [Q. 183].) R.P. believed California should have the death penalty. (6CT 1629 [Q. 186].) When asked for types of cases the death penalty should be imposed, R.P. stated, "I don't know." (6CT 191 [Q. 191].) His impression on the imposition of LWOP as a punishment for murder was that it was "[m]uch more harsh than death." (6CT 1629 [Q. 193].) R.P. believed LWOP was worse for a

defendant. He explained, "Following the expose on the California Penal system prison is a horrible place to be for a lifetime." (6CT 1630 [Q. 198].) He believed LWOP was a severe sentence, but death by lethal injection was not. (6CT 1634 [Q. 225, 226].) R.P. believed LWOP was a more severe punishment and explained, "The lost [*sic*] of liberty, and to live your life in a society of predators is not living." (6CT 1635 [Q. 227].)

During *Hovey* voir dire, R.P. told the court he would not automatically refuse to vote for death or LWOP without weighing the good and bad factors. (14RT 2873-2874.) The prosecutor questioned R.P. about his son being a recent victim of a robbery, his own involvement in the neighborhood watch group, and his other son's negative experience with the police, which R.P. perceived it as "harassment of a young Black male." (14RT 2875-2878.) As to question number 178 regarding his feelings about the death penalty, R.P. expressed concern that some states had declared a moratorium on the death penalty and "a lot of people" in prison had been released due to DNA evidence. While R.P. believed death penalty was the "correct" punishment in some cases, he stated, "[I]n some instances there have been mistakes made, so I think we should be very careful about what we do." (14RT 2880-2882.) R.P. stated he would make his decision solely based on the evidence presented in the case. (14RT 2884.) Having sat on two murder cases, R.P. found the "aftermath" to be "disturbing" and "upsetting," but stated he could live with himself if he voted for death in this case. (14RT 2884-2886.)

As to question number 190, R.P. explained he believed LWOP was "much more harsh than death" because "[T]he shape of the penal system right now, it's survival everyday." R.P. recounted a story he read about in which an inmate bled to death after pulling a "shunt" out of his arm and the prison guards refused to testify about the event in a subsequent investigation. (14RT 2886-2887.) When he said the state's penal system

appeared more about punishment than rehabilitation, the prosecutor told him that California did not have a rehabilitation system. R.P. stated he could follow the law. (14RT 2887-2888.)

When the prosecutor asked how R.P. could impose the death penalty when he believed LWOP was the harsher punishment, R.P. stated, "Because that would come under the instructions of the judge." After the prosecutor explained that the law never required the death penalty, that he had the choice to impose death only when the aggravating factors substantially outweighed mitigating factors, R.P. stated he could impose the death penalty, that he could look appellant in the eye and say, "death." (14RT 2889-2893.)

The prosecutor asked R.P. to explain his comment in question number 228 that the death penalty is overused in "certain segments of our society." R.P. stated, "[I]t appears to me that there are a great many more African-Americans on death row than there are any other groups, any other minority groups." He stated that "something is fundamentally wrong" when Blacks compose 12 percent of the population but occupy "40 or 60 some percent of prison cells in this country." (14RT 2893-2896.) R.P. stated he would not "take that into consideration in this particular case." (14RT 2896.)

Based on the assault hypothetical, R.P. stated that the person holding the victim's arms was equally guilty as the one who is doing the beating and that he could impose the death penalty on the person holding the arms. (14RT 2897.) Based on the bank robbery hypothetical, R.P. stated all three participants were equally guilty and that he could impose the death penalty on the person waiting in the car if the aggravating factors substantially outweighed mitigating factors. (14RT 2897-2899.)

The prosecutor questioned R.P. about question number 227, which punishment was a more severe punishment to him. When the prosecutor asked which punishment R.P. would impose if he believed the case

warranted the most severe punishment, R.P. initially stated he would rely on the instructions from the court. Then he stated he could impose death, as the death penalty was the most severe punishment according to the legal system. (14RT 2899-2900.) The parties passed for cause. (14RT 2903.)

5. The *Wheeler/Batson* Motions

Appellant made four *Wheeler/Batson* motions, contending the prosecutor improperly used peremptory challenges as to prospective jurors S.L., R.C., E.W., and R.P.

a. S.L.

When the prosecutor used her seventh peremptory challenge to excuse S.L., defense counsel objected under *Wheeler/Batson*. He argued that S.L. was qualified to sit as a juror and that his race was the only basis for the prosecutor's exercise of her peremptory challenge. (15RT 3222.) The court found that the defense had failed to make a prima facie showing of racial discrimination. Noting that S.L. had expressed "some reservations" about imposing the death penalty at the *Hovey* challenge, the court found that the prosecutor's motive to excuse him was based on her "perceived perception of this juror's inability to be able to impose death at the penalty phase." (15RT 3224.)

b. R.C.

When the prosecutor used her eleventh peremptory challenge to excuse R.C., defense counsel objected under *Wheeler*. Counsel noted that they initially had seven Black jurors, that the parties stipulated to dismissing one Black juror after she was seated, and that there were now four Black prospective jurors remaining. Counsel argued that the prosecutor's dismissal of two Black jurors amounted to systematic exclusion of qualified jurors and that R.C. was qualified to serve. (16RT 3319-3320.) The court found that the defense had failed to make a prima

facie showing of racial discrimination. The court noted that R.C. declined to answer the prosecutor's questions and left many of his answers on the questionnaire blank. (16RT 3322.) Noting that R.C. and the prosecutor "had a big tiff or big fight during the *Hovey* questioning," the court stated, "I can understand the reason why [the prosecutor] would not want this juror, it's not because of his race, it's because they just simply did not click." (16RT 3322-3323.) The court also noted that the prosecutor had challenged prospective juror 2615, a White male, without asking any further questions following the court's denial of her cause challenge. (16RT 3323.)

c. E.W.

When the prosecutor used her thirteenth peremptory challenge to excuse E.W., defense counsel objected under *Wheeler/Batson*. (16RT 3372-3373.) The court found that a prima facie showing was made and asked the prosecutor for an explanation. (16RT 3373, 3375.) The prosecutor noted the following: E.W., unlike the other seated jurors, believed LWOP was the most severe sentence;[13] E.W., as a trained engineer, "is trained to look at all possible doubt"; he believed prosecutors tend to be "over-zealous to convict"; he believed the death penalty needed to be reformed like affirmative action; during *Hovey* voir dire, he said he had bad experiences with police officers but did not indicate so after he was seated; his bad experiences with police occurred in Long Beach; he indicated in question number 113 that the most important problems with the criminal justice system were "too slow laws, laws biased against economically disadvantaged, too expensive to hire lawyers, not enough

[13] The prosecutor noted that the prospective juror in seat number 4 (Juror No. 255) believed both punishments were equal. (16RT 3376.) The prosecutor exercised her fourteenth peremptory challenge to excuse him as she had alluded to earlier. (16RT 3378, 3426.)

punishment of bad police officers and lawyers"; he said during *Hovey* voir dire that the death penalty caused "so much additional litigation that we should just let it go"; and he had no opinion whether he was for or against the death penalty. (16RT 3375-3378.) The prosecutor continued:

> To me, if someone cannot say that they believe in the death penalty, I don't believe they can impose it. In my mind, the tie goes to the runner and the tie here would be life without the possibility of parole, unless somebody can say and all of challenges for cause, and all peremptory challenges have been on that basis, if they said they believe in life without the possibility of parole is the most severe punishment then I have pre-empted them or challenged them for cause.

(16RT 3378.)

She also noted that she had challenged prospective jurors who had no feelings about the death penalty and that E.W. appeared to have familiarity with legal terminology. (16RT 3378-3379.) She added:

> The two things that really bother me that he believes that life without the possibility of parole is the most severe sentence and he also believes that since if the death penalty is imposed it caused so much additional litigation, he doesn't believe it should be, just let it go, is what he says. To me that is indicative of what his verdict is going to be.

(16RT 3379-3380.)

Defense counsel countered that people with jobs strive for perfection within that job, E.W.'s opinion about defense attorneys and prosecutors was based on television and not worth much weight, and other jurors have also said LWOP was the worse punishment for them. (16RT 3380-3381.)

The trial court accepted the prosecutor's reasons as a race-neutral basis for the challenge. The court stated, "[I]f [the prosecutor] is consistently challenging by way of peremptory, folks who cannot impose the death penalty or feel that life without parole is the most severe sentence and that is not a race basis for excusing a juror." (16RT 3382.)

The prosecutor then requested that she be allowed to state her reasons for challenging S.L. and R.C. on the record, and the court stated it was going to ask her to do so. (16RT 3382-3383.) As to S.L., the prosecutor offered the following reasons: S.L. believed LWOP was the most severe sentence for a defendant; he believed whether a person had made "hateful decisions" would affect whether he would impose the death penalty; he believed LWOP would be better for someone who had committed the crime for the first time; he would require the prosecutor to prove all the special circumstances for a death verdict; he believed rehabilitation was important; and he said he would probably vote for LWOP if he believed the person would not commit crimes again. (16RT 3383-3385.) The court stated, "As to [S.L.], based upon the presentation as I have indicated before this was a close denial of the challenge for cause during the *Hovey*. I believe that the basis is race neutral . . . ." (16RT 3385.)

As to R.C., the prosecutor referred to his answers in the questionnaire and their exchange during voir dire at length, including his unwillingness to set aside his beliefs, and having no opinions about the death penalty or which punishment was worse, as well as his failure to answer questions or to answer them in a confusing manner. (16RT 3385-3394.) The court stated:

> I have indicated earlier as to [R.C.] I can understand a race neutral basis for the People to excuse this juror. [¶] He does not respond to the questions posed upon him and there seems to be a lot of friction between the prosecutor and the prospective juror or this prospective juror during the *Hovey* examination.[14]

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[14] Earlier in the same day, when the prosecutor stated she intended to exercise her peremptory challenge against R.C., the court found that the issue was not ripe for consideration, but noted that R.C. and the prosecutor "had some problems communicating during voir dire" and that he had "refuse[d] to answer [the prosecutor's] questions." (16RT 3306-3309.)

(16RT 3394.) The prosecutor added that she had challenged R.C. for cause because she felt he had a "personality conflict" with her. (16RT 3394.) The court responded, "On that, the record will be perfected." (16RT 3394.)

d. R.P.

Before using her seventeenth peremptory challenge to excuse R.P., the prosecutor listed the reason for the prospective jurors she had excused:

> 9703, who was a male White, because he believed that life without the possibility of parole was a more severe punishment.
>
> I excused Juror No. 1073,[15] a female White who believes that people can change in the right environment, and believes in rehabilitation.
>
> I excused 7331, a female White who had a bad experience with police.
>
> I excused 2615, a male White, whose son is in probation camp. And I pretty much backed him into a corner on the hypotheticals.
>
> I excused Juror No. 8441, a male White, who felt that the death penalty is archaic and believes in rehabilitation.
>
> I excused 0255, who is a female White, who believes that both punishments, death and life without the possibility of parole, are equally severe.
>
> I excused Juror No. 4856, I believe it was a male White – yes, it was a male White, who indicated on his questionnaire that he would rather not judge another man's guilt and also indicated that he had researched the death penalty on line.
>
> I excused Juror No. 7362, who sat on a hung jury, who was a female White.

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[15] Juror No. "1073" appears to be a typo, as respondent did not find a prospective juror with that identification number. The prosecutor appears to have referred to Juror No. 1078, a White female, who was seated in chair number 3 before being excused. (36CT 10421-10424; 15RT 3240-3244.)

(16RT 3455-3456.) She added that she excused Juror No. 3345 "because he sat on a jury in which they – the result was not guilty." (16RT 3456.)

The prosecutor then used her peremptory challenge to excuse R.P. and referred to his answers in the questionnaire and their exchange during voir dire at length, including the following: R.P.'s belief that LWOP was the more severe punishment; his sons' experiences with the Long Beach Police Department; his belief that the death penalty was sometimes overused, especially as it relates to the Black community; his concern that some states have declared a moratorium on the death penalty and that other convicts have been released due to DNA evidence; and his feeling "disturbed" for a month or two after sitting as a juror on murder cases. (16RT 3456-3463.) She added that though R.P. stated he could follow the law and impose death, because the court does not instruct the jury that they have to impose the death penalty, R.P. would not impose the death penalty. (16RT 3463.)

Defense counsel objected on *Wheeler/Batson* grounds. He argued that R.P. was "very forthright," that he stated he could impose the death penalty and believed the death penalty had its place. (16RT 3464-3465.) The prosecutor countered that R.P. was "forthright" in believing LWOP was harsher than death and that he was concerned about the percentages of Black people currently on death row. She added that she had marked R.P. for dismissal after reviewing only the death penalty portion of his juror questionnaire and had asked defense counsel to stipulate to a challenge for cause but that counsel had declined. (16RT 3465-3467.) The court recessed to review the transcripts and questionnaires of other jurors excused by the prosecutor. (16RT 3467.)

Following recess, the prosecutor reiterated that her challenge was based on R.P.'s views on the death penalty, that she did not believe someone who believed LWOP was a more severe punishment could impose the death penalty, and offered her notes to the court for review. (16RT

3470-3473.) The parties agreed that a Black female was currently seated on the jury and that another Black juror was in the venire. (16RT 3471-3474.) Defense counsel disagreed with the prosecutor's claim that R.P. could "never" vote for death and noted that R.P. said he could impose the death penalty. (16RT 3474-3475.) After hearing further arguments by the prosecutor (16RT 3476-3478), the court found that R.P. could impose the death penalty and granted the defense motion (16RT 3479-3480). The prosecutor objected, stating that the court was using the wrong standard:

> You are determining whether or not you would keep this juror as a juror because he says he could vote for death. The issue is not that. The issue is whether or not my reasons are race neutral.
>
> The court has to make a finding that I am not excluding for race neutral reasons. If that is true then the previous juror should be allowed to remain as well because he indicated life without the possibility of parole was more harsh.
>
> On the hypothetical he indicated he could impose the death penalty. That is not the issue. That is not a *Hovey* issue. The issue is not whether or not he said he could impose death. The issue is whether or not I have made peremptory challenges based on race neutral reasons.

(16RT 3480-3481.)

Distinguishing R.P. from E.W., who had stated he could not impose the death penalty on the bank robbery hypothetical, the court stated that the prosecutor was "mistaken" about R.P.'s ability to impose the death penalty. (16RT 3481-3482.) The prosecutor argued that whether the court believed R.P. could impose the death penalty was not the issue. (16RT 3482.) The court agreed with the prosecutor that exercising a peremptory challenge because someone indicated that LWOP is a severe punishment was a race-neutral reason. (16RT 3482-3483.) In further discussion, the court stated that the prosecutor's race-neutral reason is "mistaken, based upon [the court's] reading of the transcript." (16RT 3485.) The court invited the

prosecutor to exercise another peremptory, but she refused. (16RT 3488.) The prosecutor asked the court to review the law and revisit the issue after lunch. The court agreed. (16RT 3489-3490.)

When they returned, in further discussion, the prosecutor noted that she had given her reasons for exercising her peremptory challenge against R.P. before the court found a prima facie case of discrimination. (16RT 3492-3501.) Defense counsel stated he had made a *Wheeler* motion based on systematic exclusion of African-Americans. (16RT 3501.) The court found a prima facie case of discrimination. After further discussion in which the prosecutor laid out all of her reasons in detail, the matter was continued to the next day. (16RT 3501-3514, 3518-3533.)

The next day, the court vacated its previous ruling and found the People's challenge to R.P. was race neutral. Specifically, the court found that the following reasons were race neutral and neither implausible nor fantastic: R.P.'s concern over judging another person; R.P.'s opinion that the death penalty is overused, that a moratorium had been declared in another state; and R.P.'s concern that there were disproportionate number of Blacks on death row or prison. (17RT 3535-3538.) Defense counsel moved for a mistrial, arguing that all four Black male jurors were excused. (17RT 3538-3539.) The prosecutor argued there was no basis for a mistrial as no jury was sworn yet. (17RT 3539.) The court found that the mistrial motion was not ripe for consideration and denied the motion. The court also noted that the prosecutor's peremptory challenges were properly exercised for race-neutral reasons. (17RT 3540-3541.)

B. General Principles

The use of peremptory challenges to remove prospective jurors solely on the basis of their membership in a racial or other cognizable group is prohibited by the state and federal Constitutions. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1104; see *Batson v. Kentucky*, *supra*, 476 U.S. at

pp. 84-89; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Under *Batson*, the following three-step procedure governs review of a prosecutor's use of peremptories:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "if a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]

(*Johnson v. California*, *supra*, 545 U.S. at p. 168, internal brackets and fn. omitted, ellipsis original; *People v. Zambrano*, *supra*, 41 Cal.4th at p 1104.)

"[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.]" (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L.Ed.2d 834]; see *People v. Stevens* (2007) 41 Cal.4th 182, 192.) It is presumed that a prosecutor who uses a peremptory challenge does so for a purpose other than to discriminate. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 554; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 278.)

C. Black Males Are Not a Cognizable Group

Appellant alleges that the excusal of "African-American males" violated his rights under the state and federal Constitutions. (AOB 186-187.) Contrary to appellant's claim, Black males are not a cognizable group. (See AOB 186-187.) On the first step of the *Batson* inquiry, a defendant must establish a prima facie case by showing that (1) the defendant is a member of a cognizable group; (2) the prosecution has removed members of a cognizable group; and (3) circumstances raise an "inference" that the challenges were motivated by race. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 95-97; *Tolbert v. Gomez* (9th Cir. 1999)

190 F.3d 985, 988.) However, "neither the [United States] Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black males,' may establish a cognizable group for *Batson* purposes." (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812, overruled on a different ground by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 [gender and race may not be combined to form a cognizabe group for *Batson* purposes]; see *United States v. Dennis* (11th Cir. 1986) 804 F.2d 1208, 1210 ["black males," as opposed to Blacks generally, do not constitute cognizable racial group for purpose of making out prima facie case of unconstitutional discrimination].) This Court has similarly never recognized that such a combination establishes a cognizable group. (See *People v. Davis* (2009) 46 Cal.4th 539, 583 ["No California case has ever recognized 'people of color' as a cognizable group"]; *People v. Neuman* (2009) 176 Cal.App.4th 571, 578 [same]; but see *People v. Motton* (1985) 39 Cal.3d 596, 605 [Black women constitute a cognizable group].) There is simply no authority for any argument by appellant that "Black males" can be grouped together as a single cognizable class. (See *People v. Young* (2005) 34 Cal.4th 1149, 1235-1238 (conc. opn. of Brown, J.) [contrasting the federal definitions of cognizable group with the state definitions and finding the state standard set forth in *Motton* as "too broad" and lacking "evidentiary basis"].) Thus, as "Black males" do not establish a cognizable group, appellant fails to state a prima facie case that the prosecutor excused members of a protected class.

D. Appellant Failed to Show a Prima Facie Case of Discrimination As to S.L. and R.C.

A defendant establishes a prima facie case of discrimination by making a showing that "'the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California*, *supra*, 545 U.S. at p. 168; *People v. Howard* (2008) 42 Cal.4th 1000,

1016.) If a trial court denies a *Wheeler/Batson* motion without finding a prima facie case of discrimination, this Court reviews the record of voir dire for evidence to support the trial court's ruling, and will affirm that ruling where the record suggests non-discriminatory grounds which the prosecutor might reasonably have relied upon in challenging the stricken jurors. (*People v. Hoyos* (2007) 41 Cal.4th 872, 900.) While the reviewing court considers "the entire record before the trial court" in determining whether a prima facie case was established, other types of relevant evidence include the following:

> "'The party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.' [Citation.]"

(*People v. Bonilla* (2007) 41 Cal.4th 313, 342, internal brackets omitted, ellipsis original.)

If a trial court expressly states that it does not believe that a prima facie case has been made then invites the prosecution to justify its challenges for the record on appeal, the issue of whether a prima facie case has been made is not rendered moot, and there is no implied finding of a prima facie case. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1018; *People v. Welch*, *supra*, 20 Cal.4th at p. 746.) On the other hand, "[w]hen a trial court, after a *Wheeler/Batson* motion has been made, requests the

prosecution to justify its peremptory challenges, then the question whether defendant has made a prima facie showing is either considered moot [citation] or a finding of a prima facie showing is considered implicit in the request [citation]." (*People v. Welch*, *supra*, 20 Cal.4th at pp. 745-746; see *People v. Lenix* (2008) 44 Cal.4th 602, 613, fn. 8.)

Initially, the trial court did not "*de facto* indicate[ ] that a prima facie case of discrimination" was shown as to S.L. and R.C. (AOB 190.) As noted above, the trial court here expressly found that a prima facie case was *not* made as to these two prospective jurors. (15RT 3224; 16RT 3322-3323.) The mere fact that the trial court later invited the prosecutor to explain her reasons for excusing these jurors does not constitute an implied finding of a prima facie case. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1018.) This is not a case where the trial court asked the prosecutor for an explanation without first making an express finding of a prima facie case. The trial court's finding that the defense failed to make a prima facie case is supported by substantial evidence.

1. S.L.

Here, the record supports the trial court's determination that appellant failed to establish a prima facie showing of discriminatory purpose as to S.L. He was the first Black prospective juror to be excused by the prosecutor. As later recounted by defense counsel, there were still five other Black prospective jurors in the venire at the time. There was no "pattern" of striking jurors of a specific race, and appellant failed to prove a prima facie case of discrimination. (*People v. Bell*, *supra*, 40 Cal.4th at p. 597; see *People v. Davis*, *supra*, 46 Cal.4th at p. 583 [relevant evidence to make a prima facie showing of discriminatory exercise of peremptory challenges includes a showing that "opponent has struck most or all of the members of the identified group from the venire"].) "'As a practical matter, [ ], the challenge of one or two jurors can rarely suggest a *pattern* of

impermissible exclusion.'" (*People v. Bell*, *supra*, 40 Cal.4th at p. 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111, italics original; see *People v. Box* (2000) 23 Cal.4th 1153, 1188-1189 [the fact that three Black prospective jurors were challenged by the prosecutor was an insufficient basis for stating a prima facie case of discrimination].)

Further, the prospective jurors' responses in their juror questionnaire and during voir dire show an obvious race-neutral reason for the prosecutor's challenge. (*People v. Howard* (1992) 1 Cal.4th 1132, 1155 ["If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm."].) As this Court has stated repeatedly, "[a] prospective juror's views about the death penalty are a permissible race and group-neutral basis for exercising a peremptory challenge in a capital case. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 970; see *People v. Booker* (2011) 51 Cal.4th 141, 167; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202.) The prosecutor explained that her primary reason for challenging these jurors related to their views on the death penalty. (16RT 3466.) In his questionnaire, S.L. stated LWOP was worse for a defendant (6CT 1480 [Q. 198]) and that LWOP was the more severe punishment (6CT 1485 [Q. 227].) During voir dire, he stated he would consider whether a person had "a history of just hateful decisions" in deciding whether death would be appropriate. (9RT 1732-1733, 1735; 6CT 1482 [Q. 209].) He also stated that if there was no evidence that the person would commit the same types of crimes even in prison, he would probably vote for LWOP. (9RT 1745.)

Contrary to appellant's claim, the prosecutor did not use "misleading questions" when questioning S.L. (AOB 197-199.) S.L. was questioned about "hateful decisions" and about defendants whose only violent decision was a capital murder because S.L. first brought up the topic during voir dire. (9RT 1732-1733.) Also, S.L. was not the only prospective juror

questioned by the prosecutor about how many special circumstances would have to be found true for a death penalty. Contrary to appellant's claim, the prosecutor questioned Juror No. 3 regarding the number of special circumstances she would need to prove for the juror to return a death verdict.[16] (13RT 2719-2721.) Additionally, the prosecutor asked the same question to two other prospective jurors who were excused for their views on the death penalty (7RT 1421-1422 [G.P.]; 8RT 1581-1583 [S.R.]), as well as other prospective jurors (4RT 631-634 [Prospective Juror No. 0543]; 5RT 900-901 [Prospective Juror No. 4726]; 12RT 2496 [Prospective Juror No. 3345]; 13RT 2635-2636 [Prospective Juror No. 8772]; 13RT 2697-2698 [Prospective Juror No. 1597]; 13RT 2743 [Prospective Juror No. 4325]; 18RT 3859 [Prospective Juror No. 9018]).

The prosecutor's questions "relating to the panel's attitude as to which was the 'worse penalty'" did not "virtually mirror[]" the questions in *Miller-El v. Dretke* (2005) 545 U.S. 231, 246-252 [125 S.Ct. 2317, 162 L.Ed.2d 196]. (AOB 200-201.) In *Miller-El*, the High Court found the prosecutor's explanations as to the two Black prospective jurors unsupportable because the prosecutor kept other White prospective jurors who expressed the same ambivalence regarding penalty as the two Black prospective jurors he had challenged. (*Ibid.*) Ambivalence, or inconsistent views regarding the death penalty, "[o]n the face of it, . . . is reasonable from the State's point of view." (*Id.* at p. 248.) As discussed below, the prosecutor in this case was consistent in excusing prospective jurors who believed LWOP was the more severe punishment. (*Post*, Arg. II.F.) Indeed, none of the seated jurors or the six alternate jurors believed LWOP

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[16] The prosecutor posed a similar question to Alternate Juror No. 4, whether he would require her to prove all of the counts. (14RT 2921.)

was the more severe punishment in their questionnaire.[17] (7CT 1782 [Juror No. 1]; 7CT 1832 [Juror No. 2]; 7CT 1882 [Juror No. 3]; 7CT 1932 [Juror No. 4]; 7CT 1981 [Juror No. 5]; 7CT 2031 [Juror No. 6]; 8CT 2081 [Juror No. 7]; 8CT 2131 [Juror No. 8]; 8CT 2181 [Juror No. 9]; 8CT 2230 [Juror No. 10]; 8CT 2279 [Juror No. 11]; 8CT 2329 [Juror No. 12]; 9CT 2379 [Alt. Juror No. 1]; 9CT 2428 [Alt. Juror No. 2]; 9CT 2477 [Alt. Juror No. 3]; 9CT 2526 [Alt. Juror No. 4]; 9CT 2576 [Alt. Juror No. 5]; 9CT 2625 [Alt. Juror No. 6].)

Because the record suggests race-neutral reasons why the prosecutor might reasonably have challenged S.L., substantial evidence supports the trial court's finding of no prima facie case of discrimination. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.)

2. R.C.

The record supports the trial court's determination that appellant failed to establish a prima facie showing of discriminatory purpose as to R.C. He was only the second Black juror to be challenged by the prosecutor. He stated in his juror questionnaire that he had no feelings about the death penalty (6CT 1528 [Q. 178]), that he was neither opposed to nor for the death penalty (6CT 1529 [Q. 186]). He had no answer as to which penalty was worse for a defendant (6CT 1530 [Q. 198]) or which punishment was more severe (6CT 1535 [Q. 227]). But he also stated that he "will not" set aside his beliefs, explaining, "My life is predicated upon my belief systems." (6CT 1530-1531 [Q. 200].) "An advocate may legitimately be concerned about a prospective juror who will not answer questions." (*People v. Howard*, *supra*, 42 Cal.4th at p. 1019.)

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[17] The prosecutor also identified other White prospective jurors she challenged based on their views on the death penalty. (16RT 3455-3456.)

Moreover, R.C., at times, appeared hostile in his responses to the prosecutor. After stating he had no "opinion" about the death penalty, he took issue with the prosecutor stating he did not know what his "opinion" was on the death penalty and replied, "I said, 'I don't have a disposition about that.'" (11RT 2280-2281.) He felt the prosecutor was "coming at" him with her questions. (11RT 2281-2282.) He sarcastically said she was "amazing" when she inquired about the subjects he taught in school. (11RT 2283-2284.) When the prosecutor asked if he would want him as a juror if he were the prosecutor, he refused to answer and stated, "Well, I'm doing the best I can, but I'm not going to put myself in your position . . . ." (11RT 2291-2292.) When the prosecutor asked if he could look appellant in the eye and say "death," he replied, "If you were the defendant, I could look you in your eye and say 'death.'" (11RT 2303-2304.) "Hostile looks from a prospective juror can themselves support a peremptory challenge." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125.) The court later commented that there was "a lot of friction" between R.C. and the prosecutor during voir dire. (16RT 3394.)

Conflict between R.C. and the prosecutor was not created by the prosecutor via confrontational and insulting questioning. (See AOB 215-222.) Their inability to communicate was apparent from the beginning of the voir dire, when R.C. repeatedly asked the prosecutor whether he had interrupted her. (11RT 2274-2276.) In denying the People's challenge for cause, the court noted that R.C. was "not very keen to answering questions in the theoretical sense or in the abstract." The *Hovey* voir dire, however, required the prosecutor to ask questions about a prospective juror's views about the death penalty in the abstract. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1327.) Their conflict was not "caused" by the prosecutor. (AOB 220.)

Because the record suggests race-neutral reasons why the prosecutor might reasonably have challenged R.C., substantial evidence supports the trial court's finding of no prima facie case of discrimination. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.)

E. The Prosecutor's Stated Reasons Were Race Neutral

A prospective juror's feelings about the death penalty are reasonably related to trial strategy (see *Miller-el v. Cockrell* (2003) 537 U.S. 322, 339 [123 S.Ct. 1029, 154 L.Ed.2d 931]) and are a legitimate race-netural reason for exercising a peremptory challenge (*People v. Ledesma* (2006) 39 Cal.4th 641, 678; *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn. 9). Specifically, a juror's uncertainty, reservations, or skepticism about the death penalty is a race-neutral justification for a peremptory challenge. (*People v. Watson* (2008) 43 Cal.4th 652, 681; *People v. Ward* (2005) 36 Cal.4th 186, 201.)

> [E]ven when jurors have expressed neutrality on the death penalty, "neither the prosecutor nor the trial court is required to take the jurors' answers at face value." [Citation.] If other statements or attitudes of the juror suggests that the juror has "reservations or scruples" about imposing the death penalty, this demonstrated reluctance is a race-neutral reason that can justify a peremptory challenge, even if it would not be sufficient to support a challenge for cause. [Citations.]

(*People v. Lomax* (2010) 49 Cal.4th 530, 572, internal brackets omitted.) "Obvious race-neutral grounds" for peremptory challenges include considering life imprisonment as a more severe penalty than death. (*People v. Davis*, *supra*, 46 Cal.4th at p. 584.)

A juror's negative experience with the criminal justice system or a criminal conviction constitute valid, race-neutral reasons for a prosecutor to dismiss a potential juror from the jury. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 575; accord, *People v. Garcia*, *supra*, 52 Cal.4th at p. 749 [negative contacts with criminal justice system].) A prospective juror's occupation or

educational background could pose a race-neutral reason for excusing the juror. (*People v. Clark*, *supra*, 52 Cal.4th at p. 907; *People v. Blacksher* (2011) 52 Cal.4th 769, 802; *People v. Reynoso* (2003) 31 Cal.4th 903, 924-925 [a prosecutor "can challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected"].)

1. E.W.

Here, race-neutral grounds supported the prosecutor's challenge of E.W. E.W. was ambivalent about the death penalty. Although he stated he was "OK" with the death penalty "in principle," he also stated the delay in administration made it "really useless" and that maybe they "should just let it go" in light of "so much additional litigation" it created. (6CT 1578 [Q. 178, 179].) He also believed LWOP was worse for a defendant (6CT 1580 [Q. 198]) and that LWOP was the more severe punishment than death (6CT 1585 [Q. 227]). During *Hovey* voir dire, he stated that while California should not abolish the death penalty, "it needs some reform just like affirmative action." (12RT 2412.)

Also, during general voir dire after he was seated, the prosecutor inquired about his job as a satellite engineer. (16RT 3351-3356.) He stated that as a part of his job, he was trained to "see things from many different angles" and to consider "all possible doubt." (16RT 3353-3354.) His current responsibility, writing operations manuals, required writing operational procedures for contingencies. (16RT 3355-3356.) The prosecutor's peremptory challenge of E.W. based on his occupation was lawful and valid. As this Court explained, "[A]n attorney could peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects *too much education*, and that a juror with that particularly high a level of education would likely be specifically biased

against their witnesses, or their client's position in the case." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 925, fn. 6, italics original.)

When the prosecutor asked if he or anyone he knew had a bad experience with a police officer, E.W. stated that he had been ticketed a few times in Long Beach where he felt it was undeserved. (16RT 3358-3359.) "A negative experience with police . . . is a gender-neutral reason for exclusion. [Citations.]" (*People v. Panah* (2005) 35 Cal.4th 395, 442.)

The record amply reflects race-neutral grounds for challenging E.W. Accordingly, the trial court did not err in denying appellant's *Wheeler/Batson* motion.

2. R.P.

Similarly, race-neutral grounds supported the prosecutor's challenge of R.P. Like E.W., R.P. was ambivalent towards the death penalty. Though he believed the death penalty had "its place," he also believed it was "sometimes overused" and should not "be used lightly." (6CT 1628 [Q. 178, 179].) He reevaluated his opinion on the death penalty due to "reversals of several people (innocent people) on death row." (6CT 1628 [Q. 180].) He believed the death penalty process required "great scrutiny" and that the death penalty was used "too often." (6CT 1628 [Q. 182, 183].) He believed LWOP was worse for a defendant. (6CT 1630 [Q. 198].) He did not believe death by lethal injection was a severe sentence. (6CT 1634 [Q. 226].) Indeed, he believed LWOP was a more severe punishment. (6CT 1635 [Q. 227].)

R.P. was concerned that some states had declared a moratorium on the death penalty and that "a lot of people" in prison had been released due to DNA evidence. (14RT 2880-2881.) He was particularly concerned about the overuse of the death penalty in the Black community, noting that Blacks comprised of 12 percent of the general population, but 40 to 60 percent in prison population. (14RT 2893-2896.)

R.P. also had a negative experience with the criminal justice system. He was upset about one of his son's negative experience with the criminal justice system, which he believed "was about harassment of a young Black male." (14RT 2877-2878.) He had a dim view of the state's penal system, recounting an investigation into an inmate's death and the refusal to testify by "[s]ome 40 guards." (14RT 2887.) "A prospective juror's distrust of the criminal justice system is a race-neutral basis for his excusal. [Citation.]" (*People v. Clark*, *supra*, 52 Cal.4th at p. 907.)

The record amply reflects race-neutral grounds for challenging R.P. Accordingly, the trial court did not err in denying appellant's *Wheeler/Batson* motion.

F. Comparative Juror Analysis

This Court has stated that comparative juror analysis is appropriate for the first time on appeal at the third step of the *Wheeler/Batson* test, if an appellant relies upon such an analysis on appeal and "the record is adequate to permit the urged comparisons." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.) "The reviewing court need not consider responses by stricken panelists or seated jurors other than those identified by the defendant in the claim of disparate treatment." (*Id.* at p. 624.) In conducting such an analysis, the issue is not whether the challenged prospective jurors are similarly situated to jurors who were accepted, but whether the record shows the party exercising the peremptory challenges honestly believed the jurors were not similarly situated in legitimate respects. (*People v. Lewis* (2008) 43 Cal.4th 415, 472; *People v. Huggins* (2006) 38 Cal.4th 175, 233.) A comparative juror analysis is not required for the first time on appeal where the trial court finds that the defense failed to make out a prima facie case. (*People v. Bell*, *supra*, 40 Cal.4th at pp. 600-601; *People v. Bonilla*, *supra*, 41 Cal.4th at pp. 349-350.)

As discussed above, appellant's *Wheeler/Batson* motion as to S.L. and R.C. was denied after the trial court concluded appellant failed to make a prima facie showing of discriminatory exercise of peremptory challenges. (*Ante*, Arg. II.D.) Thus, a comparative juror analysis as to S.L. and R.C. is of little value and is not required. (*People v. Taylor* (2010) 48 Cal.4th 574, 616-617 [declining to engage in comparative analysis at first-stage *Wheeler/Batson* analysis]; see also *People v. Bonilla*, *supra*, 41 Cal.4th at p. 350 ["Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and we thus decline to engage in a comparative analysis here."].) As to E.W. and R.P., a comparative juror analysis shows the prosecutor's explanations were genuine.

1. E.W.

Appellant contends Juror Nos. 4, 5, 9, 10, 12, and Alternate Juror No. 5 gave conflicting answers in their questionnaire about which punishment was worse. (AOB 202-205.) These jurors' responses, however, are not similar to E.W.'s response on the question. E.W. gave no conflicting answers about which punishment was worse. He said LWOP was worse for defendant (6CT 1580 [Q. 198]), and that LWOP was the more severe punishment (6CT 1585 [Q. 227].)

Appellant contends Juror Nos. 4, 5, 7, 8, and Alternate Juror Nos. 1 and 4 said they had not previously thought whether they were for or against the death penalty like E.W. but that they were not challenged. (AOB 230-232.) Respondent disagrees. When E.W. was asked whether he had ever thought about whether he was for or against the death penalty before coming to court, he answered "yes" and further explained, "OK w/ it in principle, but if it creates so much additional litigation, maybe should just

let it go." (6CT 1578 [Q. 179].) On the other hand, the jurors identified by appellant all answered the question in the negative. (7CT 1925 [Juror No. 4]; 7CT 1974 [Juror No. 5]; 8CT 2074 [Juror No. 7]; 8CT 2124 [Juror No. 8]; 9CT 2372 [Alt. Juror No. 1]; 9CT 2519 [Alt. Juror No. 4].) Moreover, none of these jurors expressed the opinion, as did E.W., that "letting go" of the death penalty might be preferable to keeping it.

Appellant contends Juror No. 11 was also an engineer like E.W., but was not challenged. (AOB 232-233.) Juror No. 11, however, was not similarly situated as E.W. While Juror No. 11 was an engineer (8CT 2239), he also believed LWOP was "a lesser offense" for a defendant (8CT 2274 [Q. 198]) and that "life is less severe" than death as a punishment (8CT 2279 [Q. 227]). These responses clearly differentiate Juror No. 11 from E.W., who believed LWOP was worse for a defendant (6CT 1580 [Q. 198]) and that LWOP was the more severe punishment (6CT 1585 [Q. 227]). Juror No. 11's responses distinguish him from E.W. and provide a race-neutral reason for the prosecutor's non-challenge of Juror No. 11. (See *People v. Gray* (2005) 37 Cal.4th 168, 189 ["a party may decide to excuse a prospective juror for a variety of reasons, finding no single characteristic dispositive."].)

Appellant contends Juror Nos. 4, 7, 8, 9, 12, and all six of the alternate jurors, like E.W., were not satisfied with the enforcement of the death penalty and believed the death penalty was used too seldom or too randomly. (AOB 234-235.) These jurors' responses, however, are not similar to E.W.'s response. E.W. believed the death penalty is used *both* "too seldom" and "randomly." (6CT 1578 [Q. 183].) On the other hand, the jurors identified by appellant believed the death penalty was used either "too seldom" or "randomly." (7CT 1925 [Juror No. 4; "too seldom"]; 8CT 2074 [Juror No. 7; "randomly"]; 8CT 2124 [Juror No. 8; "randomly"]; 8CT 2174 [Juror No. 9; "randomly"]; 8CT 2322 [Juror No. 12; "randomly"];

9CT 2372 [Alt. Juror No. 1; "too seldom"]; 9CT 2421 [Alt. Juror No. 2; "too seldom"]; 9CT 2470 [Alt. Juror No. 3; "too seldom"]; 9CT CT 2519 [Alt. Juror No. 4; "randomly"]; 9CT 2569 [Alt. Juror No. 5; "randomly"]; 9CT 2618 [Alt. Juror No. 6; "randomly"].) A belief that the death penalty is used "too seldom" indicates a preference for the death penalty in that the juror believes the death penalty is not utilized enough.

Moreover, E.W.'s belief that the death penalty needed "some reform just like affirmative action" (12RT 2412) was only a part of his larger beliefs about the death penalty; namely, that the "current form is so slow that it's really useless" (6CT 1578 [Q. 178]), and that "if it creates so much additional litigation, maybe should just let it go" (6CT 1578 [Q. 179]). None of the jurors identified by appellant held such views about the death penalty, and thus were not similar to E.W.

Indeed, as set forth above, the prosecutor gave additional explanations for challenging E.W., including his negative experiences with the police officers and his belief that prosecutors tend to be "over-zealous to convict" and that the laws were "biased against economically disadvantaged." (*Ante*, Arg. II.A.5.c.) Appellant, however, presents no comparative juror analysis as to those responses. The identified jurors' responses were not comparable to E.W., and appellant's comparative juror analysis should be rejected.

2. R.P.

Appellant contends many of the seated jurors "felt much as [R.P.] did regarding which penalty was worse and the concept of rehabilitation." (AOB 242.) Respondent disagrees. As noted above, all of the seated jurors and the six alternate jurors believed death was the more severe punishment in their questionnaire. (*Ante*, Arg. II.D.1.) R.P., however, believed LWOP was the more severe punishment. (6CT 1635 [Q. 227].) Indeed, he did not

believe death by lethal injection was a severe sentence. (6CT 1634 [Q. 226].)

Appellant also contends Juror Nos. 2, 5, 10, 11, and Alternate Juror Nos. 5 and 6, like R.P., expressed concerns regarding the imposition of the death penalty. (AOB 242-243.) R.P.'s concerns about the death penalty, however, were different in character from the jurors identified by appellant. R.P. believed the death penalty was "[s]ometimes overused" (6CT 1628 [Q. 178]), and should not be "used lightly" (6CT 1628 [Q. 179]). He was concerned about "reversals of several people (innocent people) on death row" (6CT 1628 [Q. 180]) and believed "[t]he whole process need[ed] great scrutiny" (6CT 1628 [Q. 182]). None of the identified jurors held the same concerns over the death penalty as R.P. (See AOB 243.) Although Juror No. 4 expressed concern over innocent people being executed in some states such as Texas, she also stated she was not concerned about a similar situation occurring in California since California "don't immediately execute people here." (14RT 2986.) Further, Juror No. 4 believed the death penalty was used "too seldom." (7CT 1925 [Q. 183].) On the other hand, R.P. believed the death penalty was used "too often." (6CT 1628 [Q. 183].) He was especially concerned that the death penalty was overused in the Black community. (14RT 2893-2896.) Accordingly, the identified jurors' responses were not comparable to R.P., and appellant's comparative juror analysis should be rejected.

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE THE VICTIM'S TOXICOLOGY REPORT; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends the trial court's exclusion of the victim's toxicology report violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, "including his

rights to due process of law, to present a defense, a fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty." (AOB 250-261.) Respondent disagrees.

A. Relevant Proceedings

Prior to jury selection, the prosecutor sought to exclude evidence of the victim's intoxication. When defense counsel suggested they address the issue after jury selection, the prosecutor stated she wanted to address it before jury selection so she could question the jurors' feelings towards intoxication. (3RT 244, 250.) The trial court asked defense counsel for an offer of proof. When defense counsel countered that he had just received notice of the prosecution's motion and that the court had previously indicated such motions should be in writing, the court suggested that no mention of the victim's intoxication be made until the defense provided an offer of proof. While defense counsel agreed, the prosecutor objected, stating she needed to question the jurors on biases towards drinking during voir dire. (3RT 250-252.) Defense counsel objected to providing an offer of proof, stating that the court was, in effect, asking him to disclose his defense and that questions about intoxication do not constitute proper grounds for a peremptory challenge. (3RT 252-253.) The court stated that it needed to know the relevance of the evidence. (3RT 253.) When the prosecutor stated, and defense counsel agreed, that the defense had not yet provided discovery of guilt phase evidence to the prosecution, the court stated the toxicology evidence would not be admitted at the guilt phase. (3RT 253-255.)

When defense counsel stated that the People had the toxicology report from the coroner's office, the parties once again revisited the relevance of the victim's toxicology evidence. Defense counsel proffered that the evidence was relevant as it tended to corroborate appellant's statement to the police about the victim's conduct, specifically, her use of racial slurs

against the three men. Counsel argued that a lone White woman would not have confronted three young Black men with racial slurs at midnight if she were not inebriated, and that the jury, in determining the truthfulness of appellant's statement to the police, should be able to consider the toxicology evidence. (3RT 255-259.) The prosecutor disagreed that a person's intoxication would cause them to utter racial slurs. (3RT 259.) Defense counsel countered that whether appellant's statement to the police was credible was "crucial" on the issue of the parties' intent, whether it was "to rob, or to rape or was [ ] cumulative in some other way." (3RT 260-261.) The prosecutor argued that a person's intoxication would not cause them to utter such inflammatory statements and that the victim's intoxication did not diminish appellant's specific intent. (3RT 261-262.) Defense counsel argued whether the victim was intoxicated was "important because it would have a bearing upon whether or not [appellant] acted for the purposes of revenge" for the victim's inflammatory racial slurs. (3RT 262-263.)

The trial court excluded the victim's toxicology evidence under Evidence Code section 352. The court found that the victim's intoxication had "no bearing" on the specific intent of appellant and that any probative value was substantially outweighed by the danger of confusing the jury. (3RT 263-264.)

B. The Victim's Toxicology Report Was Properly Excluded

Evidence is admissible only if it is relevant. (Evid. Code, § 350 ["No evidence is admissible except relevant evidence"].) The test of relevancy is not whether the evidence conclusively establishes a material fact; rather, evidence is relevant if it "tends, logically, naturally, or by reasonable inference to establish a material fact . . . ." (*People v. Peggese* (1980) 102 Cal.App.3d 415, 420.) Evidence leading only to speculative inferences is

irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035.) "[T]he trial court is vested with wide discretion in determining relevance and in weighing the prejudicial effect of proffered evidence against its probative value. Its rulings will not be overturned on appeal absent an abuse of that discretion." (*People v. Edwards* (1991) 54 Cal.3d 787, 817.) Thus, reversal is not required unless defendant can show that the trial court "'exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Here, Keptra's toxicology report was properly excluded as irrelevant. Defense counsel's claim that evidence of Keptra's intoxication would support appellant's statement to the police about her confronting his party with inflammatory racial slurs is purely speculative. A person's intoxication level has no "tendency in reason" to prove he or she is likely to utter racial slurs. (Evid. Code, § 210; see *People v. Babbitt* (1988) 45 Cal.3d 660, 681-682 ["Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose."], citing *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244.) Even if it did, the defense's proffered evidence lacked any insight into how Keptra would have responded to intoxication, that is, whether Keptra was more likely to have uttered inflammatory racial slurs because she was intoxicated.

In *People v. Stitely* (2005) 35 Cal.4th 514, the parties stipulated that the victim's autopsy report indicated she was intoxicated. The defendant, however, sought to prove the victim was intoxicated under the Vehicle Code standards and to introduce expert testimony to show how a certain

level of blood-alcohol level would affect people in general. (*Id.* at pp. 548-549 & fn. 17.)

The defendant planned to use evidence of intoxication to prove that the victim impulsively consented to sexual intercourse. (*Id.* at p. 549.) The *Stitely* Court held:

> The trial court properly excluded defendant's evidence on relevance grounds. [Citation.] Nothing in the offer of proof showed how [the victim's] blood-alcohol content and intoxication affected her judgment and behavior the night she was killed, or increased the chance that she did, in fact, consent to vaginal and anal intercourse. Defendant essentially wanted jurors to speculate on intoxication, inhibition, and impulse. Speculative inferences are, of course, irrelevant. [Citation.]

(*Id.* at pp. 549-550.)

Similarly, any evidence of Keptra's intoxication in the toxicology report would simply have invited the jury to speculate on its effect on Keptra on December 29, 1998. Such speculative inference was irrelevant and properly excluded. (See *People v. Kelly* (1992) 1 Cal.4th 495, 523 [the trial court properly excluded evidence of victim's substance abuse which, "without more, would be meaningless to a jury's consideration of the victim's conduct"].)

The evidence was also irrelevant on the issue of specific intent. Contrary to defense counsel's claim, Keptra's intoxication had no "bearing" upon appellant's intent. Appellant told the police that Hardy and Pearson approached Keptra and that it was Pearson who began punching her after she yelled, "I hope they kill you all." Appellant claimed that while he was at the crime scene, his participation was minimal and only at Pearson's direction. Thus, relevance of whether Keptra was intoxicated to yell racial slurs, if any, went to Pearson's intent, that is, whether Pearson acted in the heat of passion following Keptra's inflammatory racial slurs, and not appellant's intent. Indeed, appellant told Detective Lasiter that Keptra's

use of racial slurs, while offensive, did not offend him. (Supp. 5CT 59.) Even if Pearson had acted from heat of passion, appellant's own culpability, as an aider and abettor, would be based on his own mental state (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118), and appellant never claimed that he acted in the heat of passion triggered by Keptra's racial slurs. Also, evidence of Keptra's intoxication had no relevance on appellant's intent to aid and abet in the underlying felonies for felony murder. (See AOB 255-256.) Accordingly, the evidence was irrelevant and properly excluded. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1125 & fn. 29 ["the proffered evidence [of the victim's relationship with his brother] had little, if any, significance to the vital issues in the case against defendant" where the defense case was not based on the theory that the brother might have killed the victim and there was no evidence to support such a theory].)

Keptra's toxicology report was properly excluded under Evidence Code section 352 since the evidence was, at best, minimally relevant. On the other hand, the likelihood of undue prejudice to Keptra and confusion to the jury was great. Under the circumstances, the trial court properly exercised its discretion.

C. Any Error Was Harmless

In any event, even assuming the trial court should have admitted Keptra's toxicology report, any error was harmless. Initially, appellant argues the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, should apply here because evidence of significant probative value was excluded, depriving him of various rights under the United States Constitution. (AOB 261.) However, the applicable standard in this case is that of *People v. Watson* (1956) 46 Cal.2d 818, 836. If a trial court erroneously excludes evidence, the defendant must show on appeal that it is reasonably probable he or she would have received a more favorable result

had that evidence been admitted. (*Ibid.*; see *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1125.) Further, "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution . . . . [Citations.]" (*People v. Marks* (2003) 31 Cal.4th 197, 227.) As this Court explained in *People v. Cunningham* (2001) 25 Cal.4th 926, while "the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. [Citation.]" (*Id.* at p. 999.)

Here, as Keptra's toxicology report had only slight probative value and concerned a minor or subsidiary issue, the applicable harmless error standard is the less stringent *Watson* standard. Applying the *Watson* standard, it is not reasonably probable appellant would have received a more favorable result had Keptra's toxicology report been admitted. There was strong evidence to support the jury's verdict. Appellant admitted holding Keptra down while Pearson raped her. Appellant kicked Keptra in the abdomen, held down the fence so Pearson and Hardy could throw Keptra's body over, collected Keptra's clothing, moved Keptra's body up the embankment, and threw away the stick and the bag of clothing. Appellant told Carter that he, Pearson, and Hardy beat Keptra, ripped her clothes off, threw her over the fence, dragged her down a drainage ditch, and stomped on her. Appellant said he held Keptra down while Pearson went through her pockets and when Pearson raped her. Carter also stated that appellant told her he took a turn with the stick as well, twisting it inside Keptra's vagina. And when Pearson, looking at appellant, told Kendrick that appellant and Hardy had "beat the shit out of her," appellant did not deny it but remained silent. Although appellant denied having sex with Keptra, her blood was also found on appellant's overalls and his semen was found on his shirt.

On the other hand, appellant's statement to the police and testimony at trial, minimizing his own involvement, was self-serving and not credible. From the start, appellant tried to hide his involvement in the crimes against Keptra. In his interview with the police, appellant initially claimed he fell asleep at Gmur's house on the evening of December 29, 1998. After the police told him that they had already interviewed Pearson and Hardy, appellant gave a different version of the events, minimizing his own involvement, and his brother Hardy's, while blaming Pearson for all the decisions made that night and for the injuries inflicted upon Keptra. Appellant only acknowledged that Hardy had also inserted the stick in Keptra's vagina after the detectives told appellant that Hardy had admitted to it. Although appellant claimed he was afraid of Pearson, there was no evidence whatsoever that he feared Pearson either before December 29, 1998, or after. Before finding Keptra, appellant, Pearson, and Hardy drank together at Gmur's house and planned to travel to Felix's house together to spend the night. The day after the murder, Pearson and appellant were together at Gmur's house, watching television with Kendrick.

Thus, even if Keptra's toxicology report had been admitted into evidence, it would have had, at most, only a slight or minimal effect in corroborating appellant's claim that the assault followed Keptra's inflammatory racial slurs. Any relevance of the toxicology report, at best, went to Pearson's intent, not appellant's. Under the circumstances, there is no reasonable probability or possibility that appellant would have obtained a more favorable outcome if the court had admitted Keptra's toxicology report. For the same reason, any error was harmless under the more stringent *Chapman* standard as well.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE APPELLANT'S SELF-SERVING HEARSAY STATEMENT; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues the trial court erred in redacting the victim's racial slurs from the audiotape of his interview with the police. Appellant argues the statement was an admission under Evidence Code section 1220 and that its exclusion was prejudicial violated "his rights to due process of law, to present a defense, fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty" under the state and federal standard. (AOB 262-267.) Respondent disagrees.

A. Relevant Proceedings

In appellant's statement to the police, he stated that he heard someone say, "I hope – like I hope you all die niggers," "Niggers I hope you all die," and "Fuck you niggers" or "the niggers are gonna die." On January 28, 2004, the prosecution filed a motion to exclude self-serving hearsay, requesting that the above statements be redacted from the audiotape of appellant's interview. She argued that the statements were inadmissible because they were self-serving hearsay and irrelevant. She also argued that the evidence would mislead the jury because appellant did not state that it was the victim who made the racial slurs. (3CT 675-679.)

On February 2, 2004, the court addressed the prosecution's motion to exclude appellant's statement. Defense counsel argued that the statement was non-hearsay and relevant as to appellant's state of mind. He also argued the statement explained why Hardy walked across the street. (3RT 293-296.) The prosecutor argued that appellant's state of mind was not at issue until he testified. She also noted that appellant told the police that he did not know who made the racial slur, that he believed it was "a muscular female voice." She argued the context of appellant's statement did not

explain why he crossed the street as appellant also stated he was not offended by it. (3RT 296-297.)

The trial court found that appellant's state of mind was in issue but that his statement to the police regarding the racial slurs was hearsay. The court found whether the statement explained Hardy's conduct was speculative. Appellant's statement was not an admission and did not reflect on his state of mind. The court granted the prosecution's motion and ordered any redaction as necessary. The court's ruling was specifically limited to the audiotape. The court stated it would revisit the issue should appellant decide to testify. (3RT 297-300.)[18]

B. The Trial Court Properly Excluded Appellant's Statement

Evidence Code section 1220 states:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

In *People v. Williamson* (1977) 71 Cal.App.3d 206, the defendant was convicted, in part, of vehicle burglary. (*Id.* at p. 210.) The prosecutor objected to the officer's testimony that defendant told the officer at his arrest that he was just walking by the area and was doing a good deed when he pushed the car that was in the street into a driveway. The defense sought to admit the proffered testimony for the truth of the matter. The trial court sustained the objection. (*Id.* at p. 213.) On appeal, defendant argued his

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[18] Appellant cites to 21RT 4503-4509 as the relevant hearing in which the trial court determined the prosecution's motion. (AOB 263-264.) However, those pages of the reporter's transcript refer to an Evidence Code section 402 hearing on the prosecution's request to redact the racial slurs from Carter's statement to the police.

statement was admissible as an admission. (*Id.* at pp. 213-214.) The *Williamson* court found the proffered testimony was not admissible under Evidence Code section 1220 because the defendant, not the prosecution, "sought introduction of the statement on his own behalf." (*Id.* at p. 214.)

Similarly, appellant's statement to the police that he heard someone utter racial slurs on the night of the murder was not admissible as an admission of a party because it was not "offered against the declarant." (Evid. Code § 1220.)

Relying on Evidence Code section 356, appellant argues his statement about the racial slurs should have been admitted since the rest of his statement from the interview was admitted. (AOB 265.) Evidence Code section 356 states, in relevant part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party . . . ." "By its terms [Evidence Code] section 356 allows further inquiry into otherwise inadmissible matter only, (1) *where it relates to the same subject*, and (2) it is necessary to make the already introduced conversation *understood*." (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192, italics original.) Thus, the courts have excluded the additional evidence "if not relevant to the conversation already in evidence." (*Id.* at p. 193.)

Here, evidence that appellant heard someone utter racial slurs was not admissible under Evidence Code section 356 because it was not relevant. As noted above, appellant never claimed that he acted in the heat of passion when he and his cohorts robbed, raped, tortured and ultimately killed Keptra. (*Ante*, Arg. III.B.) Indeed, the exact nature of her utterances was irrelevant. Keptra's utterances alerted appellant and his cohorts that a woman was across the street, and caused Hardy to cross the street and offer her $50 for oral sex. The redaction of the racial slurs sufficiently alerted the jury of the context in which the statements were made. (See *People v.*

Harris (2005) 37 Cal.4th 310, 335 ["the jury is entitled to know the context in which the statements on direct examination were made"].)

C. Any Error Was Harmless

Even assuming the trial court erred, appellant cannot show it is reasonably probable he would have received a more favorable result had the audiotape of his interview with the police not been redacted to exclude the racial slurs. Even with the racial slurs redacted, the jury heard evidence that the victim made confrontational statements, including, "I hope they kill you all," before the attack. Further, the jury heard evidence about Keptra's racial slurs from appellant. Appellant testified that Keptra yelled, "Fuck you niggers," from across the street. After Hardy crossed the street and offered her money for oral sex, Keptra ran into a leafy area and yelled, "Fuck you niggers. You niggers should die." Appellant never claimed that hearing the racial slurs caused him to act under the heat of passion. Rather, his defense was that he participated minimally and only at Pearson's direction. (See *ante*, Arg. III.B.) Moreover, as discussed above, the evidence of appellant's guilt was strong. (*Ante*, Arg. III.C.) Under the circumstances, there is no reasonable probability that appellant would have obtained a more favorable outcome if the court had not redacted the racial slurs from appellant's statement to the police. For the same reason, any error was harmless under the more stringent *Chapman* standard as well.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE EVIDENCE ON A THEORY OF HOW APPELLANT'S SEMEN WAS DEPOSITED ON HIS SHIRT; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends the trial court erroneously denied him an opportunity to present relevant evidence on an alternate theory of how his semen was deposited on his shirt. Appellant argues the error violated his

"rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corollary provisions of the California Constitution, including his rights to due process of law, to present a defense, a fair trial, effective assistance of counsel, and reliable determination of guilt, special circumstances, and penalty." (AOB 267-271.) Respondent disagrees.

A. Relevant Proceedings

The prosecution presented evidence that a cream-colored shirt with black stripes was recovered from appellant's mother's house. (21RT 4598-4600.) Human blood found on the shirt was tested for DNA analysis. (20RT 4247-4249.) DNA testing showed the stain on the shirt contained appellant's semen. (20RT 4322-4324, 4339.)

On cross-examination, Carter testified that she did not remember appellant having a cream-colored shirt with black stripes. (21RT 4536.) When defense counsel asked whether appellant sometimes put his shirt on after they had sex, the prosecutor's objection on relevance grounds was sustained. (21RT 4536, 4539.) Outside the presence of the jury, defense counsel stated that because the DNA expert testified that appellant's semen was found on the shirt (Peo.'s Exh. 12 D), he wanted to ask Carter if appellant put on his shirt after they had sex. The court found that the evidence was not relevant: whether appellant got dressed after having sex was not relevant; Carter testified that she had not seen the shirt in question before; and the theory of the case was not sex, but rape. (21RT 4541-4543.)

B. The Trial Court Properly Excluded Carter's Testimony; In Any Event, Any Error Was Harmless

Here, the exclusion of Carter's testimony on whether appellant sometimes put his shirt on after they had sex did not deny appellant an opportunity to present relevant evidence. Carter testified that she did not

remember appellant having the cream-colored shirt in which appellant's semen stain was found. Thus, even if appellant sometimes put on his shirt after they had sex, the evidence would not have supported "an alternative and plausible theory as to how the semen stain came to be deposited on the creme colored shirt." (AOB 269.) Carter's testimony was not relevant.

In any event, appellant cannot show prejudice. Initially, the record does not show how Carter would have answered the question. It is an appellant's duty to establish prejudice on appeal. (See *People v. Jones* (1964) 228 Cal.App.2d 74, 89.) Moreover, as noted above, Carter's testimony on whether appellant sometimes put on his shirt after having sex was irrelevant on the question of how appellant's semen stain was deposited on the cream-colored shirt, a shirt which Carter testified she did not recall appellant owning. Under the circumstances, there is no reasonable probability that appellant would have obtained a more favorable outcome if Carter was permitted to answer whether appellant sometimes put on his shirt after they had sex. For the same reason, any error was harmless under the more stringent *Chapman* standard as well.

VI. APPELLANT'S EVIDENTIARY CLAIM REGARDING HIS FEAR OF PEARSON IS FORFEITED; IN ANY EVENT, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE THE EVIDENCE AND ANY ERROR WAS HARMLESS

Appellant argues the trial court erred in denying him an opportunity to present evidence as to his fear of Pearson. Appellant argues the error deprived him of his rights "under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and corollary rights under the California Constitution including his rights to present a defense, to due process of law, equal protection of law, a fair trial, to counsel in aid of his defense, and to reliable determination of guilt, death eligibility, and sentence." (AOB 272-278.) Respondent disagrees. Appellant's claim is

forfeited for failure to object. In any event, the trial court properly exercised its discretion and any error was harmless.

During direct-examination, appellant testified that he threw the clothes in a dumpster as directed by Pearson. When defense counsel asked appellant if he was afraid of Pearson, appellant replied, "Yes, I was." (23RT 4974.) When defense counsel asked why, the following colloquy occurred:

> A Just because of his –
>
> [The Prosecutor]: Objection, Your Honor. [¶] Relevancy.
>
> The Court: That's overruled. [¶] Answer.
>
> The Witness: Because of his reputation –
>
> The Court: Stop. Stop. [¶] Ask your next question. [¶] Let me invite counsel to sidebar a second.

(23RT 4974-4975.)

At sidebar, the discussion continued:

> The Court: [¶] . . . [¶] The defendant was ready to testify about Kevin Pearson's reputation.
>
> [Defense Counsel]: I was not aware of that.
>
> The Court: It would be hearsay, obviously, because it would be something that he heard from sources. There's no foundation for reputation evidence. We're not going to have a trial on Kevin Pearson's reputation, are we?
>
> [Defense Counsel]: No.
>
> The Court: I just want to make sure it's not an area that I cut you off.
>
> [Defense Counsel]: No.
>
> The Court: All right. Very good.

(23RT 4975.) The court struck appellant's answer after "Yes." (23RT 4975.)

Initially, appellant failed to preserve a claim that the trial court erred in denying him an opportunity to present evidence of his fear of Pearson on appeal. To preserve for appeal a claim concerning the exclusion of evidence, the proponent must reveal to the trial court "[t]he substance, purpose, and relevance of the excluded evidence . . . by the questions asked, *an offer of proof*, or by any other means[.]" (Evid. Code, § 354, subd. (a), italics added; *People v. Anderson* (2001) 25 Cal.4th 543, 580; *People v. Whitt* (1990) 51 Cal.3d 620, 648.) The trial court admitted appellant's testimony that he was afraid of Pearson. When the court stopped appellant from testifying about Pearson's reputation, defense counsel stated that he did not intend to inquire into that area. As appellant never advised the trial court that he sought to admit evidence of Pearson's reputation, lay a foundation for its admission, or argue that the trial court was required to admit such evidence, appellant failed to preserve his claim on appeal. (See *People v. Lightsey* (2012) 54 Cal.4th 668, 630-631 ["we cannot hold the trial court abused its discretion in rejecting a claim that was never made"] citing *People v. Valdez* (2004) 32 Cal.4th 73, 109.)

Even assuming appellant's claim is preserved on appeal, the trial court properly exercised its discretion in excluding testimony about Pearson's reputation. "Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule." (Evid. Code, § 1324.)

> As general reputation consists of the estimation in which one is held in the community in which he resides, it can only properly and safely be testified to by a member of the community; it is the opinion of a member of a community as to the estimation in

> which another who moves in it is held generally by that community. Such member has the means of knowing what that general reputation is, and can properly speak of it.

(*Tingley v. Times Mirror Co.* (1907) 151 Cal. 1, 27.) Testimony about a person's reputation in the community must be based on knowledge of what the community thinks about the person, and not on what the particular character witness thinks. (See *People v. Neal* (1948) 85 Cal.App.2d 765, 771; *People v. Long* (1944) 63 Cal.App.2d 679, 684.)

First, because defense counsel never made an offer of proof as to the anticipated testimony, appellant fails to affirmatively demonstrate error from the record. (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 93-94.) Second, appellant did not choose to lay an adequate foundation. The source of appellant's knowledge of Pearson's reputation was undeveloped and unknown. Similarly, no testimony was adduced to permit the court to determine whether appellant had sufficient knowledge of Pearson's reputation in the community. He did not testify that they shared mutual friends or that he had spoken with others who had opinions as to Pearson's reputation. "'Reputation is not what a character witness may *know* about [an individual]. Reputation is the estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of [her] either by the witness or others.'" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1311, quoting *People v. McDaniel* (1943) 59 Cal.App.2d 672, 676, italics in *McDaniel*.) Lastly, assuming the trial court engaged in an Evidence Code section 352 analysis, appellant cannot show the trial court abused its discretion. As appellant never explained why the reputation evidence was, or was not, time consuming, confusing and/or more probative than prejudicial, the trial court could have found that the potential for undue consumption of time or confusing the issues (i.e. a trial on Pearson's reputation) was apparent.

In any event, even assuming the reputation evidence was erroneously excluded, appellant cannot show the exclusion constituted a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid.Code, § 354; *People v. Breverman* (1998) 19 Cal.4th 142, 173.) Even without the reputation evidence, there was other properly admitted evidence that appellant feared Pearson. (23RT 4975.) In addition to testifying that he was afraid of Pearson, appellant also testified that he did not try to stop Pearson because he believed Pearson was drunk and would have "turned on" him. (23RT 4938.) And he testified that he was afraid Pearson's friends would beat him if he did try to stop Pearson. (23RT 5076.) Further, the evidence of appellant's guilt was strong. (See *ante*, Arg. III.C.) Additional unspecified testimony from appellant concerning Pearson's reputation would likely have made little difference. Accordingly, appellant's claim must be rejected.

VII. THE TRIAL COURT'S ADMISSION OF KENDRICK'S STATEMENT DID NOT VIOLATE APPELLANT'S RIGHT TO CONFRONTATION

Appellant contends the trial court erred in admitting "the extra-judicial inculpatory statements of non-testifying co-defendant," Pearson. He argues the error violated "his rights under the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution, including his rights to confrontation and cross-examination, due process of law, a fair trial, and reliable determination of guilt, capital eligibility [ ], and penalty." (AOB 279-286.) Respondent disagrees. The trial court did not admit Kendrick's statement that "Killer Kev" committed the murder by Pearson's silence but when appellant adopted the statement by asking Pearson, "How did he know that."

After the prosecutor called Keith Kendrick to testify, defense counsel asked for a sidebar and objected to the admission of a statement by Pearson

that he was involved in the killing as hearsay. (20RT 4396-4398.) The prosecutor countered that the statement was admissible as an adoptive admission and explained the context of the statement:

> . . . [Kendrick] will testify that he was at Monte Gmur's house, that the defendant was there along with Kevin Pearson, and that when the news came on about the body, the victim being found, [Kendrick] said, "Oh, I know who did that, Killer Kev."
>
> And then the defendant said to Mr. Pearson, "How does he know that," implying that he was also there, and knows exactly what happened.
>
> And then Mr. Pearson went on to describe in more detail what had happened, with the defendant remaining silent, listening to what was being said.

(20RT 4398.) Citing *Crawford v. Washington*, (2004) 541 U.S 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], defense counsel argued that Kendrick's statement was "suspect" and that he did not have an opportunity to cross-examine Pearson. (20RT 4399-4400.) The prosecutor argued that the statement was admissible as an adoptive admission by appellant when appellant said, "How did he know." (20RT 4401.) After further discussion, the court denied appellant's motion to exclude Kendrick's testimony. (20RT 4401-4403, 4411.) The court found appellant's comments following Kendrick's statement constituted an adoptive admission. The court also found there was no violation of the Confrontation Clause as Kendrick was available to testify and to be cross-examined. (20RT 4408-4411.)

Evidence Code section 1221 provides:

> a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

For the "adoptive admission" exception to the hearsay rule to apply, a direct accusation in so many words is not essential. When a person makes a statement in the presence of the defendant under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it, and his silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence. (*People v. Roldan* (2005) 35 Cal.4th 646, 710, citing *People v. Fauber* (1992) 2 Cal.4th 792, 852 and *People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

Here, Kendrick's statement, "Oh, I know who did that. Killer Kev," was admissible because it was adopted by appellant when he asked Pearson, "How does he know that?" Appellant's statement indicated he had "knowledge of the content thereof" and had "manifested his adoption or his belief in its truth." (Evid. Code § 1221.) Thus, appellant's statement was a "tacit admission" of Kendrick's statement and constituted an adoptive admission. (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1120-1121.)

Moreover, contrary to appellant's claim, this Court has repeatedly held that "an adoptive admission can be admitted into evidence without violating the Sixth Amendment right to confrontation 'on the ground that "once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions*, and are admissible on that basis as a well-recognized exception to the hearsay rule."' [Citations.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 661, quoting *People v. Cruz* (2008) 44 Cal.4th 636, 672, italics in *Cruz*.) As the *Jennings* court stated, "the admission of an out-of-court statement as the predicate for an adoptive admission does not violate the principles enunciated in *Crawford* or in

Aranda and *Bruton*.[19] [Citations.]" (*Id.* at p. 662.) Accordingly, appellant's confrontation claim fails.

VIII. SUBSTANTIAL EVIDENCE SUPPORTED THE TORTURE-MURDER SPECIAL CIRCUMSTANCE

Appellant contends there was insufficient evidence to support the true finding on the torture-murder special circumstance. Specifically, appellant argues there was no evidence that he had any intent to torture Keptra. (AOB 286-291.) Respondent disagrees.

In reviewing an insufficiency of evidence claim, the court asks "whether '"after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403, italics original.) The evidence upon which the judgment relies must be "reasonable, credible, and of solid value." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The reviewing court cannot reweigh the evidence or evaluate the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Rather, the reviewing court must "presume the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]" (*In re Bartholemew D.* (2005) 131 Cal.App.4th 317, 322.) When a verdict is supported by substantial evidence, the appellate court must defer to the lower court's findings. (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

The torture-murder special circumstances requires that a murder be "intentional and involve[ ] the infliction of torture." (§ 190.2, subd. (a)(18); *People v. Wisenhunt* (2008) 44 Cal.4th 174, 202.) There must be an intent

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[19] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].

to kill, an intent to torture, and infliction of an extremely painful act on a living victim. (*People v. Bemore* (2000) 22 Cal.4th 809, 839.) "[T]he requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. A premeditated intent to inflict prolonged pain is not required." (*People v. Elliot* (2005) 37 Cal.4th 453, 479, footnote omitted.) A defendant who facilitates torture as an aider and abettor – i.e., acts with the intent or purpose of committing, or of encouraging or facilitating the commission of that crime (see *People v. McCoy*, *supra*, 25 Cal.4th at pp. 1117-1118) – is equally liable as the actual torturer. (*People v. Lewis* (2004) 120 Cal.App.4th 882, 888-889.)

Here, there is circumstantial evidence from which a rational jury could have inferred that appellant intended to cause cruel or extreme pain and suffering in beating Keptra. Upon encountering Keptra, appellant, along with cohorts Pearson and Hardy, raped, beat, kicked and stomped on her. They also beat her with a wooden stick and repeatedly inserted the stick inside Keptra's vagina. Although Keptra moaned and gasped for air, the beating continued. Keptra's autopsy showed 114 injuries consisting of 94 external and 20 internal injuries, and 11 fractured bones. She had multiple scrapes, contusions, lacerations and brushings on her body, including on her external and internal genitalia area. Her right ear was partially torn off. A wooden splinter was found deep within the vaginal tissue. Given the brutal nature of the crime, the jury could infer appellant intended to inflict extreme pain on Keptra.

Appellant's claim that "nothing" in his statements indicated his intent to torture Keptra is belied by the record. Appellant told Detective Lasiter that he held Keptra down while Pearson tore her clothes and stomped on her chest. When Keptra pulled away from appellant's grasp, he regained control over her and Pearson stomped on her. When Keptra gasped for air,

appellant responded by kicking her in the abdomen. (21RT 4643-4646.) The evidence showed that appellant actively and jointly participated in the torture of Keptra. Accordingly, appellant's claim should be rejected.

IX. THE TRIAL COURT PROPERLY EXCLUDED REVEREND CLARK'S AND JAMES ARMSTRONG'S TESTIMONY AT THE PENALTY PHASE RELATING TO DYSFUNCTION IN APPELLANT'S HOME; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant argues the exclusion of specific testimony from Reverend Clark and James Armstrong at the penalty phase violated his rights to present mitigating evidence under the Sixth, Eighth, and Fourteenth Amendments. Specifically, appellant argues the trial court unconstitutionally excluded "evidence regarding appellant being a follower when his brother (a co-defendant) initiated things; observations of the intoxication of appellant's mother; the poor outcomes of other children in the family; and the conditions and circumstances surrounding the housing projects in which appellant lived as a child." (AOB 291-300.) Respondent disagrees.

A. Relevant Proceedings

1. Reverend Clark

On direct examination, Reverend Clark testified that he met appellant's family at First Shining Light Church where he was an assistant pastor. Appellant was around 10 years old and living in Carmelitas housing project. A few times, Reverend Clark and others went to appellant's home for counseling. Reverend Clark has been to appellant's home to minister to Pamela. (28RT 5819-5823.) When defense counsel asked, "And for what problem were you ministering to Pamela," the prosecutor objected as

irrelevant. The court sustained the objection stating, "Also, pen[it]ent clergy privilege." (28RT 5823.)

Defense counsel also questioned Reverend Clark about appellant's relationship with Hardy. Reverend Clark testified that appellant "just liked to be with" Hardy and "always liked to be there" with him. (28RT 5823.) When Reverend Clark stated appellant was a follower of Hardy, the following colloquy occurred:

> Q And why do you say that?
>
> A Warren was the one that whenever something was going on, he was the one that – like I could only give like one illustration, that I can remember. There was a – wherever the church was – like whenever we were out on outtings [*sic*] or we were doing something, Warren was the kind of guy that he would like step out and initiate whatever was going on, and Jamelle kind of like tagged along and was there with him.
>
> Q And when you say he would initiate whatever was going on, what would he initiate?

(28RT 5824.) The prosecutor objected on relevance grounds. (28RT 5824.) After the court sustained the objection, Reverend Clark testified that appellant followed Hardy and that he did not see Hardy follow appellant. (28RT 5824.)

On redirect examination, defense counsel asked Reverend Clark whether he had ever been in Pamela's presence and smelled alcohol. The prosecutor objected on relevance grounds, and the court sustained the objection. (28RT 5874.)

2. James Armstrong

On direct examination, James testified that he was "a poor excuse of a father," and stated, "I didn't raise none of my kids right." He stated he had six children. When defense counsel asked how many of the six children were in jail, James replied, "Four." The prosecutor objected and moved to

strike. The court struck the testimony and instructed the jury to "ignore the response" as the line of questioning was irrelevant. (28RT 5899-5900.)

Defense counsel also questioned James about various places he and appellant's family lived. James testified that he and Pamela lived in Monrovia for two years before they separated and Pamela moved to Duarte. (29RT 5927-5928.) When James testified that he lived "in Monrovia in an area called Tin Pan Alley, or Sodom and Gomorrah," defense counsel asked, "what type of housing was that?" (29RT 5928.) The court sustained the prosecutor's relevance objection.

B. The Trial Court Properly Excluded Irrelevant Mitigating Evidence; In Any Event, Any Error Was Harmless

"The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015, overruled in other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) "Nonetheless, the trial court still '"determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury."'" (*People v. Williams* (2006) 40 Cal.4th 287, 320, quoting *People v. Cain* (1995) 10 Cal.4th 1, 64.) "[R]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. [Citations.]" (*People v. Farley* (2009) 46 Cal.4th 1053, 1128, internal quotation marks omitted.) The court "has the authority

to exclude as irrelevant evidence that does not bear on the defendant's character, record, or the circumstances of the offense. [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 137.)

In *People v. Rowland* (1992) 4 Cal.4th 238, this Court stated:

> [T]he background of the *defendant's family* is of no consequence in and of itself. That is because under both California law [citation] and the United States Constitution [citation], the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the "*defendant's* character or record" that "the sentencer . . . may not be precluded from considering"—not *his family's*. [Citations]. [¶] To be sure, the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself.

(*Id.* at p. 279, italics original, internal brackets omitted.)

Here, the trial court properly excluded the contested evidence. Initially, as to all of the evidence, appellant never made an offer of proof or otherwise attempted to advise the court of the substance and purpose of the testimony he sought to elicit. Thus, appellant failed to preserve his claim on appeal. (Evid. Code, §354; *People v. Vines* (2011) 51 Cal.4th 830, 868-869.) Further, where "the trial court's ruling did not foreclose defendant from presenting a defense, but 'merely rejected certain evidence concerning the defense[,]'" appellant cannot show the trial court's rulings infringed on his constitutional rights. (*People v. Vines*, *supra*, 51 Cal.4th at p. 869.)

Moreover, the nature of the problems for which Pamela was receiving counseling, whether Reverend Clark ever smelled alcohol on Pamela, and the type of housing the family lived in was irrelevant, as appellant failed to demonstrate that he knew of it. (*People v. Loker* (2008) 44 Ca.4th 691, 729; *In re Scott* (2003) 29 Cal.4th 783, 821 [referee properly refused to admit "certain evidence regarding petitioner's family and conditions at home that were not linked to petitioner"].)

In any event, even if the trial court abused its discretion in excluding Reverend Clark's and James' testimony, the error was harmless. "Penalty phase error is prejudicial under state law if there is a 'reasonable possibility' the error affected the verdict." (*People v. Watson, supra*, 43 Cal.4th at p. 693.) "This standard is identical in substance and effect to the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. [Citation.]" (*Ibid.*)

Here, the excluded evidence was largely cumulative of, and comparable to, the tremendous amount of family history evidence that appellant had already introduced. Reverend Clark testified that the Carmelitas housing project had many problems with drugs, prostitution, and gangs, that Pamela was a "struggling mom," and that appellant liked to follow Hardy. James testified Pamela was an alcoholic and drank in appellant's presence. It was undisputed that two of James' children, Hardy and appellant, were charged with committing capital murder. Further, the properly admitted aggravating evidence in this case – specifically, the circumstances of the crime – was overwhelming and far outweighed any mitigating evidence appellant offered and any mitigating evidence that was excluded. Appellant and his cohorts savagely sexually assaulted, tortured and murdered Keptra. She sustained 114 internal and external injuries and 11 fractured bones. Appellant described the stick being inserted into Keptra's vagina as "trying to make a batch of butter." Under these circumstances, there is no reasonable possibility that the introduction of the excluded evidence would have affected the jury's penalty determination.

X. AGGRAVATING EVIDENCE REGARDING APPELLANT'S INVOLVEMENT IN A FIGHT WAS PROPERLY ADMITTED IN THE PENALTY PHASE; IN ANY EVENT ANY ERROR WAS HARMLESS

Appellant argues the admission of Gmur's testimony about "jumping" Chris into the gang violated his rights to an opportunity to be heard, due process, equal protection, and a reliable determination of appropriate penalty. Specifically, appellant argues there was no evidence that appellant used or attempted to use any force or violence against a person because Gmur did not personally witness the fight. (AOB 301-307.) Respondent disagrees.

Before the penalty phase began, defense counsel moved to exclude Gmur's testimony that appellant was involved in "jumping" Chris into their gang. (26RT 5551.) Defense counsel argued that Gmur lacked personal knowledge as he was not a percipient witness to any activity that occurred outside of his home and that the fight did not constitute "a criminal activity" as it was consensual. (26RT 5558-5562.) The prosecutor countered that circumstantial evidence showed appellant had engaged in a criminal activity by "jumping" Chris into the gang: Pearson asked Gmur if he could use Gmur's back bedroom to put Chris "on the block"; when Gmur refused, Pearson, Hardy, appellant and Chris left the house and went to a nearby park; and after they returned about 15 to 20 minutes later, Hardy phoned someone named "Capone" and said Chris was "cool" and that they were now going to call him "Playboy." She further argued that consent was not an element of assault or battery. (26RT 5570-5572.) The court denied appellant's motion. The court found the circumstantial evidence was sufficient to meet the foundation requirement and that the elements of battery were satisfied. (26RT 5576-5579.)

Pursuant to section 190.3, factor (b), the prosecution presented evidence that appellant was involved in a battery when he, along with

Pearson and Hardy, initiated Chris into their gang by "jumping" him. (26RT 5618-5636.) The trial court instructed the jury, under section 190.3, factor (b), and CALJIC No. 8.85, that it could consider the following, in its penalty determination, if applicable:

> The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(4CT 977.)

The court instructed the jury on the elements of assault (4CT 984 [CALJIC No. 9.00]), assault with a deadly weapon or by means of force likely to produce great bodily injury (4CT 985-986 [CALJIC Nos. 9.02, 9.08]), and battery (4CT 987 [CALJIC No. 16.140]). The court defined "willfully" (4CT 982 [CALJIC No. 1.20]), and "knowingly" (4CT 983 [CALJIC No. 1.21]). The court further instructed the jury that the other criminal activity evidence must be proved beyond a reasonable doubt. (4CT 979 [CALJIC No. 8.87].)

Section 190.3, factor (b) permits the prosecutor to introduce evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, factor (b).) This section allows proof of violent conduct, other than the capital crime, that itself is criminal. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 584.) Such other violent crimes are admissible regardless of when they were committed or whether they led to criminal charges or convictions, except as to acts for which the defendant was acquitted. (*Ibid.*)

> Before an individual juror may consider evidence of other violent criminal activity in aggravation, he or she must find the existence of such activity beyond a reasonable doubt. [Citation.] There is no requirement, however, that the jury as a whole

> unanimously find the existence of other violent criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation. [Citation.]

(*People v. Griffin*, *supra*, 33 Cal.4th at p. 585.)

There must be substantial evidence of the other violent criminal conduct. Substantial evidence of other violent criminal conduct is evidence that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1167-1168; *People v. Clair* (1992) 2 Cal.4th 629, 672-678.) A trial court's ruling on the admissibility of evidence of other violent criminal conduct is reviewed for abuse of discretion. (*People v. Griffin*, *supra*, 33 Cal.4th at p. 587; *People v. Ochoa* (1998) 19 Cal.4th 353, 449; *People v. Clair*, *supra*, 2 Cal.4th at p. 676.)

Here, the evidence was properly admitted under section 190.3, factor (b). To prove a battery was committed, a violation of section 242, the prosecution must prove that a person used force or violence upon another person and that the use was willful. (4CT 987 [CALJIC No. 16.140].) Appellant was at Gmur's house with Pearson, Hardy, and Chris, when Pearson asked Gmur if he could use a back bedroom to put Chris "on the block." Not wanting "some sort of violent ritual" to occur at his home, Gmur refused. Appellant, Pearson, Hardy, and Chris then went to a nearby park and returned 15 minutes later. Hardy called someone named "Capone," and reported that Chris was "cool" and that they were going to call him "Playboy." (26RT 5618-5625.) There was evidence that appellant belonged to a gang called Capone Thug Soldiers. Williams testified that one became a member of Capone Thug Soldiers by being "jumped in," or fighting someone. (26RT 5641-5644, 5657-5658.) A reasonable inference from the evidence showed that appellant, Pearson and Hardy engaged in a fight with Chris to initiate him into their gang, and thus engaged in battery,

a "willful and unlawful use of force or violence upon the person of another." (§ 242.) Moreover, "[v]oluntary mutual combat outside the rules of sport is a breach of the peace, mutual consent is no justification, and both participants are guilty of criminal assault. [Citation.]" (*People v. Lucky* (1988) 45 Cal.3d 259, 291.) Accordingly, there was substantial evidence that would permit a rational jury to find beyond a reasonable doubt that appellant willfully used unlawful force upon another. (See, e.g., *People v. Jones* (2011) 51 Cal.4th 346, 380 [section 190.3, factor (b), evidence properly admitted where there was "very strong circumstantial evidence of defendant's identity as one of the robbers"]); *People v. Martinez* (2003) 31 Cal.4th 673, 694 [defendant's claim that there was no "direct evidence" of his possessing the shank rejected where sufficient circumstantial evidence showed he possessed the shank].)

In any event, any error in admitting the evidence of appellant's battery was harmless. When a trial court erroneously admits section 190.3, factor (b) evidence under state law, the penalty phase judgment will be reversed only if there is a reasonable possibility the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Gonzalez* (2006) 38 Cal.4th 932, 961.) Here, properly admitted factor (b) evidence showed appellant, as a member of Capone Thug Soldiers, engaged in random violence against innocent people, kicking them off their bicycles and hitting people with sticks. Further, as discussed above, appellant's case in mitigation paled in comparison to the properly admitted evidence in aggravation, particularly the circumstances of the crime. (See, *ante*, Arg. IX.) Accordingly, there is no reasonable possibility any error affected the penalty verdict. (See *People v. Martinez*, *supra*, 31 Cal.4th at p. 694-695; cf. *People v. Pinholster*, *supra*, 1 Cal.4th at p. 962 [admission of irrelevant aggravating evidence rarely reversible error]; *People v. Wright* (1990) 52

Cal.3d 367, 426-427 [same].) Under the circumstances, appellant's claim must be rejected.

XI. THE PROSECUTION'S REBUTTAL EVIDENCE REGARDING APPELLANT'S GANG CONTACTS WAS PROPERLY ADMITTED; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant contends his various rights under the federal and California Constitutions were violated when the trial court "erroneously permitted the prosecutor to introduce non-statutory aggravating evidence of 'gang contacts'" as rebuttal to appellant's mitigation evidence. (AOB 307-315.) Respondent disagrees.

During the prosecution's rebuttal case, after Pamela had finished testifying, the prosecutor informed the court outside the presence of the jury that she intended to call witnesses related to appellant's gang contacts with the police, that appellant's moniker was "Young Dog or Big Young Dog." (29RT 6106-6107.) Defense counsel objected that the evidence exceeded the scope of the defense presentation. He argued that the evidence did not constitute proper rebuttal evidence as the defense had not raised appellant's gang membership in its case, appellant's gang moniker was irrelevant, and the defense did not dispute that appellant was a gang member. (29RT 6107-6108.) After further discussion, the court found that the evidence was "fair evidence" to rebut the defense evidence relating to appellant's good character and overruled the defense objection. (29RT 6108-6111.)

The prosecutor then presented four police witnesses, Officers Bruce, Candelaria, Thrash, and Keleher. Officer Bruce testified that he had contacted appellant on two separate occasions and that appellant had identified himself as a Rolling 20's gang member known as "Big Young Dog," or "Young Dog." (29RT 6155-6156, 6158-6159.) Officer Candelaria testified that he once contacted appellant and that appellant was

known as "Young Dog." (29RT 6218-6220.) Detective Thrash testified in general about the gangs in Long Beach, specifically, the Insane Crips and the Rolling 20's Crips. He also testified that appellant was a documented member of the Rolling 20's Crips gang. (29RT 6221-6229.) Finally, Sergeant Keleher testified that he once contacted appellant and that appellant identified himself as a member of the Insane Crips gang. (29RT 6230-6232.)

As this Court in *People v. Loker*, *supra*, 44 Cal.4th 691, explained:

> When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own. "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it undermines defendant's claim that his good character weighs in favor of mercy." [Citation.] Once the defendant's "general character is in issue, the prosecutor is entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." [Citation.] The prosecution need only have a good faith belief that the conduct or incidents about which it inquires actually took place. [Citations.]

(*Id.* at p. 709, internal brackets omitted.) """"The admission of rebuttal evidence rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of 'palpable abuse.'""" (*People v. Smith* (2005) 35 Cal.4th 334, 359.)

Here, the testimony of the four police officers was properly admitted to rebut Reverend Clark's testimony regarding appellant's good character. Reverend Clark testified that appellant showed "potential to be an artist." (28RT 5826.) He stated appellant attended church every Sunday and sometimes during the week as well. Appellant also helped clean the church and distribute food and gifts to "unfortunate" children in the housing project even though Reverend Clark believed appellant was also an "unfortunate" child and did not have very much. (28RT 5837-5838.) The

church had an outreach program for gang members, but appellant was not in the program. (28RT 5839-5840.) Under the circumstances, the prosecution's rebuttal evidence that appellant was an admitted gang member was "relevant to the jury's evaluation of the defense evidence as it bears upon the appropriateness of the death penalty." (*People v. Smith*, *supra*, 35 Cal.4th at p. 359.)

Even assuming the trial court erred, appellant cannot show prejudice under any standard. Properly admitted evidence already showed appellant was a gang member. Williams testified appellant was a member of the Capone Thug Soldiers. (26RT 5641-5643.) Pamela testified that appellant began hanging out with gang members when he was about 12 or 13 years old and that he associated with the Rolling 20's gang. (29RT 6008-6009, 6011-6012.) Moreover, as discussed above, appellant's case in mitigation paled in comparison to the properly admitted evidence in aggravation, particularly the circumstances of the crime. (See, *ante*, Arg. IX.) Accordingly, appellant's claim must be rejected.

XII. APPELLANT'S PROSECUTORIAL MISCONDUCT CLAIM IS FORFEITED; IN ANY EVENT, THE PROSECUTOR DID NOT COMMIT ANY MISCONDUCT AND ANY ERROR WAS HARMLESS

Appellant contends the prosecutor committed misconduct in the following instances: (1) intentionally depriving appellant of a "constitutionally impaneled jury" as set forth in Arguments I and II of the Opening Brief (AOB 317-320); (2) suppressing competent evidence as set forth in Arguments III to VI of the Opening Brief (AOB 320-323); (3) depriving appellant of effective assistance of counsel by claiming a discovery violation (AOB 323-328); and (4) engaging in disruptive and petty conduct, and disparaging defense counsel (AOB 329-331). Appellant argues the judgment must be reversed because the prosecutor's pervasive

misconduct deprived him of a fair trial. (AOB 315-316, 332-334.) Respondent disagrees. Appellant's prosecutorial misconduct claim is forfeited for failure to object. In any event, the prosecutor did not commit any misconduct, and any error was harmless.

A. Appellant's Prosecutorial Misconduct Claim Is Forfeited

Initially, appellant's prosecutorial misconduct claim is forfeited by failing to timely object and to request a curative admonition below. In order to preserve a prosecutorial misconduct claim, a defendant must make a timely and specific objection and request an admonition to the jury to disregard any impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Further, a defendant asserting a prosecutorial misconduct claim on appeal must obtain a ruling from the court on the objection. (*People v. Heldenburg* (1990) 219 Cal.App.3d 468, 474-475; see *People v. Brewer* (2000) 81 Cal.App.4th 442, 459-460.) "[O]therwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 447, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) At trial, appellant did not object to any of the instances of misconduct alleged here on any ground. To the extent appellant maintains the instances of alleged prosecutorial misconduct violated provisions of the federal Constitution (AOB 315-316), those issues are waived as well since appellant never objected to the alleged misconduct by relying upon the federal Constitution. (See *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Jackson* (1996) 13 Cal.4th 1164, 1231, fn. 17; *People v. Raley* (1992) 2 Cal.4th 870, 892.) Having failed to timely object, appellant's misconduct claim is forfeited.

Further, appellant's prosecutorial misconduct claim is forfeited for another reason. California Rules of Court, rule 8.204(a)(1)(B) and (C)

require parties to an appeal to "support each point by argument and, if possible, by citation of authority" and to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Indeed, "'Every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as [forfeited], and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793, internal brackets omitted.) Here, appellant has not presented a cogent and reasoned argument with appropriate citations to the record to challenge the prosecutor's conduct. "[I]t is defendant's burden on appeal to affirmatively demonstrate error—it will not be presumed. [Citation.]" (*People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Appellant's mere citations to broad sections of the Opening Brief fail to preserve his claim on appeal. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error"]; see also *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545 [no requirement for appellate courts "to search the record to ascertain whether it contains support for [appellant's] contentions"].) Accordingly, appellant has forfeited this contention by failing to adequately brief the issue on appeal as well.

B. The Prosecutor Did Not Commit Misconduct and Any Error Was Harmless

Prosecutorial misconduct violates the due process clause of the United States Constitution "when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) "In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's

right to a fair trial.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1202.) Misconduct that falls short of rendering a trial fundamentally unfair violates "California law 'only if it "'involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.]" (*People v. Harrison*, *supra*, 35 Cal.4th at p. 242.)

Prosecutorial misconduct that violates the federal Constitution requires reversal unless it is harmless beyond a reasonable doubt. (*People v. Cook* (2006) 39 Cal.4th 566, 608, citing *Chapman v. California*, *supra*, 386 U.S. 18.) Violations of state law require reversal when it is reasonably probable the defendant would have received a more favorable result without the prosecutor's misconduct. (*People v. Cook*, *supra*, 39 Cal.4th at p. 608; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.) "In either case, only misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm. [Citation.]" (*People v. Pigage*, *supra*, at p. 1375.)

1. The Prosecutor Did Not Deprive Appellant of a Constitutionally Impaneled Jury

Appellant contends the prosecutor's conduct during voir dire constituted misconduct. (AOB 317-320.) He argues that "[h]er examination of the prospective jurors she sought to excuse was little more than bullying or confusing the prospective jurors she did not like into making statements that a trial court sympathetic to the prosecution would use to improperly excuse those jurors." (AOB 317.) He also argues the prosecutor's claim that she removed all of the Black males for the jury for race-neutral reasons was false and that "[h]er role in the selection of [his] jury was one of a win-at-all-costs partisan, who used every trick at her disposal to impanel a jury stacked toward conviction and a death verdict." (AOB 319.)

Here, the prosecutor did not commit prejudicial misconduct. As discussed above, the hypotheticals used by the prosecutor were proper. (*Ante*, Arg. I.B.) Further, the trial court properly excused nine prospective jurors for cause (*ante*, Arg. I) and denied appellant's *Wheeler/ Batson* motions (*ante*, Arg. II).

Moreover, "it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct 'prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it.' [Citation.]" (*People v. Medina* (1995) 11 Cal.4th 694, 741.)

2. The Prosecutor Did Not Suppress Competent Evidence

Appellant contends the prosecutor committed misconduct in suppressing relevant, admissible evidence as set forth in Arguments III to VI of the Opening Brief. He argues that the prosecutor "deliberately suppress[ed] the truth" to minimize evidence that was damaging to her case and "to argue a false theory." (AOB 320-323.)

Here, the prosecutor did not commit prejudicial misconduct. As discussed above, appellant forfeited his claim that trial court improperly excluded evidence regarding his fear of Pearson by failing to object. (*Ante*, Arg. VI.) Further, the trial court properly excluded the contested evidence and any error in admitting the evidence was harmless. (*Ante*, Arg. III-VI.) Under the circumstances, appellant cannot show it is reasonably probable that a result more favorable would have occurred had the evidence been admitted.

3. The Prosecutor Did Not Deprive Appellant of Effective Assistance of Counsel by Claiming a Discovery Violation

Appellant contends the prosecutor committed misconduct in insisting upon extended hearings during the penalty phase into defense counsel's alleged discovery violation. Appellant argues the "ill-timed attacks" by the prosecutor were "aimed at disabling [defense] counsel from performing his role as an advocate." (AOB 323-328.) Respondent disagrees.

During cross-examination of Detective McMahon in the guilt phase, when defense counsel showed some crime scene photographs to the witness, the prosecutor alerted that she had not seen the photographs. At sidebar, defense counsel stated that his investigator had taken the photographs but that he did not turned them over to the prosecution because he considered the photos to be work product. He also stated that the prosecution already had the same photographs and that he had not intended to use the photographs. The court raised a concern that the defense had not complied with the discovery requirement. (22RT 4746-4756, 4764-4766.)

On May 4, 2004, during the penalty phase, the prosecution called Pamela Armstrong as a witness. On cross-examination, when defense counsel asked Pamela about appellant's half-brother Curtis, the prosecutor asked to approach. (29RT 6060-6061.) At sidebar, the prosecutor stated that defense counsel had just handed her a report by Joe Brown from February 1999 before beginning his cross-examination. She stated that the defense had previously listed Pamela as a defense witness, but that they failed to turn over the 1999 report. Although the defense later amended their witness list, the prosecutor argued that they violated discovery by failing to turn the report over. After much discussion about defense counsel's previous representation to the court regarding its witness list, the court continued the matter, stating it would first review the transcripts. The

court also stated the possible discovery violation was troubling because the defense had previously claimed crime scene photographs were work product and properly excluded from discovery. (29RT 6061-6071.) When the matter resumed, defense counsel agreed with the court that he had requested his penalty witness list to be amended to include Pamela on March 26, 2004, and that he should have turned over the witness' statement at that time. (29RT 6074-6075.) The prosecutor objected to the late discovery, stating that she might not have called Pamela as a witness had she known about Pamela's statement, a letter she wrote to defense counsel. The parties stipulated that the defense would not question Pamela about Curtis. (29RT 6076-6079.)

Turning to additional matters, the prosecutor discussed having two additional rebuttal witnesses and reiterated that the report by defense investigator Brown was incomplete and in violation of discovery. The court stated that the prosecutor could call Brown as a witness. The parties also agreed to conduct an Evidentiary Code section 402 hearing with Brown. (29RT 6080-6085.) After the conclusion of Pamela's testimony, the court excused the jury and conducted a hearing with Brown. (29RT 6106-6154.) Brown testified that there were aspects of James's trip to Chicago – such as James taking a woman on the trip, using drugs until he ran out of money and using drugs in appellant's presence – that were not included in any reports, but that he had informed defense counsel about them. (29RT 6122-6124, 6132-6134.) Defense counsel never told Brown not to make a report about the incident, but Brown did not know why he failed to make one. (29RT 6146-6147.) Generally, Brown did not memorialize information in writing unless requested by counsel. (29RT 6124-6126.) He also generated reports on his own after interviewing witnesses. (29RT 6144.) James' Chicago trip was memorialized in a April

10, 1999, report by defense investigator by Malcolm Richards. James gave Brown the same information as he did to Richards. (29RT 6136-6141.)

When the jury returned, they heard testimony from Officer Bruce. After the jury was excused and ordered to return the next day at 10:30 a.m., the court discussed its concerns regarding the discovery violation. The court was particularly concerned that defense investigators' preparation of reports might have been driven by attorneys. Defense counsel stated that he did not recall discussing the Chicago trip with Brown, and that he had already received a report about the trip from Richards, a previous investigator. The matter was continued. (29RT 6160-6168.)

The next day, the Evidence Code section 402 hearing continued outside the presence of the jury. The court heard testimony from Brown and Richards. (29RT 6169-6216.) After the court excused the jury for the day, the court further inquired of the matter. The court compared Richards' original notes with the copy he gave to defense counsel and was "satisfied" that they corresponded. (29RT 6243-6281.)

Here, the prosecutor did not commit misconduct when the trial court conducted a series of hearings on the discovery violation. During James' testimony, the prosecutor discovered that James' statement to Brown regarding a trip to Chicago was not turned over to the prosecution. Noting that the defense had previously argued crime scene photographs were "work product" and thus not subject to discovery, the trial court considered the possibility of a second discovery violation by the defense to be particularly troubling. Thus, the trial court was permitted under section 1054.5 to conduct hearings to determine if section 1054.3 was violated and if any sanctions would be appropriate. As appellant concedes, these hearings occurred outside the presence of the jury. (AOB 326.) There was nothing "deceptive or reprehensible" about the trial court's inquiry into the possible repeated discovery violations by the defense and the prosecutor's

conduct in this matter. There was no "attempt" to persuade the jury, as the jury was not privy to any of their discussions. Absent appellant's conclusory statement that defense counsel's effectiveness was compromised (see AOB 328), appellant fails to show he was prejudiced by the court's inquiry. Additionally, in light of the very strong evidence of appellant's guilt, any error was harmless. (*Ante*, Arg. III.C.) Under the circumstances, appellant's claim must be rejected.

4. The Prosecutor Did Not Engage in Disruptive and Petty Conduct During Trial or Disparage Defense Counsel

Appellant contends the prosecutor "often engaged in disruptive and petty conduct during the trial" and acted in "an aggressive and hostile manner" towards defense counsel. (AOB 329-331.) Respondent disagrees.

A claim of prosecutorial misconduct must focus upon the potential injury to the defendant. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) When the claim focuses on comments made by the prosecutor to the jury, an appellate court must determine how the remarks would or could have been understood by a reasonable juror. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) A prosecutor's remarks during opening statement are not misconduct unless evidence the prosecutor references is "'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 762.) Similarly, vigorous representation is not misconduct. (*People v. Valencia* (2008) 43 Cal.4th 268, 301.) "[T]he critical inquiry on appeal is not how many times the prosecutor erred but whether the prosecutor's error rendered the trial fundamentally unfair or constituted reprehensible methods to attempt to persuade the jury." (*People v. Hinton* (2006) 37 Cal.4th 839, 864.)

First, the prosecutor did not commit prejudicial misconduct in making a passing comment during a pre-trial discovery proceeding that should

defense counsel fail to comply with discovery and the trial court was to instruct the jury on the violation, "the court would have the ability then to sanction counsel and have counsel report himself to the state bar as well." (2RT 97; see AOB 329.) The court had ordered defense counsel to turn over relevant discovery related to appellant's supplemental motion to continue filed under seal, and defense counsel acknowledged his compliance was necessary to avoid having the jury instructed on the discovery violation. (2RT 88-98.) There was no prejudice to the fairness of appellant's trial.

Second, the prosecutor's comment about defense counsel's fee arrangement and that he "did not want to work all that hard" did not constitute prejudicial misconduct. (See AOB 329.) The prosecutor's comment was made in a pre-trial proceeding during which defense counsel sought an order from the trial court directing the prosecutor to release discovery to appellant by mail instead of an in-person pick-up so that he could save money. (2RT 196-207.) In context, the prosecutor's comment was appropriate and did not constitute prejudicial misconduct. Further, in denying defense counsel's request, the court noted that there was no further discovery to be turned over and that any burden to the defense, if there were further discovery, was de minimis at best. (2RT 206-207.) There was no prejudice to the fairness of appellant's trial.

Third, the prosecutor's remarks in the opening statement that Keptra was peaceably walking to a store when approached by appellant and his cohorts, and that appellant and his cohorts later said, "Why didn't you give us these foodstamps to begin with?," did not constitute prejudicial misconduct. (19RT 4152-4153; see AOB 329-330.) The prosecutor had "'wide latitude'" to draw reasonable inferences from the evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 169.) "Whether the inferences drawn by the prosecutor are reasonable is a question for the jury. [Citation.]"

(*People v. Tafoya* (2007) 42 Cal.4th 147, 181.) Further, her comments were brief and did not so infect the trial with unfairness that it amounted to a denial of due process in the context of the whole record.

Fourth, the prosecutor's comments regarding counsel, which were made outside the presence of the jury during a discussion regarding a discovery dispute, did not prejudice the fairness of appellant's trial. (19RT 4402; 22RT 47131; 26RT 5565; see AOB 330.) Similarly, there is no evidence to support appellant's claim that the prosecutor's objections during appellant's testimony were "hypertechnical and unnecessary [ ] intended to disrupt the concentration of appellant and destroy the flow of the testimony." (AOB 330.) Indeed, the prosecutor's application of the ordinary rules of evidence did not infringe upon appellant's rights to due process. (See *People v. Boyette* (2002) 29 Cal.4th 381, 427-428; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

Fifth, the prosecutor's cross-examination of appellant did not constitute prejudicial misconduct. (See AOB 330-331.) "'Where a defendant takes the stand and makes a general denial of the crime the permissible scope of cross-examination is very wide.' [Citation.] When a defendant voluntarily testifies in his own defense the People may 'fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.' [Citation.]" (*People v. Harris* (1981) 28 Cal.3d 935, 953.) The prosecutor's cross-examination of appellant was entirely proper, and there was no prejudice to the fairness of appellant's trial.

Lastly, the prosecutor's examination of the witnesses did not constitute prejudicial misconduct. (See AOB 331.) While appellant claims that "the prosecutor's examination of many of the witnesses was almost

entirely leading" (AOB 331), defense counsel only lodged a single leading objection during the cited portions of the record, and the objection was overruled. (21RT 4453.) The prosecutor's examination of these witnesses was proper, and there was no prejudice to the fairness of appellant's trial.

XIII. APPELLANT'S JUDICIAL BIAS CLAIM IS FORFEITED; IN ANY EVENT, THE TRIAL COURT WAS NOT BIASED AND ANY ERROR WAS HARMLESS

Appellant contends the trial court demonstrated its bias in the following instances: (1) during jury selection as set forth in Arguments I and II of the Opening Brief (AOB 340-346); (2) refusing to allow appellant to present a defense as set forth in Arguments III to VI of the Opening Brief (AOB 346); (3) making disparaging comments toward defense counsel (AOB 347-348); and (4) making evidentiary rulings in favor of the prosecution (AOB 348-351). Respondent disagrees. Appellant's judicial bias claim is forfeited for failure to object. In any event, the trial court was not biased and any error was harmless.

A. Appellant's Judicial Bias Claim Is Forfeited

The failure to object or raise the issue of judicial bias also forfeits claims that the trial court's alleged bias affected subsequent rulings. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "[D]efendant's willingness to let the entire trial pass without [a] charge of bias against the judge not only forfeits his claims on appeal but also strongly suggests they are without merit. [Citation.]" (*Id.* at p. 1112.) Here, having failed to object at trial, appellant has forfeited this claim on appeal. (See *People v. Blacksher*, *supra*, 52 Cal.4th at p. 825; *People v. Snow* (2003) 30 Cal.4th 43, 78.)

B. The Claim Also Fails on the Merits

A criminal defendant "has a due process right to an impartial trial judge under the state and federal Constitutions. [Citations.]" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1111.) The constitutional right to due process "requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. [Citation.]" (*Ibid.*) "[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist '"the probability of actual bias on the part of the judge or decisionmaker that is too high to be constitutionally tolerable."' [Citation.]" (*People v. Freeman* (2010) 47 Cal.4th 993, 996, internal brackets omitted.) "[I]t is the exceptional case presenting extreme facts where a due process violation will be found. [Citation.]" (*Id.* at p. 1005.)

In reviewing a claim of judicial misconduct or bias on appeal, the appellate court must assess whether any misconduct or bias that is proven was so prejudicial as to deprive the defendant of a fair trial. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.) "Indeed, 'our role . . . is not to determine whether the trial judge's conduct left something to be desired . . . . Rather, we must determine whether the judge's behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial.' [Citation.]" (*People v. Snow*, *supra*, 30 Cal.4th at p. 78, internal brackets omitted, ellipsis original.)

1. The Trial Court Was Not Biased During Jury Selection

Appellant contends the trial court demonstrated bias against him during jury selection in allowing the prosecutor to improperly exclude qualified prospective jurors (see AOB 38-137) and in failing to prevent the

prosecutor from removing all of the Black male prospective jurors (see AOB 137-249). (AOB 340-346.)

Here, the trial court was not biased. As discussed above, the trial court properly excused nine prospective jurors for cause (*ante*, Arg. I) and denied appellant's *Wheeler/Batson* motions (*ante*, Arg. II). The prosecutor's use of the hypotheticals (see AOB 340), as discussed above, was proper. (*Ante*, Arg. I.B.) Similarly, the trial court's reasoning for granting the challenge as to G.P. was proper. (*Ante*, Arg. I.B.; see AOB 341.) As to prospective juror O.S., the trial court's description of his answer did comport with O.S.'s statement. (See AOB 341-342; 6RT 1224-1225.) The trial court's comment to the prosecutor about possibly substituting Juror No. 7 did not indicate bias. (See AOB 345-346.) When the court said, "You like every single one of the 18," the court was referring to the fact that defense counsel, unlike the prosecutor, had sought to excuse Juror No. 7 for cause earlier. (22RT 4803-4804.)

Nothing in the trial court's conduct during the voir dire suggested bias. "[A] trial court's numerous rulings against a party – even when erroneous – do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.) Appellant "never expressed any concern that the judge was prejudiced against him during trial nor did he request the judge to recuse himself." (*Ibid.*) Appellant's "willingness to let the entire trial pass without another charge of bias against the judge . . . strongly suggests they are without merit. [Citation.]" (*Ibid.*) Accordingly, appellant's claim should be rejected.

2. The Trial Court Did Not Refuse to Allow Appellant to Present a Defense

Appellant contends the trial court evidenced bias in excluding relevant evidence as set forth in Arguments III to VI of the Opening Brief. He

argues "the exclusion of this proffered evidence was part of a pattern of judicial impatience and dismissiveness toward the entire defense." (AOB 346.)

Here, the trial court was not biased. As discussed above, appellant never objected to the admission of evidence that he feared Pearson. (*Ante*, Arg. VI.) Further, the trial court properly excluded the contested evidence, and any error in admitting the evidence was harmless. (*Ante*, Arg. III-V.) Contrary to appellant's claim, the record shows the trial court was thoughtful and careful in considering the arguments of both parties in making its rulings. Under the circumstances, appellant cannot show he was deprived of a fair trial. "Even if there was error, such error was harmless." (*People v. Samuels* (2005) 36 Cal.4th 96, 118 [no judicial misconduct and any error harmless under *Watson*].)

3. The Trial Court Did Not Make Disparaging Comments Toward Defense Counsel

Appellant contends the trial court demonstrated bias in making disparaging comments toward defense counsel. (AOB 347-348.) Respondent disagrees.

On the three occasions when the court said defense counsel's question was "unintelligent," "unintelligible," or "incomplete," the trial court's description was accurate. First, on recross-examination of Kendrick, when defense counsel had difficulty locating the correct page and line number of the transcript in its attempt to impeach him on his prior statement to the detectives, the court suggested reading from an earlier point in the transcript. (20RT 4460-4463.) The following colloquy occurred:

> [Defense Counsel]: Okay. I shall.
>
> "June turned to the side and he said well, how did he know? So then I started questionin' him. I mean like what – I mean, what's going on? As I still believed they're lying. After that, um, Scrappy, I believe, went to his house."

You had been given that information before I asked the question of you; is that correct?

[Prosecutor]: Objection, Your Honor. Vague. I don't know what he's referring to.

[Defense Counsel]: Well, that tape recording.

[Prosecutor]: Objection, Your Honor.

The Court: Stop. Stop. Stop. Stop. The objection is sustained. That's an unintelligent question.

What information are you talking about?

By [Defense Counsel]:

Q Okay. The information I just read to you was before, and contained in the audio tape you were listening to; is that correct?

A That's correct.

(20RT 4463.)

Second, during direct-examination of appellant, the following colloquy occurred:

By [Defense Counsel]:

Q Did the subject matter of how you came in contact with this lady come up?

A You're asking how did it come up?

Q No, did it come up, yes or no?

A Did it come up with us two?

Q Between you – okay. Good question.

Between you and Jeanette – when you talked to Jeanette, did the subject matter of how it was that you were in contact with this lady.

[Prosecutor]: Objection. I don't understand the question.

The Court: Do you understand the question?

The Defendant: Not really.

The Court: Rephrase please. The witness doesn't understand. It's unintelligible.

[Defense Counsel]: Very well.

(23RT 4958.)

Lastly, during cross-examination of Carter, the following colloquy occurred:

By [Defense Counsel]:

Q Did Mr. Armstrong say whether or not he had a condom?

[Prosecutor]: Objection. At what point?

[Defense Counsel]: When he talked to you.

[Prosecutor]: At what point in time?

[Defense Counsel]: When he talked to you on Thursday the 5th.

The Court: That is such an incomplete question.

When Mr. Armstrong talked to you on either December 30th or January 5th, did he tell you whether or not he had a condom at the scene of December the 29th?

The Witness: Yes.

The Court: What did he say?

The Witness: No.

The Court: Next question.

(21RT 4535.) The trial court's characterization of defense counsel's question was accurate and did not "diminish[ ] the cause of the defense in the jury's eyes." (AOB 347.)

Further, the trial court's comment made outside the presence of the jury about defense counsel attempting to "create" an appeal does not demonstrate bias. (AOB 347-348.) Before the presentation of defense evidence, the court informed the parties, outside the presence of the jury, of a letter written by Alternate Juror No. 6 in which she noted that Juror No. 3 appeared to be isolating herself from the other jurors and that she believed it was because Juror No. 3 had already decided the case. The parties discussed what Alternate Juror No. 6 meant in the letter and seemingly agreed to a resolution. Then Mr. Patton, defense cocounsel, raised another possible interpretation of the letter, that Alternate Juror No. 6 was wondering why Juror No. 3 had not indicated her feelings. (23RT 4854-4861.) The trial court responded, "Oh, no. No. No. No. No. Wait a second. I don't want you to make a bad record for me, Mr. Patton. I know you're a very clever lawyer, and you've been creating an appeal for me throughout. I appreciate that very much; you're an outstanding lawyer." (23RT 4861.) The court went on to explain that the letter did not suggest anyone was discussing the case, that Mr. Patton did not have the benefit of having the letter in front of him. (23RT 4861-4862.) Here, the trial court did not "accuse" cocounsel of attempting "to create error." (AOB 347.) The trial court did not insinuate cocounsel was fabricating a nonexistent record, but merely attempted to "set the record straight" for purposes of appeal. Taken in context, the trial court's comment was not accusatory and does not demonstrate bias.

4. The Trial Court Was Not Biased in Other Instances

Appellant contends the trial court demonstrated bias in various other instances. (AOB 348-351.) Respondent disagrees.

First, the trial court's evidentiary rulings during Carter's testimony were proper and did not demonstrate "partisanship." (AOB 348-349.) The

court struck Carter's testimony that she was nervous because the question had called for a yes or no answer. (21RT 4553-4554.) Moreover, Carter had already testified that she was nervous when she spoke with the detectives. (21RT 4521, 4552-4553.) On another occasion, the trial court's providing the basis for the prosecution's objection does not demonstrate bias or prejudice as defense counsel's question was speculative, as the court found. (21RT 4534 ["And you knew he didn't have one, because you and he did not use condoms –"].)

Second, contrary to appellant's claim, the trial court did not examine witnesses in the two instances cited by appellant. (See AOB 349.) As to the first instance, the trial court merely rephrased defense counsel's question for the prosecutor when the prosecutor stated she did not hear it. (21RT 4500.) As to the second instance, the trial court merely asked the witness if she could see the exhibit displayed by defense counsel. (21RT 4537.) While "[a] trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony," the trial court in this case did not examine witnesses and did not demonstrate bias in rephrasing a question for the prosecutor's hearing and asking a witness if she could clearly view an exhibit. (*People v. Cook*, *supra*, 39 Cal.4th at p. 597.)

Third, the trial court did not favor the prosecution in its evidentiary ruling in the two instances cited by appellant. (See AOB 349-350.) As to the first instance, after appellant testified on direct-examination that his brother Hardy's putting the stick inside Keptra's vagina was "wrong" and "animal-like" (23RT 4945-4946), the following colloquy occurred:

> Q What did you do to help Penny at that point in time?
>
> [Prosecutor]: Objection, Your Honor, that misstates the evidence. The defendant has not testified that he helped the victim.

The Court: The objection is overruled. The question should be, "What did you do?"

Q. By [Defense Counsel]: What did you do, if anything, to help, when you saw your brother?

[Prosecutor]: Objection, same objection, Your Honor, misstates the evidence.

The Court: Why don't you just ask – that's sustained.

What did you do when you saw your brother put the stick in the victim's, what appears to be the victim's body?

[Appellant]: The best thing that I could do.

[Prosecutor]: Objection, Your Honor, this is not answering the question.

The Court: The question is, "What did you do?"

[Appellant]: I took the stick from my brother.

(23RT 4946.) Here, it appears that the court overruled the prosecutor's misstating the evidence objection but found defense counsel's question to be leading as it suggested that defense counsel should ask, "What did you do?" When defense counsel failed to correct his question, asking appellant what he did "to help," the court sustained the objection and asked the question to appellant instead. There was no "inconsistency" and no demonstration of bias in the court's conduct.

As to the second instance, during cross-examination of appellant, the court sustained defense counsel's speculation objection to the prosecutor's question, "Wouldn't you agree with me that it would be *highly unlikely* that your DNA and the victim's DNA in those spots, would be in the same place – on that place?" (24RT 4980, italics added.) The prosecutor rephrased the question, "Would you agree that it would be *very difficult* for your DNA and the victim's DNA to be in the same spot on that jacket?" (24RT 4980, italics added.) The trial court overruled defense counsel's speculation

objection. (24RT 4980.) Here, the trial court properly exercised its discretion and determined that asking appellant, a lay person, whether finding his and Keptra's DNA on the same spot would be "highly unlikely" was speculative, as opposed to asking him whether he thought it would be "very difficult."[20] There was no "inconsistency" and no demonstration of bias in the court's conduct.

Lastly, appellant contends the court's comment to appellant about "knowing better" was a "revealing exchange" demonstrating the court's prejudice by "ascrib[ing] legal knowledge to him that very few defendants, let alone a young, uneducated male such as appellant, would have." (AOB 350-351.) Before appellant took the stand, outside the presence of the jury, the court gave the following order:

> The Court: On the remorse and sympathy issue, do you agree remorse and sympathy are not issues in the guilt phase?
>
> [Defense Counsel]: That's correct.
>
> The Court: And your client is not going to testify how sorry he is, or how remorseful he is, and he is asking for their forgiveness, is that correct?
>
> [Defense Counsel]: That's correct.
>
> The Court: Mr. Armstrong is present in court. I make that court order. He is not to do so. If he is to do so, I will interrupt immediately during the proceedings and advise the jury that we have had this instruction and your client has failed to obey the court's instructions. All right, I want to make that is [*sic*] crystal clear.

(23RT 4910.)

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[20] When the prosecutor reasked the question, appellant disagreed that it "would be difficult" for his DNA to be found on the same spont as the victim's DNA on the jacket and agreed that "it would be easy." (24RT 4980.)

During his direct testimony, appellant testified that he contemplated telling the detectives he did not know about "the incident that happened on the 405 Freeway," but that he told them he did. (23RT 4962-4963.) When defense counsel asked what he meant by "contemplating," appellant replied, "I wanted to tell them no, but since it was on my heart, heavy, I just told them." (23RT 4963.) The prosecutor objected, moved to strike, and asked that the jury be admonished. At sidebar, the court determined that appellant's answer went to "sympathy and compassion" though the court acknowledged defense counsel had not tried to elicit such a response. When defense counsel stated he had "tried to scrupulosuly [ ] obey the court's orders in this case," the court responded, "But not your client. He knows better, so –." (23RT 4963-4964.) The court instructed the jury regarding the role of sympathy. (24RT 4964-4965 [CALJIC No. 1.00].) As the record clearly indicates, in stating appellant "knew better," the court was referring to its order to appellant not to testify so as to garner sympathy from the jury. The only "revealing" aspect of this exchange was appellant's blatant disregard for the court's order, not "the court's prejudice toward appellant." (AOB 350-351.) Whether considered individually or collectively, the above instances do not manifest judicial bias and in no way impact the fairness of appellant's trial. Accordingly, appellant's claim must be rejected.

XIV. CALJIC INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE DID NOT UNDERMINE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

The trial court instructed the jury with CALJIC Nos. 2.01 (sufficiency of circumstantial evidence – generally), 2.02 (sufficiency of circumstantial evidence to prove specific intent or mental state), and 8.83 (special circumstances – sufficiency of circumstantial evidence – generally). (3CT

775, 812, 832.) In these instructions, the trial court essentially informed the jury that if "one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (3CT 775, 812, 832.) Appellant argues that the above language undermined the constitutional requirement of proof beyond a reasonable doubt by permitting the jury to find "guilt based on a degree of proof less than that required by the Due Process Clause" and operating "as an impermissible mandatory, conclusive presumption of guilt." (AOB 351-354.) Respondent disagrees.

This Court has previously rejected this contention. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 144, and cases cited therein.) As the *Crittenden* court explained:

> When the questioned phrase is read in context, not only with the remaining language within each instruction but also together with related instructions, including the reasonable doubt instruction, it is clear that the jury was required only to reject unreasonable interpretations of the evidence and to accept a reasonable interpretation that is consistent with the evidence. [Citation.]

(*Ibid.*)

Appellant's claim to the contrary must be rejected.

XV. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE ON WHETHER APPELLANT COMMITTED PREMEDITATED OR FELONY MURDER

The People presented three theories to support their case for first degree murder: (1) premeditated and deliberate murder (3CT 817-818); (2) felony murder (3CT 819); and (3) murder by torture (3CT 821). The court instructed the jury on these theories, and also instructed that the jurors did

not need to agree on the specific theory, as long as they agreed the murder was of the first degree. (3CT 825.) Relying on *People v. Dillon* (1983) 34 Cal.3d 441, appellant contends that the trial court erred by failing to instruct the jury that it must agree on the factual theory to convict a defendant of first degree murder, namely, whether appellant had committed malice murder or felony murder. (AOB 355-367.) Respondent disagrees.

Appellant's reliance on the plurality opinion in *Dillon* for the proposition that felony murder and malice murder are "a separate and distinct crime" is misplaced. (AOB 358.) In *People v. Kipp* (2001) 26 Cal.4th 1100, this Court explained as follows:

> Defendant mistakenly relies on a statement in the plurality opinion in *People v. Dillon* (1983) 34 Cal.3d 441, . . . that the "two kinds of murder"—that is, felony murder and murder with express or implied malice—"are not the 'same' crimes." [Citation.] As we have since explained, however, this means only that the two forms of murder have different elements even though there is but a single statutory offense of murder. [Citations.] "Felony murder and premeditated murder are not distinct crimes. . . ." [Citation.]

(*Id.* at p. 1131, ellipsis original.)

Moreover, as appellant recognizes (AOB 356), this Court has repeatedly rejected a claim that a jury must unanimously agree on a theory of first degree murder as either malice murder or felony murder. (*People v. Moore* (2011) 51 Cal.4th 386, 413; *People v. Tate* (2010) 49 Cal.4th 635, 697; *People v. Nakahara* (2003) 30 Cal.4th 705, 712 -713.) Accordingly, appellant's claim must be rejected.

XVI. THE JURY WAS PROPERLY INSTRUCTED ON CONSPIRACY

The jury was instructed regarding conspiracy per CALJIC Nos. 6.10.5, 6.11, and 6.12 without objection. (22RT 4883; 3CT 809-811.) Appellant contends that because he was not charged with the crime of

conspiracy, the court's instructions on conspiracy violated his rights to due process. Specifically, appellant alleges he did not receive notice of this theory and was deprived of an opportunity because the conspiracy was uncharged. (AOB 367-373.) Respondent disagrees.

Initially, appellant's claim regarding the instructions on conspiracy, including his claim that he was deprived of an opportunity to defend because he did not receive notice, is forfeited for failure to object. (See *People v. Toro* (1989) 47 Cal.3d 966, 976-977 [failure to object to lesser related offense instruction bars contention based on lack of notice], disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

In any event, appellant's claim fails. "It is firmly established that evidence of conspiracy may be admitted even if the defendant is not charged with the crime of conspiracy. [Citations.] Once there is proof of the existence of the conspiracy there is no error in instructing the jury on the law of conspiracy. [Citation.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1134.) Thus, the trial court's duty to instruct does not depend on whether appellant was warned of the prosecution's theory of the case, but rather on whether the evidence supports a prima facie case of conspiracy. In that regard, appellant does not claim that there was no factual support for giving the conspiracy instructions.

Moreover, to the extent appellant argues the instructions were inadequate because they undermined the prosecution's burden of proof beyond a reasonable doubt (AOB 371), appellant's claim also fails. As explained recently by this Court in *People v. Valdez* (2012) 55 Cal.4th 82, an uncharged theory of conspiracy, as used in this case, is a theory of liability like aiding and abetting. (*Id.* at p. 150.) Thus, "[f]or purposes of complicity in a cofelon's homicidal act, the conspirator and the abettor stand in the same position. [Citation.]" (*Ibid.*)

> "The instructions given here did not tell the jury that it could presume any particular element of murder, including intent, based on proof of predicate facts. Instead, the instructions specified that, as an *alternative* to finding, based on the elements of murder, that defendant himself committed or aided in the crime, it could find him responsible for the crime based on his participation in a conspiracy to commit murder. This correctly stated the law concerning conspiracy as an alternative theory of liability. [Citations.] Accordingly, there was no error." [Citations.]

(*Ibid.*, brackets and italics original)

To the extent appellant claims the jury had to agree unanimously on the existence of a conspiracy (AOB 368), this Court in *Valdez* has also rejected such a claim. (*People v. Valdez*, *supra*, 55 Cal.4th at pp. 153-154.) Indeed, these instructions have been repeatedly upheld as correct statement of law. (*People v. Garceau* (1993) 6 Cal.4th 140, 190; *People v. Belmontes* (1988) 45 Cal.3d 744, 789-790, overruled on another point in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) Appellant offers no reason why *Valdez* should be reexamined. Accordingly, appellant's claim should be rejected.

XVII. CALIFORNIA'S DEATH PENALTY STATUTE IS NOT IMPERMISSIBLY BROAD

Appellant argues that California's death penalty statute violated the Constitution because it is impermissibly broad. (AOB 374-377.) Respondent disagrees.

This Court has consistently rejected the claim that the California death penalty statute fails to narrow, in a constitutionally acceptable manner, the class of persons eligible for the death penalty. "California's statutory special circumstances (§ 190.2, subds. (a)(1)-(22)) are not so numerous or inclusive as to fail to narrow the class of murderers eligible for the death penalty. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 165.) "The

special circumstances listed in section 190.2 adequately narrow the class of murders for which the death penalty may be imposed. [Citation.]" (*People v. Snow*, *supra*, 30 Cal.4th at p. 125.) "The statute (§ 190.2) does not impose overbroad death eligibility, either because of the sheer number and scope of special circumstances which define a capital murder, or because the statute permits capital exposure for an unintentional felony murder. [Citations.]" (*People v. Anderson*, *supra*, 25 Cal.4th at p. 601; see, e.g., *People v. Marks*, *supra*, 31 Cal.4th at p. 237; *People v. Box*, *supra*, 23 Cal.4th at p. 1217; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479.)

Appellant argues that the death penalty applies to "virtually all intentional murders" in California. (AOB 375.) The defendant in *People v. Crittenden*, *supra*, 9 Cal.4th 83, made a similar argument: "In particular, defendant contends that the categories of murder subjecting a defendant to eligibility for the death penalty have been expanded to the extent that the death penalty law does not perform the mandated narrowing function. This development, defendant asserts, is reflective of an original unconstitutional purpose, harbored by the proponents of the law, to apply the death penalty in every case of murder." (*Id.* at p. 154.) This Court held in *Crittenden*, "[e]ven taking into account this statutory expansion, however, we believe the death-eligibility component of California's capital punishment law does not exceed constitutional bounds." (*Id.* at p. 156.)

Similarly, this Court has repeatedly held, "California's death penalty law, which permits capital punishment for many first degree murders, including unintentional felony murders, is not overly broad. [Citations.]" (*People v. Elliot* (2012) 53 Cal.4th 535, 593.) Appellant provides no reason for this Court to depart from its prior holding.

XVIII. SECTION 190.3(A) AS APPLIED DOES NOT ALLOW FOR ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH

Appellant contends California's death penalty statute is invalid because section 190.3, subdivision (a), as applied, allows arbitrary and capricious imposition of death in violation of various rights under the federal Constitution. (AOB 378-385.) Respondent disagrees.

This Court has repeatedly rejected this claim. (*People v. Brady* (2010) 50 Cal.4th 547, 590 ["Section 190.3, factor (a), whether considered on its face or as applied, does not allow for arbitrary and capricious imposition of the death penalty"]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1029; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant offers no reason for this Court to depart from its prior holding.

XIX. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant contends that California's death penalty statute is unconstitutional because it failed to provide common safeguards present in other death penalty statutes. (AOB 386-443.) Respondent disagrees.

A. The Jury Is Not Required to Find Beyond a Reasonable Doubt That Aggravating Factors Exist, That They Outweigh the Mitigating Factors, or That Death Is the Appropriate Sentence

Appellant argues that the jury must be required to find beyond a reasonable doubt that aggravating factors exist, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. (AOB 387-402.) As this Court explained in *People v. Demetrulias* (2006) 39 Cal.4th 1, California's death penalty statute does not require instruction on the burden of proof at the penalty phase and "'is not invalid for failing to require . . . (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable

doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt.' [Citation.]" (*Id.* at p. 43; accord *People v. Rogers* (2006) 39 Cal.4th 826, 893; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Davis* (2005) 36 Cal.4th 510, 571; *People v. Brown*, *supra*, 33 Cal.4th at p. 402.) Unanimity is required only as to the appropriate penalty. (*People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Anderson*, *supra*, 25 Cal.4th at p. 590.)

Appellant argues that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] require that the aggravating factors be found beyond a reasonable doubt by a unanimous jury. (AOB 391-402.) This claim should be rejected. *Ring* is inapplicable to the penalty phase of California's capital murder trials because "once a defendant has been convicted of first degree murder and one or more special circumstances have been found true under California's death penalty statute, the statutory maximum penalty is already set at death. [Citation.]" (*People v. Stanley*, *supra*, 39 Cal.4th at p. 964.) Thus, "'[A]ny finding of aggravating factors during the penalty phase does not "increase the penalty for a crime beyond the prescribed statutory maximum" [citation], [and] *Ring* imposes no new constitutional requirements on California's penalty phase proceedings.' [Citations.]" (*Ibid.*, internal brackets omitted.)

Appellant also argues that the jury must be required to find beyond a reasonable doubt that aggravating factors outweigh the mitigating factors. (AOB 387-402.) As this Court, however, explained, "neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. [Citations.]" (*People v. Blair*, *supra,* 36 Cal.4th at p.

753.) Furthermore, "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase. [Citations.]" (*Ibid.*; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 43; *People v. Gray*, *supra*, 37 Cal.4th at p. 236; *People v. Wilson* (2005) 36 Cal.4th 309, 360.)

As this Court stated in *People v. Hovarter*, *supra*, 44 Cal.4th 983,

> That "twenty-five states require that any factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt," as defendant contends, does not erode our confidence in the constitutionality of this state's death penalty law. "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." [Citation.]

(*Id.* at p. 1029, internal brackets omitted.)

Accordingly, appellant's claim should be rejected.

B. The Jury Is Not Required to Find by a Preponderance of the Evidence That Aggravating Factors Exist, That They Outweigh the Mitigating Factors, or That Death Is the Appropriate Sentence

Even if proof beyond a reasonable doubt is not required, appellant argues that the jury must be required to find by a preponderance of the evidence that aggravating factors exist, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty. (AOB 403-406.) Respondent disagrees.

This Court has repeatedly rejected this claim. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1355; *People v. Brady*, *supra*, 50 Cal.4th at p. 590.) Indeed, as this Court in *People v. Collins* (2010) 49 Cal.4th 175, stated:

> It is settled that "the trial court need not and should not instruct the jury as to *any* burden of proof or persuasion at the penalty phase." [Citation.] "The death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the

> evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence." [Citation.]

(*Id.* at p. 261, italics original.)

Appellant offers no reason for this Court to depart from its prior holding.

C. The Trial Court Does Not Have the Duty to Instruct on Any Burden of Proof at the Penalty Phase

Appellant argues the trial court's failure to instruct the jury on any burden of proof in the penalty phase violated his rights under the federal Constitution. (AOB 406-409.) Respondent disagrees.

As noted above, this Court has repeatedly rejected claims identical to appellant's claim regarding a burden of proof at the penalty phase. (*People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Redd* (2000) 48 Cal.4th 691, 757; *People v. Carrington* (2009) 47 Cal.4th 145, 200.) Appellant offers no reason for this Court to depart from its prior holding.

D. The Jury Is Not Required to Unanimously Agree on Aggravating Factors

Appellant argues his rights under the Sixth, Eighth, and Fourteenth Amendments are violated because California's capital sentencing scheme does not require the jury to agree unanimously on aggravating factors. (AOB 410-427.) Respondent disagrees.

This Court has repeatedly held that neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors. (*People v. Famalaro* (2011) 52 Cal.4th 1, 44; *People v. Osband* (1996) 13 Cal.4th 622, 710; see *People v. Valdez*, *supra*, 55 Cal.4th at p. 179 ["The trial court need not instruct jurors that . . . their findings regarding aggravating factors must be unanimous"].) While appellant argues these decisions should be reexamined in light of *Blakely v.*

Washington (2004) 542 U.S. 296 [124 S.Ct. 2531,159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (AOB 418-427), this Court has held that these recent decisions in the United States Supreme Court "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard. [Citations.]" (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 227; see *People v. Bivert* (2011) 52 Cal.4th 96, 124; *People v. Stevens*, *supra*, 41 Cal.4th at p. 212.) Appellant offers no reason for this Court to depart from its prior holding.

E. The Jury Is Not Required to Make Written Findings of Aggravating Factors

Appellant argues that the jury must make written findings of aggravating factors. (AOB 427-431.) Respondent disagrees. The jury is not required to make written findings regarding aggravating factors. (*People v. Stevens*, *supra*, 41 Cal.4th at p. 212; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893; *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Davis*, *supra*, 36 Cal.4th at p. 571; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-778.)

F. Intercase Proportionality Review Is Not Required

Appellant contends that intercase proportionality review is required in capital sentencing. (AOB 432-438.) Respondent disagrees. "Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required. [Citations.]" (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; accord *People v. Stevens*, *supra*, 41 Cal.4th at p. 212; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 44; *People v. Gray*, *supra*, 37 Cal.4th at p. 237; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Stitely*, *supra*, 35 Cal.4th at p. 574.)

G. Reliance on Unadjudicated Criminal Activity at the Penalty Phase Does Not Violate the Constitution

Appellant contends any reliance of unadjudicated criminal activity by the jury during the penalty phase violates his rights under the federal Constitution and renders his death sentence unreliable. (AOB 438-439.) Respondent disagrees. "The use of unadjudicated criminal activity at the penalty phase and the absence of a requirement that the jury agree unanimously that it has been proved do not render a death sentence unreliable. [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 836; *People v. Elliot*, *supra*, 53 Cal.4th at p. 593; *People v. Scott* (2011) 52 Cal.4th 452, 497.)

H. The Use of Restrictive Adjectives in Mitigating Factors Is Proper

Appellant argues use of adjectives such as "extreme" and "substantial in the list of potential mitigating factors acted as a barrier to the consideration of mitigation in violation of Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 439.) Respondent disagrees. "Including in the list of potential mitigating factors adjectives such as 'extreme' (§ 190.3, factors (d), (g)) and 'substantial' (*id.* factor (g)) does not erect an impermissible barrier to the jury's consideration of mitigating evidence. [Citation.]" (*People v. Valdez*, *supra*, 55 Cal.4th at p. 180; *People v. Fuiava* (2012) 53 Cal.4th 622, 732; *People v. Elliot*, *supra*, 53 Cal.4th at p. 594; *People v. Letner* (2010) 50 Cal.4th 99, 208.)

I. The Trial Court Was Not Required to Instruct that Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators

Appellant argues the trial court's failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the capital sanction. (AOB

440-442.) Respondent disagrees. "A trial court is not required to delete inapplicable sentencing factors or to instruct that statutory mitigating factors are relevant solely as potential mitigators. [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 268; *People v. Wilson* (2008) 43 Cal.4th 1, 32.)

J. Prosecutorial Charging Discretion Does Not Render California's Death Penalty Statute Unconstitutional

Appellant argues that it is unconstitutional to permit an individual prosecutor unbridled discretion to decide whether the death penalty will be imposed. Such discretion, he argues, creates the risk of county by county arbitrariness based on "irrelevant and impermissible conditions." (AOB 442-443.) Respondent disagrees. As held in *People v. Crittenden*, *supra*, 9 Cal.4th 83:

> [P]rosecutorial discretion to select those eligible cases in which the death penalty actually will be sought does not, in and of itself, evidence an arbitrary and capricious capital punishment system, nor does such discretion transgress the principles underlying due process of law, equal protection of the laws, or the prohibition against cruel and unusual punishment. [Citations.]

(*Id.* at p. 152; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Steele* (2002) 27 Cal.4th 1230, 1269; *People v. Earp*, *supra*, 20 Cal.4th at p. 905 ["There is no constitutional proscription against delegating to each district attorney the power to effectively decide in which cases to seek the death penalty"]; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479; *People v. Ray* (1996) 13 Cal.4th 313, 359.) Appellant provides no persuasive basis for his request that this Court reconsider its prior holdings on this issue. Accordingly, his claim should be rejected.

XX. THE ABSENCE IN CALIFORNIA'S DEATH PENALTY STATUTE OF PROCEDURAL SAFEGUARDS AVAILABLE TO NON-CAPITAL DEFENDANTS DOES NOT VIOLATE EQUAL PROTECTION

Appellant argues that California's death penalty statute violates equal protection because it "provides significantly fewer procedural protections" than those afforded to non-capital defendants. (AOB 444-446.) Respondent disagrees.

This Court has rejected the claim that procedural differences in capital and non-capital cases, including the availability of certain "safeguards" such as intercase proportionality review, violate equal protection principles under the Fourteenth Amendment. (See *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182; *People v. Cox* (1991) 53 Cal.3d 618, 691, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Allen* (1986) 42 Cal.3d. 1222, 1287-1288.) As this Court has observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Danielson* (1992) 3 Cal.4th 691, 719-720, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "By parity of reasoning, 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." (*People v. Blair*, *supra*, 36 Cal.4th at p. 754.)

XXI. USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW AND/OR THE CONSTITUTION

Appellant contends that use of the death penalty as a regular form of punishment violates international law and the Eighth and Fourteenth Amendments. (AOB 446-450.) Respondent disagrees. As this Court

stated in *People v. Hillhouse* (2002) 27 Cal.4th 469, at page 511, "had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis, without recourse to international law. [¶] . . . International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]" (See also *People v. Foster* (2010) 50 Cal.4th 1301, 1368; *People v. Loker*, *supra*, 44 Cal.4th at p. 756; *People v. Harris* (2008) 43 Cal.4th 1269, 1323; *People v. Vieira* (2005) 35 Cal.4th 264, 305.)

XXII. THERE WAS NO CUMULATIVE ERROR

Appellant contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 450-452.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn.14; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

CONCLUSION

For the stated reasons, respondent respectfully asks that the judgment be affirmed.

Dated: January 14, 2013

Respectfully submitted,

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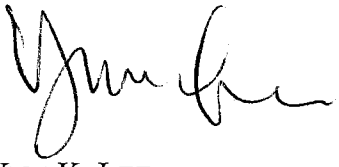
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **62,785** words.

Dated: January 14, 2013

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **People v. Armstrong** No.: **S126560**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On **January 14, 2013**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **January 14, 2013**, I caused thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, 1st Floor San Francisco, CA 94102-3600 by **FEDEX.**

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 **January 14, 2013**, at Los Angeles, California.

Nora Fung
Declarant

Signature

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