No. S056891
(Riverside Co. Sup
Ct. No. CR-45819)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES ALVIN THOMPSON,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

HONORABLE VILIA SHERMAN, JUDGE

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES ALVIN THOMPSON, Defendant and Appellant.	No. S056891 (Riverside Co. Sup. Ct. No. CR-45819)

APPELLANT'S OPENING BRIEF

STATEMENT OF CASE

On April 2, 1992, a warrant was issued on application of the Perris Police Department in Riverside County for appellant's arrest in connection with the murder of Ronald Gitmed. (CT 3A-6.[1])

On May 7, 1992, a grand jury proceeding was held concerning Gitmed's murder, which did not result in an indictment. (RT 1951, 2534.)

On May 11, 1992, attorney Jay P. Grossman from the Conflicts Panel for Riverside County accepted appointment to represent appellant and

[1]References to the record on appeal in the instant brief are as follows: "RT" for the Reporter's Transcript of Proceedings on Appeal; "CT" for the Clerk's Transcript on Appeal; "Supp. CT-JQ" for the Clerk's Supplemental Transcript on Appeal (Juror Questionnaires), Volumes 1-12.

waived formal arraignment, and appellant entered a plea of not guilty.[2] (CT 16.) On May 14, 1992, the case was transferred at appellant's request to the Municipal Court in Riverside. (CT 16-17.)

On May 21, 1992,[3] appellant was charged by felony complaint filed in the Municipal Court of the Three Lakes Judicial District in Riverside County in Case No. P92F2716, with the murder and robbery of Ronald W. Gitmed on August 28, 1991 (Pen. Code, § 187[4]). (CT 1-2.)

On December 11, 1992, a preliminary hearing was held in front of the Hon. Robert G. Spitzer in the Riverside Superior Court after which the court ordered that appellant be held to answer. (CT 7, 110-188.)

On December 24, 1992, Information Number CR. 45819 was filed in Riverside Superior Court charging appellant with one count of murder, for the murder of Ronald Gitmed on or about August 28, 1991, and alleging that appellant had personally used a .22 caliber pistol in the commission of the crime (§§ 12022.5(a), 1192.7(c)(8). (CT 189.) The information further alleged two special circumstances: (1) that appellant had previously been convicted of murder by the District Court of the State of Texas, County of El Paso, within the meaning of Penal Code section 190.2(a)(2)), and (2) that

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[2]On April 15, 1992, the Riverside Public Defender appeared to represent appellant, and on April 17, 1992, the public defender declared a conflict but was not relieved. (CT 15.) On May 6 and 11, 1992, attorneys from the Conflicts Panel for Riverside County made a special appearance. At each of these proceedings the case was continued for arraignment. (CT 15-16.)

[3]The felony complaint filed May 21, 1992, was dated March 10, 1992. (CT 2.)

[4]All statutory references in the instant brief are to the California Penal Code except where otherwise indicated.

he committed the charged murder during the commission of a robbery (Pen. Code, § 211) within the meaning of Penal Code section 190.2(a)(17)(i)). (CT 190.)

On January 26, 1993, the case was assigned to Judge William R. Bailey for trial. (CT 198; RT 107, 109.) On January 24, 1995, it was re-assigned to Judge Ronald R. Heumann. (CT 476.) On June 7, 1995, the case was again re-assigned, to Judge Vilia G. Sherman, who tried the case. (CT 484.)

Trial began on February 29, 1996; the jury and four alternates were sworn in on April 1, 1996, and opening statements were given by both sides. (CT 921, 925; RT 1198-1314; 1421, 1428-1440, 1441-1457.)

Presentation of evidence by both sides in the guilt phase was given over the course of ten days beginning April 2, 1996 and ending April 18, 1996. (CT 926-928, 933-940, 943-948, 956 [prosecution guilt phase case in chief, April 2-4, 8-10, and 15, 1996]; 956, 959-963, 965-967 [defense guilt phase evidence, April 15-16, and 18, 1996]; 967 [prosecution rebuttal April 18, 1996].)

On April 23, 1996, at 9:30 a.m. the jury began deliberations, and in the afternoon of April 24, 1996, it returned its verdicts finding appellant guilty of first degree murder (CT 1097; RT 3074). The jury also returned specific findings that appellant did <u>not</u> personally use a firearm in the commission of the murder (CT 1096; RT 3075), and that he committed the murder while engaged in the commission of a robbery (CT 1095; RT 3074).

Also on April 24, 1996, appellant orally moved under *People v. Marsden* (1970) 2 Cal.3d 118 and *Faretta v. California* (1975) 422 U.S. 806, to dismiss his appointed attorneys and to represent himself. (CT 1100; RT 3080.) The court held a *Marsden/Faretta* hearing that afternoon and

continuing on the morning of April 25, 1996. (RT 3084-3157 [sealed transcript][5].)

On April 25, 1996, the court granted appellant's request to represent himself by remaining silent, not participating in any way in the special circumstance and penalty trials, and not presenting any mitigation evidence; and the court placed attorneys Aquilina and Grossman on stand-by status for the special circumstance and penalty phases. (CT 1101, RT 3159.)

On April 30, 1996, a trial on the truth of the special circumstance of a prior murder conviction in Texas in 1977 was held, with evidence presented only by the prosecution, and the jury returned its verdict finding the special circumstance to be true. (CT 1109, 1116-1118; RT 3074-3075.)

Also on April 30, 1996, the penalty phase of the trial was conducted with evidence presented only by the prosecution. (CT 1118; RT 3231.)

On Wednesday, May 1, 1996, penalty phase jury deliberations began. (CT 1122; RT 3318.) The court declared a recess until Monday, May 6, 1996.

On Monday, May 6, 1996, two jurors, Pye and Rodriguez, asked to speak to the court privately, and the court spoke with them in open court in the presence of counsel for both sides. (CT 1123-1125; RT 3328-3346.) The court excused Juror Rodriguez and ordered Juror Pye to return to deliberations. (CT 1123-1125.) The court granted appellant's request for the re-appointment of counsel for the limited purpose of handling issues that arose from the jurors' remarks. (CT 1123-1125; RT 3331-3335.)

On May 7, 1996, the court seated alternate juror Gomez and the jury

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[5]Reporter's transcript pages 3084-3115 are incorporated in Volume 24-A, filed under seal.

returned its verdict sentencing appellant to death. (CT 1150, 1151; RT 3386-3390.)

On July 11, 1996, appellant filed a petition requesting access to personal juror information under Code of Civil Procedure section 237. (CT 1156-1157.) The trial granted the motion in part on July 12, 1996, and after a hearing ordered the release of information concerning juror Rodriguez on August 1, 1996. (CT 1166; 1186.) On August 28, 1996, the Court scheduled a Code of Civil Procedure section 237 hearing with regard to juror Pye. (CT 1203.) On September 13, 1996, after a hearing, the trial court ordered the release of Juror Pye's information. (CT 1226.)

On October 9, 1996, appellant filed a motion for a new trial which was denied after hearing on October 21, 1996. (CT 1230; 1343.) At the same hearing the trial court denied appellant's motion to modify the sentence pursuant to Penal Code section 190.4, subdivision (e). (CT 1343.)

Also on October 21, 1996, the trial court sentenced appellant to die for the murder of Ronald Gitmed with the special circumstances that the murder was committed while appellant was engaged in or an accomplice to a robbery and that appellant had previously been convicted of first or second-degree murder. (CT 1344; RT 3497-3501.)

The instant appeal is automatic. (§ 1239.)

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STATEMENT OF FACTS

A. Trial for Murder of Ronald Gitmed

1. Summary

In the summer of 1991 appellant became acquainted with a group of people involved in the drug (methamphetamine) scene who lived in trailers and sheds in the desert outside Riverside on land littered with stolen vehicles and car parts. He met these people through a man named Anthony Mercurio, whom appellant had met in prison and whose girlfriend lived in the compound. In August, 1991, appellant also struck up an acquaintance with one Michelle Keathley, a drug dealer, and later met her cousin, Ronald Gitmed, the victim in this case, whose body was found on August 28, 1991, floating near the shore of Canyon Lake in an area of the desert near Perris in Riverside County. At trial the prosecution relied on the testimony of Anthony Mercurio to establish that appellant was the one who shot Gitmed.

The defense relied on an alibi witness and lack of proof of the date appellant was seen with the victim, to establish that appellant was not present when Gitmed was killed. No evidence aside from Mercurio's testimony linked appellant to the scene of the crime or to any property taken from the victim at the time of the murder, and the murder weapon was never found.

2. Prosecution Case

In August of 1991, appellant was living with his mother and stepfather, Jean and Eugene Churder, in Riverside. (RT 1797.)

One night in early August, 1991, appellant was at a pool hall in Riverside and struck up an acquaintance with Michelle Keathley. (RT 1612.) They were together until sometime in the wee hours of the morning. (RT 1645.) Keathley was married and had a young child, but she

invited appellant to come to her house after her husband, Kerry Keathley, left for work later that morning. (RT 1647-1648.) Ms. Keathley was a drug dealer who sold and used drugs. (RT 1650-1651, 1656-1657.)

Appellant did go to Ms. Keathley's house that morning after her husband was gone, and he cooked breakfast. (RT 1606-1609, 1613, 1620; 1659.) About 9:00 or 10:00 a.m. Ms. Keathley's sister, Alicia Levenson, arrived with her boyfriend, Erickson Arias. (RT 1592-1598; 1606-1609; 1659.)

Keathley, Arias, Levenson and appellant all used "speed" that day, and Arias stayed around for about three to four hours. (RT 1597, 1604-1606; 1659-1660.) Appellant asked Arias to give him a ride to somewhere near Lake Elsinore so he could pick up $6000 someone owed him, and said that he could take a gun with him. (RT 1603-1606.) At first Arias agreed, but later that night he told appellant he would not give him a ride. (RT 1603-1606.)

After that initial visit at Michelle Keathley's house, appellant would come around occasionally, traveling on foot or by bicycle. (RT 1613.) Arias saw appellant again five to six days later when appellant came to Michelle Keathley's in the afternoon to pick up his bicycle. (RT 1609.)

Meanwhile, a man named Anthony Mercurio was released from prison on parole and went to live with his girlfriend, Charlene Triplett. (RT 1879-1881.) Appellant had met Mercurio in June or July of 1991. (RT 1880.)

Mercurio's girlfriend, Charlene Triplett, lived with various relatives on Santa Rosa Mine Road in a rural area outside the town of Perris in a kind of family compound with a mobile home, campers, and sheds, and with a "chop shop" on the property where stolen vehicles were stripped, repainted,

or otherwise altered for sale. (RT 1712-1713, 1728-1729, 1880, 2032-2033, 2089-2090, 2129.)

The Santa Rosa Mine Road property was the residence of Charlene's mother, Barbara Triplett. (RT 2174-2175.) Also living there were Charlene's sister Sandra with her husband Tim Leyva and their two children; and Charlene's uncle, Barbara's brother Danny Dalton, who ran the chop shop. (RT 1928-1929, 2048, 2129, 2175.) The telephone was in the name of Tim Leyva's brother. (RT 2175.)

At some point in August after Mercurio had moved in with Charlene, appellant came by to visit him and spent the night. (RT 2176-2177.)

Michelle Keathley had a cousin named Ronald Gitmed. (RT 1611.) On Monday, August 26, 1991, he was moving out of his apartment. (RT 1583.) He and Don Fortney, a friend since high school, moved furniture and other household items into a storage facility, finishing a little after 3:00 p.m. (RT 1580-1585.) They made plans to go to dinner together the following day, Tuesday, August 27, 1991. (RT 1588.)

Also on Monday, August 26, 1991, around 7:00 p.m. Gitmed visited his mother for about 20 minutes. (RT 1487-1488.)

On the evening of Monday, August 26, 1991, or else the evening of the next day, i.e. Tuesday, August 27, 1991, Gitmed visited Michelle Keathley at her house, as he often did. (RT 1614; 1617, 1649, 1663-1666.) Her friend, Ronada French, also came to Keathley's house the same day Gitmed did, after getting off work around 5:00 p.m., and French testified that Gitmed arrived after she did. (RT 2405.)

Appellant unexpectedly dropped by at Keathley's house the same evening French and Gitmed were there. (RT 1614-1616.) Keathley testified that she had not realized that appellant was in the house, but at some point

she came out of her bedroom and found him there talking with Gitmed about Gitmed giving appellant a ride someplace, which appellant would pay him for. (RT 1616-1617.) They left five to ten minutes later, and before they left, Gitmed told Keathley that appellant was going to collect $6000 and would pay him $1000 for the ride. (RT 1618, 1621.)

They returned within a few minutes because Gitmed wanted some drugs that Keathley had used his money to buy, so that he could get his money back. (RT 1618-1619.) Keathley testified that appellant had told Gitmed that he could get Gitmed's money back for him.[6] (RT 1619.) Gitmed took the drugs and left again, driving his car. (RT 1621.) That was the last time Keathley saw Gitmed alive. (RT 1621-1622.)

French testified that Gitmed and appellant might have left Keathley's half an hour to an hour before she did, but she was not sure of the timing. (RT 2405.) She testified that she left around dusk. (RT 2405.)

About 3:30 a.m. the next morning, i.e., either August 27 or August 28, 1991, Keathley saw appellant return to her house to retrieve his bicycle, which had been tied to a tree near her front door. (RT 1622.) Keathley asked him where Gitmed was, and appellant said that he was down the street and would be home in a couple of minutes. (RT 1622.) A couple minutes later she asked what had happened to Gitmed, and appellant told her there had been a scuffle, Gitmed "got a little scared," and that he might have gone home. (RT 1622-1623.) About a minute after appellant rode off on his bike Keathley heard a car start, but she did not see it, and there was no evidence about what car it was or whether it had any connection to the

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[6]The record does not indicate whether Keathley heard appellant tell Gitmed this, or whether Gitmed told her that appellant had said this.

case. (RT 1630.)

Mercurio and Charlene Triplett testified that in the evening of either Monday, August 26, or Tuesday, August 27, appellant and Gitmed arrived at the Triplett compound in Gitmed's car, and appellant introduced Gitmed and Mercurio. (RT 2178-2181; 1882-1884, 1888, 1898, 1919-1920, 1922, 1924-1925, 2181.) Gitmed showed off his car stereo, and Mercurio noticed that there were bags full of clothing and other small items in the car. (RT 1884, 1897.)

Gitmed and appellant went out to get hamburgers, which they brought back to the house and everybody ate, and Gitmed, Mercurio and appellant all took some methamphetamine provided by Gitmed. (RT 1883-1885, 1928-1929, 2180.) It was after dark when the three men got into a stolen truck, a red Toyota "4X4," that Mercurio testified had been on the property for a couple of weeks, and he drove off with appellant and Gitmed as passengers. (RT 1885-1888; 1900; 1926.)

At about 11:00 am Wednesday, August 28, 1991, a group of friends who were jet skiing found Gitmed's body floating face down in the water north of the causeway across Canyon Lake, in a scarcely populated area of the desert outside Perris, and notified the police. (RT 1499-1506.) Gitmed had three .22 caliber gunshot wounds. (RT 1533, 1536-1537.)

Dr. Choi, a forensic pathologist in the coroner's office, examined Gitmed's body about 11:00 a.m. on August 29, 1991. (RT 1532-1533.) He testified that one shot entered Gitmed's chest at a downward angle, entered his heart and was immediately fatal; one shot entered his back, at a downward angle, into the lower left side; and one shot went through the left forearm. (RT 1537-1538.) He also testified that the body still had some rigor mortis at the time he examined it, and that the photograph of the body

taken by police at the scene on the previous day indicated that rigor mortis had set in by that time. (RT 1550, 1552.) Dr. Choi testified that rigor mortis would have begun in as little as 2 hours from death. (RT 1550, 1552.) The coroner was unable to say when death occurred, other than to say that Gitmed had not been dead "for very many days." (RT 1550-1551.)

The murder weapon was never found. It was the prosecution's theory that Gitmed was killed sometime during the night of August 27-28, 1991. (RT 1431-1433, 1436[7].)

Michelle Keathley met appellant at a 7-11 convenience store a few days after appellant and Gitmed had been at her house together and gave appellant a ride in exchange for drugs. (RT 1624.)

Mr. Gitmed's body was unidentified until September 11, 1991, when Michelle Keathley contacted the Perris Police because her family was concerned that Gitmed was missing, and her husband, Kerry Keathley, had seen a newspaper report of a body found in a lake. (RT 1624-1625.) At that time Michelle Keathley told Perris Police Sergeant Betty Fitzpatrick that she had last seen Gitmed on Monday, August 26, or Tuesday, August 27, 1991, when he left with "Tex" (appellant's nickname) to go see someone named Tony whose girlfriend had a mother named Barbara, and that she was fairly sure it had been Tuesday. (RT 1627.) At trial Keathley testified that she was "pretty sure" it was Tuesday (August 27), but that it could have been Monday (August 26). (RT 1628.)

After learning from Keathley that Gitmed had been seen in appellant's company, on September 13, 1991, the police went to his

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[7]In his opening statement the prosecutor said that the witnesses would testify

mother's residence on Rogers Street in Riverside, where appellant was living. (RT 1704-1705.) No evidence connecting him to Gitmed's death was found at that time, but he was taken into custody and booked. (RT 1707.)

On September 17, 1991, Perris police officers executed a narcotics search warrant at the Triplett compound. (RT 1710-1713; 1910.) They found methamphetamine and paraphernalia, i.e. syringes, spoons, cotton balls, and sheets of glass, on the property, and arrested Barbara Triplett, Danny Dalton, a Laura Woods, and a Christopher Bain. (RT 2450.) Tony Mercurio, Charlene Triplett, Barbara Triplett and some children were also present on the property but were not arrested or detained. (RT 1710-1713; 1732.) The police impounded the stolen truck which Mercurio had used to take appellant and Gitmed "four-wheeling" and seized some items of furniture from the main mobile home on the property. (RT 1732-1734.) They took away a Sharp VCR, three end tables, a vacuum cleaner, a lamp, a fan and a Magnavox television. (RT 1830-1832.) The end tables, vacuum cleaner and television were identified at trial as belonging to Gitmed. (RT 1903.)

Also, in the course of conducting the September 17, 1991, drug warrant search at Santa Rosa Mine Road, the police inspected a datebook belonging to Barbara Triplett which listed the name "Tex" with Michelle Keathley's telephone number next to it. (RT 1713-1714.) Later that day Sgt. Fitzpatrick asked Mercurio if he knew someone named "Tex" or "James," and Mercurio made statements implicating appellant in Gitmed's murder. (RT 1716.) Mercurio was not arrested or charged at that time. (RT 1910.)

On September 25, 1991, the police executed a search warrant on the

Churder residence on Rogers Street, where appellant lived, and found a bag and a jacket that had belonged to Gitmed in the trunk of appellant's mother's car. (RT 1488-1489; 1816-1817.)

On October 3, 1991, the police returned to the Santa Rosa Mine Road property and seized some chairs that belonged to Gitmed. (RT 1832-1834.)

On January 3, 1992, Mercurio led the police in an hour-long chase that involved running a red light, being chased by a police car to a dead end, twice doing a U-turn & coming straight at the police car, being pursued by 3 or 4 police cars through the hills and dirt roads, including those near Canyon Lake, in heavy rain, failing to obey traffic signs or signals, driving on the wrong side, and turning headlights on and off, causing other motorists on their way to work to swerve off the road. (RT 2020, 2488-2492, 2495-2499.) He was arrested for felony assault on a police officer and possession of a rifle. (RT 1911.)

Mercurio was in jail for one year, from January 1991 to January 1992. (RT 1912.)

On March 21, 1992, appellant was charged with Gitmed's murder. (CT 1-2.)

On April 8, 1992, Mercurio signed an agreement with the Riverside district attorney. (RT 1911; Exhibit 23.) Mercurio agreed: to testify at appellant's trial; to plead guilty to one felony count of fleeing from a police officer and one count of being a convicted felon in possession of a firearm in case no. P92F-1058; and to plead guilty to one count of accessory to commission of a felony in the Gitmed murder. (Exhibit 23.) He was not actually charged in the Gitmed case until April 16, 1992, when a felony complaint was filed against him as an accessory. (Exhibit AA.)

In exchange, the district attorney promised: to dismiss three counts of felony assault with a deadly weapon on a peace officer and to grant probation in the assault case with one year in jail to be served concurrently on both counts; and to grant probation for the accessory charge in the Gitmed murder, with one year in jail to be served concurrently with the assault case sentence. (Exhibit 23.) In addition, the district attorney secured the agreement of the sheriff and the parole office that Mercurio would be allowed to serve his sentence for parole violation in the county jail, so he did not have to serve time in state prison. (Exhibit 23.)

On May 7, 1992, grand jury proceedings were held at which Anthony Mercurio testified. (RT 1951, 2534.)

On May 21, 1992, appellant was charged with the Gitmed murder by felony complaint dated March 10, 1992, filed in Three Lakes Judicial District Municipal Court. (CT 1-2; RT 1719.)

At the guilt phase of appellant's trial, which took place from February 29 to May 7, 1996,[8] Mercurio's testimony was the only evidence that appellant was the person who shot Gitmed. No murder weapon was found and no physical evidence linked appellant to the scene of the crime.

Mercurio could not remember what date anything occurred. He testified that it was after dark when he left the Triplett compound on Santa Rosa Mine Road and drove a truck, with Gitmed and appellant as passengers, out to a spot on the shore of Canyon Lake. (RT 1887; 1894.)

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[8] On April 5, 1990, the trial court received reports from two jurors that Juror Monninger was talking during court proceedings and made comments about the case during breaks. (RT 1740-1752.) The trial court excused her on April 4, 1996. (RT 1764-1765.) Other jurors confirmed that Monninger hd been discussing the case. (RT 1768-1780.) Alternate Juror Nosce was seated. (RT 1794-1795.)

At the lake they parked 30-40 feet from the water's edge. (RT 1891.) All three got out of the truck. (RT 1892.) Mercurio testified that while he stood by the truck and watched, appellant and Gitmed walked in front of the truck and out onto a small peninsula and started arguing, but Mercurio could not really understand what they were saying. (RT 1893.) Appellant's voice got louder and he told Gitmed to take his clothes off. (RT 1893.) Appellant's voice kept getting louder and eventually Gitmed removed his shirt or jacket. (RT 1894.)

At trial, Mercurio testified that Gitmed did not take anything out of his pockets nor did appellant ask him to. (RT 1894.) He had told the grand jury, however, that appellant had held a gun on Gitmed and Gitmed had put "his wallet or some change and stuff" on the hood of the truck. (RT 2537.) His grand jury testimony was read into the record by defense counsel. (RT 2531 et seq.)

Mercurio testified at trial that he heard shots and looked away, looking around for some kind of help. (RT 1894-1895.) He testified that appellant shot Gitmed while the two men stood facing each other, just an arm's length apart. (RT 1959.) He did not recall seeing Gitmed fall to the ground. (RT 1895.) When appellant started walking back toward the truck Mercurio got into the vehicle, started the engine, and waited for appellant, who might have thrown "something" in the back of the truck and got in. (RT 1895.) At trial Mercurio thought appellant "might" have had a wallet or some change "or something like that" in his hands when he got into the truck. (RT 1896.) Mercurio testified at trial that he never saw appellant with a gun and did not explain how Gitmed's body ended up in the water. (RT 1894, 1896.) To the grand jury, however, he had testified that he saw appellant point a gun at Gitmed. (RT 2536-2537.)

At trial Mercurio testified further that after the shooting he drove back to Charlene's house and went indoors, and that appellant stayed outside. (RT 1897.) Mercurio and his girlfriend, Charlene Triplett, both testified that they watched through the bedroom window as appellant went through things in Gitmed's car and then drove off in it. (RT 1897, 1900.)

Mercurio testified that the day after the shooting he was taking some trash to a dumpster on the Triplett compound and again saw appellant going through things in Gitmed's car, with a small semi-automatic handgun on the roof of the car. (RT 1900-1901.) Charlene Triplett, however, testified that Mercurio and appellant were together burning paperwork and other things that day, and that Mercurio asked her for some lighter fluid while appellant was cleaning a gun. (RT 2202.)

Mercurio further testified that a couple of days after the shooting he and appellant went to Gitmed's storage facility and removed a number of small items of furniture – a television and videocasette recorder and other items – and took them to Mercurio's girlfriend's house. (RT 1903-1904; see exhibits N and O.)

Mercurio testified that appellant told him that the contents of the storage unit were appellant's property, that he was leaving town and that he would rather leave it with Mercurio than in storage. (RT 1901.) Charlene Triplett testified that appellant told her that he was splitting up with his wife or girlfriend, and that he wanted to give some furniture to her and Mercurio as a wedding present. (RT 2182-2183.) Mercurio brought her a television and other furniture. (RT 2183.)

According to Mercurio's testimony, appellant came to the Triplett compound less than a week after the shooting, wanting to get rid of Gitmed's car, perhaps to leave it with Danny Dalton, but Mercurio advised

Dalton not to take it. (RT 1904-1906; 1907.) Dalton, however, denied this, testifying that the car was never offered to him. (RT 2124.)

Dalton and Mercurio testified that they and appellant drove out into the desert and appellant set fire to Gitmed's car. (RT 1905-1906; 2041.)

3. Defense Case

During August 1991, appellant's uncle[9], Richard Hartenbach, was helping appellant look for work, saw him frequently, and sometimes gave him cash. (RT 2582-2583, 2594, 2625) He testified that he took appellant out to dinner on the evening of August 27, 1991. (RT 2581.) He arrived at appellant's home between 5:00 and 6:00 p.m., they went to dinner, and he brought appellant home about 10:30 or 11:00 p.m. (RT 2581-2582.)

Hartenbach testified that he was able to recall the date and time because appellant's mother had telephoned on September 13, 1991, the day before Hartenbach's birthday, and told him that appellant had been arrested on suspicion of murder that occurred August 27, 1991. (RT 2588-2589.) Hartenbach had replied that this was impossible because he had taken appellant out to dinner that night and had to have him home early because appellant had an appointment with his parole officer the next morning, i.e. Wednesday, August 28, 1991. (RT 2588-2589; 2593.)

A disinterested party, one Marvin Avery, testified that in late August, 1991, he was fishing at Canyon Lake with his family. (RT 2424-2426.) About 10:00 p.m. he saw a man with three other men and a woman at a campsite 40-50 yards away. (RT 2427-2428, 2429-2430.) The man was running and diving into the water, and at one point he walked through the

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[9]Mr. Hartenbach's ex-wife was the sister of appellant's mother, Jean Churder. (RT 2578.)

area where the Averys were fishing, to within five feet of them. (RT 2428-2429.) Avery testified that he had identified the man in 1991 as Ronald Gitmed from photographs shown to him by the police. (RT 2429-2430.)

Gordon Grimes, another disinterested party, testified that in August of 1991 he used to drive his nephew's red Toyota pickup truck, that it was stolen during the night of August 26, 1991, and that he had reported the missing vehicle to the police on August 27, 1991. (RT 2443-2444.) Grimes testified that the truck shown in photograph exhibits marked "X" and "Y" looked like the same truck, although with a different tailgate. (RT 2442.) This was the same truck Mercurio had previously identified as the one in which he had taken Gitmed and appellant four-wheeling, and which he said had been on the Triplett property for at least the two weeks he had lived there. (RT 1885-1886; see exhibits 19, 19B, X, and Y.) Grimes's nephew's truck was never recovered. (RT 2445.)

Deputy Sheriff Craig Petree testified that when the narcotics search warrant was served at the Triplett family compound, Mercurio told him that Barbara Triplett was in charge, and she acknowledged possession of drug paraphernalia and four-tenths of a gram of narcotics. (RT 2447, 2449, 2451.)

Testimony by the storage facility manager established that the storage unit Ron Gitmed had been using was leased by Paul J. Gitmed, and both Ronald and Bruce Gitmed were authorized to have access to it. (RT 2457-2458.) Anyone could enter and exit the storage facility by punching in the correct code for a particular unit to open the gate. (RT 2458.) Business records showed entries and exits on August 26 and 28, 1991, but did not indicate the identities of those coming and going. (RT 2462-2463.)

4. Prosecution Rebuttal

Ronald Gitmed's mother, Naomi Dekens, testified that when he was growing up, her son had always been afraid of the water and was generally anxious and tense. (RT 2666-2668.) He would appear almost retarded to people who did not know him and was under the care of a doctor from grade school through adulthood. (RT 2668.) Dekens "forced" him to take swimming lessons as a child. (RT 2669.) Also, he was always self-conscious about his body, usually wore bulky clothes, and she had never seen him take off his shirt. (RT 2669.) As an adult, she had seen him in jacuzzi tubs, but never in backyard swimming pools. (RT 2670.)

Perris Police Officer Donna Martinez testified that when Michelle Keathley came in to identify photographs of Ronald Gitmed she became very upset and cried "pretty good" for a while before she calmed down. (RT 2672.)

Michelle Keathley testified that on one occasion in 1991 someone named Barbara had called her house asking for "Tex." (RT 2674.) Also, her telephone bill dated September 5, 1991, reflected a phone number, 943-3744, that she had never called. (RT 2674-2675.)

An official from the Elsinore Valley Municipal Water District, John Hoagland, testified that the records for Canyon Lake showed that over the days from August 26 to August 28, 1991, the water level at the dam decreased by about 2 inches, attributable to usage and evaporation. (RT 2646-2648.) There were no tides or surges in the artificial body of water and no flowing water. (RT 2644, 2648-2649.) However, there were no records for water levels north of the causeway. (RT 2651.)

B. Appellant's Representation of Himself

After the jury returned its verdict of guilty on April 29, 1996, the trial court granted appellant's request to represent himself for all further proceedings on the express understanding that he would present no defense, no motions, no argument and would not participate in the trial proceedings. Attorneys John Aquilina and Jay Grossman were placed on standby status. (CT 1105-1106; RT 3199-3201.)

C. Trial on Prior Murder Special Circumstance

The prosecution presented testimony by Jesus Reyes, a former investigator of the El Paso, Texas, sheriff's department and by a fingerprint expert to establish that on March 11, 1977, appellant pled guilty to, and was convicted of, the murder of Floyce Fox in El Paso County, Texas. (RT 3203-3219.) This evidence was uncontested by appellant.

D. Trial on Penalty

The prosecution relied on the factual circumstances of the prior murder in Texas, appellant's 19 conviction of being an ex-felon in possession of a gun, and testimony by Ronald Gitmed's family about the victim's character and personal problems, in aggravation of sentence. There was no defense case in mitigation.

1. Circumstances of Prior Murder

The prosecution evidence established that appellant had quickly confessed to having killed Floyce Fox in Texas in 1976, and his own account of the circumstances of that case was presented to the jury through his written statements and through the testimony of Jesus Reyes, formerly an investigator for the El Paso County Sheriff's Office. (RT 3240-3250; People's Exhibit 44.)

In September of 1976 appellant was hitchhiking and was picked up

by Floyce Fox, who was driving a pickup truck and hauling a trailer because he was moving from the San Diego area to Texas. (RT 3246, 3273-3278.) Appellant and Fox drove through Arizona and New Mexico into Texas, stopping several times along the way. (RT 3246.) One day Fox was intoxicated and appellant was driving the truck . (RT 3246-3247; see also RT 3259 [victim heavily intoxicated].) Fox's wallet was missing and he started arguing with appellant about this and directed him to leave the freeway and park on a dirt road in a remote area of the desert. (RT 3246-3247.) Appellant opened the passenger door and Fox got out or fell out on top of him. (RT 3247.) A scuffle ensued, at some point Fox threatened to kill him, and appellant stabbed Fox. (RT 3247.) Appellant then went through Fox's pockets, found some money, and headed east in the truck, using Fox's credit cards along the way. (RT 3248.) Fox's body was found on September 22, 1976, lying by the roadside, with his right rear and left front pockets pulled inside out and the front pocket ripped. (RT 3203-3205, 3234-3236, 3250.)

Appellant abandoned a U-Haul trailer in Fort Stockton, about 240 miles east of El Paso. (RT 3248.) He drove on to visit with relatives in Houston, then to Missouri to see other relatives, then to California, and finally back to Missouri, where he was arrested on October 12, 1976, and confessed. (RT 3250.)

2. Prior Felony Conviction

The trial court took judicial notice of the court file in case no. CR-26440, containing documents that showed appellant was convicted of a violation of section12021.1, ex-felon in possession of a gun, on March 26, 1987, in Riverside County. (RT 3292-3293.)

3. Character of Victim

Ronald Gitmed's mother, Naomi Dekens, testified that she missed her son very much, and that she had dwelled on the way he died ever since his death. (RT 3279, 3285.) She described him as childlike, loving, and sweet, although disruptive at times because of his anxiety disorder. (RT 3279.) She testified that he was also diagnosed as "emotionally retarded." (RT 3279.) She showed the jury some Mother's Day cards he had given her which had childlike handwriting, and which she said she read every Mother's Day. (RT 3280, 3286.)

Gitmed was in special programs and schools for the handicapped and spent a year in the "mental ward of U.C. Irvine" after second grade. (RT 3280-3281.) He was placed in various homes and finished high school in a special program when he was 19. (RT 3281.)

Dekens testified that she had been trying very hard to help Gitmed, who lived on social security disability income, to learn to live as an independent adult. (RT 3281-3282, 3283.) She testified that he had always been unusually fearful of many ordinary things. (RT 3282.) He had his first and only girlfriend when he was 25, but she took advantage of him. (RT 3283.) He was very gullible. (RT 3284.) He did not deserve to die, and she sometimes blamed herself for his death. (RT 3286.)

Bruce Gitmed, Ronald Gitmed's brother, also testified that he missed him very much, and described things they used to do together for fun, like renting a Cadillac and driving around together. (RT 3290-3291.) He testified that his brother "would always be willing to do something like to drive somewhere to . . . do some adventure, to go camping." (RT 3291.) Bruce Gitmed testified that because of Ronald's disabilities it was hard for him to find work, but that his own business had grown very successful since

his brother's death, he employed other family members, and would have been able to employ Ronald. (RT 3289.)

4. No Defense

Appellant, representing himself, presented no evidence or argument relevant to his sentence. (RT 3294.)

E. Penalty Phase Juror Substitution and Penalty Verdict

On the morning of May 6, 1996, Juror Rodriguez and Juror Pye separately came forward to inform the court that they did not want to continue to serve on the jury. (RT 3330, 3344.) After questioning the jurors and discussion with counsel, the trial court found that Juror Rodriguez was incapable of continuing to deliberate and excused her, but retained Juror Pye on the jury. (RT 3353, 3356, 3357-3359.) The jury was excused and instructed to return the following day. (RT 3368.)

On May 7, 1996, alternate Juror Gomez was seated. (RT 3382-3383.) On that same morning the jury returned its verdict sentencing appellant to death and was discharged. (RT 3385-3386, 3390.)

F. Hearing on New Trial Motion and Sentencing

On August 1, 1996, the trial court, having obtained Juror Rodriguez's permission, granted appellant's request for information about how to contact her and ordered that the defense and the prosecution contact her at the same time. (RT 3416-3419.) On September 13, 1996, the trial court granted the same request with regard to Juror Pye and again ordered that contact with the juror was to be made by both sides at the same time. (RT 3447-3448.)

On October 11, 1996, appellant filed a motion for new trial on the basis of juror misconduct which was denied after hearing on October 21, 1996. (CT 1230; RT 3475.)

Also on October 21, 1996, the trial court denied appellant's automatic motion to reduce his sentence and sentenced appellant to death. (RT 3495.)

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INTRODUCTION TO ARGUMENT

In the instant brief the errors raised are presented in the chronological order in which they occurred at appellant's trial. Every phase of appellant's trial contained multiple reversible errors, and the order in which they are presented here does not reflect their relative significance or appellant's assessment of their relative merit.

All citations to statutes in this brief and any related briefing submitted by appellant are to the California Penal Code unless otherwise indicated.

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ARGUMENT

I

REVERSAL OF THE ENTIRE JUDGMENT IS REQUIRED BECAUSE THE TRIAL COURT DISMISSED EIGHTEEN POTENTIAL JURORS SOLELY ON THE BASIS OF THEIR ANSWERS TO QUESTIONNAIRES IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND TRIAL BY AN IMPARTIAL JURY

A. Introduction

The trial court excused eighteen venire members for cause without voir dire based solely on their written responses to a lengthy questionnaire.[10]

Appellant contends, supported by argument and authority set out below, that:

(1) the substitution of questionnaires for voir dire was constitutionally impermissible under the First, Sixth, and Fourteenth Amendments of the federal constitution and clear United States Supreme Court case law precedents as well as state law;

(2) the wording of the questionnaires was biased and they were used in a biased manner to discriminate against death penalty skeptics and opponents;

(3) the issue of the constitutional violations resulting from excusing venire members without voir dire could not be waived and in any case was sufficiently preserved;

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[10]A blank questionnaire appears at pages 414-438 of the Clerk's Transcript and the original completed questionnaires comprise the Clerk's Supplemental Transcript on Appeal, Juror Questionnaires, Volumes 1-12. Citations to this transcript are in the form Supp. CT-JQ.

(4) to the extent defense counsel forfeited or waived the issue or invited the errors with regard to specific prospective jurors they rendered ineffective assistance of counsel under the Sixth and Fourteenth Amendments;

(5) if questionnaire-based excusals were allowable in principle, the trial court's findings of substantial impairment were unreasonable and unsupported by the record, and violated appellant's constitutional rights to due process and to heightened due process in a capital case under the Fifth, Eighth and Fourteenth Amendments, to reliable guilt and penalty determinations in a capital case under the Eighth and Fourteenth Amendments, to effective assistance of counsel under the Sixth and Fourteenth Amendments, and to trial by an impartial jury under the Sixth and Fourteenth Amendments;

(6) if the subject procedure was constitutionally permissible, the trial court erroneously denied appellant's challenges of four prospective jurors for cause which violated his rights to fundamental fairness, due process, and equal protection of the law; and

(7) Reversal of the entire judgment is required.

B. Prospective Jurors May Be Excused for Cause Only If They Are Unable To Perform Their Duties As Jurors or Their Ability to Do So Is Substantially Impaired

Appellant was entitled under the Sixth and Fourteenth Amendments of the federal constitution and Article 1, sections 15 and 16 of the California Constitution to be tried by a fair and impartial jury, "a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required." (*Gray v. Mississippi* (1987) 481 U.S. 648, 659, fn. 9; see also *id.*, at pp. 658, 668; *Morgan v.*

Illinois (1992) 504 U.S. 719, 726-728.) The trial court at appellant's trial was therefore required to determine that the people selected to serve on the jury did not hold views concerning capital punishment which would "'prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath.'" (*Wainwright* v. *Witt* (1985) 469 U.S. 412, 424, quoting *Adams* v. *Texas* (1980) 448 U.S. 38, 45; U.S. Const., Amends. VI, XIV; see *Gray v. Mississippi, supra,* 481 U.S. at p. 668 ["*Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury"]; *Darden v. Wainwright* (1986) 477 U.S. 168, 178; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21; *People v. Cunningham* (2001) 25 Cal 4th 926, 975.)

In this context the United States Supreme Court has emphasized that, "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McGree* (1986) 476 U.S. 162, 176, underlining added.)

The same standards apply to jury selection in a capital case under both the federal and state constitutions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1246, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 and *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Heard* (2003) 31 Cal.4th 946, 958.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114 []; *Rodrigues* [8 Cal.4th] at p. 1146 [].)" (*People v. Jones, supra,* 29 Cal.4th at p. 1246, parallel citations omitted.)

However, this Court has observed that "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled--indeed, duty-bound--to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart* (2004) 33 Cal.4th 425, 446, underlining added.)

At appellant's trial, however, the trial court found fifteen prospective jurors to be substantially impaired under *Witherspoon/Witt* and three other people to be substantially impaired for other reasons, solely on the basis of their written answers to questionnaires distributed to them by the trial court, rather than after voir dire.

C. The Substitution of a Written Questionnaire for Actual Voir Dire to Determine *Witherspoon* Bias or Other Cause for Disqualification of Prospective Jurors Was Impermissible under the Federal Constitution and State Law

The trial court in appellant's case used written questionnaires to excuse eighteen people from the venire, which meant that they were excluded from the voir dire process normally used – and used at appellant's trial for all other venire members – to determine whether cause existed to excuse them from jury duty. The trial court's truncated procedure denied appellant the process due to him under the federal constitution and state law, violated his right to be tried by an impartial jury, and amounted to a quasi-secret process for selecting the jury which is insupportable in the criminal justice jurisprudence of this country, and violated the First, Sixth and Fourteenth Amendments of the federal constitution.

1. The Trial Court Excused Potential Jurors for Cause Solely on the Basis of Their Questionnaires

When appellant's case was transferred to Department 62 for trial, Judge Sherman, in consultation with trial counsel for both sides, reviewed and revised the juror questionnaires that had been developed by counsel and previous judges.[11] (Pre-R.T. 437, 476-477, 479-482; CT 252-289, 293.)

On March 11 and 12, 1996, the trial court conducted voir dire of eight panels of venire members and, with the agreement of the prosecutor and defense counsel, excused those who could not serve as jurors for reasons of personal hardship. (RT 176-186, 187-197, 197-218, 224-231, 252-254, 280-282, 297-299.) The remaining potential jurors were given the questionnaires.

Before the venire members filled out the questionnaires, the trial court explained to them that in case appellant's case reached the penalty phase, it was necessary to talk with them about their views because "it involves strongly held personal beliefs about the issue of the death penalty . . ." (RT 342.) The trial court told the panel members that both sides in the case were "entitled to 12 people who can recognize and admit their biases and prejudices. Because that's the first step in being able to set them aside." (RT 343, underlining added.) The court assured the venire that

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[11]The jury questionnaire used in appellant's case was initially developed by counsel for both sides in consultation with Judge Bailey in Department 63 where the case was originally assigned. (Pre. R.T. 154-155, 157, 168-169, 198-199, 203-205, 209-210, 211-247, 257-260, 281-282, 290-292, 294-296.) Judge Bailey contemplated that the questionnaires would be used as background to inform voir dire. (Pre. R. T. 199; 204-205.) The Hon. Ronald Heumann modified the questionnaire when appellant's case was transferred to Department 61. (Pre. R.T. 345-346, 358.)

"being able to tell us about them does not mean you won't serve on the jury, but we do need to know about them and to know whether you can set those biases and prejudices aside. [¶] And that's because both sides are entitled to a fair and impartial jury who can follow the law of the state regardless of their personal feelings. And that includes personal feelings about the death penalty." (RT 343, underlining added; see also RT 367.)

The trial court also explained that the questionnaires would "help to shorten up the period of follow-up questioning and minimize the amount of time" venire members would have to spend at court. (RT 344.)

On March 21, 1996, the trial court conducted two sessions in open court but out of the presence of the venire panel, for the purpose of identifying people that it would be a waste of time to voir dire because their written answers on their jury questionnaires established that their ability to serve as jurors was substantially impaired. (RT 718-784; see RT 727 [court comments "no point in trying to talk [to] somebody who clearly is never going to change their mind"].) The trial court and counsel for both sides had previously reviewed questionnaires off the record.

The trial court asked for the comments of counsel before making its final decision on each of the individual potential jurors, ultimately excusing seventeen venire people without voir dire on March 21, 1996, and another person on March 27, 1996, for a total of eighteen questionnaire-based excusals for cause. The procedure was that the trial court, or sometimes defense counsel, identified the venire members they believed had written responses possibly indicating substantial impairment. The prosecutor stipulated to the excusals and did not formally object to the procedure, although he maintained that prospective jurors should not be excused solely on the basis of their questionnaires and that, aside from a few exceptions

unrelated to death penalty attitudes, they should be voir dired. (See, e.g., RT 721, 730.)

Trial defense counsel, however, theoretically agreed with the trial court that it could excuse venire members based on their questionnaires as long as the same standard was used for finding supporters of the death penalty to be substantially impaired as for finding opponents of the death penalty impaired. (RT 718-719, 743, 770.)

Defense counsel did not, however, agree or stipulate to excusals of strong opponents of the death penalty; rather, he submitted them to the court's discretion. (See RT 744, 759, 771.)

The trial court's rulings based on the questionnaires fell into three broad categories.[12]

One category was the trial court's excusal of three people for cause unrelated to hardship or to *Witherspoon-Witt* standards. These were prospective jurors Hunckler, Alfaro, and Rutherford. (RT 720-721, 780-781; 1199-1201)

A second category was the trial court's excusal of people for cause because the court found them to be substantially impaired in their ability to serve as jurors because of their attitudes toward the death penalty. In this category, the trial court excused nine people opposed to the death penalty and six people on the basis of their pro-death penalty responses. With regard to death penalty opponents, defense counsel told the court he

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[12]During the review of questionnaires in open court the trial court excused two people on the basis of hardships which had not previously been noticed, and excused them on stipulation of counsel for both sides. (RT 764-765 [Frisch]; RT 774-775 [Swart].) Appellant raises no issue with regard to those venire members.

believed that one death penalty opponent, Knight, was substantially impaired (RT 756) but refused to stipulate to the excusal of eight others, submitting to the court's discretion on those. (RT 741-744 [Cheek]; 744-745 [Smith]; 749-751[Bennett]; 770 [Turner]; 771 [Valenzuela]; 772 [Sympson, Scalise]; 773 [Juniel]; 756-759 [Knight].[13])

With regard to death penalty supporters, defense counsel requested or stipulated to excusals. (RT 730 [Porter]; 732-733 [Packler]; 751-752 [Marsh]; 757 [Riegler]; 775 [Herr]; 772 [Sands (Ellis)].[14])

In the third category of rulings, the trial court denied defense requests to excuse four strongly pro-death penalty venire members, finding that they were not substantially impaired. (RT 748-749 [Griffith]; 752-754 [Rofkahr]; 754-755 [Valdez[15]]; 771, 777-780, 781 [Poirier].[16])

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[13]The questionnaires of the excused anti-death penalty venire members are in the Supplemental Clerk's Transcript-Juror Questionnaires at pages 491 [Bennett]; 248 [Cheek]; 678 [Knight]; 3388 [Juniel]; 1140 [Scalise]; 407 [Smith]; 1005 [Sympson]; 897 [Turner]; 1299 [Valenzuela].

[14]The questionnaires of the excused pro-death penalty venire members are in the Supplemental Clerk's Transcript-Juror Questionnaires at pages 83 [Porter]; 137 [Packler]; 542 [Marsh]; 1218 [Herr]; 786 [Riegler]; 1272 [Sands].

[15]Defense counsel offered to stipulate to the excusal of potential juror Valdez, who was "strongly pro-death," not because of that attitude but because she knew the trial judge and the judge's husband. (RT 754-755.) The trial court noted her pro-death responses but declined to excuse Valdez for cause because it thought she might be "rescuable" with regard to those attitudes. (RT 755.)

[16]The questionnaires of the pro-death penalty potential jurors who were not excused after appellant's challenges to them, are in the Supplemental Clerk's Transcript-Juror Questionnaires at pages 461 [Griffith]; 570 [Rofkahr]; 597 [Valdez]; 1381 [Poirier].)

2. Failing to Voir Dire the Prospective Jurors Excused Because of Their Written Answers on Questionnaires Violated Appellant's Right to Due Process and Trial by an Impartial Jury

a. United States Supreme Court Opinions

The United States Supreme Court has explained that "[o]ne touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.' *Smith v. Phillips,* 455 U.S. 209, 217[] (1982). Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." (*McDonough Power Equipment Inc. v. Greenwood* (1984) 464 U.S. 548, 554, parallel citations omitted, underlining added.)

In addition, the high court has observed that the trial court's determination of a prospective juror's bias "has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind . . . [and] such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (*Wainwright v . Witt, supra,* 469 U.S. at p. 429, underlining in original, underlining added, footnote omitted.) Consequently, such determinations are "entitled to deference" on appeal. (*Ibid.*)

In *Morgan v. Illinois* (1992) 504 U.S. 719 the court discussed at length the critical importance of voir dire to a reasonable determination of juror bias. The court observed, inter alia, that "[i]t is true that '[v]oir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion."' *Ristaino v. Ross,* 424 U.S. 589, 594 [] (1976) (quoting *Connors v. United States,* 158 U.S. 408, 413 []

(1895)). The Constitution, after all, does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. *Dennis v. United States,* 339 U.S. 162, 171-172 [] (1950); *Morford v. United States,* 339 U.S. 258, 259 [] (1950). 'Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' *Rosales-Lopez v. United States,* 451 U.S. 182, 188 [] (1981) (plurality opinion). Hence, '[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness.' *Aldridge v. United States,* 283 U.S. 308, 310 [] (1931)." (*Morgan v. Illinois*, 504 U.S. at pp. 729-730, footnote omitted, parallel citations omitted, underlining added, bracketed words in original.)

Further, the United States Supreme Court has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections, see, *e.g., Turner v. Murray, supra,* 476 U.S., at 36-37 []; *Ham v. South Carolina,* 409 U.S. 524, 526-527 [] (1973)." (*Morgan v. Illinois, supra*, 504 U.S. at p. 730, underlining added, parallel citations omitted.)

The long line of United States Supreme Court opinions which have set out the principles and procedures to be used in the selection of an unbiased jury in capital cases all contemplated actual voir dire of potential jurors by the trial court. (See *Gray v. Mississippi, supra,* 481 U.S. at pp. 651-657; *Ross v. Oklahoma* (1988) 487 U.S. 81, 83; *Darden v. Wainwright,*

supra, 477 U.S. at pp. 175-178; *Wainwwright v. Witt, supra,* 469 U.S. at pp. 415-416; *Adams* v. *Texas, supra,* 448 U.S. at pp. 41-42; *Witherspoon v. Illinois, supra,* 391 U.S. 510, 514-515; see also *Lockhart v. McCree, supra,* 476 U.S. at p. 166; *Patton v. Yount* (1984) 467 U.S. 1025, 1027; *Davis v. Georgia* (1976) 429 U.S. 122 and *Davis v. State (Georgia)* (1976) 225 S.E.2d 241, 243; *Maxwell v. Bishop* (1970) 398 U.S. 262, 264-265; *Boulden v. Holman* (1969) 394 U.S. 478, 482-483; *Irvin v. Dowd* (1959) 359 U.S. 394, 397; *Reynolds v. United States* (1879) 98 U.S. 145, 156-157; *United States v. Martinez-Salazar* (9th Cir. 1998) 146 F.3d 653, 656 ["Because the '"determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge,"' we do not disturb a district court's decision to deny a challenge for cause absent a showing of abuse of discretion or manifest error."].)

There is no suggestion, direct or indirect, in any of these cases, that a written questionnaire could ever substitute for actual voir dire. On the contrary, the opinions have consistently emphasized the importance of the prospective jurors' physical presence in court for questioning so that they can be observed by the trial court.

For example, in *Patton v. Yount, supra,* 467 U.S. 1025, the Supreme Court reflected on the federal statutory rule of deference to trial court determinations of venire members' bias as follows:

> "There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only after an often extended voir dire proceeding designed specifically to identify biased veniremen. It is fair to assume that the method we have relied on since the beginning, e.g., *United States v. Burr*, 25 F.Cas. No. 14,692g, p. 49, 51 (No. 14,692g) (CC Va.1807) (Marshall, C.J.), usually identifies

> bias. Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.' (Citation.)"

(*Patton v. Yount, supra*, 467 U.S. at p. 1038, underlining added.) The *Yount* opinion also quoted from *In re Application of National Broadcasting Co.* (1981) 209 U.S.App.D.C. 354, 362, 653 F.2d 609, 617, to wit: "'voir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner[.]'" (*Yount, supra,* 467 U.S. at p. 1038, fn. 13.)

The *Yount* court also noted that "Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated voir dire calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible." (*Id.*, at p. 1038, fn. 14, underlining added.)

Thus, in *Wainwright v. Witt, supra*, 469 U.S. 412, 429, the high court pointed out that "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." (Underlining added.)

And the *Witt* court also explained that ". . . determinations 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. [] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully *infra,* this is why deference must be paid to the trial judge who sees and hears the juror." (*Id.,* at pp. 424-426, footnote omitted, underlining added; see also *Darden v. Wainwright, supra,* 477 U.S. at p. 178 [trial court aided by observing prospective juror's demeanor].) The *Witt* court explained that a party who seeks to exclude a potential juror because of bias "must demonstrate, through questioning, that the potential juror lacks impartiality. See *Reynolds v. United States,* 98 U.S. 145, 157 [] (1879). It is then the trial judge's duty to determine whether the challenge is proper. This is, of course, the standard and procedure outlined in *Adams* [*v. Texas, supra*, 448 U.S. 38], but it is equally true of any situation where a party seeks to exclude a biased juror. See, *e.g., Patton v. Yount,* 467 U.S. 1025, 1036 [] (1984) (where a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply 'did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed')." (*Wainwright v. Witt, supra,* 469 U.S. at pp. 423-424, parallel citations omitted, underlining and brackets added.)

In appellant's case, the questionnaires impermissibly reduced the determination of bias to a set of questions and answers that attempted to "obtain results in the manner of a catechism" (*Wainwright v. Witt, supra,* 469 U.S. at p. 424) without the benefit of the trial court seeing and hearing

the prospective jurors.

In *Morgan v. Illinois, supra,* 504 U.S. 719, the United States Supreme Court specifically focused on the necessity of voir dire in the context of *Witherspoon* concerns, stating that "the principles first propounded in *Witherspoon v. Illinois,* 391 U.S. 510 [] (1968) . . . demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting." (*Id.*, at p. 731, fn. omitted, parallel citations omitted, underlining added.)

The high court's opinions in *Boulden v. Holman, supra,* 394 U.S. 478 and *Maxwell v. Bishop, supra,* 398 U.S. 262 are also instructive. These were pre-*Witherspoon* trials in which voir dire had been conducted, which reached the United States Supreme Court post-*Witherspoon*, and in which the high court found that the voir dire had been inadequate because it did not sufficiently explore the juror's attitudes beyond their simple answers.

The *Boulden* court found that the record in that case indicated that jurors had been wrongfully excluded because the voir dire was insufficient to determine whether, in spite of statements that they had a fixed opinion against capital punishment or did not believe in it, those excluded were "able as [jurors] to abide by existing law--to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman, supra,* 394 U.S. at pp. 482-484, underlining added.)

If actual voir dire can be constitutionally insufficient to make the required determination under *Witherspoon*, then certainly reliance on a mere written questionnaire is even more insufficient. And *Boulden* highlights that the crucial inquiry is not what the individual thinks or feels about the validity of the death penalty as a philosophical question, but whether the

juror can follow the court's instructions and give fair consideration to the death sentence in a particular case.

In *Maxwell* the high court held that it was constitutionally impermissible to dismiss seven prospective jurors, including (1) one who stated during voir dire that his or her conscientious scruples against the death penalty might prevent [the juror] from returning a death verdict even if the juror was "convinced beyond a reasonable doubt at the end of [the] trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty . . . ." (*Maxwell v. Bishop, supra,* 398 U.S. at p. 264); and (2) one who answered that he did "not believe in capital punishment" when asked if his feelings against capital punishment would prevent him, or make him have feelings about, returning a death sentence even if he "felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence." (*Id.,* at p. 265.)

The notion that in-person questioning of potential jurors is basic to a constitutionally adequate determination of their fitness for service is not new. Over 120 years ago in *Reynolds v. United States, supra*, 98 U.S. 145, the United States Supreme Court pointed out that potential jurors sometimes even "seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." (*Id.*, at pp. 156-157, underlining added.) Thus, in *Reynolds* the trial court's decision not to exclude a juror for bias after voir dire even though he had formed a hypothetical decision about the case was entitled to deference. (*Id.*, at p.

157.)

The procedure used in appellant's case is out of line with all the above-cited opinions and principles and denied appellant the process due to him under the federal constitution to ensure that he would be fairly tried by an impartial jury drawn from a representative cross-section of the community. At the very least, no deference is due to the trial court's findings of substantial impairment and this Court should review the questionnaires de novo. (See appellant's discussion of the excused jurors, *post*.)

b. State Law

California Code of Civil Procedure[17] section 191 unequivocally states that "trial by jury is a cherished constitutional right, and . . . jury service is an obligation of citizenship." Further, "[i]t is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; [and] that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state . . . ." (Code Civ. Proc. § 191.)

Further, California Code of Civil procedure section 197, subdivision (a), provides as follows in pertinent part: "All persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross section of the population of the area served by the court." (Underlining added.)

The culling of eighteen people from the venire so that they were

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[17]Juries in criminal trials are formed in the same manner as civil trial juries. (Pen. Code § 1046.)

excluded from the voir dire process was a material departure from the letter and the spirit of state statutory provisions governing the formation of the jury.

The trial court's duty with regard to jury selection under state law is the same today as it was when this Court defined it nearly a century ago: "It was the function of the trial court to determine the true state of mind of each member of the panel who was questioned touching his qualifications to serve as a juror. Frequently there is a conflict between different portions of the testimony given during an examination on voir dire, due not always to the lack of candor on the part of the person examined but to his misunderstanding of the questions asked and of the duties of a juror, until such duties are explained by the court. When such conflict occurs, the trial court must decide, if possible, which of the answers most truly reveals the state of the [venire member's] mind." (*People v. Loper* (1910) 159 Cal. 6, 11, underlining added.) The trial court here completely abandoned that obligation with regard to eighteen potential jurors.

Moreover, "given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death." (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 81.)

At the time of appellant's trial in 1996, the California Code of Civil Procedure section 223 provided: "In a criminal case, the court shall conduct an initial examination of prospective jurors."[18] (Underlining

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[18]Code of Civil Procedure section 223 in its entirety provided as follows at the time of appellant's trial: "In a criminal case, the court shall (continued...)

added.) As this Court recently pointed out in *People v. San Nicolas* (2004) 34 Cal.4th 614 this section gives the trial court discretion in the manner in which voir dire is conducted, so long as it takes place in open court. (*Id.*, at p. 632 and fn. 3.) It does not, however, sanction the substitution of written questionnaires and review of them outside the presence of the prospective jurors, for the required examination in open court.

Six years before appellant's trial, in *Lesher Communications, Inc. v. Superior Court (Contra Costa)* (1990) 224 Cal.App.3d 774, the Court of Appeal in the First District held that questionnaires of people who are questioned during jury selection voir dire must be accessible to the public, but not those of mere venire members who are never voir dired. The *Lesher*

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[18](...continued)
conduct an initial examination of prospective jurors. The court may submit to the prospective jurors additional questions requested by the parties as it deems proper. Upon completion of the court's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any or all of the prospective jurors. The court may, in the exercise of its discretion, limit the oral and direct questioning of prospective jurors by counsel. The court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party, which can then be allocated among the prospective jurors by counsel. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. ¶ The trial court's exercise of its discretion in the manner in which voir dire is conducted, including any limitation on the time which will be allowed for direct questioning of prospective jurors by counsel and any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." (Underlining added.)

court reasoned that, "we assume that these questionnaires play no role whatsoever until a prospective juror is actually called to the jury box. The *Press-Enterprise*[19] court rested its decision that voir dire must be open to the public on the interest of the public in open criminal trials. A review of the history and tradition of open criminal proceedings in English and American courts led to the conclusion that an open trial included an open voir dire. However, venirepersons [sic] who are never called to the jury box do not play any part in the voir dire or the trial. They fill out the questionnaire only as a prelude to their participation in voir dire. The questionnaire serves no function in the selection of the jury unless the person filling it out is actually called to be orally questioned." (*Id.*, at p. 779, underlining added.)

Following *Lesher,* and on remand from this Court, the Court of Appeal in the Fourth District held in *Copley Press Inc. v. Superior Court* (1991) 228 Cal.App.3d 77 that the public has the right of access to the questionnaires of venire members who are voir dired. (*Id.,* at p. 80, 87-88.)

There, the constitutional interest was a First Amendment right of the public and specifically, the press. In appellant's case the constitutional interest is arguably even more fundamental to our system of justice – the defendant's right under the Sixth and Fourteenth Amendments to a fair trial by an impartial jury, and the potential jurors' right to equal protection under the Fourteenth Amendment.

This Court relied on *Witt* for the summary holding in *People v. Brown* (2004) 33 Cal.4th 382 that it does not violate the constitution to "leave to the judgment of the trial court the determination whether a

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[19]*Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 50.1

prospective juror's attitude toward imposing the death penalty will support an excusal for cause." (*Id.*, at p. 403, citation to *Wainwright v. Witt, supra,* 469 U.S. at pp. 424-429, omitted.) In *Witt*, however, as appellant has previously pointed out, the trial court had conducted actual voir dire. (*Wainwwright v. Witt, supra,* 469 U.S. at pp. 415-416.) Neither *Witt* nor any other United States Supreme Court case sanctions the procedure used in appellant's case.

The usual rule that a trial court's decision whether to exclude a potential juror for *non-Witherspoon* bias is entitled to deference on appeal does not apply where there has been no voir dire because it is grounded on the presumption that the trial court is in a position to observe the sincerity and demeanor of prospective jurors during questioning. The long line of opinions by this Court which have established and relied on that rule all involved determinations of bias made after personal questioning of the venire through voir dire. (See, e.g., *People v. San Nicolas*, *supra*, 34 Cal.4th at p. 634 [trial court considered questionnaire and asked follow-up questions in voir dire that "covered the range of issues necessary to establish bias and test the prospective jurors' feelings and attitudes toward the death penalty"]; *People v. Ghent* (1987) 43 Cal.3d 739, 768; *People v. Fields* (1983) 35 Cal.3d 329, 354-355; *People v. Eudy* (1938) 12 Cal.2d 41, 44-45; *People v. Craig* (1925) 196 Cal. 19, 25-26 [trial court's "position" is superior to that of reviewing court whose examination is limited to record]; *People v. Loper, supra,* 159 Cal. At p. 11; *People v. Ryan* (1907) 152 Cal. 364, 371; *People v. Fredericks* (1895) 106 Cal. 554, 559-560; *People v. Wong Ark* (1892) 96 Cal. 125, 127.)

In appellant's case, therefore, the trial court's rulings with regard to the potential jurors discussed in the instant argument are not entitled to such

deference.

Consistent with these principles, in *People v. Stewart, supra,* 33 Cal.4th 425, this Court reversed the capital conviction for *Witherspoon-Witt* error because the trial court had excused "five prospective jurors for cause based solely upon their checked responses and written answers on a jury questionnaire." (*Id.*, at p. 441.)

This Court concluded in *Stewart* that the requisite determination could not be made solely on the basis of the juror questionnaires, explaining that "[b]efore granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties . . . ." (*People v. Stewart, supra*, 33 Cal.4th at p. 445, quoting from *Wainwright v. Witt, supra,* 469 U.S. at p. 424, and from *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

A review of the specific line of cases in which this Court has reviewed trial courts' evaluations of prospective jurors under *Wainwright* establishes that actual voir dire has been the process consistently used in the trial courts to provide information sufficient for making a reliable determination of this nature. (See, e.g., *People v. Bolden* (2002) 29 Cal.4th 515; People *v. Boyette* (2002) 29 Cal.4th 381, 417-418; *People v. Farnam* (2002) 28 Cal.4th 107, 133; *People v. Ayala* (2000) 24 Cal.4th 243, 275.) In fact, in *Bolden*, this Court stated that "[t]he trial court may excuse for cause a prospective juror who on voir dire expresses views about capital punishment, either for or against, that 'would "prevent or substantially impair"' the performance of the juror's duties as defined by the court's

instructions and the juror's oath.' [Citations.]" (*People v. Bolden*, supra, 29 Cal.4th at pp. 536-537, underlining added.)

c. This Court's Dicta Stating There is No Constitutional Right to Voir Dire Should be Disapproved

In *People v. Bittaker* (1989) 48 Cal.3d 1046 this Court found that the trial court conducted an inadequate voir dire to identify *Witherspoon* bias and wrongfully excluded counsel from conducting voir dire. (*Id.*, at pp. 1083-1084.) The *Bittaker* court then discussed the standard of reversal for cases in which the trial court erred in the limitations it placed on jury selection voir dire. (*Id.*, at pp. 1085-1086.) Relying on *People v. Coleman* (1988) 46 Cal.3d 749 and *Ross v. Oklahoma* (1988) 487 U.S. 81, this Court concluded that voir dire, like peremptory challenges, is "not a constitutional right but a means to achieve the end of an impartial jury." (*People v. Bittaker, supra*, 48 Cal.3d at p. 1086; see also *People v. Carter* (2005) 36 Cal.4th 1215, ___, 32 Cal.Rptr. 838, 868-869; *People v. Wright* (1990) 52 Cal.3d 367, 419.) Based on that proposition, this Court found no prejudicial error in *Bittaker* because all of the jurors who gave insufficient or ambiguous answers during voir dire were removed by peremptory challenges, and the defendant did not allege on appeal that any of the seated jurors, or the jury as a whole, was incompetent or biased, so there was no violation of his constitutional right to an impartial jury. (*Id.*, at p. 1086-1087.)

Appellant submits that neither *Coleman* nor *Ross* is authority for the proposition that jury selection voir dire is not required by the federal constitution.

First, neither case addressed the constitutional underpinnings of jury

selection voir dire; that was not an issue in either case. ""[I]t is axiomatic that cases are not authority for propositions not considered. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66; *People v. Dillon* (1983) 34 Cal.3d 441, 473-474.) "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New v. Oklahoma*, 195 U.S. 252, 256; *Tefft, Weller & Co. v. Munsuri*, 222 U.S. 114, 119; *United States v. More*, 3 Cr. 159, 172; The Edward, 1 Wheat. 261, 275-276." (*Webster v. Fall* (1925) 266 U.S. 507, 511; see also *United States v. Shabani* (1994) 513 U.S. 10, 16, quoting *Webster*; *Galam v. Carmel (In re Larry's Apt., L.L.C.)* (9th Cir. 2001) 249 F.3d 832, 839 [same].)

Further, in both *Ross* and *Coleman*, voir dire of prospective jurors had been conducted by the trial court and counsel. (*Ross v. Oklahoma, supra*, 487 U.S. at p. 83, *People v. Coleman, supra,* 46 Cal.3d at p. 765.)

In *People v. Coleman, supra*, 46 Cal.3d 749, the issue was whether the trial court's erroneous denial of a challenge for cause to a venire person was reversible per se. This Court held that, "the erroneous denial of a challenge for cause to a death-biased juror is not analogous to the wrongful exclusion of a prospective juror. In the former case, the defendant is forced to use one peremptory challenge; in the *Witherspoon* situation, the defendant is deprived of the jury to which he was entitled. We also find that the erroneous denial of a challenge for cause, with the result that a defendant uses one of his peremptory challenges, is not the type of constitutional error which should automatically result in a per se reversal." (*Id.*, at pp. 763-764, underlining added.)

Similarly, the issue in *Ross* was whether the fact that the defendant

used a peremptory challenge to remove a prospective juror that the trial court had erroneously failed to exclude under *Witherspoon*, constituted a violation of the defendant's Sixth and Fourteenth Amendment rights and required reversal per se. (*Ross v. Oklahoma, supra,* 487 U.S. at p.83.) The high court affirmed the judgment, holding that: (1) since the jury that tried the case was impartial the defendant's Sixth Amendment right to be tried by an impartial jury had not been violated (*id.*, at p. 88); and (2) since he had exercised the peremptory challenges he was allotted under state law, the defendant's Fourteenth Amendment due process right to the correct application of state law was not violated (*id.*, at pp. 90-91). The *Ross* court pointed out that the defendant's right to peremptory challenges derived from state statute, not the federal constitution. (*Id.*, at p.89.)

The problem of an erroneously included juror – which was the problem in both *Coleman* and *Ross* – is fundamentally different from the problem of an erroneously excluded juror, which is the problem in the case at bar and was the problem in *Gray v. Mississippi* (1987) 481 U.S. 641, where the Supreme Court held that such error does implicate the defendant's constitutional right to an impartial jury. (*Id.*, at p. 668.) Appellant's contention here is that potential jurors were erroneously excluded from the venire, both because the trial court did not conduct voir dire, and because *Witherspoon* standards were not met.

To the extent that previous opinions of this Court may be understood as holding that a trial court may, consistent with the federal constitution, entirely dispense with in-person voir dire of potential jurors to determine

whether *Witherspoon* cause[20] exists to exclude them from the venire and may exclude them without such voir dire, they should be reversed.

Appellant submits that, under the federal constitution and the United States Supreme Court opinions previously discussed, a state may protect a defendant's right to an impartial jury without peremptory challenges, but not without in-person voir dire.

D. Excusing Jurors for Cause Without Voir Dire in Open Court Violated the First Amendment

The United States Supreme Court has said that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." (*Press-Enterprise v. Superior Court, supra,* 464 U.S. at p. 505.) The open nature of criminal trial proceedings in England stretches back to before the Norman conquest (*ibid.*), jury selection proceedings began to be conducted in public in the sixteenth century (*id.*, at p. 507), and "[p]ublic jury selection thus was the common practice in America when the Constitution was adopted" (*id.*, at p. 508).

In *Press-Enterprise* the United States Supreme Court explained that, "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Press-Enterprise v. Superior Court, supra,* 464 U.S. at p. 510.) Finding that the presumption had not been overcome in that case, the high court held that

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[20]Appellant does not intend by this argument to raise any issue with regard to excusals for hardship under *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

jury selection voir dire must be open to the public unless there is a compelling reason to close it and the trial court has reasonably concluded that there is no alternative. (*Id.*, at pp. 510-511.)

Moreover, the purpose of voir dire is ". . . to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused." (*Press-Enterprise*, *supra,* 464 U.S. at p. 511, fn. 9, underlining added.)

At appellant's trial, the trial court decided to eliminate people from the venire on the basis of their questionnaires outside the presence of the venire members, in order to streamline the process of voir dire. In *Copley Press v. Superior Court, supra,* 228 Cal.App.3d 77, the Court of Appeal observed that, "[w]hile efficient judicial administration is a praiseworthy purpose and one we applaud, it does not reach constitutional dimensions. As much as we would like to see judicial proceedings run efficiently and expeditiously, we cannot give much weight to such a goal when compared to a constitutional interest." (*Id.*, at pp. 84-85.)

If there was increased efficiency at appellant's trial because of the questionnaire procedure, it was bought at the price of protecting the First and Fourteenth Amendment rights of the prospective jurors as well as appellant's fundamental right to an impartial jury drawn from a representative cross-section of the community.

E. The Questionnaires Used at Appellant's Trial Were Inadequate for Determining Substantial Impairment, Were Biased, and Were Used in a Biased Manner to Eliminate Death Penalty Opponents from the Venire

Assuming, arguendo, that it is possible in principle to devise a questionnaire that a trial court could reasonably use in lieu of voir dire for jury selection in a capital case, the one used at appellant's trial was not it. It

was biased in such a way that people who were qualified to be jurors but were opposed to the death penalty were more likely to be excused than those in favor of it, and the trial court did not use the same standards for excusing pro-death penalty and anti-death penalty venire members based on the questionnaires. The process of jury selection therefore fell short of the heightened due process to which appellant was entitled at his capital trial. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 (conc. Opn. of O'Connor, J.).); see also *People v. Champion* (1995) 9 Cal.4th 879, 908-909 ["trial courts should be evenhanded in their questions to prospective jurors during the "death-qualification" portion of the voir dire, and should inquire into the jurors' attitudes both for and against the death penalty."]; *People v. Stanworth* (1969) 71 Cal.2d 820, 833 [duty of this Court to examine complete record in capital case to ascertain "whether defendant was given a fair trial."].)

1. The Specialized Vocabulary and Full Import of the Questions Were Not Readily Comprehensible by Lay People

The questionnaires handed out to prospective jurors at appellant's trial were daunting, consisting of 55 pages and 71 questions, some of which required composing written answers or explanations. This very process must have been seriously intimidating to many people, but more importantly, it actually disadvantaged people completely unaccustomed to such a medium of communication and those with disabilities that made this mode of communication difficult. Judges and lawyers may live and work in the world of the written word, but it is safe to say that many Americans do not. As the United States Supreme Court has recognized, "jurors are not necessarily experts in English usage. Called as they are from all walks of

life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 555.)

Certainly the vast majority of people in the venire at appellant's trial were lay people with no training in the law generally, let alone in the particular jurisprudence of the death penalty. Looking at the written questionnaires handed out to them was undoubtedly the first time they had heard of concepts which are commonplace to the capital litigation bar and bench and which have a particular meaning in a capital trial, such as "mitigation and aggravation," "penalty phase," and "special circumstances." It is completely unreasonable to think that when they wrote their responses they could have grasped the full significance and practical importance of such concepts, how they related to the duties of a juror, and what legal principles governed them. That is one of the reasons that voir dire of prospective jurors was so important, i.e., it was an opportunity to clarify these legal concepts and to elicit better informed and therefore more accurate responses from the prospective jurors.

The terms "mitigation and aggravation" in particular have a specialized meaning in the penalty phase of a capital case. To this Court, and to counsel at trial and on appeal, these words and their specialized relevance to capital cases are familiar and easily comprehensible. But it is highly unlikely that any of the prospective jurors would have had the slightest idea of their significance in this context at the time they completed their questionnaires. Their answers to questions 56 and 57, therefore, are unlikely to represent their true responses. The same is true of the phrase "special circumstances" and the consequent unreliability of their answers to questions 48, 54, 55, 56, 57 and 58. (See also discussion of the biased

phrasing of question 58, *post.*) The trial court actually recognized this problem when it questioned whether "they really understand" concepts like special circumstances. (RT 753.)

Other questions were inartfully worded and consequently were likely to elicit responses that did not reflect the person's actual ability. For example, question 60 asks "can you see yourself [voting for the death penalty in certain circumstances]." A response of "no" could simply mean, "I can't imagine this," rather than "I will not follow the law and obey the court's instructions and vote for the death penalty even if I believe beyond a reasonable doubt that the factors indicating death is the correct punishment outweigh the factors indicating that death should not be imposed." (See CT 434, question 60.)

Appellant was entitled to a heightened degree of due process in his capital case (*Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 856 (conc. Opn. of O'Connor, J.).) and the process due to him for determining whether potential jurors were qualified under *Witherspoon/Witt* to sit as jurors was competent questioning by in-person voir dire so that the trial court could observe the venire members, be sure they understood what the law would require of them as jurors at appellant's trial, and determine whether they could honestly meet those requirements. The trial court's failure to conduct voir dire for that purpose therefore constituted a denial of appellant's direct right to due process under the federal constitution, as well as his federal constitutional due process right to the correct application of state law in which he had a clear liberty interest.

2. Question no. 58 Was Used to Eliminate Death Penalty Opponents

Question no. 58[21] asked whether the prospective juror would sometimes, always, or never impose the death penalty for certain crimes committed under special circumstances: murder for financial gain, a previous conviction of murder, multiple murders, murder of a police officer, and murder during a robbery.

The trial court said that it was giving "a fair amount" of weight to this question in evaluating the prospective jurors' responses. (RT 723.) The record shows, however, that the trial court gave significant weight to this question when death penalty opponents answered "never" (RT 745, 751, 773) but did not consider the question so important when death penalty supporters answered "always" (RT 748-749, 752, 753, 755.)

The prosecutor observed that this question seemed to ask prospective jurors "to prejudge the facts." (RT 723.) The trial court noted that some venire members indicated in their responses to this question that they would be "very much inclined to vote for death" in these circumstances. But the court felt that such pro-death penalty people might "just need a further

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[21] *58. Do you feel that, depending on the circumstances of a case and the evidence presented in a penalty phase, you would: always impose the death penalty, never impose the death penalty, or sometimes impose the death penalty after a person has been previously convicted of first degree murder and, if the charged "special circumstance" was one of the following:*

A. Murder committed for financial gain;
B. Defendant previously convicted of murder;
C. Defendant convicted of multiple murders;
D. Murder committed upon a peace officer;
E. Murder committed during the course of a robbery.
Please explain.

explanation" (RT 724) and could be "rescuable" (RT 755).

For example, the trial court did not excuse Michael Poirier, although he wrote that he could not set aside sympathy, bias or prejudice, was strongly in favor of the death penalty and thought it should be used more, thought background information about the defendant was irrelevant to penalty because he should "suffer the punishment" if he was guilty, and that he would "always" impose the death penalty for all the special circumstances listed in Question 58. (RT 3rd Supp. CT 1395, 1397, 1398, 1399, 1401.) The trial court commented that some people "feel that as soon as you find a special circumstance true, that's pretty much it." (RT 779.) And Poirier was "worth follow-up to find out if he really believes that and he would always do that, or he just misunderstood what the special circumstance is all about." (RT 779.)

The discussion during actual voir dire concerning Jacquelyn Gomez[22] is also revealing. Defense counsel initiated the discussion by pointing out that potential juror Gomez had answered "always" to every category of murder on Question 58 and asked if the trial court's position was that this was not in itself grounds for excusal. (RT 1205-1206.) The trial court replied, inter alia, "If I excused jurors because they answered some or all of Question 58 A through E 'always,' we'd have about five jurors left, quite frankly. And I think it simply needs follow-up. . . . I think that she needs an explanation of the procedure, and we'll see if she still holds the same view. If she does, maybe it's cause, but I think she needs follow-up." (RT 1206.)

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[22]This venire person, Jacquelyn Gomez, was ultimately selected as an alternate and eventually sat on the jury during penalty phase deliberations.

However, the trial court did not view those who said they rejected the death penalty for the crimes listed in Question 58 in the same way. Rather than seeing such responses as indicating a need for further explanation, the trial court invariably cited anti-death penalty jurors' responses that they would never impose death for those crimes as an indicator that they were substantially impaired. (RT 745, 751, 756, 773.)

In the end, the trial court did not consider a single venire member whose questionnaire was discussed and who answered "never" to all the sub-parts of Question no. 58 to be worth following up, but found at least four people who answered "always" to be worth questioning in voir dire. (RT 748-749 (Griffith), 753 (Rofkahr), 755 (Valdez) 777 (Poirier).)

3. Question no. 60 Suggested the Correct Answers for Death Penalty Supporters but Not for Death Penalty Opponents

Question number 60 was introduced with the following caveat: "There are no circumstances under which a jury is instructed by the court to automatically return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole." The rest of the question then asked the potential juror whether in an appropriate case they could "see themselves" voting for death or alternatively whether they could "see themselves" voting for life in prison without the possibility of parole.

Any venire person reading this question would understand that the law does not allow an automatic vote for death. Thus, the potential juror would know that the "correct," i.e. law-abiding, response was to indicate that he or she could vote for life without the possibility of parole in an appropriate case, even if he or she was a strong supporter of the death

penalty.

But a potential juror would not understand from this instruction or any other, that it is equally true that the law does not allow an automatic vote for life without the possibility of parole. Thus, the venire person might think that it was legally acceptable to automatically vote against the death penalty, and an opponent of the death penalty might well give that response.

Thus, the phrasing of the introduction to question 60 A and B had the effect of informing a death penalty supporter of the "correct" answer but may have affirmatively misled a death penalty opponent. This problem could possibly have been eliminated by omitting the introductory paragraph. Alternatively, the question could have included, for example, such language as: "By the same token, there are no circumstances under which a jury is instructed by the court to automatically return a verdict of life without the possibility of parole. No matter what the evidence shows, the jury is always given the option of imposing the death penalty." With this information, the potential jurors' understanding of the legal framework for the subsequent questions, as well as for question 58, would have been more complete and accurate, and their responses more truly indicative of their qualifications to sit as jurors in a capital case.

To the extent that any of the trial court's findings rested on the prospective jurors' answers to question 60,[23] they should be disregarded

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[23] *60. There are no circumstances under which a jury is instructed by the court to automatically return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole.*

A. Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, rejecting the

(continued...)

because the phrasing of the question suggested a "correct" answer for pro-death penalty people but did not do so for anti-death penalty people. Responses to that question, therefore, do not provide a rational basis to support a factual finding concerning the ability and willingness of a venire person to perform the duties of a juror in a capital case.

F. The Issue of the Trial Court's Reliance on Questionnaires to Excuse Venire Members for Cause is Cognizable on Appeal

Assuming, arguendo, that this Court concludes that the procedure of excusing potential jurors solely on the basis of their written questionnaires is, in principle, constitutionally permissible, the issues related to the trial court's excusals of venire people on that basis at appellant's trial are cognizable on appeal.

1. Appellant's Fundamental Constitutional Right to Trial by an Impartial Jury Could Not be Waived by Trial Counsel

Appellant's right to be tried by an impartial jury is a fundamental constitutional right and no objection at trial was required to preserve the issue for appeal. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280; *Rose v. Clark* (1986) 478 U.S. 570, 578.)

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[23](...continued)
death penalty and choosing life imprisonment without the possibility of parole instead?

YES NO

B. Given the fact that you have two options available to you, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty instead?

YES NO

Moreover, appellant has established, above, that as a matter of federal constitutional law and state law, the trial court did not have the power to dispense with actual voir dire of potential jurors, especially in a capital case where a heightened degree of due process was necessary. Trial counsel therefore could not have forfeited the issue or invited the error, because no act or statement of trial counsel could confer on the trial court the discretion which it did not legally have.

Thus, the issue of the erroneous excusal of potential jurors based solely on their questionnaires is cognizable on appeal regardless of whether appellant objected sufficiently at trial.

2. The Trial Court Itself Challenged Most of the Excused Jurors

"To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection . . . ." (*Press-Enterprise v. Superior Court, supra,* 464 U.S. at p. 512.)

The trial judge in appellant's case reviewed the juror questionnaires out of court before she conducted the in-court review in the presence of counsel and appellant. (RT 718.) She came into open court having already identified those prospective jurors she considered to be potential problems in the sense that she thought, based on their questionnaire responses, that they appeared to be substantially impaired by their attitudes about the death penalty under *Witherspoon/Witt* standards and in effect excused them on the court's own motion. (See, e.g., RT 725, 728, 729-731 [Porter]; 726-727 [Bennett]; 728 [court remarks "two, three, four people" may not be worth follow-up]; 731-735 [Packler]; 737-739 [Edelbrock]; 741- 743 [Cheek]; 744-745 [Smith]; 746, 748 [Griffith]; 749-752 [Bennett]; 752-753

[Rofkahr]; 753-755 [Valdez]; 756 [Knight]; 756-757 [Riegler]; 768 [Scalise]; 768 [Herr]; 768 [Ellis]; 769 [Swartt]; 771 [Turner]; 772- 773 [Valenzuela]; 773 [Juniel].)

Further, the trial court expressly stated that the responsibility for ruling on the questionnaires lay with the court, not counsel. The dialogue between court and counsel following the review of Edelbrock's questionnaire reveals the trial court's approach:

> "MR. RUDDY: If he wants to challenge her for cause, I'll agree.
>
> "MR. GROSSMAN: I don't want to challenge her, she's anti-death penalty.
>
> "THE COURT: I think you're putting Mr. Grossman in a difficult position.
>
> "Mr. GROSSMAN: I don't want to commit malpractice this early in the morning, your Honor.
>
> "THE COURT: Exactly.
>
> "MR. RUDDY: Your Honor.
>
> "THE COURT: Let's put her on one side and look at Patricia Cheek. As long as we're here doing this, and Judge Webster's not ready, we might as well continue and see how far we get. If we reach a point of diminishing returns, Mr. Ruddy –
>
> "MR. GROSSMAN: Judge, frankly, with all due respect to the Court, I think we have – there were people that I was prepared to concede on when we came in this morning, because I think having 20 jurors on Monday morning is better than having 30 when you know there's ten or eight that you're not going to have anyway based on this questionnaire.

"THE COURT: You have more time with the ones you do have.

"MR. GROSSMAN: It puts me in a horrible position of only agreeing to those people that Mr. Ruddy wants to excuse, and not the people that I think have a basis for excusal.

"THE COURT: I understand. The final decision rests with me anyway. [¶] So as long as we've done this, and if we've gone through the first 30 and have them marked this way, we're going to finish the first 30. If it turns out to be a waste of time, we don't do it again. All right.

"MR. GROSSMAN: Fine."

(RT 741-742, underlining added.)

Thus, in the particular circumstances of appellant's case, whether trial counsel objected to the excusals is immaterial to this court's review of the issue because the trial court based its rulings at least with regard to Porter, Packler, Cheek, Smith, Griffith, Bennett, Rofkahr, Valdez, Knight and Riegler primarily on its own objections to the prospective jurors, not counsel's. (RT 729-731, 726-727, 731-735, 741-743, 744-745, 748-749, 749-752, 752-753, 753-755, 756, 756-757.)

The trial court itself actually indicated that it understood that defense counsel was neither making nor objecting to challenges but rather indicating only that "the Court is justified in making a finding of substantial impairment." (RT 759.)

3. Defense Counsel Objected Sufficiently to the Excusal of Anti-death Penalty Venire Members

Assuming, arguendo, that this Court concludes that appellant was required to object to the excusal of venire members solely on the basis of

their questionnaires, appellant submits that he did object sufficiently, at least with regard to the "anti-death penalty" individuals. Defense counsel apparently believed that there was a significant difference between "submitting" and "not objecting" on the one hand, which were the phrases he used to preserve the issue and protect his client, and "stipulating" on the other hand, which he used to indicate an affirmative agreement or even advocacy in favor of the trial court's action. (See, e.g., RT 744.)

Thus, trial defense counsel requested or stipulated to the excusal of most of the potential jurors who had expressed strong support for the death penalty.[24] (RT 730 [Porter]; 733 [Packler]; 746-752 [Griffith]; 752-754 [Rofkahr]; 756 [Knight]; 771 [Poirier].)

With regard to people who had noted anti-death penalty attitudes and beliefs on their questionnaires, however, trial counsel "submitted" the question of substantial impairment to the trial court's discretion. (RT 741-744 [Cheek]; 744-745 [Smith]; 749-751[Bennett]; 770-771 [Turner]; 771 [Valenzuela]; 771-772 [Sympson]; 772 [Scalise]; 773 [Juniel]; 756-759 [Knight].)

With regard to Turner and Sympson, defense counsel specifically stated, "I am not the moving party." (RT 771.)

With regard to Cheek, defense counsel specifically stated that he did not agree to "stipulate" to her excusal. (RT 743.) He also said, however, that "She's one that I would tell the Court again that based on this questionnaire, you could excuse, and I would have no objection. . . . Stipulating causes problems. . . ." (RT 744.)

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[24]Defense counsel also stipulated to the excusal of death penalty supporter Valdez for reasons unrelated to her attitudes about the death penalty. (RT 754-755.)

Referring to the prospective jurors who described themselves on their questionnaires as strongly against the death penalty, defense counsel told the court that "frankly, having those [people] on a jury would be in my client's best interest, but they're not going to be on the jury. And if the Court excuses them, I'm not going to object to them." (RT 759, underlining added.) So in context, the phrase "no objection" was defense counsel's shorthand statement that he believed an objection would be futile. That is, defense counsel believed that the questionnaires of certain anti-death penalty venire people contained responses that the trial court would find indicated substantial impairment, and particularly where the court indicated it would so find, counsel believed an objection would have been futile. (See RT 770, 772, 741-744, 744-745, 749-751, 771, 772.)

Trial counsel's assessment was correct. The record is clear that the trial court intended from the outset to rely heavily on the questionnaires to reduce voir dire. For example, when discussing the necessity of photocopying completed questionnaires for the use of counsel, the court, and the potential jurors, the judge said to counsel, "And you feel the juror needs one for followup. Well, there may not be that much oral followup needed." (Pre-RT 438, underlining added.) The court also commented, during a discussion of particular questions, "If we are going on the questionnaire to cut down voir dire we're not to have questions like this." (CT 280, underlining added.) During the review of questionnaires on March 21, 1996, the trial court commented there was "no point in trying to talk [to] somebody who clearly is never going to change their mind." (RT 727.)

In *People v. Benavides* (2005) 35 Cal.4th 69, this Court held that the defendant was barred from raising the issue of the trial court's excusal of

potential jurors based solely on questionnaires on appeal in that case because at trial he had stipulated to the excusals. (*Id.*, at p. 88.) This court observed that "[t]he record reveals no indication that . . . the trial court was passing on the adequacy of the reasons for the stipulations." (*Ibid.*)

Appellant's case is easily distinguishable. First, he did not stipulate to the excusals of jurors whose questionnaire responses indicated that they were opposed to the death penalty. (RT 741-745, 749-751,770-772, 756-759.) Although sometimes stating that he believed the trial court could find substantial impairment based on the questionnaire of a particular juror, defense counsel consistently submitted the issue to the trial court's discretion. (RT 744, 759, 771.) It is clear from the reporter's transcript of the entire questionnaire-excusal proceedings that defense counsel intended to preserve the issue, and not to affirmatively agree to any of the excusals during that process. In view of defense counsel's comment that "having those [anti-death penalty people] on a jury would be in my client's best interest" (RT 759), it cannot be said that appellant's counsel did not want to accept the anti-death penalty venire members. (Compare *Benavides*, 35 Cal.4th at p. 88 [neither defense nor prosecution wanted to accept any of the excused jurors].)

Second, and also unlike in *Benavides*, here it is indisputable that the trial court was doing much more than "passing on the adequacy of trial counsel's stipulations." (*Id.*, at p. 8.) The trial court itself initiated and led the entire process, and there were very few, if any, actual stipulations to the excusals in which counsel for both sides joined. The trial court took the lead in identifying the questionnaire responses it believed justified finding substantial impairment. For example, the trial judge came to court on March 21, 1996, having already singled out specific venire members and,

sua sponte, read aloud from their questionnaires the responses she believed were disqualifying. (RT 725-782.)

More important, the trial court in appellant's case repeatedly made affirmative findings with regard to the existence of substantial impairment based on its own independent review of the questionnaires and its own assessment of them. The trial court itself explicitly stated that it was excusing potential jurors because it made "a finding based on their questionnaires of substantial impairment with respect to the ability to impose the death penalty or not impose it . . . ." (RT 760, underlining added.)

4. If an Objection Was Required and Trial Counsel Failed to Object Sufficiently to Preserve the Issue They Provided Ineffective Representation

If this Court concludes that more of an objection at trial was necessary to preserve the *Witherspoon-Witt* errors than trial counsel raised, appellant was afforded ineffective assistance of counsel under the Sixth and Fourteenth Amendments because the standards which had to be observed by the trial court to protect appellant's federal constitutional right to be tried by an impartial jury in his capital case were clear and well-established at the time of appellant's trial in 1996 and his counsel had a duty to know and apply the law. (See ABA Standards for Criminal Justice (3d ed. 1993) Standard 4-5.1; see also *Wiggins v. Smith* (2003) 539 U.S. 510, 522 [reiterating that ABA standards are the norms for counsel in capital cases].)

Witherspoon was decided in 1968, *Witt* in 1985 and *Gray* in 1987. These were major opinions from the United States Supreme Court with an enormous impact on the criminal law in the realm of jury selection. And the principle that jury selection voir dire, like all other aspects of a criminal

trial, should be conducted in open court, is literally centuries old.

It is apparent from the record in appellant's case that the district attorney was familiar with the guiding principles of "death-qualifying" the jury under the governing cases and statutes. It also, appears, however, that defense counsel was not. If this Court finds the instant issue forfeited by trial defense counsel, then appellant received ineffective assistance of counsel in violation of his Sixth Amendment right to competent representation which resulted in a denial of his right to be tried by an impartial jury and therefore affected the fundamental fairness of his capital trial and the reliability of the guilt and penalty verdicts. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) This court should therefore reach the merits of the issue. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1201; *People v. Belcher* (1974) 11 Cal.3d 91, 96.)

5. Failure to Object to the Use of Written Questionnaires as the Sole Basis of Excusal for Cause

It appears from the record that defense counsel may have believed that the mere fact that the questionnaires had been answered "under oath" meant that the written responses alone were a sufficient basis for the trial court to find the existence of bias or the lack of it without any in-person question of the potential jurors who expressed strong personal opinions in favor of the death penalty or opposed to it. (See, e.g. RT 729, 746.) This was incorrect under the United States Supreme Court cases cited, *supra*, in the instant argument. Trial counsel was under a duty to know the law and to make reasonable decisions about the conduct of the trial informed by that knowledge. The principles on which appellant now relies were solidly established at the time of appellant's trial in 1996 and trial counsel certainly

should have been familiar with them and understood their relevance to jury selection in appellant's case.

If trial counsel's acquiescence in the questionnaire-based excusal procedure and/or his submission to the trial court's discretion with regard to particular jurors rather than lodging an "objection" or asserting a "challenge," is found by this Court to constitute forfeiture or waiver of the trial court's error for purposes of appellate review, then trial counsel failed to protect appellant's right to an unbiased jury under the Sixth Amendment and to due process and equal protection of the law under the Fourteenth Amendment. Thus, trial counsel's representation of appellant fell below the standard of a vigorous advocate acting competently. (*Strickland v. Washington, supra,* 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

6. Anti-Death Penalty and Death Penalty-Neutral Jurors

Assuming, arguendo, that this Court concludes that the questionnaire-based excusals were constitutionally permissible and that therefore trial counsel's failure to object to the procedure did not constitute ineffective assistance, his failure to object sufficiently to the excusal of jurors whose questionnaires indicated that they were philosophically opposed to the death penalty did. These were jurors that he himself acknowledged would be in his client's best interest to have on the jury. (RT 759) He even told the court that he would not "stipulate" to these excusals because he did not "want to commit malpractice this early in the morning." (RT 741.) Trial counsel therefore obviously knew that he at least had an obligation not to act against his client's interest, and to preserve the issue of these excusals.

Defense counsel stipulated to the excusal of Michael Hunckler because his son was being prosecuted for kidnaping and robbery, saying, "I just don't see any way based on that process going on that he's going to be able – should sit on this case." (RT 719-721.) Apparently defense counsel assumed that this father's concern about his son and the impending court proceedings necessarily created a substantial impairment of his ability to serve as a juror. Whether that assumption was correct could only have been determined through questioning, and counsel's stipulation in these circumstances was not based on sufficient information to be reasonable. (See *People v. Anzalone* (2005) 130 Cal.App.4th 146, 158 [deference to trial counsel's reasonable tactical choices]; see also *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

7. Trial Counsel Had No Tactical Reason for Failure to Object Sufficiently

Trial counsel told the court at the outset of the process of reviewing questionnaires that he intended to focus on "the substantial impairment test." (RT 724.) Thus it is clear that his intention was to apply the law of the *Witherspoon* line of cases to the jury selection process at appellant's trial.

Trial counsel's understanding of the applicable test, however, was wrong. He said: ". . . I think clearly if someone says in a questionnaire either 'my predisposition is to impose, always impose LWOPP,' or, 'my predisposition is to always impose the death penalty,' that's a substantial impairment. [¶] And that's my analysis under the case law, is that if somebody has a strong feeling that you're going to have to talk them out of, I consider that under the case law to be a substantial impairment." (RT 724-725.)

Under the authorities previously cited, defense counsel was simply wrong: a "predisposition" or "strong feeling" was a completely insufficient basis for finding substantial impairment. (See § B., *supra.*)

Trial counsel then referred to the questionnaire of Carol Porter, pointing to her statement that "'background information's irrelevant[]'" and, presumably referring to question 58, adding, "She would always vote for the death penalty. And in Question 60 . . . she says she could not vote for life without possibility of parole. [¶] I think – and my argument's going to be on similarly situated jurors like this – that's substantial impairment. Because I have [to] overcome a predisposition which the law does not require me to do. . . . [¶] That's my analysis." (RT 725.)

The problem with this part of counsel's analysis is that mere written answers to a questionnaire--especially to biased questions like 58 and 60, as appellant has discussed, *supra*, were not a legally sufficient basis for determining substantial impairment under the reasoning of the United States Supreme Court cases previously cited in the instant argument which pre-dated appellant's trial, and under state law with which trial counsel should have been familiar. A "predisposition" is not disqualifying under all the cases previously cited.

It is thus demonstrable on the face of the record that trial counsel had no reasonable tactical reason for failing to object sufficiently to the erroneous excusal of potential jurors who might have been qualified to serve.

G. The Trial Court Erred in Excusing Venire Members Who Gave Appropriate, Ambiguous or Conflicting Responses to Key Questions

Assuming, arguendo, that this Court concludes that it is

constitutionally acceptable for the trial court to excuse a prospective juror for cause solely on the basis of written answers on a questionnaire, and that the questionnaire used in his case was reasonable and was used in an unbiased manner, eighteen people were nevertheless wrongfully excluded from the venire before appellant's trial because their questionnaires contained appropriate, ambiguous and/or conflicting responses and comments that should have been followed up with voir dire to protect appellant's constitutional rights to trial by an impartial jury and due process. (*People v. Stewart, supra,* 33 Cal.4th at pp 451-452.)

In *Stewart* this Court held that it was error to excuse four potential jurors whose responses indicated ambiguity in their attitudes toward the death penalty, concluding that those people should have been subjected to voir dire "during which the court would be able to further explain the role of jurors in the judicial system, examine the prospective juror's demeanor, and make an assessment of that person's ability to weigh a death penalty decision . . . ." (*People v. Stewart, supra,* 33 Cal.4th at p. 448.) By this reasoning and under controlling United States Supreme Court authority previously cited, in appellant's case all of the prospective jurors excused for cause by the trial court without voir dire, and to whose dismissal trial defense counsel refused to stipulate, should have been personally questioned to determine whether they could fulfill the duties of a juror in a capital case. As appellant demonstrates below, their written responses either indicated willingness and ability to serve or contained contradictions and ambiguity concerning the death penalty and/or their willingness to set aside their beliefs and defer to the law.

The discussion below of the individual excused venire people therefore focuses on responses to those questions which are central to the

Witherspoon-Witt inquiry.[25]

1. Three Prospective Jurors With Neutral Attitudes Toward the Death Penalty Were Improperly Excused

The trial court excused three people whose questionnaire responses did not indicate any form of bias or any other type of impairment of their ability to perform the duties of a juror in a capital case. These were Hunckler (RT 719-721), Alfaro (RT 767, 780-781), and Rutherford (RT 1199-1201.)

a. Raymond Hunckler[26]

The trial court thought that Hunckler's responses to questions about his attitude toward the death penalty were "fairly neutral," but excused him with the stipulation of both sides because his son had been charged with felonies and a court date had been set in Department 33. (RT 720-721; Supp. CT-JQ 134.) Defense counsel initially requested the excusal.[27] (RT 719-720.) The trial court pointed out that Hunckler had answered both "yes" and "no" to the question whether he could follow the court's instruction on presumption of innocence.[28] (RT 720.) The trial court said

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[25]In the instant discussion, questions indicated in italics are copied verbatim from the questionnaire and the prospective jurors' complete, verbatim responses are set off by quotation marks.

[26]Hunckler's questionnaire responses are in the record at Supp. CT-JQ 113 et seq.

[27]See appellant's argument, *supra*, that this issue is cognizable on appeal regardless of trial counsel's request.

[28]Question 37 read: "In a criminal case, the defendant is presumed to be innocent, will you follow this instruction? YES NO If NOT, please explain:"

its only concern was "that maybe he felt his son deserves to be prosecuted. The rest of his questionnaire seemed perfectly ordinary and neutral." (RT 721, underlining added.) The prosecutor expressed the view again that often what "look like potential problems" can be followed up and cleared, but agreed to Hunckler's excusal on the ground that he "is the only one that had a relative that had something pending right now in the courthouse." (RT 721.) The trial court excused Hunckler based on stipulation by counsel for both sides and said that the clerk should explain to Hunckler that "given his circumstances, we understand, and he's excused." (RT 721.)

Hunckler, however, had not asked to be excused for hardship or any other reason. On the contrary, he answered "no" to question 68, which asked whether there was "any reason why you would prefer not to serve as a juror in this case?" (Supp. CT-JQ 133.) Question 70 asked whether there was "anything else, such as a personal problem, that might distract you during the trial?" Hunckler did not circle "yes" or "no," simply noting that his son was being charged with felonies and had a court date of March 22, 1996.[29] (Supp. CT-JQ 134.)

There is no basis in law or logic for dismissing Hunckler from the venire. It is simply impossible to know from the answers on his questionnaire whether the fact that his son was being prosecuted impaired his ability to fulfill his duties as a juror in appellant's case.

Dismissal of this potential juror without cause violated appellant's right to be tried by an impartial jury drawn from a representative cross-section of the community.

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[29]Hunckler's questionnaire was dated March 12, 1996 (Supp. CT-JQ 134), the trial court excused him on March 21, 1996 (RT 721) and jury voir dire in appellant's case began on March 25, 1996.

b. Angelina Alfaro[30]

Defense counsel said that he did not think the questionnaire justified an excusal for cause but that she was "never going to sit on this case." (RT 766; RT 766-767, 780-781.) The trial court considered Alfaro's written responses on the questionnaire to be "all over the map" and expressed concern about her "reliability." (RT 767.)

Defense counsel characterized Alfaro as "not terrible on the death penalty" but "frankly bizarre" and the trial court agreed and excused her. (RT 781, underlining added.)

In fact, Alfaro's spelling was poor and possibly she was not very literate, or English was not her first language, or she had some impairment such as dyslexia.[31] It may be that because of some such problem she did not fully understand the written questions. But the substance of her responses was not really remarkable, although like many other prospective jurors' responses, some were inconsistent. For example she responded to question 21 that there was nothing about the case that would make it difficult or impossible for her to be fair and impartial. (Supp. CT-JQ 959.) Yet to question no. 23, which asked whether she had religious or moral beliefs that would make it "difficult or impossible" for her to sit in judgment of another person, she answered "yes" and explained that the Bible says "if you have no sin cast the first stone." (Supp. CT-JQ 959.)

Alfaro checked "strongly in favor" on question 44, which asked her

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[30]Alfaro's questionnaire responses are in the record at Supp. CT-JQ 951 et seq.

[31]Alfaro had a 12th grade education, had a license or certificate in cosmetology, and had worked as a "caregiver" for 15 years and at a hospital for five years. (Supp. CT-JQ 951, 952.)

philosophical opinion of the death penalty. (Supp. CT-JQ 964.) But in answer to question 45, which asked why she held that opinion, she wrote "some not all," indicating that she would not automatically vote for death. (Supp. CT-JQ 965.) And in answer to question 58, she responded that she felt she would "always" impose the death penalty for a defendant convicted of multiple murders and for murder committed upon a peace officer, but only "sometimes" for the special circumstances of financial gain, previous murder convictions, and robbery. (Supp. CT-JQ 968.) She explained: "Depends on wh[a]t kind of murder." (Supp. CT-JQ 968.) On the other hand, she replied "yes" to question 55, which asked if she would "always vote guilty as to first degree murder and find a special circumstance true in order to proceed to the penalty phase . . . ." (Supp. CT-JQ 967.)

Alfaro also indicated that she would deliberate with other jurors (question 61), that she could change her vote if discussion convinced her that her initial conclusion was wrong (question 62), and that there was no reason why she "would not be a fair and impartial juror for both the prosecution and the defense . . ." (question 71). (Supp. CT-JQ 970, 972.)

There is absolutely no indication in Alfaro's questionnaire that she was not reliable and the trial court's concern about that quality in this person is puzzling. (See RT 767.) Moreover, to the extent that there were significant ambiguities or inconsistencies in Alfaro's responses, they should have been explored in voir dire, not used as a basis for excusing her. That is the whole point of the *Witherspoon-Witt* inquiry required by the federal constitution.

For example, the trial court said that it had "major concerns" about Alfaro's responses to question No. 37, that "she said she won't follow the instruction with respect to the presumption of innocence." (RT 767.) That

question was a grammatically incorrect run-on sentence and strangely worded. It asked: "In a criminal case, the defendant is presumed to be innocent, will you follow this instruction? If not, please explain." (Supp. CT-JQ 963.) In view of Alfaro's completely acceptable responses to other questions and the likelihood that she was unfamiliar with legal concepts such as presumptions, her anomalous response on this question should have been explored in voir dire. Maybe she thought it was asking if she would assume the defendant was innocent and automatically vote to acquit him. The trial court's treatment of this juror contrasts sharply with the benefit of the doubt extended to strongly pro-death penalty prospective jurors Griffith, Rofkahr, Valdez, and Poirier. (See discussion in section 4 of the instant argument, *post.*)

Alfaro's questionnaire responses indicate that she was qualified to be a juror or at least that she should have been followed up in voir dire, and excusing her without cause violated appellant's right to be tried by an impartial jury.

c. Richard Rutherford[32]

The trial court announced at the outset of the third day of jury selection voir dire, before the venire had been called into court, that it had identified Rutherford as a "problem juror" based on his written questionnaire responses. (RT 1199.) The court said that he had "an attitude about everything . . ." and pointed to his comment in answer to question 70, which asked if there was anything that might distract him during the trial, and to which he had replied, "'yes, the judges and the lawyers. They're

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[32]Rutherford's questionnaire responses are in the Supplemental Clerk's Transcript at pages 1655 et seq.

pompous and boring." The court also focused on his answer to question 63, saying Rutherford had said he gets claustrophobic "especially if he feels he can't just get outside, and therefore he couldn't just sit indoors all day and get involved in deliberations." (RT 1199.)

The court also pointed out that Rutherford indicated that he did not know whether he would always, sometimes, or never impose the death penalty for the various special circumstance murders listed in question 58 (Supp. CT-JQ 1672) and that although he stated his philosophical opinion about the death penalty was "neutral" (Supp. CT-JQ 1668 [question 44]), he had stated "that when the rich and famous are put to death it will be valid, not until then[]" (RT 1199; see Supp. CT-JQ 1668 [question 43]).

The trial court added, "He grew up in the sixties. He won't necessarily be able to follow the law if it differs from his own beliefs. He won't apply the standards given him by the Court in evaluating the testimony of witnesses. . . . [¶] Question 22. He has strong feelings about the nature of the charges, which should be obvious to us, and the defendant isn't rich or famous therefore his justice will be harder than the people who are privileged. [¶] He was accused of assault with a deadly weapon, thrown out of court on the first day. He has a lack of respect for police officers as a result of that. [¶] He felt the response of law enforcement to that situation was, quote, 'total bullshit,' unquote." (RT 1199-1200.)

The trial court expressed the concern that Rutherford had a "certain attitude that might be conveyed to other jurors." (RT 1200.)

Defense counsel reiterated his position that the judge had the authority to excuse jurors based on the questionnaires under oath, and submitted the issue of Rutherford's qualification to sit on the jury to the court's discretion. (RT 1200.) Defense counsel said that he would like

other jurors to hear some of his statements because there are people who believe the criminal justice system treats the rich better than the poor, but observed that "that has nothing to do with what [the trial court's] obligation and function is." (RT 1200.)

The prosecutor also submitted the issue, adding that it was "fine" with him if the court wanted to excuse Rutherford. (RT 1201.)

The court excused Rutherford for cause because there was "cause to believe that [he] is not going to follow the law and there is a tremendous attitude that is transmitted quite clearly through his questionnaire." (RT 1201, 1204.)

In fact, as appellant demonstrates below, the trial court's representation of Rutherford's questionnaire was inaccurate in significant details and its conclusion that he was excusable for cause was unsupported by the record and unreasonable, possibly reflecting the personal biases of the judge.

First, the court's unhappiness with Rutherford's "attitude" as reflected in his comment about judges and lawyers, does not justify excusing this man for cause. Many, many people have such an opinion about the legal profession, although few would express it so candidly and directly. In any case, it is entirely possible that Rutherford would not have found this particular court and the lawyers involved in appellant's trial to fit his stereotype. It is common for individuals who stereotype other groups to make exceptions for the individuals they actually know or work with. In any case, this comment should have been explored on voir dire to see whether it rose to the level of substantially impairing his ability to perform the duties of a juror at appellant's trial.

Second, Rutherford did not state or imply that he could not sit

indoors all day or that he could not "get involved in deliberations." (RT 1199.) On the contrary, he answered question 61 that he would "freely discuss the law and the evidence" with fellow jurors during deliberations, and indicated on question 62 that he could change his vote if the discussion showed him his initial conclusion was wrong. (Supp. CT-JQ 1674.) And he did not say or imply he could not "sit indoors all day." Question 63 asked: "If during the course of deliberations, you reached an opinion as to the appropriate verdict, would you change your opinion merely because: A. Other jurors disagreed with you? . . . B. A majority of the other jurors disagreed with you? . . . C. It is late in the day and you are tired? . . . D. You feel that you should simply reach a verdict?" Rutherford answered "no" to all these except for C, and explained that "I get claustrophobic, especially if I feel I couldn't just get outside if I wanted to (or if I knew I had to sit still/stay in)." (Supp. CT-JQ 1674.)

Rutherford's candor is again remarkable, but the important point is that this should have been explored in voir dire. He had never served on a jury before (Supp. CT-JQ 1660 [question 13]) and knew no-one connected with the court system (Supp. CT-JQ 1658 [question 8]). Did he realize that the jury would take breaks and that he could go outdoors during breaks? Did he think that the jury would be locked up indoors during the entire course of time deliberations occurred? Did he realize that the jury would generally be released to go home every day around 4:30 pm? (RT 1418, 3052.) Did he realize that if deliberations went overtime or were very lengthy or complex and he felt too tired to continue, he could ask to stop? Did he know that the jury had a voice in when and how long it deliberated? (See RT 3322-3325.)

Further, if the court believed that Rutherford's comments about the

unequal application of the death penalty for the rich and the poor (Supp. CT-JQ 1668 [question 43] were inconsistent with his statements that his philosophical opinion about it was "neutral" (Supp. CT-JQ 1668 [question 44]) and that he did not know whether he would sometimes, always, or never impose death for the special circumstances murders listed in question 58 (Supp. CT-JQ 1672), then under the principles enunciated in the *Witherspoon-Witt* line of cases, he should have been questioned about those apparent contradictions.

It is also worth noting that the trial court commented that Rutherford "grew up in the sixties." (RT 1199.) This was the second venire member that the court excused for cause based solely on a questionnaire, and about whom it made this observation, as if it were a negative factor. (RT 727; see discussion of Deborah Bennett, below.) Apparently the 1960s had some significance to the court that is not made clear on the record. It appears that the court had a personal bias against people who grew up in the 1960s, at least if they expressed skepticism about the death penalty or the criminal justice system.

Additionally, the court apparently mis-read, and consequently took offense at, Rutherford's reply to question no. 22. Following is the question and his answer verbatim:

> "22. Do you have any feeling about the nature of the charges in this case that would make it difficult or impossible for you to be fair and impartial? YES [circled by Rutherford] NO
>
> "If YES, what? Obviously, (since I haven't heard of the man), the defendant is not rich or famous, consequently his justice will be harsher than people who are priv[ile]ged." (Supp. CT-JQ 1663.)

Thus, the court's description of this as a statement that "he has strong feelings about the death penalty, which should be obvious to us" (RT 1199) does not bear up when compared with Rutherford's actual statement. He clearly meant that it was "obvious" that the defendant was not rich or famous, since Rutherford had never heard of him, and he did not suggest that his own feelings about the nature of the charges should be obvious to the court.

Second, the court's comment about Rutherford's feelings that law enforcement's response when he was accused of assault with a deadly weapon was "bullshit" completely ignored the circumstance he described that led to that assessment. Question 9 asked, "Have you, an acquaintance or relative ever been a VICTIM of a crime?" (Supp. CT-JQ 1658, italics omitted, capitalization in original.) Rutherford replied that he himself had been a victim, and in answer to "what crime?" he wrote, "He attacked me w/a knife, then a board, but he wasn't charged even though witness called it to officers attention." (Supp. CT-JQ 1658.) Frankly, if a person is attacked in this manner and then is himself unjustly charged with assault, while his assailant is not charged at all, a very negative assessment of law enforcement's response may be quite reasonable. And it does appear that Rutherford may have been unjustly charged, since the charges were "thrown out of court on the first day." (Supp. CT-JQ 1659.) The court also failed to note that Rutherford also wrote that his feeling about the response of the judicial system in his case was "o.k." (Supp. CT-JQ 1658.) Appellant submits that this venire person's experiences as the victim of a crime should have been explored in person by normal voir dire.

2. Nine Anti-Death Penalty Prospective Jurors Were Improperly Excused

The trial court improperly excused nine prospective jurors whose questionnaires contained answers and comments indicating opposition to the death penalty in varying degrees but also contained responses indicating that they could fulfill the duties of a juror. As this Court explained in *Stewart* about a juror who had given contradictory answers, "[a]t a minimum, this juror's written responses suggested ambiguity and a need for clarification on oral voir dire." (*People v. Stewart, supra,* 33 Cal.4th at p. 448.) Defense counsel did not stipulate to these excusals.

The ambiguities in these prospective jurors' questionnaires, read as a whole, required that the people who wrote them be individually questioned to determine whether their ability to perform the duties of a juror in appellant's case was substantially impaired by their views.

a. Patricia Cheek[33]

This venire person was a death penalty opponent who indicated on her questionnaire that she would try to be a "fair and impartial juror," that she was able to follow and apply the court's instruction on the law that was different from her beliefs or opinions (Question 36), that she would deliberate freely (Question 61), and that she could change her conclusions if discussion with other jurors during deliberations convinced her that she had been wrong (Question 62). (Supp. CT-JQ 259, 267.) She should have been questioned about the responses she gave concerning her attitudes about the death penalty that seemed to be inconsistent with these statements.

The trial court began the review of Cheek's questionnaire saying,

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[33]Cheek's questionnaire responses are in the Supplemental Clerk's Transcript at page 248 et seq.

"[s]he is one that says she's so anti-the death penalty, she would never vote for it under any circumstances. That is the note that I have." (RT 742.) Further, the trial court said, "[s]he also won't follow the one-witness rule, she doesn't think a single witness is enough on which to base an important judgment. [¶] She doesn't feel that we have the right to take a life, she's strongly against the death penalty, 'We don't have to kill in the name of justice. To take a life is murder under any circumstances.' [¶] She feels no purpose is served by the death penalty, or by – 'It doesn't deter violent criminals.' She doesn't feel we have the right to kill. [¶] She would automatically vote against conviction or death or a special circumstance just to thwart the system. [¶] She – 'We don't have the right to kill,' she would never vote for death under any of the special circumstances, even supposing it was a first degree murder conviction under Question 58. I think she's pretty substantially impaired." (RT 742-743.)

The prosecutor stipulated to this excusal, but defense counsel did not although he told the court he would have "no objection" if it found substantial impairment based on the questionnaire. (RT 743-744.) The trial court ultimately found Cheek substantially impaired and excused her for cause. (RT 760.)

b. Lowell Smith[34]

The trial court felt that Smith was not appropriate for voir dire because he "said he's so against the death penalty he would always vote not guilty, and against death circumstances." (RT 744.) The court pointed to "statements here, 'Who am I to deprive another of his life without – it won't

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[34]Smith's questionnaire responses are in the Supplemental Clerk's Transcript at page 410 et seq.

bring back the victim. Why isn't rehabilitation an alternative? How else can I help change things?' [¶] At the same time, this person says 'The probability he's guilty is high or he wouldn't have reached this stage.' [¶] General feelings about the death penalty, 'It's barbaric, strongly against, there's always a possibility a person can make a contribution to society even if it's just to warm the rest of us.'" (RT 744-745.) The trial court also characterized Smith's responses to Question 58 as saying he "would 'never, never, never, never, never' vote for death under any of the five special circumstances listed" in the question. (RT 745.)

Defense counsel acknowledged that the court could find substantial impairment based on the questionnaire, but did not request or stipulate to such a finding. (RT 744.)

The trial court concluded that, "this juror is so strongly against death that they would vote not guilty just to keep it from getting that far. The other three [*Witherspoon-Witt*] questions are similarly answered." (RT 745.) The court then found that Smith was substantially impaired and he was excused. (RT 745, 760.)

The responses the trial court chose to highlight did not accurately reflect Smith's answers to some of the questions most relevant to a *Witherspoon-Witt* inquiry. For example, in answer to the question whether he would be able to follow and apply an instruction by the court that he felt was different from a belief or opinion he had, his full response was: "It would be difficult – how else can I help change things?" (Supp. CT-JQ 421 [question 36].) The most important point about this response is that he did not say he could not follow such an instruction, only that it would be difficult. Without further questioning, it is impossible to know whether his personal desire to affect public policy or the law actually meant that he

would not follow instructions, but his rhetorical question on the face of the questionnaire did not justify that conclusion.

Moreover, while it is true that Smith wrote "never" to each of the sub-parts of question 58 (Supp. CT-JQ 427), suggesting that he would never impose the death penalty for murder with any of the listed special circumstances and that the list included robbery, he also replied that he would "freely discuss the law and the evidence" during deliberations with other jurors (question 61), and that he could change his vote if discussion during deliberation showed him that his initial conclusion was wrong (question 62). (Supp. CT-JQ 429.) He also wrote that a reason he would not be a fair and impartial juror for both sides was that "[i]t would be very hard not to exert what influence I can to change our present retributive justice system." (Supp. CT-JQ 431.)

It appears from Smith's entire questionnaire that he was a highly intelligent and conscientious person with deep concern for the fate of those accused of crime and sincere doubts about the wisdom of the death penalty as public policy. Whether his deeply held beliefs in fact meant that he could not fulfill the duties of a juror in a capital case, particularly if he understood the legal requirements of the job, cannot be determined from his questionnaire alone. He should have been questioned in voir dire.

c. Deborah Bennett[35]

The trial court described Bennett[36] as "the granola lady . . . obviously

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[35]Bennett's questionnaire responses are in the Supplemental Clerk's Transcript at pages 491 et seq.

[36]Appellant infers that the "granola lady" was Deborah Bennett from the appearance of her questionnaire and the court's description of answers

(continued...)

she's somebody from the '60s, who . . . kind of is into health food and spiritualism, and a real liberal kind of person. [¶]And at the end, she wrote a great deal . . . about her very strong beliefs, all around the margin and the edge. . . .." (RT 726 - 727.)

In fact, Bennett was only a teen-ager in the 1960s and she did not write anything on her questionnaire about her diet or being "into spiritualism." (Supp. CT-JQ 491-512.) And her careful answers to questions 32 and 36, respectively, indicate that she was willing to try to set aside sympathy and bias, and that she would be able to follow an instruction by the court that differed from her beliefs. (Supp. CT-JQ 502.)

Defense counsel did not request or stipulate to Bennett's excusal. The trial court found her to be substantially impaired without specific comment from defense counsel. (RT 760.) Presumably she was one of the people "strongly against the death penalty," whom defense counsel identified as being in appellant's best interest to have on the jury. (RT 759.)

This highly intelligent, analytical and scrupulously conscientious potential juror obviously had profoundly ambivalent feelings about the death penalty, as reflected in her answer to question 43,[37] although

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[36](...continued)
written along the margins and edges. (CT 491-512.) Although the trial court never mentioned her by her actual name when going through the questionnaires, the court did include her name when it read the list of those being excused on the basis of their questionnaires. (RT 760.)

[37]Q 43 *What are your GENERAL FEELINGS regarding the death penalty?*

A: "I am an opponent of the death penalty. I have strong emotional reactions upon reading about certain crimes – like the Laotian kids who killed the German lady – and the Self/Romero

(continued...)

ultimately she was philosophically opposed to it. (Supp. CT-JQ 504.) In addition, she wrote that she would not refuse to vote for guilt in order to avoid a penalty phase, adding the important information that she "could not take a position that would result in death as the only option." (Supp. CT-JQ 507, underlining added.) Finally, Bennett wrote that she could change her mind during deliberations. (Supp. CT-JQ 510.)

Her reply to question 71 that she could be fair and impartial to both the defense and the prosecution "except for the death penalty" and that she would be true to her beliefs is not entirely clear. The law does not require one to be impartial about the death penalty; those opposed to the death penalty may sit on a capital jury as long as they can follow the court's instructions. (*Lockhart v. McGree, supra*, 476 U.S. at p.176; *People v. Stewart, supra,* 33 Cal.4th at p. 446.) And to the extent this response seems to be a statement that Bennett would automatically vote for life without possibility of parole, it may well have been influenced by the problems with question 60 discussed, *supra.*

Taking all this into consideration, Bennett should have been questioned in person.

d. Tina Turner[38]

The trial court did not discuss Turner's responses, instead simply remarking that it thought there were "significant problems with Ms.

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[37](...continued)
brothers. I feel that those people deserve to die. Yet I rationally am opposed to the death penalty. It is not a deterrant [sic], it is not humane. It is not 'evenly' administered. There is too much chance for error in our system." (Supp. CT-JQ 504, underlining added.)

[38]Turner's questionnaire responses are in the Supplemental Clerk's Transcript at pages 897 et seq.

Turner's feelings on the death penalty, and her beliefs which substantially impair her ability to apply the law. On those grounds . . . she will be excused." (RT 771, see RT 781.)

When asked if he would stipulate to Turner's excusal, defense counsel replied, "No, I won't stipulate . . . ." (RT 771.) Instead, defense counsel submitted the issue to the court's discretion. (RT 771.)

Significantly, Turner simply put a question mark in place of a reply in her own words to question 36, which asked whether she would be able to follow and apply an instruction from the judge on the law that she feels is different from a belief or opinion she has. (Supp. CT-JQ 908.) This response was reason enough to go through the voir dire process with this prospective juror.

Further, Turner chose "strongly against" from the suggested responses to question 44, which asked about her "philosophical opinion regarding the death penalty" (Supp. CT-JQ 910) and her responses to other questions consistently reflected that attitude. On the other hand, she also indicated that she believed that "life in prison without possibility of parole" was a worse sentence than death. (Supp. CT-JQ 912.)

The federal constitution prohibits the dismissal of people from the venire merely because of their "feelings" about the death penalty, so that basis for the trial court's exclusion of Turner was invalid and should be disregarded. And the court's conclusion that Turner's "beliefs" substantially impaired her "ability to apply the law," based solely on her questionnaire, was not reasonable in the absence of an opportunity for her to explain the apparent inconsistencies in her responses and for the court to observe her demeanor.

e. Carolyne Valenzuela[39]

The trial court did not discuss Valenzuela's questionnaire in detail, but excused her for cause because "specifically, on her religious beliefs, she's against the death penalty, she would never impose it, based on the answers to Question 58. And . . . is so strongly against it, she would refuse to vote for guilt in order to prevent ever reaching that issue." (RT 772-773.) Trial defense counsel did not stipulate to this excusal but did not enter an affirmative objection, and stated that he thought the court had good grounds for excusal because of the juror's attitudes about the death penalty; he submitted the issue to the trial court. (RT 771.)

Again, the trial court ignored this person's reply to question 36, which asked whether she could follow the court's instruction if it differed from a belief or opinion she had. Valenzuela wrote: "Once its [sic] explained why there is a good possibility I could go along with the instruction." (Supp. CT-JQ 1313.) Also, while she stated that she would prefer not to sit as a juror in appellant's case because it might involve the death penalty (Question 68), she also indicated that there was no reason she would not be a fair and impartial juror for both the prosecution and the defense (Question 71). (Supp CT 1322, 1323.)

The trial court's decision to exclude Turner was not justified on the basis of her written answers.[40] She should have been questioned in voir

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[39]Valenzuela's questionnaire responses are in the Supplemental Clerk's Transcript at pages 1302 et seq.

[40]Valenzuela stated on her questionnaire that she had two brothers, Mario and Jesse Valenzuela, who were defense attorneys practicing in Riverside. (Supp. CT-JQ 1303, 1305.) The trial court identified her as "Mario and Jessie's sister-in-law." (RT 768-769.) It is clear, however, that

(continued...)

dire.

f. Joe Juniel[41] 772/3391

The trial court said it had the "same feelings" about Juniel as it had about Valenzuela, "particularly he doesn't feel the State has a right to take a person's life, he's strongly against it." (RT 773.) The court also pointed to his answers to questions 54, 56, 58, and 60, where he indicated attitudes consistent with the thoughts of a death penalty opponent who may not fully understand the governing law in a capital case with regard to what his obligation would be if he sat on the jury.

On the other hand, Juniel's responses to the most crucial questions indicate that he *was* qualified to serve. He said that he could set aside sympathy, bias or prejudice; follow the court's instructions even if they differed from his personal beliefs; that he could deliberate in a meaningful way; and that he could change his mind during deliberations. (Supp. CT-JQ 3402, 3410.) And while he indicated that he was "strongly against" the death penalty philosophically, he also indicated that he believed that life in prison without possibility of parole was a worse punishment. (Supp. CT-JQ 3406.) Defense counsel submitted the issue of Juniel's qualification to be questioned in voir dire to the trial court's discretion. (RT 771.)

Juniel should have been questioned about the apparent conflicts in his answers.

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[40](...continued)
this was not the basis of the trial court's decision to excuse her.

[41]Juniel's questionnaire responses are in the Supplemental Clerk's Transcript at pages 3391 et seq.

g. Thomas Sympson[42] 772/1005

The trial court did not discuss Sympson's questionnaire at all before stating that he would be excused. (RT 765-771.) Instead, the court initially identified him as one of the "potential instant dismissals. . . ." (RT 765.) And then, after its brief assessment of the questionnaire of Tina Turner and stating that she would be excused, the court merely said, "Same with respect to Thomas Sympson." (RT 771.) Defense counsel agreed but, just as he had refused to stipulate to the excusal of Turner and had submitted the question of Turner's impairment to the trial court, he qualified his response on Sympson with the clarification that "I'm not the moving party, I'm just not objecting [to the excusal] based on the questionnaires." (RT 771.) The court said it understood and that it would "make the same findings with respect to Thomas Sympson, and the answers on his questionnaire." (RT 772.) Presumably, the trial court meant that it found that Sympson's ability to serve as a juror was substantially impaired by his "beliefs" about the death penalty. (See RT 771 [finding that Turner's "beliefs" substantially impaired her].)

As appellant has previously pointed out, a prospective juror may not be excused for cause simply because he or she has strong beliefs about the death penalty. (*Lockhart v. McGree, supra,* 476 U.S. at p. 176; *People v. Stewart, supra,* 33 Cal.4th at p. 446.)

Sympson's affirmative response to Question 36 was apparently ignored by the trial court. He stated that he would be able to follow and apply the judge's instruction on the law that was different from his own

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[42]Sympson's questionnaire responses are in the Supplemental Clerk's Transcript at pages 1005 et seq.

belief or opinion. (Supp. CT-JQ 1016.) He also stated that he would "freely discuss the law and the evidence" with other jurors, and that he could change his vote if the discussion with other jurors showed him that his initial conclusion was wrong. (Supp. CT-JQ 1024.) These were the questions most relevant to a proper *Witherspoon-Witt* inquiry, and they indicated that Sympson was qualified to serve.

The dismissal of Sympson for cause without voir dire was an error and violated appellant's right to be tried by an impartial jury.

h. Ross Scalise[43] 772/1140

The trial court's treatment of prospective juror Scalise was even more cursory than Sympson. The court merely said, "Ross Scalise, same thing, Mr. Grossman?" (RT 772.) When defense counsel replied, "yes," the trial court asked the same question of the district attorney who also answered, "yes." (RT 772.) In context, it is clear that counsel were indicating that they took the same positions on Scalise that they had taken on the last few jurors, i.e. the defense was not the moving party and submitted the issue to the court, and the prosecution had no objection to the trial court's intended ruling. (RT 771-772.) The trial court then said, "I'll make the same findings." (RT 772.)

Presumably, then, like Turner and Sympson, the trial court found Scalise to be substantially impaired on the basis of his "beliefs" about the death penalty as stated in his written questionnaire. (See RT 771 [Turner].)

Like other rejected venire members, Scalise stated on his questionnaire that he was able to follow and apply the court's instruction on

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[43]Scalise's questionnaire responses are in the Supplemental Clerk's Transcript at pages 1140 et seq.

the law that he felt was different from his own belief or opinion, that he would "freely discuss the law and the evidence" with other jurors during deliberations, and that he could change his vote if those discussions showed him that his initial conclusion was wrong. (Supp. CT-JQ 1151, 1159.) And, while his responses generally were consistent with his philosophical opposition to the death penalty, he also indicated that he thought life in prison without possibility of parole was a worse punishment. (Supp. CT-JQ 1155.)

i. Lenora Knight[44]

The trial court identified Lenora Knight as a candidate for dismissal for cause, saying "[s]he always has religious convictions. Very anti-death penalty . . . she said, Question 32, she has biases that she can't set aside. . . . [¶] she said, . . . Question 71, she cannot and will not ever impose the death penalty. [¶] And we get five 'nevers' to Question 58." (RT 756.) Defense counsel said that he was "satisfied that's substantial impairment." (RT 756.)

Knight was excused for cause on the trial court's finding of substantial impairment. (RT 758-759.)

Knight was clearly a person opposed to the death penalty. She wrote that she would "never" impose death for any of the special circumstance murders listed in Question 58, explaining "I do not believe in the death penalty." (Supp. CT-JQ 698.) (See also Supp. CT-JQ 689 [questions 21 and 23]; Supp. CT-JQ 694 [question 43]; Supp. CT-JQ 697 [question 53].)

Like other excused anti-death penalty jurors, Knight thought that life

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[44]Knight's questionnaire responses are in the Supplemental Clerk's Transcript at pages 681 et seq.

in prison without possibility of parole was a worse punishment than death. (Supp. CT-JQ 696.) Also, she checked both "strongly against" and "moderately against" in response to question 44, which asked for her philosophical opinion about the death penalty. Her explanation was, "I am just against it to me it not punishment it put him out the pain he cause other." (Supp. CT-JQ 694.) Her meaning is clarified on question 45, which asked why she held that opinion about the death penalty: "because it so awful to use such method to punish with." (Supp. CT-JQ 695.) And she indicated that she could not see herself choosing death instead of life imprisonment without possibility of parole. (Supp. CT-JQ 699.)

However, Knight also wrote on her questionnaire that she would not refuse to vote for guilt to keep the case from coming to the penalty phase (Question 54) and that she would not automatically vote against death for murder with special circumstances no matter what other aggravating or mitigating evidence was presented (Question 56). (Supp. CT-JQ 697.)

Critically, Knight did not answer question 36, which asked if she would follow and apply an instruction by the court that differed from her own belief or opinion. (Supp. CT-JQ 692.) Since this is the heart of the *Witherspoon* inquiry, on this basis alone she should have been questioned in person. Certainly this, in combination with the inconsistencies in her other answers, made her completely appropriate for follow-up in voir dire.

The trial court's excusal of Knight from the venire for cause was not justified by her questionnaire responses and violated appellant's right to be tried by an impartial jury.

3. Five Pro-Death Penalty Prospective Jurors Were Improperly Excused

The trial court also improperly excused prospective jurors Packler, Marsh, Riegler, Ellis, and Herr, who expressed strong support for the death penalty in their questionnaires. (RT 731-735, 751, 757, 768, 789; Supp. CT-JQ 137, 545, 789, 1218, 1272.)

It was the trial court's duty to establish, by personal examination of these jurors, whether they were able to perform the duties of a juror in a capital case. The fact that defense counsel advocated dispensing with voir dire of these people did not eliminate the trial court's duty. Neither defense counsel nor the trial court could make a rational determination of substantial impairment without knowing whether the conflicts and ambiguities in these questionnaires could be cleared up with questioning, and appellant's fundamental constitutional right to trial by an impartial jury could not be waived.

4. If the Questionnaire-Based Excusals Were Constitutionally Permissible the Trial Court Erred in Failing to Exclude Four Death Penalty Supporters Using the Same Standards as it Used for Death Penalty Opponents

Assuming, arguendo, that it was constitutionally permissible for the trial court to excuse potential jurors for cause under *Witherspoon-Witt* standards based solely on their questionnaires, then it erred in failing to use the same standards for evaluating the questionnaires of four people who were strongly in favor of the death penalty, and whose bias was shown on their questionnaires to the same degree that bias was shown on the questionnaires of venire members who were opposed to the death penalty and were excused for cause. (See *Morgan v. Illinois, supra,* 504 U.S. at p.

733.)

Ultimately, after these people were voir dired, one was excused for cause[45] and the defense exercised peremptory challenges against the other three.[46] (RT 1077, 1175, 1301.)

The trial court's use of different standards for the excusal of pro-death penalty as opposed to anti-death penalty venire members was an abuse of discretion and violated appellant's Sixth and Fourteenth Amendment rights to an impartial jury and equal protection of the law. (See *Douglas v California* (1963) 372 U.S. 353, 356 [state may not treat individuals differently in a way that violates due process or invidiously discriminates].)

A juror must be willing and able "in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729, emphasis added.) Thus, to be qualified to serve in California, a juror must be able to refrain from treating as an "aggravating circumstance" the elements of the crime itself. (CALJIC No. 8.88.) Further, jurors must also be willing and able to consider in mitigation *every* factor that California or federal constitutional law deems mitigating and on which evidence has been presented. (CALJIC No. 8.85.) . A juror who does not believe such factors are entitled to any weight is disqualified under *Morgan v. Illinois*, *supra*, 504 U.S. 719. (*Id.*, at p. 729, emphasis added.)

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[45]See RT 810, 830-831, 887-891, 894-898 [Griffith].

[46]See RT 759-769 [Rofkahr], RT 755 [Valdez], RT 779 [Poirier]. Appellant again challenged Poirier for cause after voir dire and the trial court denied the challenge (RT 1171-1174), so he was ultimately excused based on a peremptory challenge by the defense (RT 1301).

Finally, a juror who will "invariably impose the death penalty upon conviction" of the charged offense cannot be allowed to sit as a penalty juror. (*Morgan v. Illinois*, *supra*, 504 U.S. 719, 738.) In defining the defendant's right to voir dire, *Morgan* specifically recognized the trial court's obligation to accept any "challenge for cause against those prospective jurors who would always impose death following conviction." (*Id.*, at 733, emphasis added.)

In rejecting challenges for cause against venire members whose questionnaires indicated their belief that the death penalty should "always" be imposed for robbery-murder, while excusing those who wrote that they would "never" impose death for that crime, the trial court ran afoul of one of *Morgan*'s central tenets: that without symmetry in the rules for determining bias, the jury as a whole cannot be considered impartial. (*Ibid.*)

a. Gwyneth Griffith[47]

Defense counsel argued that Griffith's questionnaire responses indicated that she was "substantially impaired." (RT 746.)

Griffith's response to the critical question 36, which asked whether she would be able to follow and apply an instruction on the law that she felt differed from her own belief or opinion, was equivocal; she wrote "I hope so" to question 36. (Supp. CT-JQ 475.) All but one[48] of the anti-death penalty venire members excused by the court answered this question

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[47]Griffith's questionnaire responses are in the Supplemental Clerk's Transcript at pages 464 et seq.

[48]One anti-death penalty venire member inserted a question mark on the response line to question 36. (Supp. CT-JQ 908.) It is unclear whether this indicated that she did not understand the question or did not know how to answer it, or had some other significance.

unequivocally "yes."

She stated that she was "strongly in favor" of the death penalty, explaining, "If you take a life you pay with yours." (Supp. CT-JQ 477.) She also explained, "Eye for an eye – to[o] many criminals let loose time after time to kill again and again." (Supp. CT-JQ 478.) And she wrote that she did not know which was the worse punishment, death or life in prison without possibility of parole. (Supp. CT-JQ 479.)

Perhaps most significantly, given that the trial court pointed to question 58 as an important indicator of substantial impairment for anti-death penalty potential jurors Cheek (RT 742-743), Smith (RT 745), Valenzuela (RT 772-773), and Knight (RT 756), Griffith wrote that she would "always" impose the death penalty for every special circumstance listed, including robbery, which was the felony charged in appellant's case, and explained again, "Murder is murder – you take a life you forfe[i]t yours." (Supp. RT 481.)

Defense counsel pointed to Griffith's response to question 60A that she could not see herself in an appropriate case choosing life imprisonment without possibility of parole. (RT 748; see Supp. RT 482.)

In spite of such responses and written comments, the trial court found that Griffith had not made "sweeping pronouncements" and that follow-up was "appropriate." (RT 749.) The trial court remarked that "[i]t may be that she actually means what she says forcefully with respect to these three or four questions and certainly needs follow-up. She may not meet the test, but I think it's worth follow-up." (RT 749.)

Griffith had at least as much of a "consistent pattern" (RT 728) of answers on her questionnaire as the anti-death penalty jurors the trial court excused. The trial court abused its discretion in failing to apply the same

standards to Griffith as it used for evaluating the questionnaires of anti-death penalty jurors and in refusing to excuse Griffith for cause, in violation of appellant's right to an impartial jury under *Witherspoon-Witt* standards.

b. Lillias Rofkahr[49]

Defense counsel pointed out that Rofkahr had indicated she[50] would always vote for the death penalty and would never choose the sentence of life without possibility of parole. (RT 753.) Counsel was apparently referring to Rofkahr's responses: to question 57, that she would always "vote for death, no matter what other evidence in aggravation or mitigation might be presented at the penalty hearing; to question 58 that she would "always" impose the death penalty for each of the special circumstances listed, including robbery; and to question 60 that she could not see herself choosing life imprisonment without possibility of parole in an appropriate case. (Supp. CT-JQ 590, 591.) The trial court also highlighted her written comment to question 58: "I see no reason to even have the death penalty for special circumstances if it['']s no[t] going to be used[.]" (Supp. CT-JQ 590, RT 753.) But the court commented, ". . . it does appear that this juror did understand the explanation. I wonder if they really understand." (RT 753, underlining added.) Ultimately the court gave Rofkahr the benefit of this doubt and kept her in the venire.

The district attorney defended Rofkahr by pointing out that she had

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[49]Rofkahr's questionnaire responses are in the Supplemental Clerk's Transcript at pages 573 et seq.

[50]During the discussions of questionnaires out of the presence of the venire, the court and counsel referred to Ms. Rofkahr as a male. In voir dire, however, counsel addressed her as "Ms. Rofkahr" (RT 953), and she indicated on her questionnaire that she was female (Supp. CT-JQ 573).

stated that she believed in the presumption of innocence and would not require the defendant to testify. (RT 754.) Of course, the excused anti-death penalty jurors had also answered those questions appropriately. (See, e.g., RT 260 [Cheek]; 422 [Smith]; 503 [Bennett]; 693 [Knight]; 909 [Turner]; 1017 [Sympson]; 1152 [Scalise]; 1314 [Valenzuela]; 3403 [Juniel].) The district attorney argued that "we always run into these jurors that . . . after a little more voir dire, some of them have a tendency to back off on their views . . . ." (RT 754.)

The trial court acquiesced to the district attorney's position that Rofkahr should be followed up and allowed her to be questioned in voir dire.[51] (RT 759-760.)

c. Esther Valdez[52]

Defense counsel offered to stipulate to the excusal of potential juror Valdez, who was "strongly pro-death," not because of that attitude but because she knew the trial judge and the judge's husband. (RT 754-755.) The trial court noted her "very pro-death penalty" (RT 754) attitude but declined to excuse Valdez for cause because it thought she might be "rescuable" with regard to those attitudes. (RT 755.)

Defense counsel said that he did not think Valdez qualified for excusal for cause "given the Court's analysis." (RT 755.) In fact, Valdez was as "impaired" as several anti-death penalty venire members excused by the court, and defense counsel's failure to challenge her constituted

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[51]Appellant exercised a peremptory challenge against Rofkahr. (RT 1077.)

[52]Valdez's questionnaire responses are in the Supplemental Clerk's Transcript at pages 600 et seq.

ineffective assistance of counsel. (See section F.4. of the instant argument, *supra.*)

Valdez described her general feelings about the death penalty in answer to question 43 as follows: "I believe the death penalty should be applied in all cases where the commission of a crime either directly or indirectly results in the death of another individual." (Supp. CT-JQ 613.) She identified herself as "strongly in favor" of the death penalty in answer to question 44 and explained, "I do not believe it is in the best interest of society or the criminal to have sent[e]nces of life imprisonment w/or w/o parole. Life imprisonment is, I believe, a more inhumane sent[e]nce than death." (Supp. CT-JQ 613.) In answer to question 45 she elaborated: "I don't believe that someone who has taken someone else's life should be maintained for life at public expense. I do not believe that (at this time) society has developed reformation treatment that can actually change criminal behavior." (Supp. CT-JQ 614.)

Valdez also, consistently, indicated in answer to question 50 that she thought life in prison without possibility of parole was a worse punishment than death and explained, "Life in prison is from what I've read or heard, not the humane reformatory it should be. I think to be in prison for the rest of a defend[a]nt's lifetime would be horrible – there is no possibility of change, growth and worthwhile human interactions." (Supp. CT-JQ 615.)

Further, Valdez indicated in answer to question 55 that she was so strongly in favor of the death penalty that she would always vote guilty and find a special circumstance true in order to proceed to the penalty phase in a capital case. (Supp. CT-JQ 616.) Question 56, the mirror of this question for anti-death penalty venire members, was repeatedly mentioned by the trial court when it found them substantially impaired. (See RT 742, 745,

773.)

By the measures the trial court used for excusing anti-death penalty venire members, Valdez should have been excused for cause and the trial court's failure to excuse her violated appellant's right to trial by an impartial jury.

d. Michael Poirier[53]

Defense counsel moved to exclude Poirier "on the same standard," apparently referring to the criteria the trial court had used to excuse Valenzuela and Juniel and other previously-considered venire members for cause. (RT 771.) The trial court remarked that it did not have his questionnaire "pulled," so apparently it had not considered Poirier a candidate for exclusion from voir dire on its own motion. (RT 771.)

Defense counsel pointed to Poirier's statement that he believed all murder should be punished by death. (RT 777.) Poirier had written in answer to question 43, which asked his general feelings about the death penalty: "I feel that the punishment should fit the crime. If you've murdered someone I believe the punishment should be death." (Supp. CT-JQ 1397.) He also indicated that he was "strongly in favor" of the death penalty and stated again, "I just feel that if you commit the crime of murder you should be punished the same way." (Supp. CT-JQ 1397.)

Defense counsel also highlighted Poirier's response to question 49, which asked whether he believed that the defendant's background information was relevant to penalty. Poirier had written, "No. I believe if the defendant is found guilty they should suffer the punishment." (Supp.

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[53]Poirier's questionnaire responses are in the Supplemental Clerk's Transcript at pages 1384 et seq.

CT-JQ 1399.) Defense counsel also noted that on question 58[54] Poirier indicated that he would "always" impose the death penalty for each of the special circumstances listed. (RT 777.) Poirier had added, "Cert[ai]n crimes should be given the death penalty and murder is one of them." (Supp. CT-JQ 1401.) Counsel also pointed out Poirier's answer to question 57, where he indicated that he would always "vote for death, no matter what other evidence in aggravation or mitigation might be presented at the penalty hearing . . . ." (Supp. CT-JQ 1401.)

The trial court, however, focused on the fact that Poirier had answered "yes" to both parts of question 60, indicating that "in the appropriate case" he could impose life imprisonment without possibility of parole and could also impose the death penalty "in the appropriate case." (RT 777, Supp. CT-JQ 1402.) Question 60, however, does not mention murder, and Poirier had made it abundantly clear that he thought all murders should be punished by death. Obviously, in his view, murder would never be an "appropriate case" for a sentence less than death. So when Poirier answered that he could consider life without possibility of parole in an "appropriate case," his answer did not conflict with the rest of his responses.

The prosecutor said that Poirier was a person that "we need further discussion during voir dire[,]" pointing out that he had written "sometimes" and crossed it out before writing "always" in response to Question 58,

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[54]The reporter's transcript quotes defense counsel as stating, "Question 15. He would always impose the death penalty." (RT 777.) Question 15, however, merely concerns membership in crime or gun control organizations. (Supp. CT-JQ 1390.) It is clear from the context that this is a transcription error and should read, "Question 58. . . ." (See Supp. CT-JQ 1401.)

which asked if he would impose the death penalty for the special circumstance of robbery. (RT 778.)

Commenting on Poirier's statements that the punishment should fit the crime and that he was strongly in favor of the death penalty, the trial court said, "Lots of people are." (RT 779.) As to Poirier's statement that one who commits murder should be "punished the same way," the trial court remarked, "that's not unusual." (RT 779.)

The trial court did find "troublesome" Poirier's response to question 57 that he would always vote for the death penalty for a murder with special circumstances, regardless of any mitigating or aggravating evidence, and the fact that he would "always" impose death for each of the special circumstances listed in question 58. (RT 779, Supp. CT-JQ 1401.) These responses were the only ones the trial court thought showed "impairment or at least a potential for substantial impairment." (RT 779.)

Nevertheless, the trial court declined to dismiss Poirier from the jury. The trial court reasoned, ". . . as I said this morning, I think that there are people who feel that as soon as you find a special circumstance true, that's pretty much it. And I think he's worth follow-up to find out if he really believes that and he would always do that, or he just misunderstood what the special circumstance is all about." (RT 779, underlining added.) The trial court thought it significant that Poirier had substituted "always" for "sometimes" on the part of question 58 that asked whether he would impose death for murder during a robbery (RT 779, Supp. CT-JQ 1401), adding, "But I think I need to follow it up." (RT 780.) Further, the trial court said, "I'm not disagreeing with you with respect to Mr. Poirier, I just want to make sure he's coming from where I think he's coming from." (RT 781.)

Defense counsel protested at that point that the trial court was not

using the same standards for dismissing pro- and anti-death penalty prospective jurors. (RT 780.) The court replied that there were "borderline" people on both sides, and that Poirier was "borderline."

The trial court was probably right; many people in the venire probably did not understand the legal significance of special circumstances, including those death penalty opponents whom the trial court had dismissed partly because of their responses to question 58. But more importantly, defense counsel was also right: Poirier's questionnaire indicated at least the same degree of bias as those of most of the anti-death penalty individuals the trial court had excused for cause. The trial court's failure to dismiss him using the same standards under *Witherspoon* was a violation of appellant's right to equal protection of the law and his right be tried by an impartial jury.

H. Reversal of the Entire Judgment is Required

The trial court's excusal, for cause, of prospective jurors Hunckler, Alfaro, and Rutherford, whose views about the death penalty were neutral, which was not supported by the record and ordered without voir dire, directly violated appellant's fundamental constitutional right under the Sixth and Fourteenth Amendments to be tried by an impartial jury, and the entire judgment must be reversed. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 147-171.)

Reversal is also required because the procedure of excusing the three death-penalty neutral jurors and fiftteen other prospective jurors for cause on the basis of written questionnaire answers without voir dire violated the First Amendment. (See *Press-Enterprise v. Superior Court, supra,* 464 U.S. 501.)

Further, the trial court's use of questionnaires alone to determine

Witherspoon bias in appellant's case violated appellant's right to due process under the Fourteenth Amendment and because this violation resulted in actual *Witherspoon* error in that qualified venire members were excluded from voir dire and therefore from the jury, reversal of the entire judgment is required. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 660, 665.)

Reversal is also required because the questionnaire-excusal procedure in appellant's case violated the equal protection clause because it discriminated against death penalty opponents, a class of people similarly situated to death penalty supporters as members of the venire. (See *Powers v. Ohio* (1991) 499 U.S. 400 [criminal defendant may assert equal protection rights of potential jurors].) Specifically, to the extent that the trial court excused anti-death-penalty venire members using a standard more lax than the standard used for pro-death penalty jurors, the jurors were denied equal protection of the law, and appellant was denied due process, under the Fourteenth Amendment, and reversal is required. (*Douglas v California, supra,* 372 U.S. at p. 356; *Powers v. Ohio, supra,* 499 U.S. 400.)

In addition, the use of the questionnaires in a biased manner to exclude death penalty opponents violated appellant's Sixth and Fourteenth Amendment rights to trial by an impartial jury drawn from a representative cross-section of the community. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 537-538; *People v. Wheeler* (1978) 22 Cal.3d 258, 272.) This is particularly important insofar as such opposition was grounded in the potential jurors' religious beliefs. This Court noted in *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713 (overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046), that "[t]he right to cross-section representation is a demographic requirement, which assures a criminal

defendant a trial by a jury selected without systematic or intentional exclusion of cognizable economic, social, religious, racial, political and geographical groups. (*Thiel* v. *Southern Pacific Co.* (1946) 328 U.S. 217, 220 []; *People v. Wheeler* (1978) 22 Cal.3d 258, 268 [].) It is designed to protect the right to be tried by an impartial jury. (*Taylor v. Louisiana* (1975) 419 U.S. 522, 530 []; *People v. Trevino* (1985) 39 Cal.3d 667, 679 []; *Wheeler, supra*, at pp. 266-267.)" (*Hernandez*, 49 Cal.3d at p. 716, fn. 1, parallel citations omitted, underlining added.)

Appellant acknowledges that this Court and the United States Supreme Court have stated that if even a single anti-death penalty juror was improperly excluded from the death-qualified pool, appellant is entitled to a new penalty trial. (See *People v. Ashmus* (1991) 54 Cal. 3d 932, 962, citing *Gray v. Mississippi, supra,* 481 U.S. at pp. 666-667 and *Witherspoon v. Illinois, supra,* (1968) 391 U.S. 510, 521-523.)

Appellant submits, however, that he is also entitled to reversal of the guilt verdict because eliminating prospective jurors who were skeptical about the death penalty or opposed to it actually resulted in a biased jury, i.e., one that was more prone to find appellant guilty of the charged crime. (*Lockhart v. McCree* (1986) 476 U.S. 162, 184-206, dis. opn. of Marshall, J.) The United States Supreme Court has emphasized that "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, *Rosales-Lopez v. United States,* 451 U.S. 182, 188 [101 S.Ct. 1629, 1634, 68 L.Ed.2d 22] (1981); *Ham v. South Carolina,* 409 U.S. 524 [93 S.Ct. 848, 35 L.Ed.2d 46] (1973); *Dennis v. United States,* 339 U.S. 162 [70 S.Ct. 519, 94 L.Ed. 734] (1950), or predisposition about the defendant's culpability, *Irvin v. Dowd,* 366 U.S. 717 [81 S.Ct. 1639, 6 L.Ed.2d 751] (1961).' *Gomez v. United*

States, 490 U.S. 858, 873, 109 S.Ct. 2237, 2246-2247, 104 L.Ed.2d 923 (1989)." (*Powers v. Ohio, supra*, 499 U.S. at pp. 411-412; and see cases cited therein.)

A study of actual capital jurors reported in the Cornell Law Review in 1998 confirmed that the jurors' guilt decisions were often a product of their premature opinions regarding punishment. (Bowers, Sandy, Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt Trial Experience, and Premature Decision Making* (1998) 83 Cornell L. Rev. 1476-1477, 1486, 1540.) This is consistent with the studies cited in Justice Marshall's dissenting opinion in *Lockhart* and appellant is aware of no empirical research contradicting this point.

It is significant that the majority in *Lockhart* assumed that the premise that pro-death penalty jurors are more likely to convict was correct, although it rejected the claim that a properly conducted *Witherspoon* voir dire denied the defendant a representative cross-section or an impartial jury. (*Lockhart v. McCree, supra,* 476 U.S. at p. 173.) In appellant's case, the *Witherspoon* voir dire was unfairly conducted, and it was impossible for appellant to obtain an impartial jury after all the death penalty skeptics had been eliminated from the venire, while those biased in favor of the death penalty remained. In these circumstances, the need for a reliable guilt determination and a heightened degree of due process in a capital case require reversal of the entire judgment. (*Beck v. Alabama* (1980) 447 U.S. 625; *Woodson v. North Carolina* (1976) 428 US 280, 305; *Gregg v. Georgia* (1976) 428 U.S. 153, 187.)

Additionally, the trial court's procedure and rulings violated the representative cross-section requirement of Code of Civil Procedure section 197, subdivision (a), and the provisions of Code of Civil Procedure section

223, the rules and principles governing jury selection under state law as developed in the case law of the state, and the provisions of the state constitution guaranteeing due process and trial by an impartial jury, resulting in a denial of the benefits of state law in which appellant had a liberty interest, all in violation of his right to due process protected by the Fourteenth Amendment of the Constitution, and requiring reversal of the entire judgment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Clemons v. Mississippi* (1990) 494 U.S. 738, 746.)

Further, even if this Court finds the procedure of excusing potential jurors on the basis of their questionnaires constitutionally permissible in the abstract, the trial court's findings of substantial impairment in appellant's case were not supported by the record and its abuse of discretion requires reversal for the erroneous exclusion of qualified individuals under *Witherspoon-Witt*. (*Gray v. Mississippi, supra,* 481 U.S. at pp. 660, 665.)

And to the extent this Court cannot determine from the questionnaires alone whether the excused venire members were actually qualified to serve within the meaning of the *Witherspoon/Witt* standards, the trial court's failure to voir dire the prospective jurors before excusing them for cause resulted in an incomplete record and violated appellant's due process right to meaningful appellate review under the federal constitution. (See *Dobbs v. Zant* (1993) 506 U.S. 357, 358 [citing *Gardner v. Florida* (1977) 430 U.S. 349, 361, (plurality opinion) and *Gregg v. Georgia* (1976) 428 U.S. 153, 167 (joint opinion of Stewart, Powell, and Stevens, JJ.)]; see also *Marks v. Superior Court* (2002) 27 Cal.4th 176, 191.)

Finally, if this Court finds that appellant forfeited any of the issues presented in the instant argument or invited any of the errors, it must find that in this regard trial counsel rendered ineffective assistance of counsel

under the state and federal constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. 1, §§ 15, 24; *Strickland v. Washington, supra,* 466 U.S. at p. 687; *People v. Ledesma, supra*, 43 Cal.3d at pp. 216-217.) A reasonable tactical choice is one made with awareness of the applicable law. (*Strickland v. Washington, supra,* 466 U.S. at p. 691.) Defense counsel had a duty to be fully informed about the law. (See ABA Standards for Criminal Justice (3d ed. 1993) Standard 4-5.1; see also *Wiggins v. Smith, supra,* 539 U.S. at p. 522 [reiterating that ABA standards are the norms for counsel in capital cases & citing *Strickland*].) There could be no conceivable tactical reason that trial counsel would conclude that it was in appellant's best interest for people opposed to the death penalty and able to perform the duties of a juror to be excluded from the venire, and any failure on trial counsel's part in this regard fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].) Moreover, the prejudice caused by counsel's error is clear, since it resulted in *Witherspoon* error and the other statutory and constitutional violations enumerated above and resulted in a biased jury and unreliable guilt and penalty verdicts. (*Strickland v. Washington, supra,* 466 U.S. at p. 687 [prejudice shown where capital trial's result is unreliable].)

The entire judgment must be reversed.

Alternatively, reversal of appellant's sentence of death is required because the erroneous exclusion of potential jurors for *Witherspoon* bias following voir dire is constitutional error affecting the composition of the jury pool and requiring reversal per se of the death judgment. (*Gray v. Mississippi, supra*, 481 U.S. at p. 668.) The United States Supreme Court

has said that "[t]he nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt exclusion* of a juror is harmless." (*Id.*, at p. 665.) If it is reversible error per se under the Sixth and Fourteenth Amendments to exclude potential jurors who have given equivocal or contradictory answers in actual voir dire, then the exclusion of potential jurors without even questioning them in voir dire must be reversible by the same standard.

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II

REVERSAL OF THE ENTIRE JUDGMENT IS REQUIRED BECAUSE THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE AFRICAN-AMERICAN JURORS VIOLATED APPELLANT'S RIGHT TO BE TRIED BY AN IMPARTIAL JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

A. Appellant Was Entitled Under the State and Federal Constitutions to be Tried by A Jury Drawn from A Representative Cross-Section of the Community

Appellant was entitled under the state and federal constitutions to be tried by an impartial jury drawn from a representative cross section of the community, and to protect that right, racial discrimination in the selection of his jury was prohibited. (U.S. Const., 6th, 14th Amends.; Cal. Const. art I, § 16; *Powers v. Ohio* (1991) 499 U.S. 400; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.) The factual inquiry to determine whether such discrimination has occurred is the same under both the federal and state constitutions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

"The United States Supreme Court has given this explanation of the process required when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges: '[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved

purposeful racial discrimination.' (*Purkett v. Elem* (1995) 514 U.S. 765, 767 [].)" (*People v. Silva* (2001) 25 Cal.4th 345, 384, parallel citations omitted.)

As appellant demonstrates below, the trial court erred in its conclusion that the prosecutor did not exercise peremptory challenges in a racially discriminatory manner, because it used the wrong standard for assessing the reasons for the challenges articulated by the prosecutor, and the reasons given by the prosecutor were unsupported by the record and transparently implausible. The exclusion of the two African-Americans discussed below violated appellant's rights under the state and federal constitutions to a fair trial and to trial by a jury drawn from a representative cross-section of the community. (*Powers v. Ohio, supra,* 499 U.S. 400, *Batson v. Kentucky, supra,* 476 U.S. at pp. 84-89; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277; *People v. Silva, supra,* 25 Cal.4th at p. 386.) Reversal is required for the further reasons explained and under the further authorities cited below.

B. The Trial Court Correctly Found a Prima Facie Showing of Racial Discrimination by the Prosecutor

During jury selection the prosecutor exercised two of his first six peremptory challenges to excuse African-American prospective jurors Doryanna Anderson-Johnson[55] and Rodell Maiden. (RT 981, 1080, 1081.) Appellant objected under *Wheeler* after the challenge to Maiden on the basis that there was a "pattern of exclusion" of African-Americans. (RT

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[55]This prospective juror wrote her surname as "Anderson-Johnson" on her questionnaire (Supp. CT-JQ 437), so that is how appellant identifies her in the instant brief, although she was called, variously, "Anderson" and "Anderson Jones" by the court and counsel at trial.

1081.)

The trial court said that two out of six did not establish a "systematic pattern, but I think there's a glimmering here." (RT 1082.) The court concluded that there was no prima facie showing. (RT 1082.) The trial court observed that two of the eleven remaining prospective jurors in the courtroom were African-Americans and warned the prosecutor to "keep an eye on it, because it might get close." (RT 1083.)

Defense counsel argued that appellant was not required to exhaust the entire jury panel before he could make a sufficient showing of a pattern of racial discrimination. (RT 1083.) The trial court explained that it was not looking at percentages, but at "how many challenges are utilized against . . . African-Americans, and whether or not that amounts to a systematic pattern. . . . [¶] Given the fact that I think we have five in the first group, and even without that, I think two is too few. But we do have five in the first group that we've looked at so far. . . . [¶] Two is just simply insufficient." (RT 1084.)

After two more peremptory challenges the prosecutor challenged prospective juror Julia Green-Hanley[56] and the defense renewed the *Wheeler* motion, pointing out that three of the prosecution's first nine peremptory challenges were used against African-American venire members. (RT 1178-1179.)

The trial court commented that, "[i]t does appear there may be some good reasons for excusing them, but I think that there is at least a prima facie case sufficient for me to require the prosecutor to explain himself."

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[56]This prospective juror wrote her surname as "Green-Hanley" on her questionnaire, rather than "Greenhanley" as it appears in the reporter's transcript, so appellant spells her name as it appears on her questionnaire.

(RT 1179.) The trial court then reviewed the challenged individuals' questionnaires[57] before listening to the prosecutor state his reasons for the challenges. (RT 1179-1180.)

C. The Trial Court Erred in Finding that the Prosecutor Challenged Prospective Jurors Maiden and Anderson-Johnson for Race-neutral Reasons

The trial court's determination that the prosecutor challenged Anderson-Johnson and Maiden for race-neutral reasons is not supported by the record because the trial court itself, rather than the prosecutor, supplied some of the reasons it found acceptable, and because the reasons the prosecutor gave for the challenges to these individuals were both inherently implausible and unsupported by the record.[58]

1. The Prosecutor's Purported Reasons for Excusing Rodell Maiden Were Unsupported by the Record and Inherently Implausible

The trial court itself was troubled by the challenge to this potential juror, whose questionnaire responses reflected a thoughtful, careful person with an open mind who would, by any reasonable measure, have been in the words of the trial court, "a perfectly acceptable juror." (RT 1118; see Supp. CT-JQ 624 et seq. [Maiden's questionnaire].)

The prosecutor said that two issues had stood out with regard to

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[57]The questionnaires of the subject venire members are in the record at Supp. CT-JQ 434 [Anderson-Johnson], 624 [Maiden], and 705 [Green-Hanley].

[58]The prosecutor's explanation of the reasons that he had challenged Green-Hanley (RT 1181) were supported by the record (Supp. CT-JQ 705 et seq.) and not inherently implausible. Appellant raises no issue on appeal with regard to the prosecutor's challenge of Green-Hanley.

Maiden. First, the prosecutor thought that Maiden seemed to be walking a "fine line" on his questionnaire to avoid saying anything that would get him excused, and "[w]hen there was a tough question, he wouldn't answer it." (RT 1184.) As an example of this, the prosecutor pointed to Question 50 (which asked whether the potential juror thought a sentence of death or of life without possibility of parole was worse) stating that Maiden had written, ". . . 'I'm neutral.'" (RT 1184.) The prosecutor also highlighted question 44, which asked, "Which would you say most accurately states your philosophical opinion regarding the death penalty?" (Supp. CT-JQ 640.) The prosecutor said that Maiden "wouldn't even answer" this question. (RT 1185.)

The trial court asked the prosecutor if his point was that he didn't "get enough out of" Maiden. (RT 1185.) The prosecutor replied, "No. I just think that he was dancing on everything. And then the only thing that he was really committed about, that he would give an answer about is on page 8, Question 11. [¶] 28 years ago . . . he was, in his mind, wrongfully accused . . . on a bed check while in the army." (RT 1185.) The prosecutor said that he viewed this two ways: "We sit here right now and think, 'Okay, a bed check 28 years ago?' It was while he was you know, it doesn't say, it says July 1968, it doesn't say whether he was in Vietnam at the time. [¶] He does mention later on that he was in Vietnam from '68 to '70. [¶] We don't know if he was stateside or in Vietnam. [¶] But the point is that we can laugh and say, 'Well, gee, he missed a bed check.' [¶] Well, it was so serious that he brought it up and he felt that he was wrongfully accused. And it's interesting that 28 years later, he is still bringing that issue up." (RT 1185-1186, underlining added.)

The prosecutor concluded, ". . . what disturbs me the most about him

is that his answers were such that he was walking this fine line, and when it got to a question where they want an answer, 'What do you think is the most serious punishment?' We still don't know from him. And we don't. And I think that he just wanted on this jury. And I'm always suspect of people in that situation." (RT 1186.)

The trial court commented that Maiden appeared initially to be a "perfectly acceptable juror, and one would wonder . . . why anyone would excuse him other than the fact that he was Black." (RT 1188.)

Defense counsel pointed out that the questionnaire asked the prospective jurors whether they had ever been accused of a crime, so Maiden gave "a full history." (RT 1189.) This was correct.

a. The "fine line" basis

The prosecutor said that what bothered him the most about Maiden was that he had walked a "fine line" and had somehow deliberately filled out his questionnaire so that he would not get excused from jury duty. (RT 1184, 1186.) This rationale was inherently implausible and unsupported by the record.

It was inherently implausible because it is simply not rational to say that filling out a questionnaire in an unbiased manner could be a reason to exclude someone from the jury, when it is clear that filling it out in a biased manner would certainly be a good reason. The point of the questionnaire and of voir dire is to identify people with bias that impairs their ability to be fair. (See *People v. Cash* (2002) 28 Cal.4th 703, 705.) By definition, being unbiased is not a problem in this context, so selecting such a person for exclusion from the jury could not possibly have a "basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 324.) This reason was a "catch-22" that could be used to mask the wrongful challenge of any

qualified prospective juror.

Moreover, the prosecutor misrepresented both the letter and the sense of what Maiden had in fact written when he highlighted only certain words from the questionnaire responses to make it seem as though Maiden had been unwilling to state his views. Following are questions the prosecutor mentioned and Maiden's complete responses:[59]

Question 44:

"Which would you say most accurately states your philosophical opinion regarding the death penalty?

"_____ strongly in favor _____ moderately in favor

"_____ strongly against _____ moderately against

"__✓__ neutral [checked by Maiden]

"Please explain: *It would depend solely on degree of crim[i]nal charges brough[t] against the Defend[ant] according to law.*"

(Supp. CT-JQ 640.)

Thus, the prosecutor's statement that Maiden "would not even answer" this question (RT 1185) was not accurate. Maiden chose one of the suggested answers and explained his choice, indicating that he was "in favor" of the death penalty in the sense that he would be willing to impose it only in a suitable case, where it was legally permissible to do so.

Question 50:

"Overall, in considering general issues of punishment, which do you think is worse for a defendant:

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[59]In the quoted excerpt the text in regular type copies verbatim the questions on the questionnaire and the text in italics copies verbatim Maiden's handwritten answers.

"DEATH LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE

[Maiden did not circle either.]

"Please explain: Again – I'm neutral with punishment issues. I would view all of the circumstances and evidence."

(Supp. CT-JQ 642.)

Maiden's comments here are consistent with his earlier responses and comments, and amount to a statement that he believed that which punishment was "worse" depended on the crime and all the circumstances. There is nothing about Maiden's questionnaire to indicate that his reluctance to pre-judge anything about the case, especially the penalty, was the equivalent of trying to hide his true opinions.

Further, to say that the "only thing . . . he would give an answer about" (RT 1185) was question 11 was also inaccurate. To hear the prosecutor describe it, one would expect Maiden's questionnaire to be virtually blank. But in fact, Maiden provided complete personal information about himself and his immediate family (Supp. CT-JQ 627-629 [questions 1-6]), circled "yes" or "no" when those were the choices given on the questionnaire (Supp. CT-JQ 629-639, 641-644, 646-648 [questions 7-16, 18-35, 37-42, 47, 48, 51-57, 61-71]), and wrote answers and explanations in his own words where that was called for (Supp. CT-JQ 630-631, 634, 638, 639-642, 644 [questions 9, 11, 16, 17, 36, 42-46, 49, 50, 58].)[60] Maiden's written comments were not especially lengthy, but they

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[60]Maiden did not write anything in answer to questions 59 and 69. (Supp. CT-JQ 645.) Neither the prosecutor nor the trial court mentioned these omissions as significant in the decision to challenge and excuse him,

(continued...)

covered the subjects they addressed.

When Maiden's actual questionnaire in its entirety is compared with how the prosecutor described it, it is evident that the prosecutor came up with sham reasons for challenging him.

b. The "wrongful accusation" basis

The trial court found that Maiden's answer to question 11, and that "he is apparently still concerned about it 28 years later, it does seem to be a minor thing. And I think that that is . . . a sufficient reason [for challenging him]." (RT 1189.)

Indeed, the prosecutor said that he challenged Maiden because he was still bringing up such a minor incident so many years later, i.e. that he was making a big deal out of a trivial matter. The prosecutor said, "the point is that we can laugh and say, 'Well, gee, he missed a bed check.' [¶] Well, it was so serious that he brought it up and he felt that he was wrongfully accused. And it's interesting that 28 years later, he is still bringing that issue up." (RT 1186, underlining added.)

But the prosecutor's explanation was both inaccurate and inherently implausible as a reason for excusing Maiden. It was inaccurate because Maiden did not "bring up" his Army experience of many years earlier, he only mentioned it in answer to a question on the questionnaire. Question 11 asked: "Have you, an acquaintance or relative ever been ACCUSED of a crime, rightly or wrongly, even if the case did not come to court?" (Supp. CT-JQ 631, italics omitted, capitalization in original.) Maiden circled

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[60](...continued)
and given the careful treatment Maiden gave to every other page of the questionnaire, the omission of this page appears to be an oversight on his part.

"YES." The following questions and answers then appear on the questionnaire:[61]

> "If yes, who? *My first Sargent – U.S. Army*
>
> "What crime(s) ? *Accused Missing a Bed Check*
>
> "What happened? *I was found not guilty after further investigation*
>
> "When? *July 1969*
>
> "Was there a trial? ["YES" is circled]
>
> "If so, did you attend the trial? ["YES" is circled]
>
> "If so, how do you feel about what happened? *I feel well about the outcome. It would have been difficult to tell if I were [in] bed or not. At that time, I was very thin.*"

(Supp. CT-JQ 631.)

The prosecutor's explanation focusing on this question suggested that Maiden was somehow still upset after many years about something quite trivial. In this regard appellant notes first that while the prosecutor may have considered missing a bed check to be an insignificant offense, apparently the Army did not, since Maiden reported that there was a trial on the matter. (Supp. CT-JQ 631.) But in any case, Maiden's entire answer to question 11 made it crystal clear that he was <u>not upset</u>. Rather, he explicitly stated the contrary, i.e. that he felt "well about the outcome." (Supp. CT-JQ 631.)

Moreover, this purported reason for challenging this African-American venire member was inherently implausible because the notion that a venire member can be challenged because he answers a question of

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[61]In the quoted excerpt the text in regular type copies verbatim the questions on the questionnaire and the text in italics copies verbatim Maiden's handwritten answers.

this sort with scrupulous honesty is unreasonable, given that it would be proper to challenge someone who deliberately withheld such information. To hold otherwise would be another "Catch-22" for people answering this question: they can be kicked off if they answer it honestly or dishonestly. The questionnaire asked if he had ever been accused and Maiden simply answered the question.

Given the disparity between the record and the prosecutor's comments, and the "Catch-22" nature of both of his purported explanations, the trial court utterly failed to make a serious inquiry into the real reasons for the prosecutor's challenge of this African-American juror, and its ruling that it was not race-based is not supported by the record.

2. The Prosecutor's Reasons for Challenging Doryanna Anderson-Johnson Were Inherently Implausible and Unsupported by the Record

With regard to prospective juror Anderson-Johnson, the prosecutor first commented that the mere fact that she was a correctional officer did not mean she would be a good juror since in his experience, sometimes they are incarcerated too. (RT 1182.)

The prosecutor explained that he had concerns that Anderson-Johnson might recognize a witness, and that she had "kind of an affinity toward prisoners[,]" because she had worked with prisoners sentenced to life without possibility of parole and thought that that was a worse sentence than death.[62] (RT 1183.) Further, the prosecutor said that although Anderson-Johnson had originally written that she would always impose the

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[62]On her questionnaire Anderson-Johnson listed her occupation as 'Correctional Sergeant" and her employer as "Department of Corrections," with nine years of service in the "general location" of "Southern California." (Supp. CT-JQ 437)

death penalty for each of the special circumstances listed on the questionnaire (in question 58), "[a]s soon as she saw that that was an issue, she volunteered 'Oh, no, what I meant was sometimes.' And she changed all the 'always' to 'sometimes' in her answers." (RT 1183.) And finally, when explaining why she did not drink alcohol, she had written that she could not "afford to" because if there were an earthquake she wanted to be "in total awareness. . . ." (RT 1183-1184.) The prosecutor said that he had "given her a negative" based on that answer before she had entered the courtroom. (RT 1184.)

The trial court found that the prosecutor had made the required showing that he had challenged Anderson-Johnson "for reasons other than the color of [her] skin." (RT 1187-1188.) The trial court observed that it was possible that as a correctional officer Anderson-Johnson had formed a bond with people, and that the prosecutor had thought perhaps she would be "too close to it." (RT 1188.) It was more significant to the court, however, that the prosecutor was concerned that Anderson-Johnson might recognize one of the witnesses when they came into court, even though she had not recognized their names. The trial court found that was "sufficient reason standing alone to excuse somebody from the Department of Corrections . . . ." (RT 1188.)

Defense counsel addressed the prosecutor's purported concern that Anderson-Johnson might have seen appellant or Danny Dalton, who was on the witness list, at Chino, pointing out that the prosecutor had not asked Anderson-Johnson whether she was at Chino at a time when any of the witnesses in the case were there, and there was no showing otherwise that Anderson-Johnson had been there at the same time as appellant, Anthony Mercurio, Danny Dalton, or any other witness. (RT 1190.)

There was abundant opportunity for the prosecutor to question Anderson-Johnson, since she was voir dired both in open court (RT 851-855) and, at her request, in chambers (RT 855, 856-863). The prosecutor's purported reasons for challenging this African-American venire member were not supported by the record and/or were inherently implausible, particularly since he did not explore those areas in voir dire that he later claimed were his reasons for challenging her.

a. Changing her answers

During voir dire the trial court addressed Anderson-Johnson individually as follows: "having listened to what I said about the jurors' duty to weigh the factors in aggravation and mitigation, let's, for argument's sake, say one of those special circumstances was involved in a case on which you were sitting. Would you feel like [another venire member] at that point, or would you wait in order to determine what the penalty ought to be?" Anderson-Johnson replied that she would wait, and then said that she had been reading over her answers to question 58, and that it would be "sometimes" rather than "always" to questions 58 B, C, and D. (RT 813.)

The trial court, reasonably, did not identify this as one of the prosecutor's valid excuses for challenging Anderson-Johnson. This is understandable, considering the court's own view that other prospective jurors who had answered "always" to that very question should not be excused because they could possibly be rehabilitated during the voir dire process, implying that when the law was explained to them, they might reasonably change their responses. (RT 779-780 [Poirier], 748-749 [Griffith], 753 [Rofkahr], 755 [Valdez].) This excuse was inherently implausible.

b. Affinity toward prisoners

The prosecutor's purported explanation that he challenged Anderson-Johnson because she might have an affinity for prisoners is belied by his own comments to her during voir dire which reflected an expectation that she had a bias toward law enforcement, not prisoners. He opened his questioning of Anderson-Johnson by expressing a concern about her occupation and asking if she would be more inclined to believe her fellow officers than other witnesses. (RT 851-852.) He did not ask any questions geared toward uncovering sympathy for the defendant because of her general good feelings toward prisoners. He expected her to be more inclined toward the death penalty than a sentence of life. (RT 852-853.)

The thrust of the prosecutor's questions on voir dire makes sense in light of Anderson-Johnson's questionnaire, which indicated a special affinity toward and appreciation of law enforcement personnel, not of prisoners. It is hard to imagine someone who could have been more identified with prison officials. Not only was she a Department of Corrections employee, so were several other relatives. (Supp. CT-JQ 442.) She actually wrote that her "entire family" worked for the Department. (Supp. CT-JQ 438.) She herself had been a witness against prisoners who had committed assault with deadly weapons and brought narcotics into the correctional facility. (Supp. CT-JQ 441.) She responded to question 42 that she had had positive experiences with a peace officer, explaining: "Riverside Police Dept; excellent treatment of people; CHP, Dept. of Correct./ A majority are good employees." (Supp. CT-JQ 449.)

With regard to her "general feelings" about the death penalty (question 43) – before exposure to the court's explanation of the law during voir dire – she wrote, "My general feelings are neutral. My true feelings are

if the circumstances of the crime constitute or is mandated by the law to be punished by the death penalty then this is the mandated punishment, which is decided by the jury due to the facts only." (Supp. CT-JQ 450.) In answer to question 44, where she responded that her philosophical opinion about the death penalty was "neutral," she explained, "My neutral opinion depends on the circumstance of the crime. It also depends on if the assailant has or had any remorse for the crime committed." (Supp. CT-JQ 450.) And during voir dire she said that her experiences with condemned prisoners and those sentenced to life without possibility of parole had not changed her perspective since coming into the Department in 1985. (RT 860.)

Anderson-Johnson also indicated on her questionnaire that the fact that the defendant had been arrested did not cause her to have sympathy for him (question 31). (Supp. CT-JQ 447.) She wrote in answer to question 49 that she believed the defendant's background information was relevant to the consideration of penalty simply because: ". . . the crime needed to be judged along with the person's background." (Supp. CT-JQ 452.) She wrote that she thought life in prison without possibility of parole was a worse punishment than death because, "[t]his means internal [sic] life behind the walls of the Dept. of Corrections without the possibility of parole." (Supp. CT-JQ 452.) However, she also answered question 51 that there was nothing about either penalty that bothered or disturbed her. (Supp. CT-JQ 452.)

In answer to question 45, which asked why she held the opinion she did about the death penalty, she wrote, "Due to my criminology education and my Dept. of Corrections employment. I see the beginning and the end results of the punishment. It is not my position to decide unless I am

presented the facts as a jury member." (Supp. CT-JQ 451.) And her explanation of the purpose of the death penalty was: "It is the law's way of creating a deterant [sic] to society for committing any other similar crimes. It is developed to prevent any future crimes of the same nature or standard. It is the last result [sic] of punishment." (Supp. CT-JQ 451.)

These written responses reveal Anderson-Johnson to be a remarkably dispassionate individual who clearly believed in the criminal justice system. There is no hint of sympathy or compassion towards prisoners in her written or spoken comments. During voir dire, Anderson-Johnson mentioned that prison staff had been victims of "tremendous assaults" by inmates. (RT 853.)

It may be that there are correctional officers in the prison system who develop an "affinity" for prisoners, but there is every indication in this record that Anderson-Johnson was not one of them. The record does not support this as a basis for the prosecutor's challenge.

c. Recognizing witnesses

Anderson-Johnson did not indicate on her questionnaire that she recognized the names of anyone associated with the trial. Nevertheless, the trial court accepted the prosecutor's explanation that he thought she might recognize someone when they appeared in court in person, as a "sufficient" reason for challenging anybody from the Department of Corrections. (RT 1188; but see discussion, below, of the proper focus for evaluating the prosecutor's explanations.)

Anderson-Johnson said during voir dire that she had worked at the California Institution for Men in Chino from 1986-1989, including working with death-sentenced inmates when they went through the reception center to be processed at Chino before being transferred to San Quentin. (RT

862.) As defense counsel pointed out, nothing in the record indicates that any witness, or anyone else connected to appellant's trial, was a condemned inmate in state prison at that time, nor that anyone was incarcerated at Chino under any classification while Anderson-Johnson was there. (RT 1190.)

At the time of trial Anderson-Johnson was working at the state prison in Lancaster in Los Angeles County, which housed some prisoners sentenced to life without possibility of parole. (RT 862.) The record contains no reason for the prosecutor to think that appellant, Mercurio, Dalton, or any other witness was incarcerated in Lancaster, during the time Anderson-Johnson worked there.

The prosecutor's stated reason based on the possibility that Anderson-Johnson might recognize someone was a pretext. All the potential jurors lived locally, as did all the prosecution witnesses, and there was just as much – or more – chance that someone from the community would recognize appellant or a witness. And the felony records of all the prosecution witnesses with such histories were going to be revealed to all the jurors.

In any case, the trial court's finding that the possibility a corrections officer might recognize someone was a "sufficient reason to excuse somebody from the department of corrections" missed the point. The question before the court was not whether "somebody" from the Department could ever genuinely be excused for this reason. The question was whether in fact this prosecutor at appellant's trial had genuinely challenged this African-American person from the Department for this reason.

3. The Trial Court Used an Incorrect Standard for Evaluating the Prosecutor's Reasons

The trial court thought that the applicable standard was whether the prosecutor had "a reason that an ordinarily competent prosecutor might use that is unrelated to race." (RT 1189.) But that was only half of the test. As appellant explains here, it was the trial court's duty to assess the genuineness of the prosecutor's reasons, not merely whether he came up with race-neutral explanations.

On appeal, where error is alleged in the trial court's finding of no purposeful discrimination, the reviewing court should generally give "great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1221.) Great deference, however, does not mean total or unreasoned deference, and the trial court's determination must be supported by a record that reflects "a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. (*People v. Fuentes* [1991] 54 Cal.3d 707, 720; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198 [].) When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva, supra,* 25 Cal.4th at p. 386, parallel citations omitted.)

This Court has commented that in performing its evaluation the trial court "should be suspicious when presented with reasons that are unsupported or otherwise implausible []." (*People v. Silva, supra,* 25

Cal.4th at p. 385, citation omitted.) Moreover, "[w]here the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised. *See Caldwell [v. Maloney* (1st Cir. 1998)], 159 F.3d [639] at 651 (stating that serious questions of pretext are raised where the facts in the record are simply objectively contrary to the prosecutor's statements); *Johnson v. Vasquez,* 3 F.3d 1327, 1331 (9th Cir. 1993) (stating that courts are not bound to accept neutral reasons that are either unsupported by the record or refuted by it). The fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the sufficiency of a valid reason. *See United States v. Chinchilla,* 874 F.2d 695, 699 (9th Cir.1989) (stating that, although reasons given by prosecutor 'would normally be adequately "neutral" explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency')." (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1221.) Here, the facts in the record are "objectively contrary" to the prosecutor's statements about Maiden "bringing up" the bed-check accusation, and about Anderson-Johnson having an "affinity for prisoners."

At appellant's trial, after the prosecutor had given his purported explanations for the exercise of his challenges against the African-American venire members, the trial court declined to hear from defense counsel, explaining its understanding that after the court found a prima facie case the prosecutor had the burden of justifying "why he exercised his challenges. And they don't necessarily have to rise to the level of cause. [¶] They have to be . . . based somewhat reasonably, reasonably related to the case, the trial, the parties or the witness[es]." (RT 1187.)

After accepting the prosecutor's explanations for his challenges, the trial court invited the defense to "make a record" as to why this decision was wrong, adding, "But I'm not going to argue with you about it." (RT 1189.)

Defense counsel argued that *Wheeler* required that "there must be a reasonable basis upon which the witness was excused." (RT 1189.) He pointed out that it was always possible to come up with some reason to challenge a juror, and asked the trial court to look beyond the reasons given. (RT 1191.)

The trial court, however, said that the prosecutor's reasons "have to be legitimate, in my book, not ridiculous and race-neutral." (RT 1192, underlining added.) The trial court found that the prosecutor had "clearly" met that standard with regard to "the two ladies," i.e., Anderson-Johnson and Green-Hanley, but that "the question of the . . . reasons for excusing Mr. Maiden were a little closer." (RT 1192.) Nevertheless, the trial court said that it thought "having been wrongfully accused, even though it was 20 years ago, is a sufficient, legitimate race-neutral, nonridiculous reason for a prosecutor to excuse a potential juror." (RT 1192, underlining added.)

The trial court's approach to the *Wheeler* hearing was ill-conceived because its obligation was to determine not merely whether "an ordinarily competent prosecutor" (RT 1189) might excuse a potential juror for the reasons given, but whether this prosecutor *actually* excused *these* African-American people for those reasons. That is, the question before the trial court was not merely whether the reasons the prosecutor gave were race-neutral and "non-ridiculous", but whether those were the prosecutor's genuine reasons for challenging the African-American venire members and not merely a pretext. "If the prosecutor . . . offers the court race-neutral

reasons, it must still determine whether those stated reasons are untrue and pretextual. [Citation.]" (*People v. Ayala* (2000) 24 Cal.4th 243, 261; *People v. Alvarez* (1996) 14 Cal.4th 155, 196 [question is "whether the prosecutor's customary denial of [racially discriminatory] intent is true"]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 814 [remand for evidentiary hearing to determine prosecutor's motives at time of voir dire].)

The trial court was not "bound to accept at face value a list of neutral reasons that [were] either unsupported in the record or refuted by it. Any other approach leaves *Batson* a dead letter." (*Johnson v. Vasquez* (1993) 3 F.3d 1327, 1331.)

This Court's opinion deferring to the trial court's resolution of a *Wheeler/Batson* issue in *People v. Catlin* (2001) 26 Cal.4th 81 is instructive. There, this Court found the trial court had determined that "the prosecutor actually was motivated" (*id.*, at p. 119, underlining added) by the neutral reasons he had explained in the context of a *Wheeler* challenge because the trial court had explicitly stated that it was "convinced" (*ibid.*) that the prosecutor's exercise of peremptory challenges "'was not because of their race but was based on permitted reasons for exercising peremptories. . . .'" (*Ibid.*, italics in original.)

The trial court's focus, then, after the prosecutor gave facially race-neutral reasons, should have been on "the persuasiveness of the prosecutor's justification . . . ." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 324.) This "issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Ibid.*, underlining added; see also

Purkett v. Elem (1995) 514 U.S. 765, 768.)

Here, the trial court's acceptance of the prosecutor's reasons is not entitled to deference because the court did not make a serious inquiry into the genuineness of the proffered reasons, and those reasons were both unsupported by the record and inherently implausible, as appellant has demonstrated, above. (*People v. Silva, supra,* 25 Cal.4th at pp. 385-386.)

D. Reversal is Required

At appellant's trial the prosecutor challenged two reasonable, fair-minded African-American people who would have been exemplary jurors. The trial court's conclusion that those challenges were not racially motivated was unreasonable on this record, which demonstrates that the prosecutor's purported explanations were unsupported and sometimes contradicted by the record, and in some respects were inherently implausible. The entire judgment must be reversed.

No assessment of prejudice is necessary because these errors are prejudicial per se. (*People v. Wheeler, supra,* 22 Cal.3d at p. 283.) "The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (*People v. Montiel* (1993) 5 Cal.4th 877, 909 []; *People v. Fuentes, supra,* 54 Cal.3d 707, 716, fn. 4; see *People v. Howard* (1992) 1 Cal.4th 1132, 1158 [].)" (*People v. Silva, supra,* 25 Cal.4th at p. 386, parallel citations omitted.)

Reversal of the entire judgment is also required because the exclusion of African-American jurors because of their race violated state law as explained in *People v. Wheeler, supra*, 22 Cal.3d 258 and its progeny, and therefore denied appellant his due process right under the

federal constitution to the correct application of state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Clemons v. Mississippi* (1990) 494 U.S. 738, 746; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

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III

THE INTRODUCTION OF EVIDENCE OBTAINED BY AN ILLEGAL SEARCH AND SEIZURE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

A. Introduction

It is "a 'cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions."' [Citations.]" (*California v. Acevedo* (1991) 500 U.S. 565, 580.)

Appellant moved in limine, pursuant to section 1538.5,[63] for the suppression of evidence found by the police in a warrantless search of containers found in the trunk of his mother's car[64] three weeks after Gitmed's death. (CT 532-543; RT 397.) The trial court denied the motion after a hearing. (CT 898; RT 397-448, 475-507 [court's ruling at RT 505].) The trial court thought that the "nexus" between the seized items and the murder of Gitmed was "a little on the thin side" (RT 504) but held that because the police had sufficient probable cause to obtain a warrant for the

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[63]Section 1538.5 provides as follows in pertinent part: "(a)(1) A defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: (A) The search or seizure without a warrant was unreasonable."

[64]Appellant also moved under section 1538.5 to exclude ammunition found in his mother's house. (CT 572-582.) This motion was mooted by the trial court's ruling that the ammunition was irrelevant because the victim was killed with a .22 caliber weapon and none of the seized ammunition was that caliber. (RT 389-393.)

house, when they learned that the items they were seeking were not there, they had probable cause to search the car under the automobile exception to the warrant rule. (RT 506.)

As a result of the trial court's ruling a duffel bag and jacket that belonged to the victim, Ronald Gitmed, were introduced into evidence in the guilt phase of appellant's trial.

For the reasons and under the authorities set out below, the trial court's factual conclusions which were the basis of its ruling were unsupported by the record and the erroneous denial of appellant's 1538.5 motion and consequent introduction of the illegally seized items into evidence violated appellant's right under the Fourth and Fourteenth Amendments to freedom from unreasonable search and seizure. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.) This constitutional error was highly prejudicial in the circumstances of appellant's case, as appellant explains, *infra*, and reversal of the entire judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B. Evidence Produced at the Hearing on Appellant's 1538.5 Motion Did Not Support the Trial Court's Conclusion that the Seizure and Search of Bags Found in the Car Trunk Was Constitutionally Permissible

This Court has held that "when defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification. [Citation.]" (*People v. Williams* (1999)

20 Cal.4th 119, 136, underlining added.) On appeal from a denial of a suppression motion, the issues are limited to those raised during argument in the trial court. (*Ibid.*)

In the case at bar the police found two bags during a search of the residence and car of appellant's mother, Jean Churder, in whose home appellant was living at the time. There is no dispute that the police conducted the search without a warrant. The trial court correctly concluded that appellant had a reasonable expectation of privacy in the two bags which was not altered by the fact that his mother put them in her car.[65] (RT 477, 481.) The trial court held, therefore, that the police "should have got a warrant" before searching them. (RT 477-478.)

Whether the police had probable cause to search the bags without a warrant was therefore the remaining issue. (RT 481.) Appellant argued at the suppression hearing that there was not a sufficient nexus between the seized items and the murder of Gitmed to provide probable cause for the search of the bags or the seizure of one of the bags and the jacket. (RT 504.)

1. The Prosecution Did Not Meet Its Burden of Justification at the Suppression Hearing

This Court has made it clear that "[t]he prosecution has the burden of proving a justification for a warrantless search or seizure . . . ." (*People v. Williams, supra,* 20 Cal.4th at pp. 136-137.)

At the suppression hearing police testimony established the following sequence of events:

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[65]The trial court also found that appellant did not have an expectation of privacy in the car itself (RT 429-430) and appellant does not contest that finding on appeal.

On September 11, 1991, Michelle Keathley identified Ronald Gitmed's body. (RT 485.) At that time Keathley told the police that Gitmed had been seen with appellant. (RT 485.)

On September 14, 1991, Betty Abney, who was the roommate of appellant's sister, Eva Thompson, told Riverside Police Sergeant Fitzpatrick that two boxes and a bag, or two bags and a box, "belonging to Eva's brother James were in her apartment and had been removed" and taken to Jean Churder's house. (RT 489, 486, underlining added.)

At some point before September 25, 1991, Riverside Police Sergeant Fitzpatrick conveyed to Officer Martinez the information obtained from Abney.[66] (RT 490.)

On September 25, 1991, Officer Martinez went to Jean Churder's residence. (RT 402.) Martinez considered appellant a possible suspect in the homicide of Ronald Gitmed. (RT 402.)

On September 25, 1991, appellant's sister, Gina Churder, told Officer Martinez that appellant's property that had been at Eva Thompson's house was in the trunk of Jean Churder's Buick (RT 488-489), which at that time was not at the residence. (RT 488-489.) Jean Churder arrived at her home after the police were already there and parked her car in the driveway. (RT 407-408.) She was not present outside by the car when the police searched it and opened the trunk, where she had stored two bags. (RT 408, 413.) Officer Martinez removed the bags from Churder's trunk. (RT 403-

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[66]On September 17, 1991, Tony Mercurio told Fitzpatrick that appellant had killed Gitmed. (RT 487.) Fitzpatrick was also "made aware" that appellant "had obtained personal property of the victim." (RT 493.) There was no evidence, however, that the latter information was communicated to Officer Martinez or any other officer involved in the search of Churder's car.

404.)

At the suppression hearing, the trial court designated as "Bag A" the blue and white bag shown in photograph Exhibit A, and as "Bag B" the solid blue bag, shown in photograph Exhibit B. (RT 444-445.) Jean Churder testified that "Bag A" belonged to appellant and "Bag B" was hers. (RT 415, 416-417.)

Also on September 25, 1991, Ronald Gitmed's cousin Michelle Keathley came to the Churder residence at the request of the police. (RT 405, 434.) Martinez could not recall whether she first opened the bags before or after Keathley's arrival, but she did open them and show the bags and their contents to Keathley. (RT 405, 434-435, 438-439, 447.)

On September 25, 1991, Keathley told Officer Martinez that Bag A belonged to Gitmed but she did not identify Bag B. (RT 445-446.) Nevertheless, Martinez took a jacket out of Bag B and showed it to Keathley, who said it belonged to Gitmed. (RT 435, 439, 446, 448.)

2. The Record Does Not Support the Trial Court's Conclusion That Before the Search There Was a Nexus Between the Bags in the Car Trunk and the Murder of Gitmed

"The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." (*Ornelas v. United States* (1996) 517 U.S. 690, 696.) Because it is a mixed question of law and fact, a trial court's determination of probable cause requires independent appellate review. (*Ibid.*)

Here, the trial court got the facts wrong when it summarized the

evidence that it believed justified the search and seizure of the bags and their contents. (RT 505-506.) The trial court mistakenly believed that the officers who conducted the search had information that appellant had some property belonging to Gitmed (RT 505), and also mistakenly believed that they had found something belonging to Gitmed in Bag A which then justified looking into Bag B (RT 479). As explained below, the court was also mistaken about the governing law, since it apparently overlooked the rules concerning private citizens acting as agents of the police.

a. Closed Containers Found in an Automobile May Be Searched Without a Warrant Only If There Is Probable Cause to Believe They Contain Contraband or Evidence

The prosecutor contended correctly at the suppression hearing that the search and seizure of the subject bags was controlled by *California v. Acevedo, supra,* 500 U.S. 565. (RT 476, 494.) In that case, the United States Supreme Court held that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*Id.*, at p. 580, underlining added; see also *United States v. Ross* (1982) 456 U.S. 798, 824; *Carroll v. United States* (1925) 267 U.S. 132, 151.) The high court has explained that probable cause is a fluid concept based in practical human experience, and that it exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." (*Ornelas v. United States* (1996) 517 U.S. 690, 696.) Moreover, "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." (*Id.*, at p. 699.)

This court has emphasized that "whether a search is reasonable must be determined based upon the circumstances known to the officer when the

search is conducted. '[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.' (*Scott v. United States* (1978) 436 U.S. 128, 137 []; *Ornelas v. United States* (1996) 517 U.S. 690, 696 [] [probable cause is based upon 'the known facts and circumstances']; . . . *Henry v. United States* (1959) 361 U.S. 98, 102[] ['Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.']; *Carroll v. United States* (1925) 267 U.S. 132, 149 [] [probable cause must be based upon 'a belief, reasonably arising out of circumstances known to the seizing officer'].)" (*People v. Sanders* (2003) 31 Cal.4th 318, 334, underlining added, parallel citations omitted.)

b. The Police Had No Reason to Believe That the Items in the Car Were Connected to the Murder of Gitmed

When the police seized and searched the subject bags they had no probable cause to justify their conduct. No facts were presented at the suppression hearing that could possibly have caused the police reasonably to believe that anything in Jean Churder's house or car was connected to the murder of Ronald Gitmed.

Trial defense counsel argued vigorously that the mere fact that appellant was a suspect in the Gitmed murder did not confer probable cause on the police to search everything he owned. (RT 496-497.) Counsel correctly stated that, "[t]here is no exception to a warrant . . . that says if you have a suspect in a homicide investigation arrested and in custody you can now search his home, his car, his belongings, his boxes." (RT 497.)

At the time of the search, all Officer Martinez knew was that some of appellant's property had been at his sister's house and had been moved to Jean Churder's house, where appellant was living. Martinez had no reason whatsoever to believe that whatever the "two bags and a box" or "two boxes and a bag" (RT 489) contained had any connection with Gitmed's murder.

Further, defense counsel pointed out that Gitmed's body had been found on August 28, 1991, and the bags were seized and searched almost 30 days later, on September 25, 1991. (RT 482.) Defense counsel argued that, even assuming arguendo the police had probable cause to seize the bags based on Keathley's statement at the scene of the search, they did not have probable cause to search their contents – the mere fact that one bag belonged to a homicide victim was not enough, since the homicide had occurred 28 days earlier. (RT 483.)

Defense counsel also pointed out at the suppression hearing that there was no evidence as to which bag the police searched first, since Officer Martinez testified she could not recall, and there was no evidence anything belonging to Gitmed was inside Bag A, which was the only bag Keathley had said belonged to Gitmed. Bag B had not been connected to Gitmed, yet Martinez searched it. (RT 479-480)

The trial court found that the police did not need a search warrant to search the *car* because of the "automobile exception" since Churder could have driven away while the police obtained a warrant. (RT 506.) Appellant does not dispute that finding on direct appeal.

However, the trial court also found that Keathley's statement that Bag A belonged to Gitmed provided probable cause for the search of that bag and went on to reason that inside Bag A was "apparently some property

belonging to the victim which raises probable cause to go into Bag B." (RT 479, 481.) In fact, there was no evidence that anything belonging to Gitmed was found in Bag A.

Equally erroneous was the trial court's conclusion that: "if the police have information from Tony Mercurio on September 17th that the defendant shot and killed the victim, and they have information from the roommate of the defendant's sister that the defendant has some of the victim's belongings, that even standing alone, that's probably sufficient to give them probable cause to look for those items. [¶] And in conjunction with the rest of the evidence, I think there's a sufficient nexus." (RT 505, underlining added.)

Again, the trial court's recitation of the facts was simply wrong. According to police testimony at the suppression hearing, before the search they had no information at all about the "victim's belongings." They knew only that appellant's own property had been moved from his sister's apartment to his mother's house, and that it was at that time in Churder's car. (RT 486.)

So the trial court got the two most critical facts dead wrong.

Defense counsel therefore argued that there was not a sufficient nexus between the seized items and the murder of Gitmed, and that even if the police had probable cause to search the house, they did not have probable cause to search the containers in the car. (RT 504, 506.)

Trial counsel was correct. There was no evidence that appellant's property which had been stored at Eva Thompson's house or any other property *of his* in his mother's house or car, had any connection at all to Gitmed's murder. The mere fact that he was a suspect in that case did not confer probable cause to search everything that belonged to him. "The

scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." (*United States v. Ross, supra,* 456 U.S. at p. 823, fn. omitted.)

It is inescapable that the police simply had no actual reason to think that the bags in Churder's trunk contained any evidence relevant to the Gitmed murder. There was no "nexus."

Moreover, the trial court's reasoning is erroneous. Appellant submits that the critical question is whether the initial seizure and opening of the bags was constitutionally permissible. If not, then the police could not recruit Keathley to search the bags, and Keathley's subsequent identification of Bag A and the jacket in Bag B could not be used to retroactively justify the seizure and opening of the bags in the first place.

This is so because this Court has held that the conduct of a private citizen is subject to the restrictions of the Fourth Amendment when she opens or inspects the contents of a container at the instigation of the police for the purpose of finding incriminating evidence. (*People v. McKinnon* (1972) 7 Cal.3d 899, 912 [airline employee deemed agent of police where employee opens and searches package at request or direction of police]; *People v. Fierro* (1965) 236 Cal.App.2d 344, 347; see *Dyas v. Superior Court* (1974) 11 Cal.3d 628, 632-635 [discussion of "private citizen" doctrine]; cf. *People v. Wharton* (1991) 53 Cal.3d 522, 579 [estate examiner not agent of police where he discovered hammer in defendant's property in private citizen capacity and police merely said to let them know if he "happen[ed] to run across a hammer or anything"].) The trial court's finding that the police had probable cause to seize and search the bags on

the basis of Keathley's information was therefore incorrect as a matter of law.

C. Reversal is Required

The search and seizure of the duffel bag and jacket found in the trunk of Jean Churder's car violated the Fourth and Fourteenth Amendments of the federal constitution, and their consequent introduction into evidence was extremely prejudicial to appellant because they were the only items of the victim's property found in appellant's possession at any time and the prosecutor argued to the jury, albeit improperly (see Arguments IV, VI, *post*), that they were evidence of his guilt of robbery. (RT 1439, 2921, 2928, 2935.) On this basis, the jury returned its verdict of first-degree murder in the guilt phase of appellant's trial, making him eligible for consideration for the death penalty.

Alternatively, under the standard urged by Justice Scalia in his concurrence in *Tuggle v. Netherland* (1995) 516 U.S. 10, the question is whether there is a reasonable doubt "as to whether the constitutional error contributed to the jury's decision to impose the sentence of death. (*Satterwhite v. Texas,* 486 U.S. 249, 256 [] (1988)." (*Id.*, at p. 15, parallel citation omitted.))

In appellant's case, it is evident that the jury believed that Gitmed was killed in the course of a robbery, since it found true the special circumstance of felony-murder. (CT 1096.) That, and the fact that there was no evidence of premeditation (see Argument IV, *post)*, means that the jury must have found appellant guilty of first-degree murder on a theory of felony-murder based on the robbery of Gitmed. The only items of Gitmed's property that the prosecution used to support that theory, however, were the bag and jacket found in Ms. Churder's car a month after the murder. That

evidence was unconstitutionally obtained and should never have been admitted; thus, the special circumstance finding of robbery-murder, based on inadmissible evidence, is invalid. (See Arguments IV, VI, *post.*)

The admission of this evidence, and the jury's reliance on it, could not have been more prejudicial, since it resulted in appellant's conviction of first-degree robbery murder and in the finding of the special circumstance of felony-murder based on robbery.

In these circumstances, the prosecution cannot possibly establish beyond a reasonable doubt that this violation of appellant's federal constitutional rights was harmless, and reversal of the entire judgment is required. (*Chapman v. California, supra,* 386 U.S. at p. 24; compare *People v. Tewksbury* (1976) 15 Cal.3d 953, 972.)

Appellant acknowledges the fact that the jury also considered appellant's prior murder conviction in aggravation, which appellant concedes for purposes of direct appeal was admissible for that purpose. The existence of one special circumstance based on constitutionally inadmissible evidence requires reversal of the death sentence, however, even if the death verdict was also based on another, valid aggravating factor. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 590, and fn. 9.)

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IV

THE ENTIRE JUDGMENT MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO FIND APPELLANT GUILTY OF FIRST DEGREE MURDER

A. Introduction

Appellant was convicted of first-degree murder under section 187, which made him eligible to be considered for the death penalty under section 190.2[67]. As appellant demonstrates below, the entire judgment against him must be reversed because there was insufficient evidence presented at his trial to support his conviction of first-degree murder under any theory, that conviction was therefore constitutionally invalid, and he was not death-eligible.

Appellant was tried for both premeditated and felony-based murder in the first degree, and on the alternative theories that he was the direct perpetrator or that he was an accomplice. (CT 189; RT 2337-2338, 2906-2910, 2919; see §§ 187,[68] 189.[69]) The prosecution also alleged that

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[67]Section 190.2, subdivision (a) provided at the time of appellant's crime and trial, in pertinent part: "The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been found under section 190.4 to be true: . . ." (Underlining added.)

[68]Section 187 provides, and provided at the time of appellant's trial, in pertinent part: "(a) Murder is the unlawful killing of a human being . . . with malice aforethought."

[69]Section 189 provided at the time of appellant's crime, in pertinent part: "All murder which is perpetrated by means of . . . willful, deliberate, and premeditated killing, or which is committed in the perpetration of . . .

(continued...)

appellant had personally used a firearm in the commission of the murder. (CT 189; see §§ 12022.5(a) and 1192.7(c)(8).) Additionally, the prosecution alleged as special circumstances under section 190.2 subdivision (a) that appellant committed the murder while engaged in the commission of a robbery,[70] and under subdivision (b) that he had previously been convicted of first-degree murder. (CT 190.)

The jury returned a split verdict, finding appellant guilty of first degree murder but also finding that he did not personally use a firearm. (CT 1096, 1097.) The jury also found that both special circumstances were true. (CT 1095[71], 1109).

That is, appellant was convicted of first degree murder under section 187. (CT 1097.) In addition, the jury returned a separate finding that the allegation that appellant personally used a firearm was untrue.[72] (CT 1096.) The jury was not polled (CT 1100; RT 3075) but had been instructed that all verdicts and findings had to be found unanimously (RT 3051).

It is clear, then, that one or more jurors were not convinced beyond a reasonable doubt that appellant was the shooter, or that he had pointed a gun at the victim, who died of gunshot wounds, or that he used a gun at all.

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[69](...continued)
robbery is murder of the first degree."

[70]Appellant was not separately charged with robbery.

[71]See Argument VI, *post* [no substantial evidence of special circumstance felony-murder].

[72]That finding read: "We, the jury in the above-entitled action, find the defendant JAMES ALVIN "TEX" THOMPSON, in the commission of the offense charged under Count I [of] the Amended Information, did not personally use a firearm, within the meaning of Penal Code Sections 12022.5(a) and 1192.7(c)(8)." (CT 1096.)

(RT 1533, 1536-1537.) The trial court later acknowledged, at sentencing, that the prosecution had not proved that appellant was the actual killer:

> "Well the jury obviously had a reasonable doubt as to which of the two was the shooter, and I can see why based on my consideration of the evidence. ¶ I don't know that that means necessarily that Mr. Mercurio was or was not the shooter. What it means is that there's a reasonable doubt as to which of them actually did the shooting. In any event, we will probably never know who actually shot Mr. Gitmed."

(RT 3491, underlining added.)

Under the provisions of section 189 relevant to the instant case, a defendant may be convicted of first-degree murder if he kills someone by a "willful, deliberate, and premeditated" act, or if he kills someone "in the perpetration of" certain enumerated felonies, including robbery. And under section 31[73], he is a principal in the crime of murder whether he is the actual killer or an accomplice.

Appellant submits, based on the argument and authority set out below, that there was insufficient evidence to support a conclusion that he was guilty under section 189 of first-degree premeditated murder or felony-murder even as a direct perpetrator, and no evidence to support a conclusion that he acted as an aider and abetter.

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[73]Section 31 provides, and provided at the time of appellant's crime, in pertinent part: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed."

B. The State and Federal Constitutions Require Sufficient Evidence at Trial From Which a Rational Trier of Fact Could Find Guilt Beyond a Reasonable Doubt Under Any Theory on Which the Jury Actually Relies

The due process clauses of the state and federal constitutions require that any criminal conviction must be based on proof beyond a reasonable doubt of every element constituting the crime. (Cal. Const., art. 1, § 24; U.S. Const., 5th & 14th Amends.; *Jackson v. Virginia* (1979) 443 U.S. 307, 316-317; *Mullaney v. Wilbur* (1975) 421 U.S. 684; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Davis (1995) 10 Cal.4th 463, 509; People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) And this Court has held that a verdict of guilt must be based on evidence that is "reasonable, credible, and of solid value." (*People v. Johnson, supra,* 26 Cal.3d at p. 578.)

The United States Supreme Court has explained that "[t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." (*Jackson v. Virginia, supra,* 443 U.S. at p. 324.) Further, ". . . the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is 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.]" (*Id.*, at pp. 318-319, footnotes omitted, italics in original.)

Soon after *Jackson v. Virginia* came down, this Court clarified the state reviewing court's duty in determining whether substantial evidence supports a criminal conviction, as follows: "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the

existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Mosher* (1969) 1 Cal.3d 379, 395 [82 Cal.Rptr. 379, 461 P.2d 659]; *People* v. *Reilly, supra*, 3 Cal.3d 421, 425.)" (*People v. Johnson, supra,* 26 Cal.3d at p. 576, underlining added.) To fulfill this obligation, the reviewing court must consider all the evidence before the jury, not just that which may have supported the prosecution theory, and must analyze the entire record to judge whether substantial evidence supported every element of the crime. (*Id.*, at p. 577.)

This Court defined substantial evidence in *Johnson* as "evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id.*, at p. 578; accord, *People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Green* (1980) 27 Cal.3d 1, 55 [evidence must be "credible and of solid value"].)

Further, ". . . the more serious the charge--and murder is considered the most serious charge of all--the more substantial the proof of guilt should be in order to reasonably inspire confidence." (*People* v. *Blakeslee* (1969) 2 Cal.App.3d 831, 837, underlining added.)

Because there was insufficient evidence to support it, appellant's conviction of first-degree murder violates the state and federal constitutions under all the authorities cited in the instant argument and reversal of the entire judgment is required.

C. Insufficient Evidence Supported Appellant's Conviction of First Degree Murder As the Actual Shooter

While the jurors' finding that appellant did not personally use a

firearm indicates that one or more jurors must have believed he was an aider and abetter, by the same token, that finding is consistent with the possibility that some jurors convicted him as the direct perpetrator. Thus, this Court must examine the record to determine whether substantial evidence was presented at trial to support appellant's conviction on that theory. Appellant submits that it was not.

Anthony Mercurio testified that he drove out to Canyon Lake with appellant and Gitmed as passengers, that while he stood next to the truck appellant and Gitmed walked a few yards away and started arguing, and that appellant told Gitmed to take off his clothes and after Gitmed removed his shirt or jacket, appellant shot him point blank. (RT 1887-1959.) He also testified that he did not see Gitmed take anything out of his pockets nor hear appellant ask him for anything, but that when appellant returned to the truck he "might" have thrown Gitmed's wallet or some change "or something" into the truck before they left the scene. (RT 1895-1896.)

The jury also heard Mercurio's grand jury testimony of May 7, 1992, read into the record from a transcript, including his statement that while appellant was holding a gun on Gitmed, appellant told him to empty his pockets and Gitmed took some property out of his pockets and put "his wallet or some change and stuff" on the hood of the truck. (RT 2534, 2537, underlining added.) At trial, Mercurio explicitly testified that he did not recall this occurring. (RT 1961-1962.)

1. Insufficient Evidence That Appellant Premeditated the Murder of Gitmed

Nothing in Mercurio's story, as told to the grand jury or at trial, established that appellant acted other than impulsively in shooting Gitmed.

Mercurio did not testify to any statements or conduct by appellant

indicating animosity toward Gitmed at any point, nor did appellant ever display a gun to Mercurio or indicate in any way that he intended to harm Gitmed. (RT 1894.) Indeed, Mercurio's trial testimony indicated that he himself was surprised when he suddenly heard shots. (RT 1894 ["It was dark out there. I just heard shots and it was over."]; 1894-1895 ["I was pretty much in shock about what just happened"].) Additionally, he testified that just before he heard those shots, appellant had been raising his voice at increasing volume (RT 1893).

This body of evidence only reasonably supported a conclusion that appellant shot Gitmed in the anger of the moment.

Certainly there is nothing in the manner of killing that Mercurio described to suggest that appellant shot Gitmed with premeditation and deliberation, and shooting a gun during an argument is a circumstance and method of killing highly compatible with a sudden impulse. (Compare *Drayden v. White* (2002) 232 F.3d 704, 709-710 [evidence of premeditation where defendant knocked victim unconscious, then strangled him neatly with cord and again with wire hanger]; *People v. Hawkins* (1995) 10 Cal.4th 920, 957 [evidence of premeditation where execution-style killing, victim shot in back of neck and head].) Nor did any of appellant's actions reflect that he acted with "'cold, calculated judgment.'" (*Drayden v. White, supra*, 232 F.3d at p. 719, quoting *People v. Perez* (1992) 2 Cal.4th 1117, 1127; compare *Perez* 2 Cal.4th at pp. 1121, 1129 [killer took knife from victim's kitchen, got second knife when first knife broke].)

Appellant submits that this evidence was not sufficient to sustain a conviction of premeditated murder under section 189. (See *People v. Johnson, supra*, 26 Cal.3d at p. 578 [guilt verdict must be based on evidence that is "reasonable, credible, and of solid value."].) Thus, even

with regard to those jurors who may have believed Mercurio's testimony about appellant's conduct, that testimony did not constitute sufficient evidence on which to base a rational conclusion beyond a reasonable doubt that appellant was the direct perpetrator of premeditated murder.

2. Insufficient Evidence That Appellant Robbed Gitmed

Aside from premeditation, the only other theory under which the jury could have convicted appellant of first-degree murder under section 189 was that of felony-murder, and the prosecution was required to prove beyond a reasonable doubt the existence of every element of the underlying felony–here, robbery. (*People v. Lewis* (2001) 25 Cal.4th 610, 642; *People v. Berryman* (1993) 6 Cal.4th 1048, 1085.)

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code § 211.) As this Court has further explained, "[r]obbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property. (§ 211; *People v. Harris* (1994) 9 Cal.4th 407, 415.)" (*People v. Marshall* (1997) 15 Cal.4th 1, 34, underlining added.)

a. No Substantial Evidence that Gitmed Was in Possession of Any Property at the Scene of the Crime

This Court has explained that, under section 211, ". . . the requirement that the taking be from the '"person"' or '"immediate presence"' of the victim describes a spatial relationship between the victim and the victim's property, and refers to the area from which the property is

taken. Thus, the decisions addressing the 'immediate presence' element of robbery have focused on whether the taken property was located in an area in which the victim could have expected to take effective steps to retain control over his property. (See, e.g., *People v. Harris* (1994) 9 Cal.4th 407, 422-424 [] [victim forcibly restrained in car outside office and home while robbers looted each location]; *People v. Webster* (1991) 54 Cal.3d 411, 439-442 [] [defendants induced victim to walk a quarter-mile away from his car, then killed him and took his car]; *Hayes, supra,* 52 Cal.3d at pp. 626-629 [victim assaulted and killed 107 feet from motel office where property was taken]; *People v. Bauer* (1966) 241 Cal.App.2d 632, 641-642 [] [defendant killed victim inside her apartment, then stole victim's keys and took her car parked outside]." (*People v. Frye* (1998) 18 Cal.4th 894, 955-956, parallel citations omitted; see *Webster v. Woodford* (9th Cir. 2004) 361 F.3d 522, 529-532 [upholding this Court's construction of "immediate presence" requirement].)

When Gitmed's body was found there was a watch on his wrist and he was wearing trousers. (RT 1517.) At appellant's trial no credible evidence of solid value was presented by the prosecution to establish that Gitmed had any other personal property in his possession or immediate presence at the time he was killed.[74]

Michelle Keathley did testify that when appellant and Gitmed left her house for the last time Gitmed took some drugs with him because appellant had told Gitmed that he could get money for the drugs. (RT

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[74] Mercurio had testified to the grand jury that Gitmed had taken things out of his pockets when appellant pointed a gun at him. (RT 2537.) At trial, however, he testified that he did not remember seeing this and that he never saw appellant with a gun. (RT 1894.)

1619.) There was no evidence, however, that Gitmed still had these drugs when he was killed, and Mercurio testified that he, Gitmed, and appellant had all used methamphetamine supplied by Gitmed before they went off-roading. (RT 1884-1885.) Certainly no rational juror could have concluded beyond a reasonable doubt that Gitmed had any of the drugs left, nor that he had them on his person or in his immediate control when he was shot.

In closing argument the prosecutor virtually conceded the lack of evidence that Gitmed had any property with him at Canyon Lake when he asserted that appellant had killed Gitmed, "even after apparently Ron Gitmed gave up his personal property." (RT 2919, underlining added.) It is unclear what the prosecutor meant by "apparently," and he did not mention any items of personal property that Gitmed had "apparently" given up.

The prosecutor continued to gloss over the lack of evidence that Gitmed was in possession of any personal property at the time he was killed, repeatedly mentioning vaguely that Gitmed's jacket and bag "wound up" at appellant's mother's house (RT 2921, 2928, 2935) and otherwise using such amorphous phrases as "wound up with the property of Ronald Gitmed" (RT 2922) and "he's possessing Ron Gitmed's property" (RT 2925) without ever specifying what property, or identifying any items of property as being in Gitmed's possession or immediate presence when he was killed.

The prosecutor literally summarized the evidence of robbery as follows: "What do the circumstances show? It shows that the defendant was out there with a gun, wound up with the property of Ronald Gitmed and shot and killed him. Ladies and gentlemen, I submit to you that the circumstances there show that the defendant was committing a robbery." (RT 2922.) But "winding up" with the victim's property a month after the

crime cannot possibly support a rational conclusion that appellant obtained the property by forcibly taking it from the victim at any time, let alone when he was killed – particularly since the jury did not conclude that appellant was "out there with a gun." (See section H, below, in the instant argument [prosecutorial misconduct in closing argument).

Significantly, in the prosecutor's point-by-point review of the "very pertinent facts" during closing argument (RT 2931) he did not mention any testimony or other evidence establishing that Gitmed had any personal property with him when he left Michelle Keathley's house with appellant, nor when he left the Tripletts' compound with appellant and Mercurio. (RT 2931-2935.)

The prosecutor simply never pointed to any property taken from Gitmed by force or fear at the shore of Canyon Lake, which is understandable since this was a glaring omission in the prosecution's case.

Moreover, the evidence that appellant was asking various people for a ride to Temecula so that he could pick up $6000 actually undermines any inference in the record that appellant had a motive to rob Gitmed because it established that he had access to a substantial amount of money. (See RT 1603, 1621.)

The prosecutor argued that robbery was appellant's "motive" for killing Gitmed, identifying "the car, the bag" as the property taken. (RT 2938.) This was nonsense. Again, there was no evidence that either appellant or Mercurio obtained a car key or anything else providing access to these things, nor any evidence of how or when appellant acquired Gitmed's bag. In any case, the prosecutor was mistaken as a matter of law. Theft is not robbery, and is not an inherently dangerous felony that will support a felony-murder conviction.

There was simply no evidence that appellant or Mercurio took Gitmed's car or bag by force or fear, and none that either of them killed Gitmed in order to acquire these things. At the time of the killing, Gitmed's car was back at the Santa Rosa Mine Road property and no evidence was presented to establish the location of the key to that car at any time. Nor was there any evidence of the location of the bag[75] at the time of the murder or indeed at any time before it was found in Jean Churder's car a month after the murder. (RT 1488, 1816.)

At the hearing pursuant to section 1538.5, at which appellant correctly argued that the jacket and bag should be excluded from evidence (see Argument III, *supra*) the trial court remarked at the lack of any evidence as to when appellant had come into possession of those items, saying, "Maybe the victim gave the defendant his property a few days beforehand." (RT 503.) In fact the only indication in the record about appellant's acquisition of the bag and jacket was police testimony at that suppression hearing – which, of course, the jurors did not hear – that on September 17, 1991, Mercurio told the police that James had "obtained personal property of the victim" without any specification of how or when appellant came into possession of the jacket, the bag, or any other "personal property." (RT 493.) Mercurio may have been referring to the property he said appellant took from Gitmed's storage locker after he had been killed,

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[75]The bag found in Churder's car was a black, white, and blue nylon duffel bag of the type with handles and zipper pockets, commonly used for carrying athletic gear. (Exhibit 11.) Mercurio testified that when he looked inside Gitmed's car at the Santa Rosa Mine Road property he saw "trash bags" filled with clothing in the car, as well as a stereo and "a lot of stuff." (RT 1897.) Clearly that testimony did not refer to the bag found in Churder's car.

and which appellant then allegedly gave to Mercurio and his girlfriend.

On this record it is possible that the jacket and bag were taken from Gitmed's car or his storage locker some time after his death. (See RT 2182 [testimony by Charlene Triplett that Gitmed's car contained "personal stuff"] and RT 1584 [testimony by Fortney that Gitmed had clothing and personal items in his car].) It is even possible that Gitmed gave these items to appellant, considering that he was in the process of moving, putting things in storage, and probably disposing of things. (See RT 503 [trial court comment that Gitmed may have given bag and jacket to appellant].)

In *People v. Morris, supra,* 46 Cal.3d 1, this Court concluded that there was insufficient evidence of robbery where there was no evidence that the victim was in possession of any property when he was killed and the defendant was found days later in possession of the victim's credit card. (*Id.*, at p. 20; compare *People v. Cleveland* (2004) 32 Cal.4th 704, 717 [sufficient evidence victim was in possession of property at time of killing where watch and jewelry victim normally wore missing when body found]; *People v. Maury* (2003) 30 Cal.4th 342, 402-403 [sufficient evidence victim possessed property where her mother had given her $100, victim had shown someone large roll of money and talked of buying "dope" and neither drugs nor cash found on victim after death]; People *v. Santamaria* (1991) 229 Cal.App.3d 269, 272 [sufficient evidence where pale areas on victim's skin indicated he had been wearing jewelry and a watch & defendant later involved in attempting to sell and pawn those items].) The state of the evidence in appellant's case compels the same conclusion as in *Morris*.

b. No Substantial Evidence That Appellant Took Any Property from Gitmed When He Was Killed

Mercurio's testimony with regard to whether appellant actually took anything from Gitmed was conflicting and ambiguous.[76]

On direct examination at trial, Mercurio testified that he did not see Gitmed take anything out of his pockets, and that appellant did not say anything to Gitmed "about pockets or empty your pockets . . . ." (RT 1894.) Mercurio testified that Gitmed stripped off his shirt before being shot, but did not testify that he saw appellant going through Gitmed's clothing at any point. He said that when appellant got back into the truck, appellant "threw something in the back, I believe . . . ." (RT 1895.) The following testimony was then elicited:

> "Q. Did you see anything? Was he holding anything? Did you see anything in his hands?
>
> "A. I believe he had some of Tex's personal items, or excuse me, Ron's personal items.
>
> "Q. What do you mean personal items?
>
> "A. I think he might have had a wallet or some change or something like that.
>
> "Q. Did you see him opening up the wallet and looking at it?
>
> "A. I can't remember for sure."

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[76]This portion of appellant's argument assumes, arguendo, that this Court concludes that Mercurio's testimony aside from his account of the actual killing was worthy of belief. (See Argument V, *infra* [no corroboration of accomplice testimony].)

(RT 1895-1896, underlining added.)

This testimony could not support a conclusion beyond a reasonable doubt that appellant had anything belonging to Gitmed. Aside from the vagueness of "wallet or some change or something," there was no foundation to establish that whatever Mercurio thought he might have seen in appellant's hands in fact belonged to Gitmed rather than to appellant.

Further, neither Gitmed's wallet nor any change or other items that could have come from Gitmed, was produced at trial nor was any reference made to such evidence by any other witness. (Compare *People v. Valdez* (2004) 32 Cal.4th 73, 104-105 [shortly before murder victim had boasted he had $3000 and body was found with bloodstained pants pocket turned inside out]; *People v. Marks* (2003) 31 Cal.4th 197, 206, 230 [taxi driver victim usually carried $1 bills but no bills were found on him when body discovered and defendant had several $1 bills when arrested, and defendant had no money before the murder but did have some afterward]; *People v. Green* (1980) 27 Cal.3d 1, 17 [defendant took wedding rings from victim at scene of murder and took her purse with a few dollars in it]; *People v. Bolden, supra,* 29 Cal.4th at pp. 528, 553 [at time of killing in victim's apartment defendant took victim's camera, binoculars, wristwatch, and distinctive coins].)

At trial, Mercurio affirmatively testified again on cross-examination that he did not hear appellant ask Gitmed for anything and did not see Gitmed give anything to him. (RT 1961.) He said he remembered telling the police "something to [the] effect" that appellant had put Gitmed's possessions on the hood of the truck, but could not "say for sure" at trial that that had actually happened. (RT 1962.) And he gave the following testimony:

"Q Do you recall or did Mr. Thompson take anything off the hood of the truck before he got into the truck?

"A I believe he did.

"Q What did he take off the hood of the truck?

"A I don't know for certain. Small items. . . . Personal items that – I believe that belonged to Ronald [Gitmed].

"Q You were sitting in the truck at that time?

"A Yes.

"Q Can you tell me how those items got on the hood of the truck?

"A I don't know for sure. I'm assuming it was Tex that put them on the hood of the truck.

"Q Did you ever see Mr. Thompson with Mr. Gitmed's clothes out at the peninsula?

"A I believe he threw his clothes in the back of the truck.

"Q Did you see Mr. Thompson with any jewelry, watch, rings, anything like that?

"A I don't think so.

(RT 1969, underlining added.)

Appellant submits that as a matter of due process and fundamental fairness, Mercurio's tentative testimony that he "assumed" appellant might have put some "items" that he "believed" were Gitmed's on the truck, and the ambiguous testimony that "he" (which could have been either appellant or Gitmed himself) might have thrown clothes into the truck, is insufficient to

sustain a conviction of murder during the commission of a robbery, whether for purposes of felony-murder under section 189 or capital murder under section 190.2, subdivision (a).

The only other evidence before the jury that appellant took property from Gitmed at the shore of Canyon Lake was Mercurio's self-serving testimony, i.e. his statements before the grand jury on May 7, 1992, which defense counsel read into the record as impeachment and which differed in some details from his trial testimony. (RT 2531.) To the grand jury Mercurio had testified that, with appellant pointing a gun at him, Gitmed took things out of his pocket, "his wallet or some change and stuff that I guess were in his pockets" and that appellant put those things on the hood of the truck. (RT 2537.) Even at that time, then, just months after the killing, Mercurio was vague and uncertain, although the scene he described would have been in full view when it occurred, since he was supposedly standing by the door of the truck at the time. (RT 2537.) This testimony differed significantly from the scene he described in his trial testimony, was patently not credible, and in any case, some or all of the jurors did not believe it, since they found that appellant did not use a gun.

Given the prosecutor's improper closing argument about appellant "winding up" with Gitmed's "property," the jury may well have relied for its conclusion that Gitmed was robbed on: (1) Mercurio's testimony that he and appellant went to Gitmed's storage locker a couple of days after the shooting and removed furniture, a television and a videocassette recorder, which they took to Mercurio's residence (RT 1903-1904); and (2) Dalton's testimony that Mercurio and appellant brought Gitmed's car stereo to him to sell, which he did. (RT 2123-2124; see section H, below, in the instant

argument [prosecutorial misconduct])[77] However, there was no evidence that either Mercurio or appellant took a car key or a key to the storage locker from Gitmed, forcibly or otherwise, at any time, let alone at the time he was shot. In the absence of reasonable, credible evidence of "solid value" (*People v. Johnson, supra,* 26 Cal.3d at p. 578) that something was taken from an area over which Gitmed had physical control when he was subjected to force or fear, the facts presented at trial, even if true, do not support a finding that appellant took any property from Gitmed when he was killed. (See *People v. Marshall, supra,* 15 Cal.4th at p. 34.)

D. The Jury's Split Verdict Establishes That Some Jurors Actually Convicted Appellant as an Accomplice

The jury's split verdict finding appellant guilty of murder and the special circumstance of robbery-murder[78] but also finding that he did not personally use a weapon (CT 1096; RT 3075) indicates that one or more jurors thought that the star prosecution witness Tony Mercurio was, or could have been, the actual killer. (See *People v. Santamaria* (1994) 8 Cal.4th 903, 919; see RT 3491 [trial court comment on reasonable doubt about identity of shooter].)

Those jurors who believed that appellant was not, or may not have been, the actual shooter, could only lawfully convict him of the murder of

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[77]Mercurio also testified that when they arrived back at the Triplett compound, he saw appellant going through Gitmed's possessions in his car, which was still parked there. (RT 1896-1897.) This fact does not support a conviction of robbery. (See Pen. Code § 211 [robbery requires taking property from victim's person or immediate presence].)

[78]This argument assumes solely for purposes of argument that this Court concludes that there was substantial evidence to support a finding that Gitmed was robbed at all and that Mercurio's testimony was sufficiently corroborated. (See Argument V, *post.*)

Ronald Gitmed if they found him guilty as an aider and abetter. (See § 190.2, subds. (c),[79] and (d)[80].)

Appellant acknowledges the general rule that, where a criminal case has been tried on two possible factual theories and only one of the theories is supported by constitutionally sufficient evidence, the verdict will be upheld on the presumption that the jury convicted on the basis of the theory that was supported by the evidence. (*Griffin v. United States* (1991) 502 U.S. 46, 59-60; *People v. Marks* (2003) 31 Cal.4th 197, 233 citing *People v. Silva* (2001) 25 Cal.4th 345, 370-371 and *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; see also *People v. Sanchez* (2001) 26 Cal.4th 834, 851; *People v. Johnson* (1993) 6 Cal.4th 1, 42.) This rule is founded on the longstanding proposition that "'in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot

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[79]Section 190.2, subd (c) provided at the time of appellant's crime as follows in pertinent part: "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been found true . . . .

[80]Section 190.2, subdivision (d) provided at the time of appellant's crime as follows in pertinent part: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in state prison for life without the possibility of parole in any case in which a special circumstance enumerated in paragraph (17) of subdivision (a) of this section has been found to be true . . . ."

be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.' [Citations omitted.]" (*Griffin, supra*, 502 U.S. at pp. 49-50, underlining added.) The essential rationale of the rule is the general notion that when jurors are confronted with a factually inadequate theory, their intelligence will lead them to base their verdict on the legal theory that is supported by the evidence, and not on a theory that is not supported. (*Id.*, at pp. 59-60; see *People v. Guiton, supra,* 4 Cal.4th at pp. 1126-1127.)

The *Griffin* rule, however, does not sanction the affirmance of verdicts which are demonstrably based on a theory for which there is insufficient evidentiary support. (*People v. Guiton, supra,* 4 Cal.4th at p. 1130.) As this court has explained: "Where the jury considers both a factually sufficient and a factually insufficient ground for conviction, and it cannot be determined on which ground the jury relied, we affirm the conviction unless there is an affirmative indication that the jury relied on the invalid ground. [Citations.]." (*People v. Marks, supra,* 31 Cal.4th at p. 233, underlining added.) The finding in appellant's case that he did not use a gun is such an affirmative indication. (See *People v. Santamaria, supra,* 8 Cal.4th at p. 919.)

It follows from *Griffin* and *Marks* that, while jurors need not agree on the theory of guilt, every factual theory on which they actually rely must be supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 324.) Since those jurors who were not convinced that appellant was the shooter must have actually relied on the theory that he was an accomplice, his conviction may be upheld only if there is substantial evidence in the record to support a conclusion that he aided and abetted

Mercurio.

E. No Substantial Evidence Supported Appellant's Conviction of First Degree Murder as An Aider and Abetter

Since it is evident, from the jury's finding that appellant did not personally use a gun, that one or more jurors convicted appellant on the theory that he was an aider and abetter, his guilt conviction must be reversed because there was insufficient evidence to support that theory.[81]

As a general rule, "in order to ensure that the purported aider and abettor has the mens rea consistent with criminal liability, case law has established that such a person must 'act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Cook* (1998) 61 Cal.App.4th 1364, 1369, quoting from *People v. Beeman* (1984) 35 Cal.3d 547, 560.) That general rule applies to aiding and abetting first degree murder under either theory applicable to this case, as appellant explains, below.

At appellant's trial, however, there was nothing other than speculation on which those jurors who did not believe appellant was the shooter could base a conclusion that appellant acted in one way or another, or that he harbored any particular intent. (See Argument V, *infra* [reversal required because accomplice testimony uncorroborated].)

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[81]If appellant's jury had unanimously believed Mercurio's story that appellant shot Gitmed, and assuming arguendo that this Court found that there was sufficient evidence to support that conclusion, then the issue of insufficiency of the evidence of murder by aiding and abetting would not arise. (See *People* v. *Anderson* (1987) 43 Cal.3d 1104, 1115-1117 [no aiding and abetting where only evidence was appellant was actual killer].)

The evidentiary void cannot be filled by speculation. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1234; *People v. Waidla* (2000) 22 Cal.4th 690, 735; *People v. Marshall* 1997) 15 Cal.4th 1, 34-35.)

1. Elements of Accomplice Liability for First Degree Premeditated Murder Were Not Established

Those jurors who believed that Mercurio was, or might have been, the actual shooter, that he premeditated before intentionally killing Gitmed, and that appellant aided and abetted him in that killing, could validly have convicted appellant as an accomplice to first-degree premeditated murder only if they found, to paraphrase the Ninth Circuit Court of Appeals, that appellant "1) *knew* that [Mercurio] planned to commit, with malice aforethought, the willful, deliberate, and premeditated murder[] of [Gitmed] (see Cal.Penal Code, §§ 187, 189); 2) specifically intended to encourage or facilitate [Mercurio's] unlawful conduct; and 3) affirmatively acted in a manner so as to aid, promote, encourage or instigate the murder[]. *See Beeman,* 199 Cal.Rptr. 60, 674 P.2d at 1326; *see also Patterson,* 432 U.S. at 215, 97 S.Ct. 2319 (""[A] State must prove every ingredient of an offense beyond a reasonable doubt. . . ."""). (*Juan H. v. Allen, supra,* 408 F.3d at p. 1276, underlining added, and see cases cited therein; see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118; *People v. Horton* (1995) 11 Cal.4th 1068, 1115.)

Further, such jurors would have had to find that appellant acted "at the time of the killing" with the requisite intent. (*People v. Pulido* (1997) 15 Cal.4th 713, 716; see *People v. Washington* (1965) 62 Cal.2d 777, 782.)

There was no evidence presented at trial, apart from Mercurio's rejected testimony, that appellant did or said anything to assist or encourage Mercurio in shooting Gitmed. The evidence shows, at most, that appellant

willingly went along with Mercurio and Gitmed for a ride in the truck, but not that he had any idea that Mercurio had a gun, let alone that he could have known at any point that Mercurio intended to kill Gitmed.

Even assuming, arguendo, that the jurors who believed that appellant was not the actual killer could reasonably have concluded that he was present when Mercurio shot Gitmed, his mere presence was not enough to convict him as an accomplice.[82] (*People v.* Rodriguez (1986) 42 Cal.3d 730, 761; *Pinell v. Superior Court* (1965) 232 Cal.App.2d 284, 288-289; *People v. Hill* (1946) 77 Cal.App.2d 287, 293.)

There was no evidence to support a rational conclusion that appellant did anything to assist Mercurio in shooting Gitmed, or that he had any knowledge that Mercurio intended to do so.

2. Elements of Accomplice Liability for First Degree Felony-Murder Were Not Established

Those jurors who believed that Mercurio was, or may have been, the actual killer and that he shot Gitmed while robbing him, could have validly convicted appellant as an aider and abetter to first-degree felony murder only if there was substantial evidence that appellant: (1) did or said something that "encouraged, promoted or assisted" Mercurio in robbing Gitmed (*People v. Terry* (1970) 2 Cal.3d 362), and that he did so (2) "with knowledge of the criminal purpose" of [Mercurio] (*People v. Beeman* (1984) 35 Cal.3d 547, 560); *and* (3) "with an intent or purpose either of committing, or of encouraging or facilitating commission of" the robbery (*ibid.*). Additionally, such jurors would have had to find that there was a

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[82]Any "duty to act" exception has no relevance to the instant case, since appellant had no such duty toward Gitmed. (See *People v. Swanson-Birabent* (2003) 114 Cal.App. 4th 733, 743.)

"logical nexus" between the murder and the robbery. (*People v.* Cavitt (2004) 33 Cal.4th 187, 193.)

Again, there simply was no evidence of any of these elements of accomplice liability for felony-murder based on robbery.

a. No Evidence of Appellant's Conduct or Intent As an Aider and Abetter to Mercurio

Those jurors who did not believe appellant used a gun could have believed that he was a voluntary passenger in the stolen truck, as Gitmed was, at least on the way to the scene. But, since even Mercurio testified that he did *not* see appellant with a gun before the shooting occurred (RT 1894) and there is no other evidence that appellant was in possession of a gun at that time, those jurors could only rationally have concluded that Mercurio was the one who took the gun along. And there is no basis in the record for concluding that appellant had any idea that Mercurio had a gun or that he was going to rob Gitmed, let alone shoot him. (Compare *Tison v. Arizona, supra,* 481 U.S. at p. 158 [evidence defendants planned their father's prison escape, took guns into prison, provided guns to escaping inmates, later kidnaped and robbed four people, watched killing of the four people without trying to intervene, left scene with killers in victims' car]; *People v. Cleveland* (2004) 32 Cal.4th 704, 717, 729 [evidence showed blood of defendent's type at crime scene, defendant's hand injured before crime, defendant involved in robbery and gunfight earlier same day with same codefendants and had discussed with them which gun best to use for murder]; *People v. Proby* (1998) 60 Cal.App.4th 922, 928 [evidence defendant supplied murder weapon, was himself armed with gun, knew of killer's propensity for violence, saw victim's injuries and left him to die, took property out of safe]; *People v. Bustos* (1994) 23 Cal.App.4th 1747,

1754 [evidence defendant helped plan robbery, knew killer was carrying knife, struck victim, grabbed her purse, fled scene with killer after he stabbed victim knowing she was badly injured, admitted involvement, did not claim surprise at knife attack]; *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [evidence defendant helped plan robbery, arranged for armed killer to enter victim's home, and after victim was shot took property and fled with killer, leaving victim to die].

There was simply no evidence that appellant ever knew that Mercurio was going to rob Gitmed, nor that appellant himself harbored the intent to deprive Gitmed of his property, nor that he did anything to aid Mercurio in accomplishing a robbery. (Compare *People v. Koontz* (2002) 27 Cal.4th 1041, 1080 [evidence defendant demanded victim's car keys before shooting him and then taking the keys]; *People v. Green* (1980) 27 Cal.3d 1, 56 [evidence defendant placed victim's clothing in car before committing rape and murder and later destroyed the clothing]; *People v. Kelly* (1992) 1 Cal.4th 495, 529 [evidence defendant killed victim and took rings she was wearing].)

On this record, if appellant was present at all when Gitmed was shot (see Argument V, *infra,* [no corroboration of date]), his role might have been to object to the robbery, object to the shooting, plead for Gitmed's life, or otherwise try to prevent or interfere with the commission of the crimes. It is impossible even to know whether appellant witnessed what happened, let alone what he may have done or intended. To paraphrase the Ninth Circuit Court of Appeal: "Speculation and conjecture cannot take the place of reasonable inferences and evidence--whether direct or circumstantial--that [appellant]-- through both guilty mind and guilty act--acted in consort with [Mercurio]. In this case, after resolving all

conflicting factual inferences in favor of the prosecution, *see Jackson,* 443 U.S. at 326, 99 S.Ct. 2781, it is only speculation that supports a conclusion that [appellant] knew that [Mercurio] planned to commit the [robbery of Gitmed], and that [appellant] took some action intended to encourage or facilitate [Mercurio] in completing the [robbery]. Such a lack of evidence violates the Fourteenth Amendment guarantee that an accused must go free unless and until the prosecution presents evidence that proves guilt beyond a reasonable doubt. *See In re Winship,* 397 U.S. at 365-68, 90 S.Ct. 1068." (*Juan H.* v. *Allen* (9th Cir. 2005) 408 F.3d 1262, 1279.)

On this record, no rational juror could have concluded beyond a reasonable doubt that appellant aided and abetted Mercurio in robbing Gitmed.

b. No Logical Nexus Between the Murder and Robbery Was Shown by the Evidence

This Court has explained that under section 189, "the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place. Under California law, there must be a logical nexus--i.e., more than mere coincidence of time and place--between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller." (*People v. Cavitt* (2004) 33 Cal.4th 187, 196.)

Remarkably, the prosecutor effectively conceded the lack of proof that there was any logical connection between the robbery and the murder of Gitmed, *even* if Mercurio's story was believed by the jury. The prosecutor told the jury in closing argument: "It is very clear from the testimony of Tony Mercurio that the defendant, James Alvin "Tex" Thompson, was out there with a gun and *for no reason*, . . . he shot and

killed him, he shot and killed him." (RT 2919.)

And when Mercurio's story is discounted, as it certainly was by one or more jurors, it is simply impossible on this record to conclude anything about what logical connection there might have been, if any, between Mercurio's act of shooting Gitmed and the taking of his property, if any. Perhaps they were stumbling around in the dark and Mercurio shot at Gitmed thinking he was an animal. Perhaps he fired the gun accidentally. Perhaps he did it on a dare, and it had nothing to do with robbing Gitmed. Or perhaps he did it so Gitmed could not report the robbery. A variety of scenarios is conceivable, but speculation is not evidence and cannot support appellant's conviction. (*Juan H.* v. *Allen, supra,* 408 F.3d at p. 1279; *People v. Fielder, supra,* 114 Cal.App.4th at p. 1234.)

F. Trial Counsel Were Ineffective for Failing to Exclude Irrelevant Evidence About a Wallet

When the police searched appellant's room in his mother's house about a month after Gitmed's body was discovered, they found a wallet in the night stand which his sister thought might have belonged to her father or to appellant. (RT 1811.) The wallet contained a Motel 6 business card and the police had received information that appellant, not Gitmed, had stayed at a Motel 6. (RT 1818, 1820.) Police Officer Martinez testified that the police had information that Gitmed had had a wallet, but they had no description of it and did not seize the wallet found on the bed-stand in appellant's room. (RT 1819.)

There was no evidence that this wallet had anything whatsoever to do with Gitmed or any other issue in the case and police testimony about it must inevitably have confused the jury, raising the unsupported inference in the jurors' minds that the wallet was somehow connected to Gitmed.

In view of Mercurio's testimony that appellant "might" have had a wallet belonging to Gitmed when he got back into the truck after the shooting (RT 1896), Martinez's testimony about finding a wallet in appellant's bedroom was foreseeably prejudicial and without any probative value, and trial counsel's failure to move to exclude it under Evidence Code sections 350 and 352 constituted ineffective assistance of counsel, since there was no conceivable tactical reason to allow the jury to hear this confusing, misleading and irrelevant evidence and a motion to exclude it would certainly have been successful. (*Strickland v. Washington, supra,* 466 U.S. at p. 687; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *People v. Leon* (2001) 91 Cal.App.4th 812, 816 ["prejudicial impact of testimony is increased where it confuses the issues"].)

G. The Trial Court Committed Reversible Error in Instructing the Jury on Aiding and Abetting

This Court has long held that it is error for a trial court "to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; *People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10 [trial court has duty "to refrain from instructing on irrelevant and confusing principles of law"]; *People v. Eggers* (1947) 30 Cal.2d 676, 687; *People v. Roe* (1922) 189 Cal. 548, 558; see *People v. Tufunga* (1999) 21 Cal.4th 935, 944 [party not entitled to instruction on theory where no supporting evidence]; *People v. Robinson* (1999) 72 Cal.App.4th 421, 428.)

Thus, "[it] is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference." (*People v. Hannon* (1977) 19 Cal.3d 588, 597; *People v.*

Saddler (1979) 24 Cal.3d 671, 681.)

Moreover, the danger of giving an unsupported instruction is that it "tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence shows are not involved." (*People v. Jackson* (1954) 42 Cal.2d 540, 547.) In appellant's case it appears that the jury was in fact misled by the court's instruction, particularly in view of the prosecutor's argument based on it, and the error requires reversal. (See discussion of prosecutor's argument, *post.*)

The trial court gave a standard instruction defining "principals" in a crime as direct perpetrators or aiders and abetters. (RT 2901.) It then explained that "an accomplice is a person who is subject to prosecution for the identical offense charged in Count 1 against the defendant on trial by reason of aiding and abetting," and defined aiding and abetting. (RT 2901-2901; see CALJIC 3.0, 3.01.) In context, it appears that the trial court may have intended to refer only to the possibility that the jury would conclude that Mercurio was an aider and abetter, because the next few instructions all related to accomplice testimony, including the necessity of corroboration. (RT 2902-2903.)

However, the trial court did not explicitly limit the aiding and abetting instruction to Mercurio, and the prosecutor told the jury in closing argument that it could convict appellant of felony murder as an aider and abetter. (RT 2929.)

But if the jury did not believe Mercurio's story that appellant held a gun on Gitmed while Gitmed took things out of his pocket, put those things

on the hood of the truck, and then shot him,[83] it could not convict him of either murder or robbery because there was no substantial evidence other than Mercurio's testimony implicating appellant in those crimes. If Mercurio was, or might have been, the shooter, there was no evidence on which the jury could rationally base any conclusions about appellant's participation – where he was physically located when Mercurio shot Gitmed, when or how he did anything to assist Mercurio in robbing Gitmed, or even whether he witnessed the shooting or was present at the scene at all.

Appellant submits that on the state of the evidence at the end of the guilt phase at his trial it was error for the trial court to instruct the jury on aiding and abetting (RT 2901-2902) because, if the jurors did not believe that appellant was the actual shooter, there was insufficient evidence, as a matter of law, to convict him as an aider and abetter. "It is the court which must determine whether or not the record contains evidence which, if believed, will support the suggested inference. After making that determination of law, the court should then instruct the jury accordingly." (*People v. Hannon, supra,* 19 Cal.3d at p. 598, italics in original.)

As this court said generations ago, instructions which are not supported by the evidence "either create a false issue or constitute a misstatement of the real issue, thereby distracting the attention of the jury from and befogging the real issue." (*People v. Roe, supra,* 189 Cal. at p. 559.)

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[83]This argument assumes, arguendo, that this Court finds that there was sufficient evidence that property was taken from Gitmed's immediate presence or sphere of control by force or fear and that he was killed in order to accomplish that robbery or that the robbery was something more than incidental to the murder. (See Argument VI, *post.*)

Here, the trial court's instructions on aiding and abetting were not supported by the evidence and undoubtedly befogged the only real issue, which was whether appellant was the actual killer. Appellant's jurors needed to understand that they could only convict appellant as the actual killer because there was no evidence of his conduct, statements or intent when Gitmed was killed, other than the scenario described by Mercurio. In these circumstances, the trial court's error was "equally as grave as would be the giving of instructions fundamentally wrong." (*Ibid.*)

Assuming, arguendo, that this Court concludes that it was not error for the trial court to instruct the jury on aiding and abetting, reversal is nevertheless required because, as appellant has established, *supra,* there was no substantial evidence presented to support a conviction on that theory, and it is evident on this record that one or more jurors did convict appellant as an aider and abetter. The United States Supreme Court has recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt . . . ." (*Jackson v. Virginia, supra,* 443 U.S. at p. 317.) That is what happened at appellant's trial.

H. The Prosecutor Committed Misconduct In Closing Argument

In spite of the lack of evidence to support a conclusion that appellant committed first degree murder, the jury did return that verdict. Appellant submits that this was the result of two things: (1) the trial court's instructional errors, i.e. giving instructions on aiding and abetting and failure to inform the jury that if it found the gun use allegation untrue it could not return a guilty verdict on the first-degree murder charge; and (2) the prosecutor's repeated and serious misstatements of the law and

misrepresentation of the evidence in closing argument to the jury. "A prosecutor's closing argument is an especially critical period of trial. [Citation.] Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694; see *Berger v. United States* (1935) 295 U.S. 78, 88; *People v. Espinoza* (1992) 3 Cal.4th 806, 820 [prosecutor held to a higher standard because of unique function as representative of government]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077.)

The prosecutor's misstatements of the law and the evidence purporting to explain the various theories of murder to the jurors amounted to so much verbal dust thrown in the jurors' eyes, were prejudicial in themselves, and compounded the instructional error.

1. Misstatements of Law

This Court has repeatedly stated that "'[I]t is improper for the prosecutor to misstate the law generally (*People v. Bell* (1989) 49 Cal.3d 502, 538 []), and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215[].)' (*People v. Marshall* (1996) 13 Cal.4th 799, 831 [].)" (*People v. Hill* (1998) 17 Cal.4th 800, 829-830, parallel citations omitted.) In closing argument at appellant's trial, the prosecutor did just that.

The prosecutor told the jury repeatedly that it could convict appellant as an accomplice if it found that the murder was committed during the course of a robbery and that appellant was merely "involved" in the robbery, omitting any mention of the essential requirements that to convict appellant of first-degree felony-murder, the jury had to find that appellant actually and intentionally did something to assist Mercurio in

accomplishing the robbery (§ 31; *People v. Joiner* (2000) 84 Cal.App.4th 946, 967) *and* that there was a logical nexus between the murder and the robbery (*People v. Cavitt, supra,* 33 Cal.4th at p. 201).

The prosecutor first addressed the jury about felony-murder, saying: "Let's say you're really unsure of precisely what happened out there by the lake on that August night in 1991. . . . Well, did the robbery take place first? Did the murder? Was the murder the thing that was primary in Mr. Thompson's mind? [¶] Well, ladies and gentlemen, under the felony-murder theory, you don't have to prove this premeditation. All that needs to be proven is that the defendant was involved in a robbery and that someone was killed during the course of that robbery." (RT 2919.)

That was an oversimplification and only partially correct, as surely the prosecutor knew.

First, the prosecution was required to prove all the elements of the underlying felony–in this case, the robbery of Gitmed–including intent, and not merely that appellant was "involved" in a robbery. "A strong suspicion that someone is involved in criminal activity is no substitute for proof of guilt beyond a reasonable doubt." (*Piaskowski v. Bett* (7th Cir. 2001) 256 F.3d 687, 692, underlining added, and *id.*, at p. 693 [defendant's presence at scene of crime and his statement later that "shit was going down" insufficient to prove guilt as conspirator]; see *Jackson v. Virginia, supra,* 443 U.S. at p. 315 [fact-finder must be convinced of guilt to "a state of near certitude."]; *People v. Beeman* (1984) 34 Cal.3d 547, 560.)

Second, as this Court has repeatedly explained that, ". . . to find a defendant guilty of first degree murder based on a killing perpetrated during a robbery, the evidence must show the defendant intended to steal the victim's property either before or during the fatal assault. (§§ 211; *People*

v. Sakarias (2000) 22 Cal.4th 596, 619 []; *People v. Marshall, supra*, 15 Cal.4th at p. 34.) (*People v. Lewis, supra,* 25 Cal.4th at p. 642, parallel citation omitted, underlining added.) Thus, the jurors could convict appellant of first-degree felony-murder as the actual shooter only if they reasonably believed, based on the evidence, that he himself had shot Gitmed, and that he formed the intent to take Gitmed's property before or during the shooting.

And even more was required to convict appellant of felony-murder as Mercurio's accomplice, which the prosecutor acknowledged the jury might believe he was (RT 2919)–and which some jurors in fact did believe that he was or might have been. Yet the prosecutor still told the jury: ". . . even if you were to conclude under some extreme evaluation of the evidence that Tony Mercurio shot and killed Ronald Gitmed, but if you conclude that the defendant was still involved in that robbery, the defendant is still responsible." (RT 2919, underlining added.) This was an even more egregious incorrect statement of the law, because, if the jurors believed that Mercurio was the one who used a gun – as some or all of them did believe – then those jurors could convict appellant only if they found, based on the trial evidence, that appellant had actually done or said something that "encouraged, promoted or assisted" Mercurio in robbing Gitmed (*People v. Terry, supra,* 2 Cal.3d 362), and "with knowledge" of Mercurio's criminal intent (*People v. Beeman, supra,* 35 Cal.3d at p. 560) and with the specific intent of "committing, or of encouraging or facilitating" the robbery of Gitmed (*ibid.*).

Proving those elements was a far greater burden on the prosecution than merely producing evidence that appellant was "involved" in a robbery that the killer committed. The word "involved" is an amorphous term, and

one that connotes a lesser responsibility than criminal liability in the normal usage of ordinary language by lay people.[84]

Appellant submits that the prosecutor's repeated use of the term "involved" set a lower bar for culpability, lightening the prosecution's burden of proof. And these were fundamental misstatements of the law which most probably actually misled the jury.

In reality there was no evidence of what appellant did if Mercurio was the shooter, let alone any proof of appellant's mental state, so a felony-murder guilt verdict on an accomplice theory was not actually a legally permissible option and the jury should not have been instructed that it was. (See Argument IV, *supra.*) But since the jury was given aiding and abetting instructions, the prosecutor's substitution of the notion of mere "involvement" for any discussion of the elements of accomplice liability for first degree felony-murder that the jury would have had to find in order to return that verdict was serious and prejudicial misconduct. Since the truth is that there was no evidence of any of those elements, the prosecutor's

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[84]For example, the difference in meaning between "involved" and "committed a crime" was actually the focus of a recent public relations storm in the political arena. (See http://www.washingtonpost.com/wp-dyn/content/article/2005/07/18/AR2005071800157.html ["Bush Raises Threshold for Firing Aides In Leak Probe," By Jim VandeHei and Mike AllenWashington [*Washington*] *Post* Staff Writers, Tuesday, July 19, 2005; Page A01]; http://www.cnn.com/2005/POLITICS/07/18/cia.leak/ ["Bush appears to shift course on CIA leak - President vows to fire anyone who committed a crime," Tuesday, July 19, 2005; Posted: 3:47 a.m. EDT (07:47 GMT"]; http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/07/20/EDG35DQAPI1.DTL&hw=fire+anyone+involved&sn=009&sc=316 ["POLITICALWATCH No crime, no problem ...Wednesday, July 20, 2005"].)

failure to mention them was most likely deliberate.

Moreover, the prosecutor repeated his misleading and erroneous legal explanations, saying: ". . . I'm not going to spend much more time talking about the definition of murder. Just that, however you look at this, if you conclude that the defendant was out there that night and he was involved in either the death or the robbery of Ronald Gitmed, you can't but come to the conclusion that he is guilty of first degree murder." (RT 2920.)

It is more than reasonably likely that appellant's jury believed from the prosecutor's argument that if appellant was voluntarily present at the scene, and there was no evidence he tried to stop the robbery, he was "involved" in the crime in the sense that lay people commonly use that term, and he could be convicted of it. This error standing alone requires reversal. (*Boyde v. California* (1990) 494 U.S. 370, 380, 380 fn. 4.)

2. Misrepresentation of the Evidence

"Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Avena* (1996) 13 Cal.4th 394, 420; *People v. Hill, supra,* 17 Cal.4th at p. 819 [argument must be "fair comment" on evidence]; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 725; *People v. Purvis* (1963) 60 Cal.2d 323, 343, overruled on another point in *People v. Morse* (1964) 60 Cal.2d 631, 637-638.)

At appellant's trial, the prosecutor represented to the jury that there was evidence that appellant had been found in possession of property taken from Gitmed by means of a robbery, when in fact there was no such evidence.

In closing argument, the prosecutor must have realized that the jurors could not reasonably think, based on Mercurio's highly equivocal and, in at

least some jurors' view incredible, testimony, that appellant had taken some unspecified items of property from Gitmed at gunpoint before he was killed. So the prosecutor had to "find" some property belonging to Gitmed somewhere in the evidence and link that to the notion of robbery in the jurors' minds. He did this by arguing to the jury, inter alia, as follows:

> "Motive here is robbery, but you may be thinking of a bigger motive. Okay. Robbery. But why did he shoot him? Why did he shoot him? Why did he have to do that?
>
> "Well, ladies and gentleman, there's a difference between motive and reason. Motive tries to explain what happened. Maybe he didn't – you know, it tries to explain what happened.
>
> "A reason is trying to put some sense into what occurred, to try to come up with a basis to understand why this happened. That's the difference between motive and reason.
>
> "A robbery occurs, property is taken and someone is killed. The motive? They wanted the property. But you keep asking why it happened, why it happened.
>
> "Why did the defendant go out there with Ron Gitmed and murder him?
>
> "And, ladies and gentlemen, I tell you. There is no reason . It is senseless. You can't understand something like this. Yes, there's a motive, the car, the bag, but that doesn't mean that there's a reason for this." (RT 2938.)

This argument was misleading and completely improper because the prosecutor knew there was no evidence whatsoever that either the car or the bag, or a means of access to them, was taken from Gitmed's immediate presence when he was killed, which was what the law required for these things to be evidence of robbery. (§ 211; *People v. Frye* (1998) 18 Cal.4th

894, 955-956; see Argument V, *post.*)

Gitmed's car was back at the Santa Rosa Mine Road property when Gitmed was killed out at Canyon Lake, there was no evidence that he had the car key with him in the truck or at the lakeshore, nor that appellant ever had possession of it, and it is common knowledge that most cars can be started without a key.

The bag was found a month later in the trunk of appellant's mother's car, and there was no evidence whatsoever that it was in Gitmed's possession at the shore of Canyon Lake when he was killed, nor any evidence of how or when the bag came to be in appellant's possession. Appellant has established in Argument III, *supra*, that the bag was inadmissible, and hereby incorporates that argument as if fully set forth herein.

The truth is that there was no evidence that the murder of Gitmed was related in any way to any item of Gitmed's property found in appellant's possession. The prosecutor's argument that "the car, the bag" were the "motive" for Gitmed's murder deliberately misrepresented this evidence, implying that theft being a motive for murder was the same thing as murder committed in the commission of a robbery under the felony-murder statute. This was black-letter wrong.

3. The Argument Constituted Misconduct

As this court explained in *People v. Morales* (2001) 25 Cal.4th 34, "[a] prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible

methods to attempt to persuade either the trial court or the jury." (*Id.*, at p. 44; accord, *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) The prosecutor's intent, however, is not relevant to determining whether he committed misconduct. (*People v. Hill, supra,* 17 Cal.4th at pp. 822-823; *People v. Berryman,* [] 6 Cal.4th at p. 1072; *People v. Benson* []52 Cal.3d at p. 793.) Rather, the question is "how the remarks would, or could, have been understood by a reasonable juror." (*Id.* at pp. 793-795, emphasis added.)

At appellant's trial the prosecutor knew that he had a weak to non-existent case against appellant, so he secured a conviction of felony-murder by lowering his standard or proof and led the jury to find the existence of a special circumstance on irrelevant evidence, rendering the guilt phase of appellant's trial unfair and violating appellant's right to due process of law under the federal constitution. At the very least, reversal is required under state law because the prosecutor's misstatements of the law and the evidence during closing argument were reprehensible and deceptive. (See *People v. Hill, supra,* 17 Cal.4th at p. 819 and cases cited therein.)

Where prosecutorial misconduct infringes upon a defendant's constitutional rights, reversal is required unless the prosecution can establish beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Hall,* (2000) 82 Cal.App.4th 813, 817; *People v. Harris* (1989) 47 Cal.3d 1047, 1083.) Moreover, when the issue of prosecutorial misconduct during closing argument is raised on appeal, the question is whether it is reasonably probable that the jury applied the erroneous information in an unconstitutional manner. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Francis* v. *Franklin* (1985) 471 U.S. 307, 315-316; *People v. Morales,*

supra, 25 Cal.4th at p. 44; *People v. Ayala* (2000) 23 Cal.4th 225, 283-284; *People v. Frye* (1998)18 Cal.4th 894, 970; *People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 427; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Berryman*, *supra,* 6 Cal.4th at p.1072.)

Unfortunately for appellant, the jury was apparently misled by the prosecutor's comments to think that it could convict him as the direct perpetrator of first-degree murder in the absence of evidence of premeditation or of taking any property from Gitmed when he was killed; and that it could convict him as an aider and abetter of Mercurio without any evidence of affirmative conduct by appellant intended to assist Mercurio in accomplishing a robbery; nor of any facts indicating that there was any logical connection between robbing Gitmed and killing him. Frankly, there is no other explanation for the jury's irrational findings both that appellant did not use a gun and that he was guilty of murder committed while he was engaged in the commission of a robbery – the jury must have been misled by the prosecutor's simplistic and repeated assurances that it hardly took any actual evidence at all to convict appellant of first-degree murder.

It is important to note that there was no ambiguity in the prosecutor's argument. Either the jury could properly find appellant guilty of felony-murder if it found merely that appellant was somehow "involved" in the robbery of Gitmed or it could not, and under the relevant law, it could not. Either the evidence of "the car, the bag" was relevant to a conclusion that appellant took property from Gitmed at Canyon Lake, or knowingly assisted Mercurio in doing so, or it was not – and under the relevant law, it was not. Thus, it is extremely probable that the jury applied the prosecutor's

comments in an improper and unconstitutional manner; there was no other way to construe them.

4. The Issue of the Prosecutor's Misconduct Is Cognizable on Appeal

Appellant acknowledges that an objection at trial is normally required to preserve an issue of prosecutorial misconduct for appeal. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1155; *People v. Osband* (1996) 13 Cal.4th 622, 717.) There are, however, exceptions to that rule which apply here.

First, the prosecutor's erroneous and misleading comments, especially those which seriously misstated the law of first-degree murder, and of accomplice liability for robbery-murder, by lowering the burden of proof, implicated appellant's substantive rights under the federal constitution to due process, a fair trial, proof beyond a reasonable doubt of every element of the charged offense, and a reliable guilt verdict in a capital case. (Cal. Const., art. I, § 24; U.S. Const., 5th, 8th & 14th Amends.; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Jackson v. Virginia, supra,* 443 U.S. at pp. 316-317; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Mullaney v. Wilbur* (1975) 421 U.S. 684; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Davis* (1995) 10 Cal.4th 463, 509; *People v. Johnson, supra,* 26 Cal.3d at pp. 576-577.) This Court has the discretion to review errors of constitutional dimension even in the absence of an objection, and appellant urges it to do so here to avoid a serious miscarriage of justice. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249; see *Johnson v. United States* (1997) 520 U.S. 461 [serious constitutional error arising in state criminal proceedings

cognizable on appeal in absence of objection in trial court].)

In addition, the prosecutor's misleading comments were so pervasive that defense counsel would have had to object not just once or twice, but to the whole thrust of significant portions of the argument. Given that the trial court itself had already erroneously instructed the jury on aiding and abetting, it was unlikely that the court would have sustained any objection by the defense or given an adequate admonition, since it would have had to advise the jury to disregard virtually all of the prosecutor's purported explanation of the law. An issue is not forfeited for appellate purposes if an objection at trial would have been futile. (*People v. Hill, supra,* 17 Cal.4th at p. 820.)

a. If an Objection Was Necessary to Preserve the Issue of Prosecutorial Misconduct, Trial Defense Counsel Provided Constitutionally Deficient Representation

Alternatively, if this Court concludes that appellant has forfeited the issue for lack of objection, then his attorneys' failure to object to the prosecutor's flagrantly improper argument constituted ineffective assistance of counsel, and appellant submits that he is entitled to this Court's review of the substantive issue of prosecutorial misconduct, particularly since the consequence of counsel's failure was that appellant wrongly became eligible for the death penalty, in violation of his fundamental constitutional rights.

Appellant's attorneys sat silently through the prosecutor's closing argument to the jury as he tried to make up for his failure to prove his case by misstating the law and misrepresented the evidence, telling the jurors that they could find appellant guilty of murder if he was merely "involved" in the robbery (RT 2919-2920) and that appellant's possession of Gitmed's

car and bag were evidence that he had committed a robbery which could be the basis of a felony-murder conviction (RT 2938).

These were blatant misstatements of the law and the evidence and defense counsel should have been on their feet protesting them.

Both the federal and state constitutions give an accused the right to assistance of counsel "in order to protect the fundamental right to a fair trial." (*Strickland* v. *Washington* (1984) 466 U.S. 668, 685-686; see U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) To establish ineffective assistance of counsel, appellant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness[.]" (*Strickland* v. *Washington, supra,* 466 U.S. at 694.) Appellant submits that this prong of the claim is satisfied, since a reasonably competent attorney certainly would have objected to statements by the prosecutor at a capital trial which lowered the burden of proof for the prosecution and led the jury to think that certain evidence could be considered as establishing one of the elements of a crime making his client death-eligible, when that evidence was in fact irrelevant to that crime. (See *Greer v. Miller* (1987) 483 U.S. 756, 766, fn. 8 ["trial counsel bore primary responsibility for ensuring that the error was cured in the manner most advantageous to his client."].) Any trial attorney competent enough to defend someone accused of capital murder should know that "arguments of counsel which misstate the law are subject to objection and to correction by the court." (*Boyde v. California, supra,* 494 U.S. at p. 384, citing *Greer v. Miller* (1987) 483 U.S. 756, 765-766, and fn. 8.)

This court should reach the merits of the instant issue because there is no conceivable tactical reason why competent trial counsel would leave such fundamentally erroneous, misleading, and highly prejudicial argument

in the jury's minds, given the state of the evidence at appellant's trial. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct]; *People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Competent counsel acting as a vigorous advocate would not have allowed the prosecution's burden of proof to be lightened, or the jury to misunderstand the law of first-degree murder to his client's detriment. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 24; *Strickland v. Washington, supra,* 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; *People v. Ochoa* (1998) 19 Cal.4th 353, 428, 431.)

The second prong of a claim of ineffective assistance of counsel requires appellant to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland* v. *Washington, supra,* 466 U.S. at p. 694.) Appellant submits that if his attorneys had objected to the prosecutor's misstatements of law and requested an admonition, the trial court would have instructed the jurors that merely being "involved" in a robbery could not support a finding of criminal liability, and would have explained that the prosecution had the burden of establishing every element of the charged offenses, including the requisite mental states and, for a conviction of aiding and abetting, some logical nexus between the robbery and the murder. Further, on timely objection, the trial court would also have instructed the jury to disregard the prosecutor's arguments that "the car, the bag" could be considered as proof of appellant's guilt of robbery – leaving the jury without any actual items of Gitmed's property identified by the prosecutor as evidence of robbery. His other comments on the subject were

vague statements that appellant had "wound up" with "property" of Gitmed's. With regard to those statements, the jury could have been instructed that the crime of robbery required that property was taken from Gitmed's "immediate presence," meaning a place which was "so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." (*People v. Hayes* (1990) 52 Cal.3d 577, 626-627.)

In *People v. Anzalone* (2005) 130 Cal.App.4th 146, petition for review pending (S135646), the reviewing court found constitutionally deficient representation where the defendant's trial counsel failed to object to the prosecutor's misstatement, during argument, about the law of concurrent intent, "an argument that allowed the jury to find appellant guilty of multiple counts of attempted murder on an erroneous legal theory." (*Id.*, at p. 159.) The prosecutor in *Anzalone* "left the jury with the mistaken impression that by firing indiscriminately in the direction of a group of men, appellant was guilty of attempting to kill them. This greatly lessened the People's burden of proof." (*Id.*, at pp. 159-160.) The Court of Appeal reversed three counts of attempted murder, finding that if the prosecutor's misstatements of law had been corrected, it was reasonably probable that the jury would not have convicted the defendant on four counts.

Appellant's case is in a very similar posture. Here, the prosecutor told the jury that it could convict appellant of capital murder as an aider and abetter if it found that he was "involved" in the robbery of Gitmed, and that it could consider his possession of Gitmed's bag and jacket as evidence of his involvement in the robbery. This greatly lessened the prosecution's burden of proof, and if the law had been correctly explained to the jury, it is reasonably probable that it would not have convicted appellant of felony-

murder.

That is, if trial counsel had interposed appropriate objections and the trial court had properly admonished the jury, it is at least reasonably probable that: (1) those jurors, if there were any, who believed that appellant was the actual shooter, would have concluded that the prosecution had failed to prove premeditation and failed to proved that appellant took any property from Gitmed at Canyon Lake; (2) those jurors who doubted, or did not believe, that appellant had shot Gitmed, would have concluded that the prosecution had failed to prove that appellant had done anything to assist Mercurio in taking anything from Gitmed at Canyon Lake; and (3) all the jurors would have understood that the prosecution had failed to present any evidence that the murder of Gitmed had any connection to robbing him, regardless of who they believed was the actual shooter. And that would have meant that the jury did not unanimously believe beyond a reasonable doubt that appellant was guilty of first-degree murder – certainly a different result that would have occurred if trial counsel had provided the vigorous advocacy to which appellant was entitled. Moreover, even if this Court concludes that it was not reversible misconduct per se, appellant submits that, when combined with the trial court's error in instructing the juror on aiding and abetting, the prejudicial effect of the prosecutor's argument on the jurors cannot be ignored.

I. The Prosecutor's Closing Argument Was Extremely Prejudicial

Especially when combined with the trial court's error in instructing the juror on aiding and abetting, the prejudicial effect of the prosecutor's argument on the jurors cannot be ignored.

The prosecutor is perceived by the jury as a representative of the

government, and of "the People." In the venerable words of the United States Supreme Court, the prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. . . . Consequently, improper suggestions, insinuations, . . . are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States* (1935) 295 U.S. 78, 88.) This fact of life has also long been recognized in this state. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677 [prosecutor's closing argument "comes from an official representative of the People. As such, it does, and it should, carry great weight. . . . [Prosecutors] are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige."].)

Improper argument by a prosecutor may therefore have a decisive effect on the jury in spite of correct instructions[85] by the court, depending on the context of the prosecutor's comments. (*Boyde v. California, supra,* 494 U.S. at pp. 384-385.) In *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, the high court distinguished "isolated" remarks made in closing argument from "consistent and repeated misrepresentation[s]". . . that "may profoundly impress a jury and may have a significant impact on the jury's deliberations." (*Id.*, at p. 646.) At appellant's trial the prosecutor's improper comments were consistent and repeated, including his entire erroneous explanation of both capital and non-capital felony-murder (RT

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[85]This argument assumes, arguendo, that this Court concludes that the trial court's instructions on accomplice liability and aiding and abetting in the context of felony-murder were correctly given.

2919-2929, 2929-2930, 2936-2937) – particularly his repeated explanation that the jury need find only that appellant was "involved" in a robbery – and his suggestion that Gitmed's car and bag were evidence of appellant's guilt of robbery (RT 2938). These were not merely isolated remarks unlikely to affect the jury's deliberations, but were highlights in the prosecutor's argument, since they explained to the jury how it could–albeit erroneously–convict appellant of capital murder on a glaringly inadequate record.

Particularly given that the jury at appellant's trial must have been struggling to apply the trial court's instructions about aiding and abetting, those jurors who believed that appellant did not, or may not have, personally shot Gitmed were very likely to have been misled by the prosecutor's argument to convict appellant based on his mere "involvement" with Mercurio and Gitmed. The injury to appellant could not have been greater.

J. Reversal of the Entire Judgment is Required

The entire judgment must be reversed because appellant was not death-eligible. His first-degree murder conviction and the death judgment resting on it should shock the conscience of this Court.

Under Penal Code section 190.2, subdivision (a), the death penalty many not be imposed absent a valid conviction of first-degree murder. Because appellant's conviction of murder under section 187 was based on insufficient evidence, that conviction was obtained in violation of his right to an elevated level of due process in a capital case (*In re Winship* (1970) 397 U.S. 358, 364; *Jackson v. Virginia, supra*, 443 U.S. at p. 324; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305) and the death penalty imposed on the basis of that conviction is disproportionate to his

culpability (*Tison v. Arizona* (1987) 481 U.S. 137, 152-159).

And because appellant's first-degree murder conviction rested on constitutionally deficient evidence, it also violated the jury-trial guarantee of the Sixth and Fourteenth Amendments of the federal constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Further, it is clear from the no-gun-use finding that one or more jurors concluded appellant was an aider and abetter, so his conviction of first-degree murder must have been to some extent attributable to that theory, which was unsupported by the evidence, and the prosecution cannot possibly demonstrate otherwise beyond a reasonable doubt. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279; see *Chapman v. California, supra,* 386 U.S. at p. 26 [burden is on state to demonstrate beyond a reasonable doubt that constitutional error did not affect verdict].)

The jury's unsupported conclusion that appellant was guilty of a robbery, for which there was no credible evidence presented at trial, led to a guilt verdict in a capital case that is irrational and shocking, and that violates appellant's rights to heightened due process and a reliable guilt conviction in a capital case under the Fifth, Eighth and Fourteenth Amendments and must be reversed. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, 643; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305; see *Piaskowski v. Bett* (7th Cir. 2001) 256 F.3d 687 [14th Amendment due process implicated where insufficient admissible evidence to support verdict.)

Further, because the prosecutor's misconduct in closing argument led to federal constitutional error, "the burden is on the prosecution to prove beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*People v. Bolton* (1979) 23 Cal.3d 208, 214 [ ], citing *Chapman v.*

California (1967) 386 U.S. 18, 24 [ ]." (*People v. Herring, supra*, 20 Cal.App.4th at p. 1077.) On this record, the prosecution cannot possibly meet that burden.

The imposition of the death penalty on appellant in these circumstances would be arbitrary and capricious and in violation of the federal constitutional principles enunciated in *Furman v. Georgia* (1972) 408 U.S. 238, 309-310 (Stewart, conc.), 313 (White, conc.), *Gregg v. Georgia* (1976) 428 U.S. 153, 189, *Woodson v. North Carolina* (1976) 428 U.S. 280, and *Roberts v. Louisiana* (1976) 428 U.S. 325.

Further, the combined errors of the court's unsupported instructions on aiding and abetting and the prosecutor's improper argument lowered the prosecution's burden of proof and amounted to a failure to require the jury to determine all of the elements of the charged crime, which was a violation of appellant's federal constitutional rights to trial by jury and due process. (*Cage v. Louisiana* (1990) 498 U.S. 39, 39; *In re Winship* (1970) 397 U.S. 358, 364; *United States v. Gaudin* (1995) 515 U.S. 506, 510.) The prosecution cannot possibly demonstrate beyond a reasonable doubt that the impact of the court's aiding and abetting instructions combined with the prosecutor's misleading argument had no effect in bringing about the murder verdict and the felony-murder special circumstance finding. (*Chapman* v. *California*, *supra,* 386 U.S. 18, 24 []; *People v. Mendoza, supra,* 37 Cal.App.3d at p. 727; *People v. Williams*, 22 Cal.App.3d 34, 58; see *People v. Harris* (1994) 9 Cal.4th 407, 416 [constitutional error where trial court erroneously instructed on element of offense].)

Reversal is also required under the federal constitution because appellant's conviction of first-degree murder deprived him of the benefits of California law, specifically the California statutes appellant has cited in

the instant argument governing first degree felony-murder and premeditated murder, accomplice liability, and the opinions of the California courts interpreting those statutes, which constitute a body of state procedural and substantive law in which appellant had a vital liberty interest protected by the Due Process clause of the federal constitution. (See *Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Whalen v. United States* (1980) 445 U.S. 684, 689-690, fn.4; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) Specifically, "'Where a statute indicates "with language of unmistakable mandatory character . . . that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause."" (*Ford v. Wainwright* (1986) 447 U.S. 399, 428, (conc. opn. of O''Connor, J.).) Section 190.2 is such a statute since it predicates imposition of the death penalty or life without possibility of parole on a valid conviction of first-degree murder.

Appellant was convicted of first-degree murder without substantial evidence to support that conviction under any theory, and this Court must reverse the entire judgment to avoid a clear miscarriage of justice. Appellant may not be placed twice in jeopardy for the murder of Ronald Gitmed, and the instant case should be remanded only for the entry of a judgment of acquittal. Appellant may not be retried for murder because the prohibition against double jeopardy "precludes a second trial once the reviewing court has found the evidence legally insufficient, [and] the only "just" remedy available for that court is the direction of a judgment of

acquittal." (*Burks v. United States* (1978) 437 U.S. 1, 18; see also *People v. Williams, supra,* 16 Cal.4th 635 at p. 692 (conc. opn. of Mosk, J.); *People v. Green, supra,* 27 Cal.3d at p. 62.)

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V

APPELLANT'S CONVICTION OF FELONY MURDER MUST BE REVERSED BECAUSE THE TESTIMONY OF ACCOMPLICE ANTHONY MERCURIO CONFLICTED WITH THE FORENSIC EVIDENCE AND WAS UNCORROBORATED

A. Accomplice Testimony Must be Corroborated by Evidence Connecting the Defendant to the Commission of the Crime

Appellant was convicted primarily on the basis of the testimony of Anthony Mercurio, who was at least an accessory to the murder of Ronald Gitmed. (RT 2888; Def. Exh. AA.) The trial court recognized, however, that the jury could reasonably consider him to be an accomplice, and instructed accordingly. (RT 2901-2903.) Since the jury returned a specific finding that appellant was not the shooter, it is manifest on the record that one or more jurors believed that Mercurio was, or may have been, the shooter. In these circumstances, Mercurio's testimony must be viewed as that of an accomplice.

Under Penal Code section 1111, "[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

In particular, accomplice testimony inculpating the defendant must be corroborated by the testimony of a non-accomplice and that testimony must "connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Fauber* (1992) 2 Cal.4th 792, 834, underlining added.) That is, "[t]he corroborating

evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 986 [citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128], underlining added.)

Corroborative evidence in this context ". . . must tend to implicate the defendant by relating to some act or fact that is an element of the crime, . . . [and is] sufficient if it substantiates enough of the accomplice's testimony to establish his credibility. The finding of the trier of fact on the issue of corroboration is binding on a reviewing court unless the evidence should not have been admitted or it does not reasonably tend to connect the defendant with the commission of the crime. [Citation.]" (*People v. McDermott, supra,* 28 Cal.4th at pp. 1000-1001, citing *People v. Szeto* (1981) 29 Cal.3d 20, 27, underlining added.)

Particularly relevant to the case at bar is the rule that, "[a]lthough corroborating evidence need only be slight and may be entitled to little consideration when standing alone [citations], it is not sufficient to merely connect a defendant with the accomplice or other persons participating in the crime. The evidence must connect the defendant with the crime, not simply with its perpetrators. (*People v. Robinson* (1964) 61 Cal.2d 373, 400 []; *In re Ricky B.* (1978) 82 Cal.App.3d 106, 111 [].) Likewise, it is insufficient to show mere suspicious circumstances. (See *People v. Robbins* (1915) 171 Cal. 466, 476 [].)" (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543, underlining added, parallel citations omitted, and citations to *People v. Szeto, supra*, 29 Cal.3d at p. 27, *People v. Perry* (1972) 7 Cal.3d 756, 769, and *People v. Shaw,* (1941) 17 Cal.2d 778, 803-804, omitted.)

Consistent with these principles, in *In re Gay* (1998) 19 Cal.4th 771,

this Court found that the fact that the defendant was light-skinned and there was evidence independent of the accomplice's testimony to establish that one of the robbers had been light-skinned was not sufficient corroboration to connect the defendant to the crime. (*Id.*, at p. 792.) In appellant's case, there is no independent evidence even with that degree of relevance linking appellant to the scene of the crime.

Further, to determine the sufficiency of corroborating evidence, the reviewing court "must eliminate the accomplice's testimony from the case, and examine the evidence of other witnesses to determine if there is any inculpatory evidence tending to connect the defendant with the offense. (*People v. Shaw* (1941) 17 Cal.2d 778, 803-804 []; *People v. Reingold* (1948) 87 Cal.App.2d 382, 392-393 [].) '[C]orroboration is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value. . . . ' (*Id.*, at p. 393.) It must do more than raise a conjecture or suspicion of guilt, however grave. [Citations.]" (*People v. Falconer, supra,* 201 Cal.App.3d at p. 1543, underlining added, parallel citations omitted.)

In the context of appellant's capital case, these standards for determining the truth and reliability of an accomplice's testimony inculpating the defendant must be scrupulously adhered to, to provide the heightened degree of reliability of the guilt verdict required under the Eighth and Fourteenth Amendments of the federal constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) And because no corroborating evidence

connected appellant to the elements of the underlying robbery[86] or to the murder, appellant's conviction of capital murder is unreliable, violates the Eighth and Fourteenth Amendments and must be reversed.

Appellant's conviction of capital murder obtained primarily on the testimony of an accomplice without sufficient corroboration also violates his due process right under the federal constitution to the benefit of the provisions of section 1111, a state statute in which he has a clear liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, *Clemons v. Mississippi* (1990) 494 U.S. 738, 746; *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522.)

B. Mercurio's Testimony Was Inherently Incredible

1. Mercurio's Story Was Incredible Because it Was Physically Impossible

At appellant's trial the district attorney told the trial court at a pretrial hearing: "This case, in terms of factually, it was very straightforward. We [have] a witness that said the defendant shot the victim." (RT 114-115.) That witness was Anthony Mercurio, who was allowed to plead guilty to being an accessory after the fact in exchange for his testimony inculpating appellant as the actual shooter,[87] and who supplied the only evidence of how the murder occurred apart from the forensic evidence, which was inconsistent with his testimony. (RT 2023-2024; see discussion, *infra*.)

Appellant acknowledges the general rule that the credibility of trial

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[86]Appellant assumes solely for the purpose of this argument, and without conceding, that this Court concludes that Gitmed was robbed.

[87]The charging decision of the Riverside County District Attorney in this case may have been influenced by the fact that appellant had a prior murder conviction which made him eligible for the death penalty (RT 3220) while Mercurio did not (RT 1865-1872).

witnesses is normally resolved by the jury. (See, e.g. *People v. Mayfield* (1997) 14 Cal.4th 668, 735.) Nevertheless, a conviction must be reversed if it is based on the inherently incredible testimony of a key prosecution witness. (*People v. Lang* (1974) 11 Cal.3d 134, 139; *People v. Ozene* (1972) 27 Cal.App.3d 905, 910; *People v. Headlee* (1941) 18 Cal.2d 266, 267; *People v. Casillas* (1943) 60 Cal.App.2d 785, 792.)

In *People v. Smith* (Ill. 1999) 185 Ill.2d 532, 708 N.E.2d 365, the Illinois Supreme Court unanimously reversed a murder conviction and death sentence where the testimony of the most crucial prosecution witness contained "serious inconsistencies" and was repeatedly impeached. (*Id.*, 708 N.E.2d at p. 370.) The *Smith* Court held the evidence was insufficient to sustain the conviction, and explained that, "we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *(Ibid.)*

The *Smith* court noted that the key witness's actions after she allegedly witnessed the murder also undermined her credibility. She did not call or contact the police and did not tell the police she witnessed the murder until two days later, and although at trial she gave vivid testimony about what she saw, the reviewing court found that "no reasonable trier of fact could have found her testimony credible." (*Smith, supra,* 708 N.E. 2d at p. 370.)

Similarly, in the instant case, Mercurio did not contact the police, did not say anything about the Gitmed murder until he was questioned by police on September 17, 1991 during a search for narcotics at the Triplett compound (RT 1716), did not tell the police his story about appellant shooting Gitmed until sometime after he was arrested in January 1992 (RT 1911), and only testified pursuant to a deal with the district attorney whose

terms included no prison time for his own involvement in the case (RT 1911, Exhibit 23.) Moreover, in spite of his supposed eyewitness account, some or all of the jurors thought his testimony that appellant shot Gitmed was not true. (CT 1096.)

In *United States v. Chancey* (11th Cir. 1983) 715 F.2d 543, the Eleventh Circuit Court of Appeals, in finding the evidence insufficient where it depended on the credibility of a key prosecution witness, observed that the general rule that the credibility of a witness is for the jury to resolve, "[a]s far as it goes . . . is undoubtedly correct. It does not address the problem, however, which arises when the testimony credited by the jury is so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt. The mere fact that the testimony is in the record is not enough." (*Id.*, at pp. 546-547; see also *People v. Lang, supra,* 11 Cal.3d at p. 139.)

Given the jury's finding that appellant did not use a gun, some of the jurors must have concluded that Mercurio himself was the shooter. (CT 1096; RT 3075.) On review, therefore, this Court must consider Mercurio's testimony keeping in mind that he himself may have been the actual killer.

2. Incredible Testimony by the Key Prosecution Witness Requires Reversal

Mercurio's testimony about the killing itself was inconsistent with two physical facts about which there was no dispute at trial.

First, Gitmed's body was found in the water of Canyon Lake on the morning of September 28, 1991. (RT 1499-1506.) Dr. Joseph Choi, a forensic pathologist from the Riverside County coroner's office, testified that Gitmed was shot three times, the shot to his heart was "immediately

fatal" (RT 1537), so that after the fatal shot he might have breathed "one or two gasps" (RT 1541) and could have moved only slightly, and that he had stopped breathing before he was in the water (RT 1540, 1549.)

Based on the forensic evidence, it would have been impossible for Gitmed to move himself into the water. Yet Mercurio explicitly testified that he never saw Gitmed's body in the water, that appellant did not put it there, and that he himself did not move it. (RT 1967.)

Second, Dr. Choi also testified that bullets entered Gitmed's body from the front and from the back (RT 1532-1533, 1547-1549) and the testimony of Department of Justice Criminalist James Hall established, in context, that the bullets came from one gun. (RT 2262-2263.) The coroner also testified that the fatal bullet entered Gitmed's body at a downward angle, but he could not say with certainty what position Gitmed was in when he was shot. (RT 1543.) However, if Gitmed had been standing up straight and facing his killer, as Mercurio testified, the shooter would have had to be 10 feet tall to shoot Gitmed at that angle. (RT 1543.)

Thus, the forensic evidence contradicted Mercurio's testimony that Gitmed and appellant stood facing each other arguing, that appellant fired two to three shots at Gitmed from that position, and that Mercurio and appellant then got back in the truck and drove away, impliedly leaving Gitmed where he fell. (RT 1959-1960, 1963, 1965.)

Obviously, whatever happened when Gitmed was killed, it was not what Mercurio said. Since this aspect of Mercurio's testimony was by far the most important, appellant submits that the demonstrable fact that he lied about it makes all of his testimony unworthy of belief. These inconsistencies with the physical evidence are not the sort of innocent mistakes or failures of memory that any witness might have. Rather, what

Mercurio described was not physically possible, given the uncontroverted forensic facts, and Mercurio's testimony was inherently incredible.

C. No Testimony from Non-Accomplices or Other Evidence Connected Appellant to the Commission of the Robbery or Murder of Ronald Gitmed

The crime of capital felony-murder by a person acting in complicity with another requires that the prosecution prove beyond a reasonable doubt that the defendant aided and abetted the underlying felony with the specific intent to kill or that he was a major participant in the crime and acted with reckless indifference to life. (*Enmund v. Florida* (1982) 458 U.S. 782; *Tison v. Arizona* (1987) 481 U.S. 137.) However, " [a] conviction can be based on an accomplice's testimony only if other evidence tending to connect the defendant with the commission of the offense corroborates that testimony. (§1111.) The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, but it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to *connect* the defendant with the *crime*. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 [].) The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Szeto* (1981) 29 Cal.3d 20, 25 [].)" (*People v. McDermott, supra,* 28 Cal.4th at pp. 985-986, underlining added, parallel citations omitted.)

Aside from Mercurio's testimony, no evidence presented at

appellant's trial connected him to the murder and robbery of Ronald Gitmed.

The testimony of non-accomplices at appellant's trial established the following facts concerning appellant's conduct and statements before the night of August 27-28, when Gitmed was shot:

1. Appellant and Mercurio had become acquainted with each other prior to August 1991. (RT 2033, 2041 [testimony of Danny Dalton]; RT 2177-2178 [testimony of Charlene Triplett]; RT 2278-2279 [testimony of Barbara Triplett].)
2. Appellant met Michelle Keathley at a pool hall in Riverside in August, 1991, sometime before the night of the crime. (RT 1612 [testimony of Michelle Keathley].)
3. Sometime in August 1991 before the night of the crime appellant asked Erickson Arias to give him a ride to somewhere near Lake Elsinore so that he could get $6000 somebody owed him, offered to split the money with Arias, and said that he could have a gun with him. (RT 1603-1604.)
4. The testimony of Gitmed's mother, Naomi Dekens, established that Gitmed was at her house for about 20 minutes around 7:00 pm on Monday, August 26. (RT 1487-1488.)

The testimony of other non-accomplices provided the following evidence concerning events that probably occurred on either Monday, August 26, or Tuesday, August 27, 1991.

1. Appellant met Ronald Gitmed at Michelle Keathley's house. (RT 1614-1615, [testimony of Michelle Keathley]; RT 2401[testimony of Ronada French].)
2. Appellant left Michelle Keathley's house sometime before

dark with Gitmed in Gitmed's car and they took some drugs with them. (RT 1627-1628, 1663-1664, 1666, 1668-1669 [testimony of Michelle Keathley], RT 2402 [testimony of Ronada French]; see also RT 2618-2619 [comments of trial court].)

3. Appellant and Gitmed arrived in Gitmed's car at the Santa Rosa Mine Road property at an unspecified time, later left to get hamburgers for dinner for several people and returned with the food. (RT 2178-2180 [testimony of Charlene Triplett].)[88]

4. Gitmed, Mercurio and appellant drove away from the Santa Rosa Mine Road property at an unspecified time in a red Toyota truck, leaving Gitmed's car there. (RT 2180, 2182 [testimony of Charlene Triplett].)

The date that appellant and Gitmed went to Santa Rosa Mine Road and drove away with Mercurio in the red truck must have been on August

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[88]Barbara Triplett further testified that the morning after one unspecified night when appellant and Mercurio had left the compound together, Mercurio telephoned her and asked her to come and pick him up from a restaurant in town. (RT 2284.) As she was driving into town she saw someone driving a small car who looked like appellant and she wondered if it was him. (RT 2284.) When she returned home, however, appellant was there without a car. (RT 2284.) Barbara Triplett did not know Ron Gitmed, never saw appellant at her property with a white man around 25 years old, and did not see Mercurio and appellant leave the property the night before Mercurio phoned her for a ride, whatever date that may have been. (RT 2288.) Her testimony about driving into town to fetch Mercurio was irrelevant and potentially confusing and should have been excluded or stricken, since it had no rational tendency to prove anything at issue in the case. (Evid. Code,, § 350.) [separate issue?]

26 or 27, since Charlene Triplett testified that these events occurred after August 25, 1991, and Gitmed was found dead the morning of August 28, 1991. (RT 1501-1502 [testimony of Collins]; RT 1510 [testimony of Mutka]; RT 2178 [testimony of Charlene Triplett].)

The testimony of non-accomplices also established the following facts concerning events that occurred on either Tuesday, August 27, or Wednesday, August 28, 1991:

1. At about 3:30 a.m. appellant arrived on foot at Michelle Keathley's house to get his bicycle, told her that Gitmed would be back soon, that there had been a "scuffle" and that Gitmed had "got a little scared," and that he might have gone home. Appellant got on his bike and rode away. (RT 1622-1623 [testimony of Michelle Keathley].)
2. In the morning, Gitmed's car was not at the Santa Rosa Mine property where it had been left the night before. (RT 2182 [testimony of Charlene Triplett].)
3. The afternoon of August 27 or August 28, 1991, appellant arrived at the Santa Rosa Mine Road property driving Gitmed's car, which contained boxes of personal belongings.[89] (RT 2182 [testimony of Charlene Triplett].)
4. Around noon on August 27 or August 28, 1991, Mercurio and appellant burned some papers near the dumpster on the Santa Rosa Mine Road property and Mercurio asked Charlene Triplett for some lighter fluid, with which appellant cleaned a

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[89]There was no evidence establishing the ownership of the items in the car.

gun. (RT 2237-2238 [testimony of Charlene Triplett[90]].

Non-accomplice testimony established the following facts which occurred on or after Wednesday, August 28, 1991 and therefore after Gitmed was dead:

1. On August 28, 1991, Gitmed's body was found in Canyon Lake, he had been shot three times from a .22 caliber firearm and he died almost instantly of one of the wounds. (RT 1502 [testimony of Collins]; RT 1532-1538 [testimony of Choi].)
2. On August 28, 1991, someone went to Gitmed's storage locker at about 12:45 p.m. and again at about 4:30 p.m. (RT 2462 [testimony of Hillman].)
3. Some rigor mortis was still present in Gitmed's body the morning of August 29, 1991. (RT 1550 [testimony of Choi].)
4. On August 29, 1991, a local newspaper reported that an unidentified body had been found floating in Canyon Lake on August 28, 1991. (Prosecution exhibit P).
5. A day or two after August 28, 1991, appellant said in a conversation with Mercurio that he should get his girlfriend and his family to say that they had never met appellant, that Mercurio should be sure his family would go along with their story. (RT 2197, 2205 [testimony of Charlene Triplett].)
6. On an unspecified date, appellant gave Gitmed's furniture that

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[90]Mercurio's testimony differed from his girlfriend's. He told the jury that the day after the shooting or the next day he saw appellant by the dumpster at Charlene's house near Gitmed's car and in possession of a semiautomatic handgun that Mercurio did not get a close look at. Triplett testified that the gun she saw was an automatic. (RT 1898, 1900-1901, 1972-1973, 2239.)

had been taken from his storage unit, including end tables, a coffee table, lamps, a television and a videocassette recorder to Danny Dalton, asking him for a car in exchange. (RT 2120 [testimony of Dalton].)

5. On an unspecified date, appellant said the items of property that had been taken from Gitmed's storage unit belonged to appellant, and that he wanted to give them to Mercurio and Charlene Triplett as a wedding present. (RT 2183 [testimony of Charlene Triplett].)

6. On an unspecified date Mercurio took the items from Dalton and put them in the Tripletts' house. (RT 2121 [testimony of Dalton].)

7. On an unspecified date appellant went with Mercurio and Dalton to take Gitmed's car out into the desert and burn it. (RT 2044-2046 [testimony of Dalton].)

8. On an unspecified date Mercurio told his girlfriend that appellant had shot Gitmed. (RT 2196 [testimony of Charlene Triplett].)

9. At some point in the month following Gitmed's death, appellant twice said something about a body floating in Canyon Lake, or a person floating who could no longer make decisions for himself. (RT 2044 [testimony of Danny Dalton]; RT 2282-2283 [testimony of Barbara Triplett].)

10. Nearly a month after the crime, appellant had possession of Gitmed's athletic bag and jacket, which were found by police at appellant's mother's house in the trunk of her car. (RT 1485 [testimony of Dekens].)

11. A television, VCR, vacuum cleaner, and other items of furniture were seized by police from the Triplett compound on September 17, 1991. (RT 1734-1735, 1830-1834.)

Appellant submits that the above evidence would be sufficient corroboration of appellant's guilt as an accessory after the fact or of receiving stolen property. But there was no testimony by anyone other than Mercurio that connected appellant to the shooting or robbing of Gitmed. It is important to remember in this context that none of the property that was later in appellant's possession was taken from Gitmed's presence or by force or fear, there is no evidence that Gitmed had the key to his storage locker in his possession when he was killed, or that appellant would have known before Gitmed was killed that he had a storage locker.

The fact that appellant left the Triplett compound with Mercurio and Gitmed in the red truck does not establish that he went with them to Canyon Lake the evening of August 27. That may have occurred on August 26, 1991. And if appellant drove off with Mercurio and Gitmed on the evening of August 26, then there is no independent evidence that he was with them, or with either of them, on August 27, which was the night Gitmed was killed.

Also, there is no independent evidence of where the three men drove to in the Toyota truck, whichever night it was. Mercurio testified that friends at whose house Mercurio claimed they stopped were "in bed" (RT 1887), but those friends were not called as witnesses to corroborate that appellant was ever in Quail Valley with Mercurio and Gitmed.

On this record, it is completely possible that Mercurio drove the truck someplace–again, whichever night it was–and dropped appellant off somewhere and drove away with Gitmed. If appellant parted ways with the

other two because of some kind of conflict, this scenario would be consistent with Michelle Keathley's testimony that appellant arrived at her house on foot around 3:00 am to fetch his bicycle and reported that there had been a "scuffle." And again, this could all have occurred the night of August 26-27.

Danny Dalton testified that he was with Mercurio and appellant when a car was burned (RT 2045) and that appellant asked him to sell a stereo, which he did (RT 2046). But he did not testify that he ever saw appellant and Gitmed together at the Santa Rosa Mine property, nor that he ever saw appellant, Mercurio and Gitmed leave together at any point. His personal belief that appellant was involved in Gitmed's death was admittedly just speculation (RT 2048 ["that's what I put together on my own"]), and the trial court cautioned the jury with regard to his testimony that it should not give any weight to the opinions of witnesses that were not based on facts to which they had testified. (See Argument VII, *post* [Dalton's testimony should have been stricken].)

The trial court referred to Dalton's testimony in specially cautioning the jury on this point, because Dalton had testified that he had "put together" that appellant had killed someone and left them floating in a lake. (RT 2048, 2085.) Dalton testified that "at some point in time" appellant talked to him and was "babbling on . . . bragging[,]" and that Dalton did not want to listen to appellant, who did not give him any details about anything that had occurred, "just different things that made me think of what has happened and some dude floating." (RT 2042-2044) When the prosecutor asked if Dalton remembered appellant saying something about somebody floating, Dalton replied, "Yeah, leaving him floating." (RT 2044.) Although prejudicially suggestive, this alleged statement by appellant does

not connect him to the commission of the crime because Dalton did not explain what appellant was "bragging" about, and did not claim that appellant said he himself had anything to do with anybody left "floating." Since the local newspaper reported on August 29, 1991, that an unidentified body had been found floating in Canyon Lake (prosecution exhibit P), the fact that appellant mentioned something about this to Dalton did not demonstrate that he was connected to the incident.

Mercurio testified that he believed the murder weapon was a semiautomatic because of the rapid firing he heard. (RT 1964.) Criminalist James Hall testified, however, that, based on the ballistics evidence, it could have been an automatic, semi-automatic, revolver or rifle. (RT 2264.) In any case, Charlene Triplett testified that the afternoon of the day after Mercurio, appellant and Gitmed had driven off together in the red truck, she saw Mercurio and appellant near the dumpster burning some papers and Mercurio asked her for some lighter fluid for cleaning a small handgun which she described to the police as an automatic.[91] (RT 2237-2239.) Since this gun was not identified as belonging to appellant, was never seen in his possession before the murder, and was never identified as the murder weapon or as the same type or caliber of gun as the murder weapon, this evidence does not connect appellant to the shooting or robbery of Gitmed.

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[91]Mercurio testified that he saw appellant with a semiautomatic on the hood of Gitmed's car a day or two after the shooting but that Mercurio himself did not get a close look at the gun. (RT 1901.) This self-serving testimony, however, conflicted with Charlene Triplett's testimony.

D. No Evidence Corroborated That Appellant Was With Mercurio and the Victim on the Date the Victim Was Killed

It was the prosecution theory that Gitmed was killed sometime during the night of August 27-28, 1991.[92] (RT 1431, 1436.)

Gitmed's mother testified that he was at her house for about 20 minutes around 7 p.m. on Monday, August 26, 1991, and there was undisputed testimony that Gitmed's body was discovered in Canyon Lake the morning of Wednesday, August 28, 1991, that rigor mortis had set in by that time, and that there was still some rigor in the elbow and knee joints when the body was examined in the coroner's office a day later. (RT 1550, 1552.) Further, there was evidence that the area where the body was found was used by campers and water skiers (RT 1952, 2425-2426), so that it was unlikely that a body would have remained undiscovered for the entire day of August 27, and more likely that the killing did occur that night or in the very early morning hours of August 28.

Critically, none of the prosecution witnesses was able to testify positively to the date on which they observed appellant's conduct. That is, the witnesses whose testimony established that appellant and Gitmed were at Michelle Keathley's house and left together, and that appellant and Gitmed arrived at the Triplett compound together, ate hamburgers with Mercurio and the Tripletts and then left with him in a truck, were all uncertain what date these things happened. So for all the jury knew, those events happened on August 26 and there was no credible, independent evidence to support a conclusion beyond a reasonable doubt that appellant

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[92]The information charged appellant with murder "on or about August 28, 1991." (CT 189.)

was actually with Gitmed and Mercurio on the night of August 27, when Gitmed was killed – let alone that he was connected to Gitmed's murder.

Significantly, the prosecutor acknowledged, in his closing argument to the jury, the failure of proof with regard to what date appellant and Gitmed were at Keathley's house. He said, "We have the defendant, it's either Monday or Tuesday – I think Michelle Keathley was trying to be very honest, remember the best she could – who either Monday or Tuesday was leaving with Ron Gitmed." (RT 2927.)

Gitmed's cousin, Don Fortney, testified positively that on the afternoon of Monday, August 26, 1991, he helped Gitmed move some of his property into a storage facility until about 3:00 pm or a little bit later, but "not by much later." (RT 1586.) Fortney testified that he and Gitmed had plans to go out to dinner together the following night, i.e. Tuesday, August 27, 1991. (RT 1588.) This undermines the theory that Gitmed went with appellant to the Triplett compound around dinnertime on Tuesday, and makes it more likely that Gitmed was at his cousin Michelle's after visiting his mother and left there with appellant to go to Santa Rosa Mine Road on Monday, August 26.

In any case, certainly Fortney's testimony does not corroborate any fact in Mercurio's version of events. Nor do the storage unit records establish which day Gitmed went to Michelle Keathley's house. She testified that appellant was there sometime in the evening when Ronada French was also visiting her. (RT 1614-1615.) Ronada French testified that she had gone to Keathley's house after getting off work about 5:00 p.m., and that Gitmed and appellant did not leave Keathley's house until night was falling (RT 2405), which must have been sometime around 8:00 p.m., or a little later, given that it was August. But neither Keithley nor

French was sure which date this occurred. So Gitmed certainly could have gone to Keathley's after being with Fortney in the afternoon and later visiting his mother, leaving her house about 7:20 p.m. on Monday.

All in all, the facts to which the prosecution witnesses testified not only failed to establish that appellant was with Gitmed on August 27, but they were perfectly consistent with the two having been together on August 26.

In sum, the evidence showed only that Gitmed was alive around 7:20 p.m. on August 26, and that he was dead by the morning of August 28. And a careful examination of the record evidence reveals that it is impossible to determine whether appellant met up with Gitmed on August 26 or 27.

The trial court recognized this problem with the evidence when it made the following observation: "So apparently everybody was operating on the assumption that it was on the 27th that this murder occurred, although I think there's a more than reasonable inference that it happened on the 26th, based on the evidence that we heard presented by the defense this morning, in terms of Michelle Keathley's interview and the evidence of Ms. Underwood." (RT 2618-2619.) Judge Sherman was referring to a tape recorded police interview of Michelle Keathley that was played in open court the morning of April 16, 1996, and to the testimony of Keathley's friend Jenny Underwood that was presented the same morning. (RT 2561-2565.)

The trial court correctly recognized the ambiguity in the prosecution's evidence at that point, but the evidence to which the court referred did not suggest that the murder had occurred on the 26th, but only that appellant and Gitmed may have been at Keathley's house on that day rather than on the 27th. Neither Keathley nor Underwood reported to the

police or testified to any facts concerning the murder itself. The trial court completely missed the actual significance of the ambiguity it had recognized: i.e., that if – as the trial judge said – it could reasonably be inferred from the Keathley/Underwood evidence that appellant was at Keathley's on the 26th, then there was no evidence to support a conclusion beyond a reasonable doubt that he was there on the 27th, which was the evening Gitmed was killed.

Keathley had previously testified that she had told the police the last day she saw Gitmed was Monday the 26th or Tuesday the 27th, and that she had also told them that she was fairly sure it was Tuesday, which she confirmed at trial. (RT 1627.) On the morning of April 16, 1996, the defense played for the jury a portion of the tape-recorded police interview of Keathley in which the following dialogue[93] occurred:

"DS: Okay, Ron was found on the 28th, a Wednesday, in the morning, okay? Early in the morning . . .

"MK: Right.

"DS: . . . around eleven? Okay. So, the last time you saw him had to be, before the 28th?

"MK: It was Monday or Tuesday.

"DS: A Monday or a Tuesday?

"BF: Which, Tuesday?

"MK: I think it was, Tuesday."

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[93]On the transcript of the tape recorded interview "DS" and "BF" indicate Perris Police Officers Donna Silva and Betty Fitzpatrick, respectively; "MK" indicates Michelle Keathley, and "JU" indicates Jenny Underwood. (Defense exhibit no. Z-4.)

"JU: She called, she called me during the week at night, so it was either was [sic] Monday or Tuesday."

"MK: Tuesday. It was either Monday or Tuesday. Well, Ronada was over and her mom was coming the next day. I think it was Tuesday."

(Defense exhibit no. Z-4 [transcript], p. 1, underlining added; RT 2559-2560, 2563-2564.)

Later in the same interview, the following further dialogue occurred:

"DS: Okay. So, that was probably Tuesday night was the last time you saw him?

"MK: I think that was the . . .

"DS: About . . .

"MK . . . closest.

"DS: Okay. So, it was about three-thirty . . .

"MK: No.

"BF: Wednesday morning, that you saw him?

"MK: That guy came at three . . .

"DS: (U) [sic] came back?

"MK: . . . it was between three, and three-thirty a.m.

"DS: Okay, so Tuesday night, what time about was the last time you saw him, when he drove off with Tex?

"MK: It was, God, Ronada was there, too. She came right after work. It was like around six o'clock.

"DS: Okay, six p.m., Tuesday night? . . . ."

(Def. Exh. No. Z-4, p. 5; RT 2564 .)

It is clear from this tape recorded interview that by September 11, 1991, the police theory was that Gitmed had been killed on Tuesday night,

August 27, 1991, and their questions were focused on establishing that date, but it is equally clear, as the trial court realized, that Michelle Keathley herself simply did not know which night appellant and Gitmed were at her house together. (RT 2323, Def. Exh. Z-1.) The trial court's comment that "the murder" may have occurred the night of the 26th and referring to this evidence makes sense only if the court was assuming that appellant committed the murder, and reveals that the court missed the point of the defense evidence, which was to demonstrate that appellant and Gitmed were, or might have been, at Keathley's house on Monday, August 26th.

Significantly, the prosecutor acknowledged in closing argument that Keathley did not know whether appellant and Gitmed had been at her house on Monday or Tuesday. (RT 2927.)

This is a critical point because, if in fact appellant and Gitmed left Keathley's house together on Monday, August 26, 1991, and drove to the Triplett compound that evening, then there is no evidence that appellant was with Mercurio on August 27th at all, let alone that he was present when Gitmed was killed.

No other witness or physical evidence establishes the date that any of the significant events happened with any more certainty than Keathley, and most with less.

Keathley's friend Ronada French corroborated her testimony that appellant and Gitmed were at her house together on an unspecified evening in August 1991. French testified that one evening in August 1991 she spent about an hour at Keathley's house after work and saw appellant and Gitmed, who left together in a small car as it was getting dark. (RT 2400-2402, 2405.) She had no recollection, however, of what day or date this occurred. (RT 2405.)

Testimony by Danny Dalton and Charlene Triplett corroborated Mercurio's story that appellant and Gitmed arrived at the Santa Rose Mine Road property one night in August 1991. Charlene Triplett testified that they came to the house either Monday or Tuesday, August 26 or 27, although she acknowledged she had previously told police that it was August 27. (RT 2181.)

Barbara Triplett was absolutely unable to specify the date that anything to which she testified occurred, even after looking at a calendar in the courtroom. (RT 2286.)

Danny Dalton testified that he always had a bad memory, was using speed at the time of the events in question, and there was no way he could pinpoint the dates anything occurred. (RT 2092, 2093.)

E. The Record in Appellant's Case is Out of Line With the Facts in Other Cases Where This Court Has Found Sufficient Corroboration of Accomplice Testimony

That the evidence provided by non-accomplice witnesses in appellant's case simply does not connect appellant to the robbery or murder of Ronald Gitmed is even more clear when the record in appellant's case is compared with cases where the reviewing court has found sufficient corroboration of accomplice testimony.

For example, in *People v. McDermott*, *supra,* 28 Cal.4th 946, this Court found sufficient corroboration in testimony by the victim that the defendant had previously introduced him to one of his attackers, and in the witness's in-court identification of the accomplice in court as another person the defendant had introduced him to and as looking similar to one of his attackers; and in the fact that the defendant had benefitted from the crime in a manner consistent with what the accomplice testified was the

crime's purpose. (*Id.*, at p. 1001.)

In *People v. Hayes* (1999) 21 Cal.4th 1211, this Court found the accomplices' testimony corroborated by the testimony of other witnesses establishing that defendant had said he had killed two people and that their bodies had been chopped up, that the murder weapon had been delivered to the defendant, the defendant had told someone to mail a letter that was part of a cover-up plot, and that he had shown an unusual and particular interest in the discovery of one of the victim's skulls, referring to the location of the murders. (*Id.*, at p.1272.)

In *People v. Williams* (1997) 16 Cal.4th 635, there was sufficient corroboration where a non-accomplice identified the defendant as the person she saw leaving the scene of the crime at the time of the shooting; and the defendant admitted to police he had been present at the scene of the murders. (*Id.*, at p. 681.)

In *People v. Williams* (1997) 16 Cal.4th 153, where witness intimidation was used as an aggravating factor at the penalty phase of a capital trial, and where there was evidence that one Thomas had shot a witness, this Court found corroboration in the testimony of a non-accomplice that defendant had said he planned to get Thomas to shoot a witness in order to "beat" the case. (*Id.*, at p. 246.)

In *People v. Sanders* (1995) 11 Cal.4th 475, where the defendant was convicted of robbing and shooting four people and of robbing other victims in a restaurant, this Court found sufficient corroboration of an accomplice's testimony where there was evidence provided by non-accomplice witnesses that defendant was present at meetings when the crime was planned and eyewitnesses identified him in a lineup. (*Id.*, at pp. 501, 535.)

In *People v. Rodrigues, supra*, 8 Cal.4th 1060, there was sufficient corroboration where a non-accomplice witness testified she saw the defendant fleeing the scene, the victim had been stabbed by a left-handed assailant during a struggle and the defendant was left-handed, was treated for a stab wound the next morning and asked his brother to lie about how he had been injured, and blood in defendant's car could have come from the victim. (*Id.*, at pp. 1128-1129.)

In *People v. Zapien* (1993) 4 Cal.4th 929, there was sufficient corroboration where non-accomplice testimony provided evidence that the defendant was driving the accomplice's car on the day of the crime, appeared at her home shortly after the murder with blood on his clothes and said, "[w]hat am I going to do?" and that he left town shortly after the murder. (*Id.*, at p. 982-983.)

In *People v. Fauber, supra,* 2 Cal.4th 792, this Court considered the corroborative evidence sufficient where the testimony of non-accomplices was evidence that the defendant had been in possession of murder victim's property (telephone credit card and maps issued by victim's employer) taken during robbery of the victim. (*Id.,* at pp. 814, 835.)

In *People v. Price* (1991) 1 Cal.4th 324, where defendant was convicted of conspiracy to murder in a gang-related killing where the motive was revenge and the victim was killed in his residence, accomplice testimony was corroborated by evidence of defendant's own statement that he was a member of the gang, that he was in the same location as the co-conspirators at the time of the conspiracy, that he came from out of town to the city where the victim lived and left immediately after the killing, that he had the victim's home address, and that he possessed weapons that he told his mother were for gang-related business. (*Id.*, at pp. 376, 444.)

In *People v. Garrison* (1989) 47 Cal.3d 746, there was sufficient corroboration where non-accomplice witnesses testified that the defendant had been overheard planning a double murder and concealing a body; was in possession of property, within 24 hours of the murders, that had been stolen from the victims, knew it had been stolen, and possibly knew that the victims had been killed; left the state within four days of the murders; and later admitted involvement in the murders. (*Id.*, at pp. 773-774.)

In *People v. Bunyard* (1988) 45 Cal.3d 1189, there was sufficient corroboration of the testimony of an accomplice who was an acquaintance of the defendant's, that the defendant had hired him to kill the defendant's wife, where another acquaintance testified that the defendant had in the past repeatedly offered him money to do the same. (*Id.*, at pp. 1206-1207.)

In appellant's case, there was no evidence that he was involved in any kind of planning of the crime, no independent evidence linked him to the scene, and the murder weapon was never identified. There was no testimony by anyone concerning the purpose of the crime, appellant did not make any statements prior to Gitmed's murder which indicated that he intended to cause any harm to him, nor that he had any reason to want Gitmed killed. And he certainly never stated that he had killed anyone , revealed personal knowledge of facts about the crime unknown to the public, or left town following the crime.

In addition, there was no independent evidence that appellant ever took any property from Gitmed's immediate presence or control by force or fear. (See Argument IV, *supra.*) And he did not significantly profit by the crime, since the vast majority of the victim's property was found in Mercurio's possession, not appellant's.

F. Without Mercurio's Testimony All the Evidence is Consistent with Appellant's Innocence

When Mercurio's self-serving testimony is disregarded, a completely different possible scenario emerges from the evidence.

The date that appellant was with Gitmed at Keathley's house and later with Mercurio and Gitmed at the Tripletts' compound cannot be extrapolated backwards from an assumption that he was present when Gitmed was killed the night of the 27/28th. Rather, it was the prosecution's task at least to prove that it was on August 27, 1991, that appellant went off-roading with Mercurio and Gitmed, since that was the night Gitmed was killed, as well as to establish beyond a reasonable doubt all the elements of the charged crimes. It demonstrably failed to do so.

Appellant and Gitmed may have been at Keathley's house and then gone somewhere in the red truck with Mercurio at the wheel on Monday, August 26. If so, the record is silent as to what anyone did on Tuesday, August 27. And specifically, there is no evidence to contradict the possibility that on August 27, someone other than appellant–and very possibly Mercurio –took Gitmed to Canyon Lake on that evening and shot him. Surely the jury could not have reasonably concluded that that did not happen.

G. Reversal is Required

The conclusion is inescapable that appellant was convicted of capital murder on the uncorroborated testimony of a man who could have been charged with the same crime, and who escaped prosecution and punishment by testifying that appellant had committed the crime. The imposition of the death penalty on appellant in these circumstances would be arbitrary and capricious and in violation of the fundamental constitutional principles

enunciated in *Furman v. Georgia* (1972) 408 U.S. 238, 309-310 (Stewart, conc.), 313 (White, conc.); *Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Woodson v. North Carolina* (1976) 428 U.S. 280; and *Roberts v. Louisiana* (1976) 428 U.S. 325.

Appellant's guilt verdict and the robbery-murder special circumstance finding were based on the uncorroborated testimony of an accomplice whom some jurors probably believed to be the actual killer, constitutes a violation of appellant's rights to heightened due process and a reliable guilt conviction in a capital case under the Fifth, Eighth and Fourteenth Amendments and must be reversed. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, 643; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

Reversal of the entire judgment is also required because appellant's conviction and the finding of the robbery-special circumstance were obtained in violation of section 1111, a state law provision in which appellant had a vital liberty interest, and therefore denied appellant his due process right under the federal constitution to the correct application of state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Clemons v. Mississippi* (1990) 494 U.S. 738, 746; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

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VI

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FELONY-MURDER SPECIAL CIRCUMSTANCE

A. Introduction

Appellant's jury found that he committed the murder of Gitmed under the special circumstance that the murder was committed while he "was engaged in the commission of the crime of ROBBERY . . . within the meaning of Penal Code Section 190.2(a)(17(i)."[94][95] (CT 1095, capitalization in original.) Under state law and federal constitutional principles, the jury had to make certain factual determinations beyond what was required for a simple first-degree felony murder conviction, in order to find this special circumstance.

"Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of

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[94]Section 190.2, subd. (a)(17)(i) provided, in pertinent part, at the time of Gitmed's murder, that a person convicted of murder must be sentenced to death or to life in prison without possibility of parole if: "The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit . . . Robbery in violation of Section 211." Appellant refers to this offense in the instant argument as "special circumstance felony-murder" or "capital felony-murder."

[95]Now section 190.2, subdivision (a)(17)(A). There have been no substantive changes to the statute relevant to this case, and appellant refers to the section and subdivision in the instant brief by the numbering that applied when he was charged and tried.

the crime." (Pen. Code, § 190.4, subd. (a).) It is well-established that "the proof necessary to support a felony-based special-circumstance finding must be of the same quality, quantity and nature required under the general law to support a conviction of the substantive felony." (*People v. Morris* (1988) 46 Cal.3d 1, 18 (overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, footnote 5).) In the case at bar, the robbery-murder special circumstance finding has no support in the record because there was no credible evidence to establish the first two elements of the offense, i.e., possession of property by Gitmed and taking of that property by Mercurio or appellant. Obviously, then, there was also no evidence of intent to permanently deprive the victim of property taken when he was killed.

Appellant hereby incorporates by reference as if fully set forth herein, those sections of Argument IV, *supra*, in which he has shown: that the jury's finding that he did not personally use a firearm (CT 1096) necessarily establishes that one or more jurors believed that Mercurio was, or may have been, the actual killer; and that appellant's conviction of guilt of first-degree murder cannot stand in the absence of substantial evidence that appellant acted as aider and abetter. The same reasoning and authority apply in the instant context. Appellant therefore focuses his analysis in the instant argument on the additional elements that the prosecution failed to prove for purposes of the special circumstance of felony-murder under section 190.2, subdivision (a)(17)(i).

Appellant demonstrates herein that the felony-murder special circumstance is invalid because one or more jurors did not believe that appellant used a gun, but there was no substantial evidence of appellant's

conduct or mental state as an aider and abetter under subdivision (c)[96] or (d);[97] and there was no substantial evidence of any relationship between the murder and the robbery of Gitmed within the meaning of 190.2(a)(17)(i) as this Court has interpreted it.

On review of the sufficiency of the evidence to support a special circumstance, the question for this Court is "whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.' (*People v. Mickey* (1991) 54 Cal.3d 612, 678 [], original italics.)" (*People v. Alvarez* (1996) 14 Cal.4th 155, 225, parallel citation omitted.)

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[96]Section 190.2, subdivision (c) provided, at the time of appellant's crime and trial, as follows: "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been found to be true under Section 190.4." (Underlining added.) There have been only grammatical, non-substantive changes to this provision since then.

[97]Section 190.2, subdivision (d) provided, at the time of appellant's crime and trial, as follows: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which a special circumstance enumerated in Paragraph (17) of subdivision (a) of this section has been found to be true under Section 190.4." (Underlining added.) There have been only grammatical, non-substantive changes to this provision since then.

Here, no rational juror could have found that appellant: (1) did anything to assist or encourage Mercurio in killing Gitmed with the specific intent to kill (§ 190.2(c)); or (2) acted with reckless indifference to human life as a major participant in the robbery of Gitmed by Mercurio (§ 190.2(d)); or that (3) the robbery of Gitmed was anything more than incidental to his murder (§ 190.2, subd. (a)(17)(i)).

Moreover, under the same reasoning as appellant explained in Argument IV, *supra*, in the context of first degree felony-murder, the trial court erroneously instructed the jury on accomplice liability for special circumstance felony-murder because there was insufficient evidence to support that theory under the relevant statute.[98] This error was seriously compounded by the prosecutor's closing argument in which he fundamentally misled the jury about the law of special circumstance felony-murder and about the relevance of facts in appellant's case to that theory. This combination of errors most probably led to the jury's unsupported and erroneous conviction of the robbery-murder special circumstance finding, which must be reversed. Appellant hereby incorporates Argument IV,

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[98]The trial court instructed the jury as follows, in pertinent part: "If you find that the defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true unless you're satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of the murder of the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of robbery which resulted in the death of a human being, namely, Ronald Gitmed." (RT 2909-2910, underlining added.)

supra, by reference as if fully set forth herein.

B. Elements of Special Circumstance Felony-Murder Were Not Established

Penal Code section 190.2 is in accord with federal constitutional law concerning imposition of the death penalty on defendants who are not the actual killers. Subdivision (c), requiring that an accomplice to capital murder must act with the "intent to kill," comports with the principles explained in *Enmund v. Florida* (1982) 458 U.S. 782. There, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty on a defendant who had participated in a robbery but was not the actual killer, where the evidence did not support a conclusion that the non-killer defendant himself had the specific intent to kill. (*Id.*, at p. 797.) And the "reckless indifference" requirement of subdivision (d) for special circumstance felony-murder accomplice liability is consistent with the rule explained in *Tison v. Arizona* (1987) 481 U.S. 137, holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." (*Id.*, at p. 158, underlining added.)

Further, consistent with the United States Supreme Court opinions in *Enmund* and *Tison*, this Court has clarified that in order to sustain a finding of special circumstance felony-murder, there must be substantial evidence in the record to establish that the defendant aided and abetted the felony (here, robbery) before the murder occurred. (*People v. Jones* (2003) 30 Cal.4th 1084, 1113; *People v. Pulido* (1997) 15 Cal.4th 713, 727-727; see *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1394-1397; *People v. Asher* (1969) 273 Cal.App.2d 876, 890, fn. 2.)

1. No Evidence of Aiding and Abetting Mercurio with the Specific Intent to Kill

Under the express terms of section 190.2, subdivision (c), those jurors who were not convinced that appellant was the actual killer could have found the existence of the special circumstance of felony murder if they reasonably concluded, based on the evidence, that appellant did or said something which assisted Mercurio in shooting or robbing Gitmed, and that appellant did so "with the intent to kill."

Appellant has previously shown in Argument IV, *supra*, that there was no evidence to support a rational conclusion that he said or did anything which could have constituted aiding and abetting Mercurio in committing first-degree felony murder. Appellant hereby incorporates that portion of the instant brief by reference as if fully set forth herein.

Additionally, there was no evidence to support a conclusion that appellant ever harbored the specific intent to kill, a necessary element of capital felony-murder under section 190.2.

It is axiomatic that the elements of a crime, including intent, may be established in a criminal trial by direct or circumstantial evidence. On the record in appellant's case, however, those jurors who rejected Mercurio's testimony that appellant shot Gitmed had no information about appellant's conduct at the scene of the crime. And there was no evidence that appellant made any statements at any point to any witness, direct or indirect, or performed any acts, indicating that he harbored any intent at all with regard to Gitmed. (Compare *People v. Coffman* (2004) 34 Cal.4th 1, 91 [intent to kill established by evidence defendant stood guard while victim handcuffed, warned co-defendant, led handcuffed victim with mouth taped shut out of house, drove victim and co-defendant to site of murder]; see *People v.*

Williams (1997) 16 Cal.4th 635, 690 [method of murder by actual killer not evidence of aider and abetter's specific intent].)

On this record this Court cannot possibly conclude that appellant's jury could validly have found the existence of the special circumstance under subsection (c).

2. No Evidence that Appellant Aided and Abetted Mercurio in Committing Robbery Acting with Reckless Indifference to Human Life

In order to find the existence of the felony-murder special circumstance under subdivision (d) of section 190.2, those jurors who did not believe that appellant used a gun would have had to conclude that Mercurio robbed and killed Gitmed and that appellant was a major participant in the robbery and affirmatively acted with reckless indifference to human life.

Appellant has previously shown in Argument IV, *supra*, in the instant brief, that there was a complete dearth of evidence to establish that appellant said or did anything to assist or encourage Mercurio in any way in robbing Gitmed. Appellant hereby incorporates that portion of the instant brief by reference as if fully set forth herein, and submits that it was simply impossible on this record for those jurors who were not convinced that appellant used the gun, to rationally conclude anything about appellant's role in the robbery, if any.

Even if those jurors who doubted that appellant was the actual killer believed that he was somehow "involved" in Mercurio's robbery of Gitmed, as the prosecutor argued (see section D, below), they could not have concluded that he was a "major participant" in the absence of any evidence of his conduct or statements relating to that crime. (Compare *Tison v.*

Arizona (1987) 481 U.S. 158 [defendants major participants where they planned prison escape, took guns into prison, provided guns to escaping inmates, later kidnaped and robbed four people, watched killing of the four people without trying to intervene, left scene with killers in victims' car]; *People v. Cleveland* (2004) 32 Cal.4th 704, 717, 729 [evidence defendant was major participant where he was involved in robbery and gunfight earlier same day with same co-defendants and discussed which gun best to use for murder, his hand injured before crime and blood of his type found at crime scene]; *People v. Proby* (1998) 60 Cal.App.4th 922, 928 [evidence defendant was major participant where he supplied murder weapon, was himself armed with gun, knew of killer's propensity for violence, saw victim's injuries and left him to die, took property out of safe]; *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [evidence defendant was major participant where he helped plan robbery, arranged for armed killer to enter victim's home, and after victim was shot took property and fled with killer, leaving victim to die].)

Nor could such jurors have found that appellant acted with "reckless indifference to human life." The Court of Appeal's opinion in *People v. Hodgson* (2003) 111 Cal.App.4th 566 helps to illustrate the failure of proof in appellant's case. In *Hodgson*, as here, the crime involved only two perpetrators, and the *Hodgson* appellant was not the actual killer. (*Id.*, at p. 581.) In *Hodgson*, however, as in all other cases known to appellant where the appellate court found substantial evidence of accomplice liability for felony-murder under section 190.2, there was affirmative evidence of the non-killer's role in the crime. The *Hodgson* court pointed to evidence that the defendant had forcibly held an automatic gate open so that the killer could leave the scene to conclude that "his actions were both important as

well as conspicuous in scope and effect." (*Id.*, at 580.) In addition, the court pointed out that "it must have been apparent to appellant [the victim] had been severely injured and was likely unconscious. Her car rolled into the garage and collided with a pillar and another car. Appellant had to be aware use of a gun to effect the robbery presented a grave risk of death. However, instead of coming to the victim's aid after the first shot, he instead chose to assist Salazar in accomplishing the robbery [by holding the door open for escape]." (*Id.*, at p. 580.) This the *Hodgson* court found to be substantial evidence that the defendant acted with "'reckless indifference to human life,'" observing that "[t]his phrase 'is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.'" (*Id.*, at p. 580, quoting from *People v. Estrada* (1995) 11 Cal.4th 568, 577; see *People v. Proby, supra,* 60 Cal.App.4th at p. 928; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754 [evidence of reckless indifference where defendant knew killer was carrying knife, struck victim, grabbed her purse, fled scene with killer after he stabbed victim knowing she was badly injured, did not claim surprise at knife attack]; *People v. Mora, supra*, 39 Cal.App.4th at p. 617.)

The state of the evidence at appellant's trial stands in stark contrast to *Hodgson* and the other cases cited above.

Apart from Mercurio's description of appellant's conduct as the sole perpetrator, which one or more jurors rejected, there is no evidence whatsoever that appellant was a "major participant" in the robbery, nor that he assisted Mercurio in any way, nor that he had any particular mental state when the three men were out at Canyon Lake, let alone that he affirmatively assisted Mercurio in robbing Gitmed with the "reckless indifference" the law would require.

C. A Finding of Special Circumstance Felony-murder Required That the Prosecution Establish Beyond a Reasonable Doubt That the Robbery Was Not Incidental to the Murder

This court has explained that under section 190.2, subdivision (a)(17), a valid conviction of a felony is "a necessary condition to finding a corresponding special circumstance, but it [is] not a sufficient condition: the murder must also have been committed 'during the commission' of the underlying crime." (*People v. Green* (1980) 27 Cal.3d 1, 59 [overruled on another point in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3].) This means that "where the defendant's intent is to kill, and the related offense is only incidental to the murder, the murder cannot be said to have been committed in the commission of the related offense." (*People v. Williams* (1988) 44 C.3d 883, 927.)

More specifically, the statute limits eligibility for the death penalty based on the special circumstance of felony-murder to "those defendants who killed in cold blood in order to advance an independent felonious purpose . . . ." (*Green, supra,* 27 Cal.3d at p. 61, underlining added.) This limitation is required by the Eighth and Fourteenth Amendments of the federal constitution to avoid the arbitrary and capricious imposition of the death penalty. (*Id.,* at pp. 49-50; see *Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153.)

In *Green,* this Court explained that "[t]o permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in *Gregg* [*v.*

Georgia (1976)] 428 U.S. [153] at p. 189 [].) We conclude that regardless of chronology such a crime is not a murder committed 'during the commission' of a robbery within the meaning of the statute." (*Green,* 27 Cal.3d at pp. 61-62, parallel citation omitted.)

Thus, "[a] special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal 'is not to steal but to kill and the robbery is merely incidental to the murder . . . because its sole object is to facilitate or conceal the primary crime.' ([*People v. Green, supra,* 27 Cal.3d] at p. 61.)" (*People v. Thompson* (1980) 27 Cal.3d 303, 322.) And in *People v. Bolden* (2002) 29 Cal. 4th 515, this Court clarified that the word "primary" is not critical, rather the question is "whether commission of the underlying felony was or was not merely incidental to the murder." (*Id.,* at pp. 557-558.)

In appellant's case, this means that the prosecution was required to prove that appellant, or appellant and Mercurio, intended to rob Gitmed before the murder occurred or at least while the murder was happening (*People v. Lewis* (2001) 25 Cal.4th 610, 642), *and* that the robbery was not merely incidental to the murder, for example that they killed him in order to rob him, or in order to get away with robbing him (*People v. Green, supra,* 27 Cal.3d at p. 61; *People v. Bolden, supra,* 29 Cal.4th at p. 557).

As this Court stated in a previous case in a posture similar to the case at bar, "[t]he principles enunciated in *People v. Green* compel this court to examine the evidence in the present case to determine whether it is sufficient to uphold the jury's findings that the robbery and burglary special circumstances were true beyond a reasonable doubt. In making this determination, 'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses

substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [], underlining added [by *Thompson* court].)" (*People v. Thompson, supra,* 27 Cal.3d at pp. 322-323, parallel citation omitted; see *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318.)

In appellant's case, such a review reveals that the prosecution failed to meet its burden of proof at appellant's trial with regard to the relationship of the robbery to the murder.

D. No Reasonable Jury Could Have Concluded Beyond a Reasonable Doubt That the Robbery of Gitmed Was More than Incidental to His Murder

Appellant has previously established in Argument IV, *supra,* that the evidence was insufficient to support a conclusion that there was any logical connection between the robbery and murder of Gitmed, and hereby incorporates that argument by reference as if fully set forth herein. Appellant submits that there was, by the same token, no substantial evidence to establish that the robbery of Gitmed was anything more than incidental to his murder because it is beyond dispute that the jury was not unanimously persuaded by either of Mercurio's versions of what happened at the shore of Canyon Lake, since it found the allegation that appellant had used a gun not to be true (CT 1096), and there was no other evidence of how Mercurio was killed, who shot him, or whether he was shot before or after property, if any, was taken from him. There was no other evidence that either Mercurio or appellant ever said or did anything at any time indicating that either of them intended to take property from Gitmed which he had in his possession or control at Canyon Lake, nor any other evidence

about how killing Gitmed was connected to the taking of his property, if that occurred at all, other than occurring at the same time and place. (See *People v. Cavitt, supra,* 33 Cal.4th at p. 193.)

Even for those jurors who believed that Mercurio was, or could have been, the one who used the gun, the theory that he killed Gitmed so that he and appellant could rob him defies common sense. It was two against one–Mercurio and appellant against Gitmed, a nervous and timid person with emotional problems who appeared to be retarded. (RT 2668, 2813.) If they had wanted to take Gitmed's property, there is no evidence in the record that anything occurred at any point before or during the time they spent at Canyon Lake which would have made it necessary to kill him to do so. They could have merely robbed him in the ordinary manner, for example by threatening him with the gun, or assaulting him. Not every armed robbery involves a murder. (*Enmund v. Florida, supra*, 458 U.S. at p. 800 ["killings only rarely occur during robberies"].) Here, there was no reason to think that the robbery, if any, and the murder were connected in any way, and appellant submits that the circumstances actually suggest otherwise.

First, there was no evidence at trial that the killer shot Gitmed in any kind of physical altercation. And it is worth noting that appellant and Mercurio had a psychological "hold" on him which would have prevented him from reporting any crime, since it was his drugs they had all used earlier that night (RT 1885), and Gitmed was involved in drug dealing through his cousin, Michelle Keathley (RT 1618-1619) – criminal and social activity that Gitmed undoubtedly would not have wanted to come to light. Further, Mercurio and appellant could have simply driven away in the truck, leaving Gitmed stranded late at night out by the lake – so they did not

need to kill him to escape from the scene.

Again, the critical question for appellant's jury was "whether commission of the underlying felony was or was not merely incidental to the murder." (*People v. Bolden, supra,* 29 Cal.4th at p. 558.) On the state of this record, appellant submits that, whether they believed that appellant was the actual shooter or not, and assuming, arguendo, that the jury could reasonably find that Gitmed was robbed at all (see Argument IV, *supra*), no rational juror could have concluded beyond a reasonable doubt that any robbery was *not* merely incidental to the murder.

The evidence at appellant's trial was very similar to that in *People v. Green, supra,* 27 Cal.3d 1, where this Court concluded that the murder itself was the primary crime, and had not been committed to advance the felony. (*People v. Monterroso* (2004) 34 Cal.4th 743, 766-767; *Green, supra*, 27 Cal.3d at pp. 59-62.) In *Green,* the defendant killed his wife and took her wedding rings and a matchbook, and the Attorney General conceded that the murder was the "prime crime," and the motive for robbery was to remove anything from the body that would make it possible to identify the victim. (*Id.*, at p. 62.) Thus, the robbery was incidental to the murder and the special circumstance of felony-murder did not exist.

In appellant's case it is possible to draw the same conclusion, since Gitmed's body was found without any identifying property. If this Court somehow concludes that there was substantial evidence that Gitmed had personal property in his possession which was taken from him at the time he was killed (but see Argument IV, *supra*), then it is at least reasonably probable that it was taken from him for the same motive as in *Green* – i.e., to prevent identification of the body. In fact, Gitmed's body was not identified for several days after the murder. (RT 1624-1625.)

Nor does the fact that appellant had possession of Gitmed's car after the murder establish that killing Gitmed facilitated robbing him, since there was no evidence that he got the car key from Gitmed when he was killed (or that he ever had the key), and in any case he, Mercurio and Dalton soon took the car out into the desert and burned it (RT 1987-1988, 2124-2127), thereby destroying evidence that might have incriminated them *in the murder*. (See *People v. Thompson, supra,* 27 Cal.3d 303, 323-324 [special circumstance finding reversed where defendant refused to take money and jewelry before he shot victims & abandoned their car key and car after the killing].) That would mean that, if the car was the object of the robbery it was taken to cover up appellant's connection to the murder, and the robbery was therefore incidental to the murder rather than the other way around as required for a valid special circumstance felony-murder finding.

Just as this Court found in *People v. Thompson, supra*, 27 Cal.3d 303: "The evidence against appellant on the question of the truth of the special circumstances is 'so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt.' (See *People v. Reyes* (1974) 12 Cal.3d 486, 500 [].) It is insufficient to establish that the crime appellant committed was 'in fact a murder in the commission of a robbery [rather than] the exact opposite, a robbery in the commission of a murder.' (*People v. Green* [27 Cal.3d] at p. 60.)." (*People v. Thompson, supra,* 27 Cal.3d at pp. 324-325, parallel citation omitted, bracketed words by *Thompson* court.)

There was actually even less evidence presented at appellant's trial to support a robbery special circumstance finding than there was in *Thompson, supra,* 27 Cal.3d 303, where the surviving victim testified that the killer had asked for money and that he took car keys from the victims

before shooting them. (*Id.*, at pp. 310-311.) In *Thompson* there was also credible evidence that the killer had *not* taken jewelry, credit cards, and money, and that he had left the car and dropped the car keys outside. (*Ibid.*) On that record, this Court found it "impossible to conclude that the prosecution sustained its burden of proof on this issue[,]" and reversed the special circumstance finding. (*Ibid.*) In appellant's case, there was no credible evidence that appellant asked Gitmed for anything, and Gitmed was still wearing his wristwatch when his body was found. (RT 1517.) Moreover, the facts that Charlene Triplett saw appellant and Mercurio burning paperwork the next day which she believed had belonged to Gitmed (RT 2202), and that appellant, Mercurio and Dalton destroyed Gitmed's car within the next few days (RT 1904) suggested an attempt to destroy evidence that could have been linked to Gitmed, i.e. to cover up the murder.

This Court's analysis in *People v. Navarette* (2003) 30 Cal.4th 458 is also instructive. There, the defendant had committed a burglary earlier in the day but did not take a camera and three rifles from the victim's apartment at that time, then returned in the evening, killed the occupant of the apartment and took the camera and rifles as well as the victim's purses, keys, and truck. (*Id.*, at pp. 480-481.) Thus, it was clear that the reason the defendant had returned to the apartment was to take the victim's property, but finding her there, he killed her in order to accomplish his purpose. This Court therefore reasoned in *Navarette* that the only reasonable conclusion possible was that the murder had been committed to advance or facilitate the robbery. (*Id.*, at p. 505.)

Similarly, in *People v. Monterroso, supra*, 34 Cal.4th 743, this Court held that the evidence showed "only" that the defendant had committed the murder to facilitate the burglary-robbery or his escape where

there was uncontradicted evidence that the "defendant shot [the victim] when [he] failed to comply with the defendant's orders not to move and that defendant relied on the murder to show the other robbery victims that he was not kidding around. . . . [And as] to the second murder, defendant eliminated the only witness to the burglary-robbery." (*Id.*, at p. 767; see also *People v. Kimble* (1988) 44 Cal.3d 480, 502-503 [no sua sponte instruction on advancing felony required where evidence showed defendant killed victims to obtain keys to stereo store which he then burgled].)

Appellant submits that there was absolutely no evidence at his trial even remotely equivalent to the facts in *Navarette, Monterroso*, or *Kimble* indicating any manner in which killing Gitmed was logically connected to a robbery – no evidence even suggesting that possibility, let alone establishing it beyond a reasonable doubt. The evidence at appellant's trial failed to establish beyond a reasonable doubt that the robbery was anything more than incidental to Gitmed's murder.

E. The Trial Court Erred in Instructing the Jury on Aiding and Abetting

Appellant explained in Argument IV, *supra*, that the trial court erred in instructing the jury on aiding and abetting when there had been no evidence presented to support that theory of appellant's guilt in the context of the first-degree murder charge. Appellant hereby incorporates that argument as if fully set forth herein, and submits that the same analysis applies to those instructions in the context of the felony-murder special circumstance determination by those jurors who believed that appellant was Mercurio's accomplice rather than the actual shooter. Those jurors should not have been allowed to find that appellant murdered Gitmed while engaged in the commission of a robbery, where no evidence at all had been

presented at trial to establish that appellant did anything to assist Mercurio in shooting or robbing Gitmed or had the specific intent to kill; nor that he was a major participant in the robbery of Gitmed by Mercurio or acted with reckless indifference to human life; nor that the robbery of Gitmed was anything more than incidental to his murder.

F. The Prosecutor's Misstatements of Law and Misrepresentation of Evidence in Closing Argument Improperly Lightened the Prosecution's Burden of Proof of the Felony-Murder Special Circumstance and Misled the Jury

At the end of the presentation of evidence in the guilt phase, there was an enormous gap in the evidence with regard to the alleged robbery of Gitmed. (See Arguments IV and V, *supra.*) Appellant submits that this is why the prosecutor seriously misled the jury in his closing argument about the law of special circumstance felony-murder and about the relevance of evidence that had been presented at trial to establish that special circumstance, based on the felony of robbery, i.e., he was trying to secure a conviction in spite of the lack of evidence of all the required elements.

There were three possible factual scenarios under which the jury could have found the existence of the robbery-murder special circumstance:

First, if the jurors found that appellant was the actual shooter, that he intended to rob Gitmed before or while killing him and did rob him and that the murder facilitated or concealed the robbery (*People v. Green*(1980) 27 Cal.3d 1, 59-62 [overruled on another point in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; cited with approval in *People v. Cavitt, supra*, 33 Cal.4th at p. 203]) or that for some other reason the robbery was not incidental to the murder (*People v. Bolden, supra*, 29 Cal. 4th at pp. 557-558), then the jury could validly find the existence of the special

circumstance of murder in the commission of a robbery, and find appellant guilty as the direct perpetrator of special circumstance felony-murder under section 190.2, subdivision (a)(17)(i).

It is clear from the record, however, that one or more jurors did not find that appellant was the actual shooter, and those jurors could not rationally have convicted him as the actual killer. (CT 1096.) Such jurors therefore needed to understand the remaining theories under which they could find the existence of special circumstance felony-murder.

The second possible theory was that appellant was an accomplice to special circumstance felony-murder under section 190.2, subdivision (c). This would have required the jury to conclude, based on substantial evidence, that Mercurio was the actual shooter *and* that he intended to rob Gitmed before or while killing him and did rob him, and that the murder facilitated or concealed the robbery or that the robbery was not incidental to the murder, and that appellant aided and abetted Mercurio in the premeditated or felony-based murder acting with the specific intent to kill Gitmed.

The third possibility was to find appellant guilty as an accomplice to special circumstance felony-murder under section 190.2, subdivision (d). This required those jurors who did not believe that appellant was the shooter, to find that Mercurio was the actual shooter and that he intended to rob Gitmed before or while killing him and did rob him, and that the murder facilitated or concealed the robbery or the robbery was not incidental to the murder, and that appellant aided and abetted Mercurio as a major participant in the robbery, and that appellant acted with reckless indifference to human life.

Appellant has previously discussed the prosecutor's misstatements of

the law of first-degree felony-murder and his misuse of the evidence in that context. (See Argument IV, *supra.*) His closing argument on special circumstances was equally confusing, misleading, and prejudicial.

The prosecutor first mentioned special circumstance felony-murder saying merely that, "A special circumstance is a murder in the course of a robbery. You can't even get to the special circumstance until you conclude that the defendant is guilty of first degree murder." (RT 2920.) A discussion of second degree murder and various other topics followed.

Eventually returning to the theories of murder which the jury had to unravel, the prosecutor said, "The only difference between concluding that the defendant premeditated and there was a deliberate murder of Ron Gitmed by the defendant where there was a felony murder is by the special circumstance." (RT 2929.) This is a confusing statement, but the most reasonable reading of it is that the prosecutor was trying to say that there were two kinds of murder for the jury to consider: premeditated murder and felony-murder, and that the difference between the two was "the special circumstance." That was not true. The legal concept of the special circumstances enumerated in section 190.2, has nothing to do with the difference between premeditated murder and felony-murder under section 189.

Either the prosecutor himself did not know the difference between ordinary felony-murder and capital felony-murder, or he was deliberately trying to confuse the jury. Either way, his statements about the law were erroneous, misleading, and had the effect of lightening the prosecution's burden of proof in violation of appellant's right to due process under the state and federal constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15; see *Francis v. Franklin* (1985) 471 U.S. 307, 317; *Sandstrom v.*

Montana (1979) 442 U.S. 510, 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-701.)

Appellant has previously established in Argument IV, *supra*, that the issue of the prosecutor's misconduct in closing argument is cognizable on appeal and that, if appellant's trial counsel failed to preserve the issue by failing to object, then they rendered ineffective assistance and this Court should reach the merits of the issue. The same reasoning and authority apply in the instant context, and appellant hereby incorporates by reference that portion of Argument IV as if fully set forth herein.

1. Misstatements of Law

a. Erroneous Explanation of Special Circumstance Where Defendant is a Direct Perpetrator of Felony-Murder

The prosecutor told the jurors that if they believed Mercurio's story that appellant "robbed Ron Gitmed and shot and killed him, the special circumstance is very straightforward." (RT 2930.) The clear implication was that nothing more need be found by the jury. This amounted to telling the jury that special circumstance felony-murder was exactly the same as ordinary felony-murder, as the prosecutor had previously erroneously explained it. (See Argument IV, *supra*.)

That was an extremely serious misstatement of the law because even those jurors who believed Mercurio's story that appellant shot and robbed Gitmed could only find the special circumstance that the murder was committed "in the commission of a robbery," if they found, for example, that the purpose of the murder was to advance, or facilitate, or escape from the robbery. But if the evidence established that the robbery was, or might have been, only incidental to the murder, the jury could not validly find that

the special circumstance existed.

Regular first-degree felony-murder under section 189 and special circumstance felony-murder under section 190.2 are not the same thing; the latter requires more.

b. Erroneous Explanation of Special Circumstance Where Defendant is Aider and Abetter

The prosecutor focused the jurors on his own erroneous explanation of non-capital felony-murder, telling them that if they believed Mercurio was an accomplice, "[t]his is where felony murder comes back into play. Because if Tony Mercurio's an accomplice and he's just as involved as the defendant, under the felony murder rule the defendant is still guilty of murder, if you find that the defendant aided and abetted in the commission of the robbery. . . ." (RT 2929.) This pithy statement was misleading because in fact, under the law the jury could find appellant guilty as an accomplice to special circumstance felony-murder only if it found that he assisted in the accomplishment of the murder with the intent to kill (§ 190.2, subd. c) or that he was a major participant in the robbery and acted with reckless indifference to Gitmed's life (§ 190.2, subd. d). And the prosecutor again omitted the critical point that even if the jury found the existence of those elements, it also had to find the existence of some relationship between the robbery and the murder, i.e. that the robbery was not merely incidental to the murder. (*People v. Bolden, supra,* 29 Cal.4th at pp. 557-558.)

Thus, the prosecutor again misstated the basic principles of law the jury needed to understand.

c. Confusing the Jury on the Distinctions Between First-Degree Murder and Special Circumstance Felony-Murder

The prosecutor assured the jury that, "[n]o matter how you approach Tony Mercurio or how you approach the evidence, the only way that you can find that the defendant is not guilty of murder is that if you conclude that he had absolutely nothing to do with it and his name was picked out of the air by [the prosecution witnesses]." (RT 2929.) That was flatly not true, and the prosecutor knew it. If the jury "approached" the evidence by not believing Mercurio's story that appellant held a gun to Gitmed, then it was duty-bound on the state of this record, to find him not guilty of murder – even if it thought appellant had "something to do with it," for example by doing drugs with Mercurio and Gitmed, riding around in the truck with them, even simply being present when Gitmed was killed, and later helping to burn Gitmed's car.

But the prosecutor erroneously told the jury that if the jury was uncertain who did the shooting, "under the special circumstance, you have to determine that the defendant participated in the robbery and he acted with reckless indifference to human life. That means that as a cohort in this crime he acted in such a way that someone could get hurt. [¶] And ladies and gentlemen, however you want to look at it, I believe the special circumstance is there, whether it's premeditated first degree murder or felony murder." (RT 2930.)

Once again the prosecutor's strange and confusing argument blurred the theories of murder, suggesting that premeditated first degree murder was distinguishable from "felony murder," i.e., that premeditation equated with first degree murder, while felony-murder was something else. In fact,

premeditated murder and felony-murder are two types of first degree murder (§ 189), although felony-murder, i.e., murder committed in the commission of certain felonies, is also one of the kinds of capital murder (§ 190.2 (a)(17)). And a non-killer's mere "participation" in a robbery with "reckless indifference" does not make him guilty of special circumstance murder. Rather, under the express terms of the death penalty statute in the context of this case, the jury had to find either that appellant actively assisted Mercurio in shooting Gitmed, with the intent that Gitmed should die (§ 190.2, subd. (c)), or that appellant was a "major participant" in the underlying felony – here, robbery – and acted with "reckless indifference to human life" (§ 190.2, subd. (d)). And under either theory, it also had to find that the robbery was not merely incidental to the murder. (*People v. Bolden, supra,* 29 Cal.4th at pp. 557-558; *People v. Green, supra,* 27 Cal.3d at pp. 59-62.)

Finally, the prosecutor concluded: "Ladies and gentlemen, I submit to you when you look at all the evidence, and even if you were to conclude that Tony Mercurio was an accomplice, there's more than enough evidence to show that he [sic] murdered Ronald Gitmed. [¶] And it's even kind of interesting, this little quirk in the law. Even if you conclude Tony Mercurio is an accomplice, felony murder comes in. [¶] So either way you look at it, ladies and gentlemen, if you review all the facts and follow your oath, you can't but come to the decision that the defendant murdered Ronald Gitmed, whether it's by felony murder or just premeditation and deliberation." (RT 2936-2937.)

This confusing statement seems to be another instance of the prosecutor telling the jury that if appellant was the shooter, the crime was premeditated murder and that if Mercurio was the shooter, the crime was

felony murder, with no distinction between felony-murder under section 189 and the special circumstance of felony-murder under section 190.2, and no explanation at all of accomplice liability for premeditated murder or for either type of felony-murder.

Basically, the prosecutor's argument amounted to a statement that special circumstance felony-murder is sort of a "strict liability" offense – you are there, a robbery happens, a killing happens, you're guilty of capital murder. This was a serious misstatement of the most important legal concepts the jury had to understand at appellant's capital trial, as serious as the prosecutor's misleading explanation of reasonable doubt in *People v. Nguyen* (1995) 40 Cal.App.4th 28, where the reviewing court held that likening the standard of reasonable doubt to an everyday decision was prosecutorial misconduct. (*Id.*, at p. 36.)

2. Misrepresentation of Evidence

As appellant has previously demonstrated in Argument IV, *supra,* the prosecutor seriously misrepresented the evidence by leading the jury to think that appellant's possession of Gitmed's property a month after Gitmed was killed was evidence of robbery. In addition, that improper argument actually supports appellant's point that the prosecution failed to proved the existence of the special circumstance. The prosecutor argued:

> "A robbery occurs, property is taken and someone is killed. The motive? They wanted the property. But you keep asking why it happened, why it happened.
>
> "Why did the defendant go out there with Ron Gitmed and murder him?
>
> "And, ladies and gentlemen, I tell you. There is no reason . It is senseless. You can't understand something like this. Yes, there's a motive, the car, the bag, but that doesn't

mean that there's a reason for this." (RT 2938.)

This was a completely improper argument, since "the car" and "the bag" were manifestly not property taken from Gitmed by force or fear when he was killed and therefore had no relevance whatsoever to the crime of robbery. Leading the jury to think otherwise was clear misconduct.

Most important, the prosecutor's comments here were actually a striking concession of the lack of any evidence that the special circumstance existed, because a "reason" for the murder is exactly what a valid special circumstance finding required – and not just *any* reason. Section 190.2, subdivision (a)(17) requires that the murder must have some logical connection to the underlying felony, not merely a temporal one. (*People v. Green, supra,* 27 Cal.3d at pp. 59-62.).) The fact that the robbery is not merely incidental to the murder is what makes the murder a capital offense.

One who commits murder for "no reason" is not subject to the death penalty. (See *Green, supra,* 27 Cal.3d at p. 49-50, 61; *Furman v. Georgia, supra,* 408 U.S. 238; *Gregg v. Georgia, supra,* 428 U.S. 153; compare *Tan v. Runnels* (9th Cir. 2005) 413 F.3d 1101, 1115 [evidence victim resisted attempt to take picture of his wife that was especially precious because of his life history "directly supports the charge that the homicide occurred during the commission of a robbery, and not just for "'no reason'"].)

Appellant submits that the prosecutor was deliberately trying to confuse the concepts of "motive" and "purpose" for the murder because he knew that he had not presented any actual evidence which could be the basis of a conclusion that the robbery, if any, was actually connected to the murder beyond coincidence of time and place, and was not just incidental to it.

G. Reversal of the Death Judgment is Required

The jury's reliance on an invalid special circumstance violated appellant's right to individualized sentencing in a capital case under the Eighth and Fourteenth Amendments of the federal constitution. (*Beardslee v. Brown* (2004) 393 F.3d 1032, 1037; *Sanders v. Woodford* (9th 2004) 373 F.3d 1054, 1059; *Sochor v. Florida* (1992) 504 U.S. 527, 532; *Stringer v. Black* (1992) 503 U.S. 222, 229.)

A state appellate court that invalidates an aggravating factor in a capital case may: "'(1) remand for resentencing; (2) independently reweigh the remaining aggravating and mitigating circumstances under the procedure set forth in *Clemons v. Mississippi,* 494 U.S. 738 [] (1990), in which the state appellate court reweighs aggravating and mitigating circumstances that have already been found by a jury to exist; or (3) independently conclude that the sentencing body's consideration of the invalid aggravating circumstance was harmless beyond a reasonable doubt.'" [Citation.])." (*Beardslee v. Brown, supra*, 393 F.3d at p. 1037, parallel citation omitted.)

Appellant's case should be remanded for re-sentencing because the invalid special circumstance prejudicially affected the sentencing jury's evaluation of the evidence relevant to the determination of the appropriate penalty. If the jury had understood that it could not legally find the existence of the felony-murder special circumstance, it would also have understood the lesser level of culpability that appellant himself had for Gitmed's murder and would have viewed that event in a very different light. The jury would have understood that appellant's culpability in Gitmed's death was not, as a matter of law, serious enough to justify the imposition of a death sentence. In particular, the voice of those jurors who still had some

doubt about whether appellant was culpable at all for Gitmed's murder would have carried more weight, and the jury as a whole would have been far more likely to consider such residual doubt about what appellant's role actually was on the night that Gitmed died.

The other evidence in aggravation of sentence emphasized by the prosecution was appellant's 1977 murder conviction from Texas, and the character of Ronald Gitmed.

Appellant's prior murder was not one involving gruesome or shocking facts. The jury had heard evidence that the crime involved one adult victim; that both appellant and the victim were very drunk and got into a struggle; that the victim had attacked appellant with a knife; and that appellant had made a full confession to that crime and served a substantial prison sentence. (RT 3203-3219, 3246-3247, 3250.) This crime was the type of murder that lay jurors might well have seen as a tragic but understandable event.

The prosecutor himself had argued that the Gitmed murder was more reprehensible than the type of murder where "you had two people that were maybe going at each other, so to speak, maybe two people that had previous animosity, maybe two people that had previous altercations. Sometimes those type of situations evolve into homicidal conduct and sometimes you're left thinking, well, gee, if the victim had just let it die, let lie, he'd still be alive." (RT 3303.) The Fox murder was just that type of conflict which had "evolved into homicidal conduct," and, by the prosecutor's own reasoning, was a less disturbing offense than the Gitmed murder.

And with regard to the character of the victim, the jury may well have balanced the picture of Gitmed painted by his mother and brother, against the information that he had being taking drugs, which he had

supplied, in the company of two men he barely knew, and concluded that he was not as naive and innocent as his family believed. Appellant submits that this Court cannot conclude beyond a reasonable doubt that these two factors would have compelled the jury to sentence appellant to die, if the jury had assessed his individual culpability in Gitmed's murder at a lesser level than capital murder. Thus, the robbery murder special circumstance finding almost certainly prejudicially affected the jury's penalty verdict, which should therefore be reversed to avoid the arbitrary and capricious imposition of the death penalty and a sentence disproportionate to appellant's individual culpability, in violation of his rights under the Eight and Fourteenth Amendments of the federal constitution. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gregg v. Georgia, supra,* 428 U.S. at p. 187; *Furman v. Georgia* (1972) 408 U.S. 238; *People v. Green, supra,* 27 Cal.3d at pp. 49-51.)

Moreover, because it is impossible to know whether appellant's jury would have imposed the death penalty if they had focused on the lack of any evidence that Gitmed's murder occurred so that appellant could take his property, or that the robbery of Gitmed was anything more than incidental to his murder, appellant's death sentence is unreliable and must be reversed under the Eighth and Fourteenth Amendments. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, 643; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

On this record it is impossible to have confidence in appellant's conviction of capital murder[99], which must be reversed in order to protect

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[99]Significantly, two jurors actually came forward sua sponte during penalty phase deliberations and separately told the trial court that they had (continued...)

his rights under the Eighth and Fourteenth Amendments of the federal constitution to a reliable determination of penalty in a capital case and to freedom from cruel and unusual punishment. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) As the United States Supreme Court has repeatedly emphasized, the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, underlining added; see also *Strickland v. Washington* (1984) 466 U.S. 668, 704, ["we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." (Brennan, J. con. opn. and diss. opn.), underlining added; *People v. Horton* (1995) 11 Cal.4th 1068, 1134.)

Finally, since the jury convicted appellant of first-degree murder and found the special circumstance of robbery-murder on evidence that did not support the conviction or that finding, the Fifth Amendment prohibition against double jeopardy bars any further trial on the special circumstance allegation that appellant committed the murder of Gitmed while engaged in the commission of a robbery. (See *Burks v. United States* (1978) 437 U.S. 1, 18; *People v. Green, supra*, 27 Cal.3d at p. 62.)

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[99](...continued)
not been convinced of appellant's guilt but were pressured into their verdicts during guilt phase deliberations. (RT 3327-3331, 3344-3346; see Argument X, *infra*.)

VII

THE ERRONEOUS ADMISSION OF PREJUDICIAL AND IRRELEVANT TESTIMONY BY DANNY DALTON AND BARBARA TRIPLETT AND THE EXCLUSION OF DALTON'S PRIOR INCONSISTENT STATEMENT REQUIRE REVERSAL OF THE ENTIRE JUDGMENT

A. Introduction

Danny Dalton was a prosecution witness who had been living on the Santa Rosa Mine Road property with Mercurio and the Triplett family at the time of Gitmed's murder. (RT 2031-2033.) Barbara Triplett was the mother of Mercurio's girlfriend, Charlene Triplett. (RT 2277.)

The trial court erroneously denied appellant's motion to strike testimony by Dalton that: (1) appellant made a statement to him at some point in time about somebody floating in a lake; and (2) his opinion, admittedly based on speculation, was that appellant had killed Gitmed. (RT 2082-2083.) At the same time, the trial court also erroneously denied appellant's motion to introduce as impeachment of Dalton, evidence that he had previously said that he would testify that Tony Mercurio killed Gitmed. Each of these rulings was erroneous and prejudicial, and their combined prejudicial effect was extremely serious.

The trial court also erroneously admitted testimony by Barbara Triplett that appellant had said something about a person floating in Canyon Lake which was inadmissible for the same reasons as Dalton's similar testimony. The error in admitting this portion of Triplett's testimony is cognizable on appeal in spite of the lack of objection at trial because a motion to strike it would have been futile.

The admission of evidence of appellant's "floating" statements was

an abuse of discretion which impermissibly lightened the prosecution's burden of proof, violated state statutory law, and violated appellant's rights to a high degree of due process and a reliable guilt determination in his capital case. (U.S. Const. 8th & 14th Amends.; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The exclusion of Dalton's prior inconsistent statement, whether considered separately or in combination with the erroneous admission of his and Triplett's testimony about appellant's "floating" statements, was an abuse of discretion, lightened the prosecution's burden of proof, deprived appellant of the opportunity to impeach and cross-examine an important prosecution witness, violated state statutory law, and violated his rights to a high degree of due process, a fundamentally fair trial, and a reliable guilt verdict in a capital case, requiring reversal of the entire judgment. (U.S. Const. 5th, 6th, 8th & 14th Amends.; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

B. State Law and the Federal Constitution Prohibit the Admission of Irrelevant Evidence

Appellant was entitled under state statute and case law and under federal constitutional principles of due process and fundamental fairness, to have the evidence presented at his capital trial limited to relevant evidence. (Evid. Code, § 350 [only relevant evidence is admissible]; see *Barefoot v. Estelle* (1983) 463 U.S. 880, 898 ["relevant, unprivileged evidence should be admitted"]; *Payne v. Tennessee* (1991) 501 U.S. 808, 809 [if evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a mechanism for relief"]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 3-7 and fn. 2

[evidence of prison adjustment probative on future dangerousness relevant and therefore admissible in capital sentencing hearing, but evidence of prison adjustment with no probative value on future dangerousness irrelevant and inadmissible]; *Stringer v. Young's Lessee* (1830) 28 U.S. 320, 337 [principle that irrelevant evidence is inadmissible "has never been controverted."]

"'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) And it is axiomatic that "only relevant evidence is admissible." (*People v. Pizarro,* (2003) 110 Cal.App.4th 530, 631.)

This Court has explained that "[a]lthough a trial court enjoys broad discretion in determining the relevance of evidence (*People v. Garceau,* [1993] 6 Cal.4th [140], 177 []), it lacks discretion to admit evidence that is irrelevant (*People v. Heard* (2003) 31 Cal.4th 946, 973 []; *People v. Crittenden* (1994) 9 Cal.4th 83, 132 []) . . . ." (*People v. Morrison* (2004) 34 Cal.4th 698, 724, parallel citations omitted, underlining added.) This court has repeatedly commented that, "'"It is our duty ..., where the life or liberty of a defendant is at stake, to be particularly careful that there is not only substantial evidence to support the implied finding of [defendant's] identity but that the finding is based upon admissible and nonprejudicial evidence."' *People v. Kelly* [1976] 17 Cal.3d [24], [].)" (*People v. Pizarro, supra,* 110 Cal.App.4th at p. 555, ellipsis and brackets in original, underlining added and parallel citation omitted by appellant.)

This principle was especially important at appellant's capital trial, where an unreliable conviction of guilt also violated the Eighth Amendment. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, 443;

Woodson v. North Carolina, supra, 428 U.S. at p. 305.)

C. Dalton's and Triplett's Vague Testimony about Vague Statements by Appellant Had No Probative Value and Was Irrelevant

1. Dalton's Testimony

Danny Dalton was a reluctant witness , a convicted felon and drug addict who lived on the Santa Rosa Mine Road property where Tony Mercurio also lived with his girlfriend, Charlene Triplett, and her relatives. (RT 2032-2033, 2046-2047, 2048, 2089-2090, 2092, 2108, 2115.)

During direct examination on April 8, 1996, Dalton testified that appellant had come to visit Mercurio at the Santa Rosa Mine Road compound "on and off a few times." (RT 2042.) The prosecutor asked whether "at some point in time" Dalton had been "made aware that something had happened out at Canyon Lake[.]" (RT 2042-2043.) Dalton said that it "seemed like something happened[,]" but he did not know where. (RT 2043.) He testified that he found out "something" had happened because "this fool kept trying to tell me some shit, and I said, 'Leave me alone. I don't want to hear shit.'" (RT 2043.)

The following direct examination then occurred:

"Q What did he say?

"A He was babbling on, some bullshit bragging.

"Q What was he bragging about?

"A I wouldn't let him talk to me.

"Q Well, if you wouldn't let him talk to you, how do you know he was bragging about something?

"A Because you listen to different bullshit, and – you figure out what he's talking about."

(RT 2043.) Dalton then testified that he had told the person to shut up

because did not want to know anything about it. (RT 2043.) Dalton also testified that the person had told Dalton that he had also told Barbara and Charlene Triplett, which "pissed [Dalton] right off." (RT 2043.)

The prosecutor then asked if Dalton could remember any details of what he had said. Dalton replied, "Not a whole lot, just different things that made me think of what has happened and some dude floating. And that's – about all I know. Every time he tried telling me anything, I told him, 'shut up, man. I don't want to know nothing.'" (RT 2044.)

The prosecutor then asked a leading question: whether Dalton specifically remembered the man "saying something about floating? Somebody floating?" And Dalton replied, "Yeah, leaving him floating." (RT 2044.)

Dalton also testified in effect that when he told the person to shut up he complied, since otherwise Dalton would have struck him. (RT 2044.)

On cross examination the following day Dalton said that he could not remember anything else about anything appellant had said–neither when he had made these remarks, what he had said, nor where. (RT 2090-2092.)

2. Triplett's Testimony

Barbara Triplett testified about an equally vague statement by appellant, stating that sometime before September 17, he ". . . made a statement to me about a person floating in Canyon Lake that wasn't able to make decisions for theirself anymore, but I don't really remember why he told me that." (RT 2282-2283.)

D. The Evidence of Appellant's Statements Was Irrelevant and Inadmissible

The testimony by Dalton and Triplett that the appellant had made statements about somebody floating in Canyon Lake was too vague to be

probative on any issue in the case. (See *Piaskowski v. Bett* (7th Cir. 2001) 256 F.3d 687 [petitioner's presence at scene of crime and his reference to "'shit going down'" was constitutionally insufficient to sustain murder conviction based on conspiracy theory].) Dalton expressly testified that appellant never said he did it, and neither did appellant say anything, according to Dalton's testimony, even suggesting his own culpability. (RT 2043-2044.) Nor did Triplett testify to anything that appellant had said suggesting that he himself had any personal knowledge of Gitmed's murder or any connection to it.

Significantly, neither Dalton nor Triplett testified that appellant made these remarks before August 29, 1991, when there was a local newspaper article about an unidentified body found floating in Canyon Lake the day before. (Prosecution exhibit P). Triplett testified only that appellant made this statement sometime before September 17, 1991. (RT 2283.) Dalton had no idea what dates anything occurred (RT 2046) and specifically testified that he did not know when appellant made the "floating" remarks to him (RT 2093).

Thus, appellant's comments did not reflect any knowledge about the crime that was not available to the whole community by the next morning after Gitmed's body was discovered. Anyone in the area might have been talking about the event and could have made comments about the man who had been killed and left floating in the lake; it was a dramatic news story.

The prosecutor at appellant's trial never asked these witnesses the glaringly obvious follow-up questions that might have made this evidence relevant and admissible – questions like: did appellant say <u>who</u> left someone floating? Did he say what, if anything, he had to do with it? Did he say that <u>he saw</u> the person left floating? Or at least: did they even ask

appellant how he knew anything about someone left floating or what he knew about it?

The careful analysis of the evidence in *Piaskowski v. Bett, supra*, 256 F.3d 687, is instructive. There, the appellant was one of six people tried for the murder of a worker at a paper mill who was beaten unconscious and whose body was disposed of in a pulp vat. (*Id.*, at pp. 689-690.) The evidence showed that Piaskowski had been at the scene of the assault before the victim was attacked and after the attack, that he followed the instructions of one of the attackers to report the victim s "missing," and that when he did so, he added that there was "some shit going down." (*Id.* at p. 690.) Particularly apposite is the Seventh Circuit Court of Appeal's conclusion in *Piaskowski* that, "even if [the defendant's] call proves he knew about [the victim's] fate, it does not prove he was involved in his murder; perhaps he merely witnessed the beating or heard about it secondhand from one of the assailants. In short, the two-stage inference that the "shit going down" was murder, and that [the defendant's] knowledge of the murder necessarily constitutes his participation in it, requires a leap of logic that no reasonable jury should have been permitted to take. Although a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation. See United States v. An Article of Device, 731 F.2d 1253, 1262 (7th Cir.1984); Yelk v. Seefeldt, 35 Wis.2d 271, 151 N.W.2d 4, 9 (1967)." (*Piaskowski*, 256 F.3d at p. 693.)

Similarly, even assuming, *arguendo*, that appellant's remark to Dalton and/or Triplett could reasonably be understood as an indication that he knew a murder had occurred, the inference that such knowledge equated to his participation in it was completely unreasonable, and one the jury

should not have been allowed to make. If Mercurio's account that appellant shot Gitmed is discounted, there is even less evidence of his culpability than there was of the defendant's guilt in Piaskowski, and both Dalton's statement and the jury's verdict of guilt were clearly a lapse into speculation.

E. The Trial Court Erred in Denying Appellant's Motion to Strike Dalton's Testimony About Appellant's Statements

1. Appellant's Motion to Strike Was The Proper Remedy

The standard remedy for dealing with inadmissible evidence that has been unanticipated is to strike it from the record and to admonish the jury not to consider it for any purpose. (Evid. Code, § 353; CALJIC No. 1.02; see *People v. Coffman* (2004) 34 Cal.4th 1, 82; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1386.)

Appellant moved the day after Dalton's direct examination and outside the jury's presence, to strike his testimony about appellant's statements. (RT 2081-2082, 2084.) Defense counsel argued that there were "key phrases" Dalton had used concerning appellant's statements. One was that "Tex was bragging about . . . somebody floating and leaving them floating. And from these statements, Mr. Dalton could not remember any specific words, but Mr. Dalton assumed from all of these or inferred from all of these that Mr. Thompson had in fact killed the guy who owned the blue car." (RT 2081.) Defense counsel argued that Dalton's belief that he knew what appellant was talking about was speculation, objectionable, and inadmissible. (RT 2081.) The prosecutor agreed only that a "narrow" part of Dalton's testimony was speculation, and suggested that the court could advise the jury not to consider that part. (RT 2082.)

The trial court never explicitly ruled on appellant's request to strike Dalton's testimony concerning statements made by appellant, but it effectively denied the motion since it did not strike that testimony and instead admonished the jury about lay opinion testimony, although not in the terms requested by the parties or as the law required. (See discussion, *post*; see also *People v. Brown* (2003) 31 Cal.4th 518, 534 [trial court deemed to have ruled on relevance ground]; cf. *People v. Curtis* (1965) 232 Cal.App.2d 859, 867 [motion to strike deemed granted where jury heard motion and court instructed jury to disregard evidence].)

By the time Triplett testified, the trial court had already signaled its assessment of the admissibility of this evidence by its attitude toward, and ruling on, the very similar evidence that it had earlier allowed into evidence through Dalton, who had been allowed to testify not only about appellant's vague and irrelevant similar statement, but about his own opinion of appellant's guilt based on it. In fact, the prosecutor may have elicited the "floating" testimony from Barbara Triplett because of his prior success with the similar statement admitted through Dalton's testimony. In these circumstances, defense counsel would have reasonably concluded–as the prosecutor did–that they could not successfully challenge the testimony by a motion to strike.

Because a challenge to Triplett's testimony about appellant's vague statement would have been futile, the issue of the admissibility of that testimony in the instant appeal has not been forfeited for failure to object at trial. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649.)

2. A Lay Witness's Opinion Is Inadmissible Unless it Is Based on His Own Perception

California law also provides that, "[i]f a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony."[100] (Evid. Code, § 800.) Under this section, "[a] witness who is not testifying as an expert may testify in the form of an opinion only if the opinion is based on his own perception." (Cal. Law Revision Com. com., West's Ann. Evid. Code (1995 ed.) foll. § 800, underlining added.)

Under Evidence Code section 800, "[a] lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony." (*People v. Farnam* (2002) 28 Cal.4th 107, 153, underlining added; accord, *People v. McAlpin* (1991) 53 Cal.3d 1289, 1306 [quoting California Law Revision Commission commentary and noting this was common law rule] .)

There is no law that permits a witness to state his opinion that the defendant is guilty of murder based on his own speculation. But in the guilt phase of appellant's trial Danny Dalton gave such testimony.

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[100]The federal rule governing lay opinion testimony is strikingly similar: "Federal Rule of Evidence 701 provides that a non-expert witness's testimony 'in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness,[and] (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.'" (*United States v. Beck* (2005) 393 F.3d 1088, 1093.)

3. Dalton's Opinion Was Based on Speculation and Inadmissible

At the end of Dalton's direct examination testimony the prosecutor deliberately returned to the subject of appellant's purported statements and conducted the following examination:

"Q So if I understand it, Mr. Dalton, basically the only thing that you remember about statements by this guy Tex[101] when he was bragging about something, now, how did you know he was bragging about something bad that had happened, how did you conclude that if you didn't let him say too much?

"A Well, he never came right out and said that he did this, but little parts of everything he said, you could tell what somebody's talking about by what they're saying. [¶] I can't remember exact words or nothing. It was a long time ago, but I knew then what he was talking about."

"Q And what was he talking about?

"A Sounds like he took somebody out and blew them away and left them floating in a lake, to tell you the truth. <u>But that ain't what he told me. That's what I put together on my own</u>. That's when I told him I didn't want to hear nothing and I didn't want him up at our house.

"Q Specifically all you remember is him floating in a lake, making statements to that effect?

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[101]The defense stipulated at trial that the person known to Dalton as "Tex" was appellant (RT 2039, 2040), although Dalton was not able to identify appellant at trial either in person or from a photograph. (RT 2033-2035.) Appellant raises no issue on direct appeal with regard to this stipulation.

"A Yup. That's the only thing I can remember that he did state."

(RT 2048,[102] underlining added.)

Dalton's testimony that he "put together on [his] own" (RT 2048) the conclusion that appellant had committed a murder rendered that conclusion absolutely inadmissible as opinion testimony because it was not based on his own perception. Indeed, the next day at the hearing on the admissibility of statements Dalton made to the defense investigator inculpating Mercurio (see discussion, *post*), the prosecutor himself, ironically, opposed admitting those statements, arguing that Dalton was "basically speculating like he was yesterday . . . ." – clearly referring to Dalton's opinions about appellant's guilt. (RT 2110.)

Dalton was the uncle of Mercurio's girlfriend, Charlene, being the brother of Charlene's mother, Barbara Triplett (RT 2032). He used as much "speed" as he could every day (RT 2092) at the relevant time, did not know appellant well, and did not even recognize him in the courtroom (RT 2034).[103] Dalton's assumption about appellant may well have been the product of his own drug-muddled thinking and personal bias. In any case, it could not have been rationally based on the statements that he testified appellant had made to him, and certainly was not based on his own

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[102]Dalton also testified that one night after the subject conversation, he went out with Mercurio and appellant and saw Gitmed's car "go up in flames." (RT 2044, 2045.) On the way back from doing that, Dalton told appellant he would give him a ride off the property, although eventually Barbara Triplett did so. (RT 2045.) Dalton had no idea of what dates any of these things occurred. (RT 2046.)

[103]The defense stipulated that the man Dalton remembered as "Tex" was appellant. (RT 2034-2041.)

perceptions.

E. The Trial Court's Admonition Was Erroneous, Affirmatively Misleading, and Prejudicial

The trial court ruled that there was an "extraordinarily skimpy" foundation for Dalton's opinion but did not strike it, instead deciding that the jury should be admonished both in the final instructions and immediately. (RT 2082-2083.) The trial court proposed to admonish the jury that before a witness could give an opinion there must be evidence before the jury from which the opinion was drawn, and that Dalton had been "unable to give us the specifics from which his opinions were drawn regarding who killed the guy with the blue car." (RT 2083.)

The prosecutor and defense counsel requested instead that the jury be admonished to disregard speculation by the witness, but the defense also continued to maintain that "Mr. Dalton's testimony should be stricken as far as it relates to any statements Mr. Thompson told him." (RT 2083-2084.)

Before Dalton's testimony resumed the trial court addressed the jury as follows:

> ". . . [B]efore we proceed, I'm going to give you a cautionary instruction with respect to the opinions expressed by lay witnesses. You heard the testimony of a number of witnesses, and this is particularly, although it goes to all witnesses, particularly with respect to the direct testimony of Danny Dalton that you heard yesterday. [¶] You are to give no weight to the opinion of lay witnesses nor to draw inferences from the expression of those opinions unless you find that the opinions are clearly based on facts to which the witness has testified."

(RT 2085.)

This admonition fell short of the mark since it did not tell the jury that Dalton's opinion could only be considered if it was based on his own

perception. (Evid. Code, § 800.) And it was affirmatively misleading in two ways:

First, the admonition left before the jury Dalton's vague testimony about vague statements that appellant made to him which were not probative on any issue because they contained no information. (RT 2043 [appellant was "babbling on, some bullshit bragging"], 2044 [appellant said "leaving him floating"]; 2044 [appellant said "different things . . . and some dude floating"]; 2048 [Dalton "can't remember exact words or nothing"].) That testimony was irrelevant and inadmissible and should have been stricken.

Second, the admonition was misleading because it informed the jurors that they could consider Dalton's opinion if they found it was based on "facts" to which he had testified. The problem is that Dalton had testified that he had come to his opinion because of statements by appellant – so his opinion was "clearly based" on the "fact" to which he had testified, i.e. that appellant had said something to him about somebody floating. Thus, following the court's instruction, the jurors must have believed that they could give some weight to Dalton's opinion.

The trial court's earlier comment outside the jury's presence that the factual basis for Dalton's opinion was "extraordinarily skimpy" (RT 2082) was an understatement; the factual basis was nonexistent. Appellant did not confess to him, and Dalton's opinion was not based on his own personal perception of appellant doing anything, nor on any statement by appellant that he had done anything. Under California law Dalton was not allowed to give an opinion based on speculation. (Evid. Code, § 800.)

The trial court should have told the jury, as the defense requested (RT 2084), to disregard all of Dalton's testimony about appellant's

statements – both his vague recollection of what appellant purportedly said, and Dalton's speculative and inflammatory conclusions extrapolated from that. The jury should have been told that Dalton's testimony about appellant's statements was stricken from the record and could not be considered for any purpose. (See, e.g., CALJIC 1.02.) Instead, the trial court's purported admonition served to endorse both the relevance of Dalton's testimony that appellant had made statements about somebody floating, and the validity of Dalton's opinion that appellant was guilty of murder.

F. The Trial Court's Erroneous Denial of Appellant's Motion to Introduce Dalton's Prior Statement That He Would Pin the Crime on Mercurio Compounded the Error of Failing to Strike Dalton's Inadmissible Testimony

1. Appellant Moved To Introduce Dalton's Prior Statement that He Would Inculpate Mercurio

On April 9, 1996, after Danny Dalton testified that he had figured out that appellant had killed Gitmed (RT 2048), defense counsel told the court that Dalton had previously told defense investigator Tom Crompton that Mercurio had admitted shooting Gitmed and throwing his body in the water, and that it was Mercurio who burned Gitmed's car and gave Dalton the stereo from the car (RT 2097). Appellant wanted to ask Dalton whether he had said this and to call Crompton to testify if Dalton denied it. (RT 2097, 2098.)

The trial court held a hearing pursuant to Evidence Code section

402[104] at the prosecutor's request and ruled that Dalton's prior statement was inadmissible as more prejudicial to the prosecution than probative under Evidence Code section 352. (RT 2096, 2106-2109, 2115.) This ruling was prejudicial error.

2. A Prior Inconsistent Statement is Admissible to Impeach a Witness and for Its Substantive Truth

A prior inconsistent statement is admissible under Evidence Code section 1235 to impeach a witness and may be considered by the jury both for its tendency to undermine the witness's credibility and for its substantive truth. (*California v. Green* (1970) 399 U.S. 149.)

This Court has quoted with approval the Law Revision Commission's commentary to Evidence Code section 1235, which explains that prior inconsistent statements are admissible because "'[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court.' (Cal. Law Revision Com.

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[104]Evidence Code section 402 provides as follows in pertinent part: ". . . (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; . . . ."

com., Deering's Ann. Evid. Code, (1986 ed.) foll. § 1235, pp. 389-390.)" (*People v. Ochoa* (2001) 26 Cal.4th 398, 445-446.)

Similarly, this Court commented in *People v. Zapien* (1993) 4 Cal.4th 929, that "[t]he reason the prior inconsistent statement of a witness may be received is that the declarant is present in court and subject to cross-examination. 'The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony.' (2 McCormick on Evidence (4th ed. 1992, Hearsay Rule, § 251, p. 120, fn. omitted.)" (*Id.*, at p. 953, italics in original, underlining added.)

Moreover, the concern "that an alleged prior inconsistent statement, which the declarant denies having made, may have been fabricated, applies equally to single hearsay and to multiple hearsay. It is settled that the declarant's denial of the prior inconsistent statement does not render that statement inadmissible. (*People v. Lucky* (1988) 45 Cal.3d 259, 289 []; *People v. Strickland* (1974) 11 Cal.3d 946, 954 [].) To the contrary, it has been recognized that 'the result is more favorable to the cross-examiner than could be produced by eliciting an admission that the statement was made and an explanation of change of position ....' (2 McCormick on Evidence [(4th ed. 1992) Hearsay Rule, §§ 251,] pp. 123-124.)" (*People v. Zapien, supra,* 4 Cal.4th at pp. 953-954, parallel citations omitted,

underlining added.)

3. The Trial Court Erroneously Focused on Whether the Prior Inconsistent Statement Had a Basis in Fact

At the hearing the following examination of Dalton by defense counsel occurred, in pertinent part:

> "Q. Did you tell Mr. Crompton that Tony Mercurio told you that Tony was the one who shot this guy at Canyon Lake?
>
> "A. No. What was said is I didn't want to come in all this court bullshit and don't even be wanting – don't even try making me because I'll pin it all off on Tony is what I said.
>
> "Q. What did you mean when you made that statement?
>
> "A. What I mean is because I didn't want to have to come up here.
>
> "Q. So you told Mr. Crompton that you were going to pin it all on Tony if you had to come in here?
>
> "A. That's what I told him.
>
> "Q. And by 'pin it all on Tony,' you were referring to the shooting in part?
>
> "A. Everything.
>
> "Q. Did it include the shooting?
>
> "A. That's part of everything, ain't it?
>
> "Q. Well, I don't know. You tell me, sir.
>
> "A. Well, I said 'everything.'
>
> "Q. Okay. As part of what you were going to pin on

Tony, did it include throwing the body in the water?

"A. Whatever you want it to include. That's everything.

"Q. Did it include that Tony gave you the furniture? . . .

"A. All's I told him is I don't want to be dragging down here to go to court because I don't want to have nothing to do with this shit. I don't [sic] want to back then, I don't want to now. I'm on a subpoena is the only reason I'm here now or I wouldn't be.

"Q. Did you tell Crompton you were going to pin it on Tony as far as Tony was the one who gave you the car stereo?

"A. That's what I told him. . . . I didn't tell him I would do that for the stereo. I didn't pinpoint each one of the things. All's I said is they bring me into court, I'm going to pin it all off on Tony. That's all I said."

"Q. . . . did you mention pinning the burning of the car on Tony?

"A. I didn't specifically say any one of those items. . . . There was just one statement made. I didn't say anything about the car, the murder, the furniture or nothing. I didn't specifically bring up, or he didn't either, one of them items. I just – the overall thing."

(RT 2107-2109.)

On examination by the prosecutor, Dalton testified that Mercurio had not told him that he shot Gitmed and put him in the lake. (RT 2109.)

The prosecutor argued that what Dalton told Crompton was irrelevant or that it was excludable as too prejudicial under Evidence Code

section 352.[105] (RT 2110.) He contended that Dalton's statement to Crompton that he would pin the murder on Mercurio was just "blowing a lot of smoke" because Dalton "was obviously mad at Mr. Crompton" and that "he's basically speculating like he was yesterday in a sense. He's telling Mr. Crompton, well, I'm going to come in and speculate and pin it all on Tony if I have to come into court." (RT 2110.)

The prosecutor's argument is completely illogical. It makes no sense that Dalton would "pin it all" on Mercurio if he was "mad" at Crompton, who was the investigator for appellant. Surely, if he wanted to be uncooperative with Crompton, he would have threatened to pin the murder on appellant, not Mercurio.

In any case, appellant correctly asserted that Dalton's testimony was to an extent consistent with Crompton's report and requested permission to introduce the impeachment evidence, through Dalton, that before trial he had told Crompton that if he was called to testify, he would inculpate Mercurio. (RT 2109, 2111.) Defense counsel argued that the jury was entitled to consider this evidence in evaluating Dalton's credibility. (RT 2111.) Defense counsel correctly pointed out that there was no burden on appellant, as the proponent of the evidence, to claim that the substance of Dalton's statements was truthful, arguing that that was "for the jury to determine. Maybe they'll determine it was the truth. Maybe they'll infer, yes, he did talk to Tony Mercurio." (RT 2112.)

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[105]Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The trial court, ironically, suggested that Dalton's opinion about Mercurio presented the same evidentiary problem as his opinion about appellant, i.e. that it was inadmissible if not based on fact – a strange observation,[106] given the court's ruling on that issue. (RT 2112-2113.) Defense counsel explained that this was a different situation because here, Dalton admitted that he had previously made a statement that was inconsistent with his trial testimony, and that to rebut the effect of this admission, the prosecution could elicit testimony from Dalton that the prior inconsistent statement was a lie. (RT 2113.) That is, Dalton was not going to be asked if he thought Mercurio was guilty – which was what he had said about appellant over defense objection – rather, he was going to be asked merely whether he had told Crompton that he was going to come to court and testify that Mercurio was guilty.

The trial court nevertheless continued to focus on whether there was a factual foundation for Dalton "pinning it" on Mercurio. (RT 2113.) Defense counsel correctly explained that no foundation was needed because this evidence was primarily to impeach Dalton, not to factually establish a third party defense, adding, however, that the jury could infer that, since Dalton and Mercurio lived on the same property and were friends (RT 2087), they had talked about Gitmed's murder and there was a factual basis for Dalton's threat to implicate Mercurio. (RT 2113 [defense argument].)

The trial court noted that appellant's original offer of proof was that

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[106]The trial court's comment was actually in the form of a rhetorical question addressed to defense counsel: "Earlier this morning you wanted me to give the jury an instruction that they should disregard Mr. Dalton's opinions if they were not essentially based in fact. Isn't that exactly what we've got here?" (RT 2112-2113.)

Dalton had told Crompton that "he had information that Tony Mercurio had committed this crime, that Tony Mercurio had told him he committed this crime," but Dalton had not confirmed this at the 402 hearing. (RT 2115.) The court reasoned that since the defense had represented that Dalton's 402 hearing testimony was consistent with Crompton's report and had decided not to call Crompton, the court would exclude evidence of Dalton's conversation with Crompton under Evidence Code section 352 as more prejudicial than probative because Dalton appeared to be "a reluctant witness making statements that he was going to pin this offense on somebody else without any foundation in fact for those assertions because he was angry about possibly having to come to court." (RT 2115, 2117.)

Again, the lack of logic is striking. It simply makes no sense to say that Dalton would threaten to implicate Mercurio in order to get back at appellant for making him come to court.

Defense counsel pointed out that the defense had not represented that Dalton would testify that there was a basis in fact for pinning the crime on Mercurio; rather, the defense position was that the jury could infer that there was a factual basis from the circumstances, i.e., that since Dalton and Mercurio lived at the same residence and had a friendly relationship at the time, it would be reasonable to infer that Dalton said what he did to Crompton because he and Mercurio had talked about the crime. (RT 2087, 2116.)

Nevertheless, the trial court ruled that the evidence was inadmissible because Dalton's prior statement was "an expression of opinion without foundation in fact that was highly prejudicial to the People." (RT 2373-2374.)

Appellant submits that admitting Dalton's statement might have been

understood by the jury as exculpatory of appellant, but it would not have been "prejudicial" to the prosecution in the sense of creating any kind of unfairness. Excluding it, on the other hand, was prejudicial to appellant. Dalton's prior statement would have undermined his credibility and might have suggested to the jury that someone else – namely, Mercurio – was actually the perpetrator of the charged crimes. Its exclusion therefore unfairly lightened the prosecution's burden of proof.

On April 11, 1996, appellant made a further offer of proof with regard to Dalton's prior statements, requesting permission to call Crompton to impeach Dalton. Counsel argued that it was common practice in criminal trials to introduce a prior inconsistent statement into evidence even though the witness on the stand testifies that the substance of the prior statement was not true. (RT 2370-2371.)

Defense counsel proffered Crompton's report, which was dated March 5, 1996, and contained a summary of an interview with Dalton on February 27, 1996. (RT 2370, CT 950.)

Crompton's report included, inter alia, the following passage:

> "Danny DALTON was initially hostile and stated that he did not want to get involved in this case. He said he had done his time and he just wanted to be left alone. He said that rat, who was with my niece was fucking over everybody. He said if he had to go to court he would tell about that rat and how he was involved in this case. When I asked Danny DALTON who he was referring to as a rat, he said that "Lame," the guy who was living with his niece, Charlene. Danny DALTON could not remember the guy[']s name and when I told him it was Tony MECURIO [sic], he said that was the rat fucker who got everyone involved in this thing. He said he would tell how Tony MECURIO took that kid out there and shot him and threw his body in the lake. Danny DALTON asked me if he was going to have to testify and I

> told him that I did not know, but that the Riverside District Attorney's Office had him listed as a witness for them. Danny DALTON was quite agitated at this time and he paced back and forth in the yard stating how he would tell on the rat's involvement in this case. He said they do not want me for a witness because I will tell what that lame did. He said I know where the mother fucker lives in Nevada and I'll put this shit right back on him. He said he was a lame fucker for getting other people involved in his shit.
>
> "Danny DALTON said he did not want to get on the stand and he would not go unless he had a subpoena. He said if they subpena him then he would tell them about Tony MECURIO'S involvement and how he did everything. Danny DALTON stated that Tony MECURIO was a user and that he had done his niece wrong."

(CT 950, capitalization in original, underlining added.)

The trial court said that it thought that Dalton's statement to the investigator was "an expression of an intention to do something made under a fit of anger and it wasn't particularly relevant to impeach testimony . . . ." (RT 2371-2372.) Appellant submits that, while the trial court may have believed that Mercurio's statements were merely expressions of anger, the jury was entitled to make its own assessment of this evidence. And why the trial court thought Mercurio's prior inconsistent statements were not relevant as impeachment is simply unfathomable.

Defense counsel argued that Dalton's statement was open to interpretation, and that it was possible to understand it as a report to the investigator that he would pin it on Mercurio because Mercurio had told Dalton about his involvement in the crime. (RT 2373.) Ironically, given his previous position on Dalton's speculation about appellant, the prosecutor argued that there was no indication in the report that Dalton had any "personal knowledge." (RT 2373.)

On April 12, 1996, after reviewing the investigator's report, the trial court re-affirmed its ruling, observing that Dalton seemed to have made assertions "without any kind of factual foundation." (RT 2381.) The trial court concluded that the defense would not be allowed to call Crompton as a witness because that would involve "the same error that would have been present if I'd admitted the testimony of Danny Dalton as to why he wanted to pin it on Tony Mercurio. He just didn't want to come to court. He has absolutely no factual basis for pinning this on Tony Mercurio, and that's the problem." (RT 2381.)

The trial court said that the defense could bring in Crompton to amplify his report, adding somewhat confusingly that "he can't testify to this because it's speculative on his part, and now you want to impeach the speculation with further speculation." (RT 2381.)

4. The Exclusion of Dalton's Prior Inconsistent Statement Was an Abuse of the Trial Court's Discretion

Aside from the supreme irony of the trial court's concern that there might not have been a factual basis for Dalton's threatened inculpation of Mercurio as the killer, while ignoring the actual, admitted lack of any basis for his opinion that appellant was the killer, the admissibility of the prior inconsistent statements for impeachment purposes did not turn on whether they were true. That is, if the jury believed that Dalton probably had no factual basis for his threat to implicate Mercurio as the killer and major participant as Crompton reported, then his willingness to lie – whether out of anger at Mercurio or Crompton or for any other reason – was important impeaching evidence that the jury could reasonably have concluded demonstrated that Dalton was not credible. On the other hand, if the jury

believed that Dalton probably did have a factual basis for inculpating Mercurio, then it could also have reasonably concluded that his trial testimony inculpating appellant was not credible. And if the jury came to no conclusion at all about the truth of the substance of what Dalton had told Crompton he would say if called to testify – it would at least have known that the statement to Crompton was untrue because he did not testify as he said he would; he changed his story and was not credible.

It has never been the law that the proponent of a prior inconsistent statement must establish the truth of that statement in order for it to be admissible to impeach the witness. Yet that is what the trial court seemed to be saying here.

This Court's opinion in *People v. Cudjo* (1993) 6 Cal.4th 585, 610 is instructive. There, the defense moved to introduce hearsay testimony by one Culver, that a third party, the other prime suspect in the case, had made self-incriminating statements – evidence which would have raised a reasonable doubt about the defendant's guilt. This Court found the trial court's exclusion of that evidence under Evidence Code section 352 to be an abuse of discretion because it was based on the trial court's own assessment of Culver's credibility. The *Cudjo* opinion explains that "the trial court apparently concluded that the evidence was more prejudicial than probative because Culver was not a credible witness. However, such doubts, however legitimate, do not constitute 'prejudice' under Evidence Code section 352. (See *People v. Alcala* (1992) 4 Cal.4th 742, 791 [].) We have warned trial courts to avoid hasty conclusions that third-party-culpability evidence is 'incredible'; this determination, we have affirmed, 'is properly the province of the jury.' (*People v. Hall* [(1986)] 41 Cal.3d [826,] 834.) . . . We conclude that doubts about Culver's credibility, though

reasonable and legitimate, did not provide a sufficient basis to exclude his testimony. In sustaining the prosecutor's objection to this evidence, the trial court abused its discretion." (*People v. Cudjo, supra*, 6 Cal.4th at p. 610, parallel citations omitted, underlining added.)

As in *Cudjo*, the trial court in appellant's case invaded the province of the jury when it determined that Dalton's prior statements to Crompton indicating that Mercurio had killed Gitmed were not credible. It is important here that, according to Crompton's report, Dalton "said he would tell how Tony MECURIO [sic] took that kid out there and shot him and threw his body in the lake." (CT 950.) Dalton did not tell Crompton that he merely thought that Mercurio had committed the crime (which was what the trial court allowed Dalton to testify to with regard to appellant); rather, he was going to "tell how" Mercurio did it. As defense counsel pointed out, the jury could have inferred that Dalton knew what had happened, since at the time of the crime he lived with Mercurio and they were friends.

Additionally, the statements were admissible under Evidence Code section 1235 for their substantive evidentiary value, raising the inference that in fact Mercurio was the primary actor, the one who "got everyone involved," and who had actually killed Gitmed. (CT 950.) The trial court was focused exclusively on this aspect of Dalton's statements and its exclusion of the evidence as too prejudicial under Evidence Code section 352 was based on its own factual findings (a) that there was no factual basis for Dalton pinning the crime on Mercurio, and (b) that Dalton was telling the truth at the 402 hearing when he said he had just made up the idea that Mercurio was guilty. (RT 2116.) Again, this was an abuse of discretion.

This Court has consistently made it abundantly clear that the "prejudice" contemplated by Evidence Code section 352 is not merely that

the proffered evidence will factually or legally weaken the opposing side's case; rather the evidence must create some kind of unfairness. "Although we recognize that the prosecution is accorded protection under Evidence Code section 352, similar to that of the defense, from the use of prejudicial evidence with little probative value, the purported prejudice to the prosecution cannot be based on mere speculation and conjecture. (*People v. Love* (1977) 75 Cal.App.3d 928, 937 [].) Moreover, 'Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it.' (*People v. McDonald* (1984) 37 Cal.3d 351, 372 [].) [¶] 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues.' (*People v. Yu* (1983) 143 Cal.App.3d 358, 377 [].) Thus, the balancing process mandated by section 352 requires 'consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion.' (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291 [].)" (*People v. Wright* (1985) 39 Cal.3d 576, 585, parallel citations omitted, underlining added; see also *People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071.)

In the context of discussing the admissibility of straight third-party evidence, this Court quoted Wigmore in *People v. Hall* (1986) 41 Cal.3d 826, 834 for the principle that, "'. . . if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.' (1A Wigmore, Evidence

(Tillers rev. ed. 1980) § 139, p. 1724.)" (Underlining added.) This principle is particularly important in the context of a capital case, where the Eighth Amendment requires a reliable determination of guilt.

It boils down to this: Dalton told Crompton that he would testify that Mercurio was guilty, but in fact he testified that he believed appellant was guilty. The jury was entitled to know that he had changed his story, and appellant was entitled to cross-examine him about his prior statements, including the factual basis for them. The jury was also entitled to draw its own inference as to whether Mercurio had a factual basis for his prior statement.

G. The Issue of the Erroneous Exclusion of Dalton's Prior Inconsistent Statements is Cognizable on Appeal

If this Court concludes that appellant failed to make a sufficient offer of proof to establish that Dalton's prior statements were admissible because trial defense counsel did not question Crompton himself with regard to Dalton's statements, then appellant's trial counsel failed to provide the effective representation to which he was entitled under the state and federal constitutions and counsel's failure led to an unreliable verdict in a capital case. (U.S. Const. Amends. VI, XIV; Cal. Const., Art. 1, §§ 7, 15, 24; *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

Crompton was clearly available to testify, since he in fact did so as part of the prosecution rebuttal in the guilt phase. (RT 2815 et seq.) Trial counsel's efforts to get Dalton's prior statements into evidence, including the proffer of Crompton's report, indicate that they had no tactical reason for failing to make a sufficient offer of proof with regard to the statements, and this Court should reach the merits of the instant issue, which seriously

affected the fairness of appellant's trial and his substantial rights. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].) Additionally, this Court has the discretion to review errors, in the absence of an objection at trial, which seriously affected the fairness of the trial and the defendant's substantial constitutional rights, as appellant has demonstrated these errors did. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 456, fn. 9; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; see also People *v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.)

H. Reversal is Required

Appellant's jury was instructed it could consider any admission made by him as evidence of his guilt.[107] It is at least reasonably probable that the jury considered appellant's remarks about somebody found floating in the lake as evidence of his guilt. The erroneous admission of those statements, therefore, had the maximum possible prejudicial effect.

In many cases it would be reasonable to assume on appeal that the

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[107] The trial court gave the standard instruction on admissions, as follows: "An admission is a statement made by the defendant other than at his trial which does not by itself acknowledge his guilt of the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part. If you should find the defendant did not make the statemnt, you must reject it. If you find it's true in whole or in part, you may consider that part which you find to be true. [¶] Evidence of an oral admission should be viewed with caution." (RT 2899.)

jury was not likely to have set much store by the testimony of an inarticulate drug addict like Dalton, or of someone as involved in drugs as Barbara Triplett apparently was. But at appellant's trial, most of the prosecution's case rested on such testimony. Dalton, Mercurio, Arias, Barbara Triplett, and Keathley, were all drug users and/or convicted felons. (RT 1880, 1907-1908, 1913 [Mercurio]; 1619-1620, 1650-1651, 1656-1657 [Keathley]; 1597, 1604-1606; 1659-1660 [Keathley and Arias]; 2046-2047 [Dalton]; 2451-2453 [Barbara Triplett]) The prosecutor prepared jurors for this during jury selection voir dire (see, e.g. CT 427 [questions 33-35]) and acknowledged it in his opening statement (RT 1431, 1435). And the jury convicted appellant on the testimony of these people, so Dalton's inflammatory and highly prejudicial contribution cannot be discounted.

Moreover, the trial court specifically and improperly mentioned the so-called "floater" remarks as evidence of appellant's lack of remorse when denying his automatic motion to modify the sentence. (RT 3493.) Evidence which could have such a prejudicial effect on the judge most probably had an equally prejudicial effect on the jury.

Even if the admission of appellant's "floating" comment through Triplett would not have been seriously prejudicial standing alone, it certainly was prejudicial when combined with Dalton's testimony for several reasons: first, it focused the jury's thoughts for a second time on the sad and gruesome image of Gitmed's body abandoned in the water; and second, it increased the prejudicial effect of Dalton's testimony because it tended to bolster his credibility; and finally, it was very likely understood by the jury to be an "admission" by appellant that could be considered as evidence of his guilt. Predictably, the prosecutor linked the two statements in closing argument. (RT 2928.)

One of the most chilling images at appellant's trial was that of Gitmed's body found floating in the water at Canyon Lake. As a result of Dalton's testimony and the court's erroneous instruction, the jury was led to believe that appellant had said something about leaving Gitmed's body in the water that was self-incriminating, and that Dalton's opinion that appellant had killed Gitmed was worthy of belief. The prejudicial effect of this evidence was devastating on this record, where there was no physical evidence linking appellant to the scene of the crime, and the only substantial evidence of his guilt at all was the testimony of accomplice Mercurio, whom at least some jurors did not believe.

Standing alone, the trial court's failure to strike Dalton's testimony and the admission of his and Triplett's testmony about appellant's statements constituted a denial of appellant's right to due process and fundamental fairness, resulting in a miscarriage of justice. (U.S. Const. 6th, 8th, 14th Amends.) Moreover, it resulted in a verdict of guilt that is unreliable, requiring reversal under the Eighth Amendment. *(Strickland v. Washington* (1984) 466 U.S. 668, 704*; Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Horton* (1995) 11 Cal.4th 1068, 1134.)

In addition, the erroneous denial of appellant's motion to exclude Dalton's testimony about the "floating" statement and to admit evidence of his prior inconsistent statement, whether considered separately or together, constituted a violation of state statutory provisions concerning lay opinion testimony and prior inconsistent statements in which appellant had a clear liberty interest, and for that reason also violated his right to due process under the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343;

Hewitt v. Helms (1983) 459 U.S. 460, 466; *Whalen v. United States* (1980) 445 U.S. 684, 689-690, fn.4; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

The prejudicial effect of the trial court's errors was seriously increased by its refusal to allow appellant to impeach Dalton with his prior inconsistent statements to defense investigator Crompton. The trial court abused its discretion when it excluded the impeachment evidence based on its own assessment of Dalton's credibility, thus precluding the jury from fairly and reasonably assessing Dalton's credibility in light of the prior statements. This improperly lightened the prosecution's burden of proof and constituted a denial of appellant's rights to due process and to cross-examination under the Sixth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364; *Mullaney v. Wilbur* (1975) 421 U.S. 684; *Pointer v. Texas* (1965) 380 U.S. 400, 405-406; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137.)

Reversal is required under any standard, but because the subject errors were of federal constitutional magnitude in this capital case, the *Chapman* standard of reversal should be applied. The prosecution cannot possibly establish beyond a reasonable doubt on this record that the admission of Dalton's and Triplett's inflammatory and inadmissible testimony coupled with the exclusion of Dalton's prior inconsistent statements, which the jury might have concluded inculpated Mercurio, or at least raised a reasonable doubt about appellant's guilt, did not affect the verdict. Reversal of the entire judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 26.)

VIII

THE CUMULATIVE EFFECT OF ERRORS IN THE GUILT PHASE REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

Appellant should never have been convicted of robbing or murdering Gitmed. There just was not enough relevant, admissible evidence to prove that he did it, and none that he was culpable as an aider and abetter. Even assuming, arguendo, that this Court concludes that no single trial error requires reversal standing alone, appellant's guilt conviction must be reversed because of the cumulative effect of all the errors considered together which rendered appellant's trial fundamentally unfair, in violation of his due process rights under the Fourteenth Amendment. (See *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 fn. 15.)

"In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. *See United States v. Green,* 648 F.2d 587 (9th Cir.1981). Where, as here, there are a number of errors at trial, ""'a balkanized, issue-by-issue harmless error review'"" is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *United States v. Wallace,* 848 F.2d 1464, 1476 (9th Cir.1988). In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. *United States v. Berry,* 627 F.2d 193 (9th Cir.1980), *cert. denied,*449 U.S. 1113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1981). ""'This is simply the logical corollary of the harmless error doctrine which requires us to affirm a conviction if there is overwhelming evidence of guilt.'"" *Id.* at 201; *see also United States v. Hibler,* 463 F.2d 455 (9th Cir.1972)."

(*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381, underlining added.) The case at bar is such a case.

The record shows beyond any reasonable doubt that appellant's trial was a web of errors whose cumulative impact rendered the process of determining appellant's guilt fundamentally unfair and led to an irrational and unreliable verdict. Appellant hereby incorporates by reference Arguments I, II, III, IV, V, VI, and VII, *supra*, as if fully set forth herein.

With no physical evidence linking him to the scene of the crime, appellant was convicted by an unrepresentative jury (Arguments I, II, *supra*), primarily on the self-serving, uncorroborated testimony of Anthony Mercurio who was charged as an accessory to the crime and who must be considered to be an accomplice in view of the jury's finding that appellant was not the shooter (see Arguments IV, V, and VI, *supra*). All that the other evidence in the case established was that, in August 1991, appellant knew Gitmed and his cousin, Michelle Keathley, that he knew Mercurio and the others living at Santa Rosa Mine Road and took drugs with them, and that after Gitmed was dead appellant briefly drove his car before burning it, and a month later had possession of a jacket and bag belonging to him. (See Argument V, *supra.*) But the evidence – aside from Mercurio's self-serving testimony – did not establish that appellant ever said or did anything indicating that he was responsible in any way for the shooting or robbery, if any, of Ronald Gitmed – that is, no other evidence connected him to the crime. (See Arguments IV, V, VI, *supra.*) In fact, there was not even any credible evidence that any property was actually taken from Gitmed in a robbery – and no evidence of a robbery at all if Mercurio's testimony that appellant was the one who robbed and shot Gitmed was disbelieved–as it was, by one or more jurors. (See Arguments IV, VI, *supra*; CT 1096.)

But Mercurio's testimony was shored up by the erroneous admission of evidence that had no tendency in reason to prove any of the issues in contention, yet was extremely prejudicial – Gitmed's bag and jacket, which the prosecutor improperly linked in the jurors' minds to a robbery, Barbara Tripplett's and Danny Dalton's testimony about appellant making vague statements, and Dalton's completely unfounded lay opinion that appellant was guilty. (See Arguments III, VII, *supra.*) At the same time, appellant was not allowed to introduce Dalton's prior statements giving rise to the inference that Mercurio was the actual killer and primary actor in the crime. (See Argument VII, *supra.*)

And most egregiously, those jurors who were, manifestly, not persuaded that appellant had used a weapon were led by the trial court's instructions and the prosecutor's improper argument to believe they could nevertheless convict him as an aider and abetter, in the absence of any evidence at all of his role in the crime in that capacity. (See Arguments IV, VI, *supra.*)

This was not a trial in which appellant's "guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Rather, appellant's trial was utterly, fundamentally unfair because of the cumulative effect of the trial court's errors and the prosecutor's misconduct; appellant's conviction was obtained in violation of the Fourteenth Amendment guarantee of due process of law; and the entire judgment must be reversed. (See *Taylor v. Kentucky, supra,* 436 U.S. at p. 487 fn. 15; *United States v. Tory* (9th Cir. 1995) 52 F.3d 207, 210-211; *United States v. Green* (9th Cir. 1981) 648 F.2d 587, 593, 597; *In re Gay* (1998) 19 Cal.4th 771, 826; *People v. Hill, supra,* 17 Cal.4th 800, 845.)

The entire judgment must also be reversed under the Eighth and

Fourteenth Amendments because in these circumstances this Court cannot possibly have confidence in the verdict, and appellant's conviction of capital murder is unreliable. (*Strickland v. Washington* (1984) 466 U.S. 668, 704; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Horton* (1995) 11 Cal.4th 1068, 1134.)

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IX

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE LAW GOVERNING THE PROCESS OF CHOOSING APPELLANT'S SENTENCE VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

Appellant was entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution to a jury instruction that the findings the jury was required to make before returning a death verdict had to be found unanimously and beyond a reasonable doubt, under the principles set forth by the United States Supreme Court in *Apprendi* v. *New Jersey* (2000) 530 U.S. 466 (hereafter *Apprendi*); *Ring* v. *Arizona* (2002) 536 U.S. 584 (hereafter *Ring*); and *Blakely* v. *Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531 (hereafter *Blakely*); *Jackson v. Virginia* (1979) 443 U.S. 307, 320, n. 14; *Brown v. Louisiana* (1980) 447 U.S. 323,330-334; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

B. Beyond a Reasonable Doubt Standard

The standard of proof required for any judicial determination is driven by the seriousness of the interest at stake. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 758 [standard of proof determined by nature of interest threatened and permanency of threatened loss].) At risk in a capital sentencing proceeding is the most serious interest possible, life itself.

Accordingly, *Apprendi, Ring,* and *Blakely* and the cases cited within them, have established that, under the Fifth, Eighth and Fourteenth Amendments: (1) a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence, other than a prior conviction, are also submitted to the

jury and proved beyond a reasonable doubt (*Apprendi, supra,* 530 U.S at p. 478); (2) that any factual finding that can increase the penalty beyond the statutory maximum allowed by the jury's verdict is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached to it (*Ring, supra,* 536 U.S. at p. 609); and the statutory maximum is the punishment the jury's verdict alone allows without any additional findings, not the maximum that may be imposed after such findings (*Blakely, supra,* 542 U.S. at p. ___, 124 S.Ct. at p. 2537.)

The United States Supreme Court has long held that the prosecution must prove every element of an offense beyond a reasonable doubt (*In re Winship,* 397 U.S. 358 (1970), and the trial court must so instruct the jury (*Victor v. Nebraska* (1994) 511 U.S. 1, 5; *Jackson v. Virginia, supra*, 443 at p. 320, n. 14).

In appellant's case, the jury's verdict finding him guilty of first degree murder committed while he was engaged in the commission of a robbery, even when combined with its finding that he had previously been convicted of first or second degree murder, made appellant death-eligible; it did not authorize the imposition of the death penalty.

For the death sentence to be imposed on appellant, additional findings had to be made by the jury. First, it was required to determine whether any factors in aggravation or mitigation of the sentence existed. (§ 190.3.) Second, it was required to weigh the relevant factors in aggravation set out by statute against any relevant factors in mitigation, and determine whether the aggravation outweighed the mitigation. (*People v. Melton* (1988) 44 C.3d 713, 761; *People v. Brown* (1985) 40 C.3d 512, 544.) And then the jury was required to determine whether the factors in aggravation were so substantial that death was the appropriate punishment. (*People v.*

Duncan (1991) 53 Cal.3d 955, 978.)

Because these additional findings were required before the maximum sentence could be imposed on appellant, the jury needed to understand that it was required to find each of them – the existence or non-existence of each factor to be considered in aggravation or mitigation, that aggravating evidence substantially outweighed mitigating evidence, and that death was the appropriate punishment – beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S at p. 478; *Ring, supra,* 536 U.S. at p. 609; *Blakely, supra,* 542 U.S. at p. ___, 124 S.Ct. at p. 2537.) The trial court was therefore required to explain this law to the jury, pursuant to its duty to instruct the jury sua sponte on the legal principles "'necessary for the jury's understanding of the case.'" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 320, n. 14.) The trial court did not explain to the jury its obligation to make the additional findings necessary before the death penalty could be imposed on appellant only if they were persuaded beyond a reasonable doubt. (RT 3231-3234, 3314-3317.);

C. Unanimity Requirement

The trial court did not instruct the jury that the findings which were prerequisite to a death verdict required unanimity or even agreement by a substantial majority. Appellant was entitled to such a verdict as a matter of due process under the Fourteenth Amendment and to protect against an unreliable verdict under the Eighth Amendment.

The United States Supreme Court held in *Brown v. Louisiana, supra,* 447 U.S. 323, a non-capital case, that considerations of fundamental fairness and reliability required retroactivity of the constitutionally compelled requirement of a unanimous verdict where guilt has been

determined by a six-person jury. (*Id.*, at pp. 330-334.) In a capital penalty trial, where a heightened degree of reliability is required (*Lockett v. Ohio, supra*, 438 U.S. at p. 604), the same principles must apply to the findings made by a twelve-person jury. Such a conclusion is also compelled by the reasoning in *Ring, supra,* and *Blakely, supra,* which explained that a defendant's federal constitutional right to due process must be protected in the context of the trial court's determination of the appropriate sentence at least to the same degree as in decisions of less consequence.

Further, the high court has also held that the prohibition against double jeopardy applies to a death penalty verdict as it does to the determination of guilt or innocence itself. (*Bullington v. Missouri* (1981) 451 U.S. 430.) And in *Monge v. California* (1998) 524 U.S. 721, the court said that the penalty phase of a capital trial "is in many respects a continuation of the trial on guilt or innocence of capital murder." (*Id.*, at p. 722.) The California Constitution, of course, requires a unanimous verdict in criminal trials. (Cal. Const. Art 1, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

Given the state constitutional provision for jury unanimity in determinations of criminal liability, the reasoning and holdings of the United States Supreme Court cases cited herein, and the federal constitutional requirement of a heightened degree of due process and reliability of the verdict in a capital case, the trial court's omission violated appellant's rights under the Eighth and Fourteenth Amendments. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Strickland v. Washington* (1984) 466 U.S. 668, 704 (conc. & diss. opn. of Burger, C.J.); *Gardner v. Florida* (1977) 430 U.S. 349, 358; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.)

D. Certain Factors Only Mitigation

Appellant was entitled to have the jury instructed that several factors listed in section 190.3 could only be considered in mitigation of appellant's sentence. These were: whether or not: "the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance" (factor (d)); "the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act" (factor (e)); "the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct" (factor (f)); "defendant acted under extreme duress or under the substantial domination of another person" (factor (g)); "at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication" (factor (h)); and/or "the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" (factor (j)).[108] (See *People v. Hamilton* (1989) 48 Cal.3d 1142; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.)

The trial court, however, merely instructed the jury with the standard instruction, reiterating the used in section 190.3 to list the factors which may be relevant to sentencing. (CALJIC 8.85; RT 3232-3233.) And the prosecutor systematically drew the jury's attention to the absence of each of

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[108]See also appellant's argument concerning the unconstitutionality of factors (d) and (g) for other reasons. (Argument XIV, *infra.*)

these factors, reading the text from the statutes one by one and pointing out each time that there was no evidence of that factor. (RT 3304-3305.) The prosecutor did not explain that the lack of evidence of each of these meant that it was irrelevant to the jury's deliberations. So it is reasonably probable that the effect of this litany on the jury, highlighting the "missing" factors one by one and especially taken in its entirety, was to convey the message that the absence of evidence of any of these factors weighed in favor of the death sentence.

E. Reversal of Appellant's Death Sentence is Required

The trial court's failure to instruct the jury on the requirement of unanimity and the prosecution's burden of proof had the same effect as a failure to instruct in the guilt phase on an element of the offense and therefore violated appellant's Sixth Amendment right to a jury trial, as well as the Due Process Clause of the federal constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348; *People v. Flood* (1998) 18 Cal. 4th 470.)

On this record there is much more than a "reasonable likelihood" that the jury in fact did not unanimously agree on the existence of aggravating factors, let alone their significance and weight, especially the critical factor of the circumstances of the crime in the instant case. (See RT 3308-3309; *Boyde v. California* (1990) 494 U.S. 370, 381; *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) That likelihood is apparent on the record because it shows that at least one person with lingering doubt about appellant's guilt was on the jury (see Argument X, *infra*); and because the fact that the jury had found in the guilt phase that appellant did not use a gun (CT 1096) meant that at least some jurors did not believe he was the

shooter, and those jurors must have had serious questions about what appellant's role in the crime had been and what his personal culpability for what happened to Gitmed was (see Arguments IV, V, VI, *supra*). Moreover, the weight of the other factors in aggravation was not overwhelming: appellant's prior murder occurred in a context some jurors could well have understood as akin to the reasonable belief in the necessity of self-defense yet appellant fully confessed and took responsibility for it (RT 3312-3313, Exhibit 44); the evidence of the victim's vulnerable character may well have been off-set by the jurors' knowledge that he had been doing drugs (RT 1885-1886); and the mere fact that appellant had, several years earlier, been convicted of being an ex-felon in possession of a gun, without any showing of threatening circumstances or intent to use the weapon for harm, would not have been considered troubling, since most of the jurors themselves either owned guns or had close relatives who did.[109]

Appellant shows in Argument X, *infra*, that the trial court's failure to instruct the jury on lingering doubt after a holdout juror was replaced with an alternate was error, and hereby incorporates that argument by reference as if fully set forth herein. Even if none of the omitted instructions requires reversal on its own account, the cumulative effect of failing to instruct the jury on the standard of proof and requirement of unanimity for findings necessary to the imposition of the death sentence combined with the trial court's failure to instruct the jury on lingering doubt after an alternate was seated, do require reversal because of their cumulative prejudicial effect. If appellant's jury had correctly understood its obligations in the deliberative

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[109] Seated jurors' questionnaires indicating possession of a gun are in the Supplemental Clerk's Transcript – Juror Questionnaires at pages 200, 813, 849, 1092, 1119, 1471, 1498, 1525, and 1633.

process it is very likely that they would not have returned a death verdict. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 877; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Reversal of appellant's sentence is also required because it is reasonably probable that appellant's jurors believed that if they found that any or all of the "whether or not" factors did "not" exist, their absence could be considered in aggravation of the sentence, which introduced non-existent and irrational factors into the penalty deliberations in violation of appellant's right to a reliable and individualized sentencing determination. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi, supra*, 486 US. at pp. 584-585.)

Further, the failure to instruct appellant's jury on the applicable law that would have guaranteed to appellant the same procedural protections afforded non-capital defendants constituted a denial of his right under the state and federal constitutions to equal protection of the law with regard to the most fundamental right of all, the right to life. (U.S. Const., 14th Amend.; Cal. Const. Art. 1, § 7; see *Bush v. Gore* (2000) 531 U.S. 98, 104-105; *Trop v. Dulles* (1958) 356 U.S. 86, 102; see *People v. Olivas* (1976) 17 Cal.3d 236, 251 [personal liberty is fundamental interest second only to life].) In non-capital cases California imposes on the prosecution the burden of persuading the sentencer that the defendant should receive the most severe sentence possible and requires the sentencer to state reasons for the sentencing choice when a more severe sentence is imposed. Particularly in view of the constitutionally compelled heightened degree of due process and the critical need for a demonstrably reliable penalty verdict in a capital case under the authorities cited above, the state cannot possibly show a

compelling interest that justifies the differential treatment of capital and non-capital defendants. To the extent that any prior opinion of this Court endorses the unequal treatment of capital defendants it should be reconsidered and overruled. (See, e.g. *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) And appellant's sentence must be reversed because it was obtained in violation of his right to equal protection of the law.

Moreover, in these circumstances, the prosecution cannot possibly carry its burden of showing that the omitted instructions, especially combined with the omitted instruction on lingering doubt, each of which implicated appellant's basic constitutional rights, did not affect the penalty verdict. (*Chapman v. California* (1967) 386 U.S. 18, 26.)

The death penalty verdict returned by appellant's jury is unreliable and violates the federal constitution under the cases and constitutional provisions cited, *supra*. To the extent that this Court's previous opinions are inconsistent with these and endorse the imposition of the death penalty on appellant without a unanimous determination by the jury beyond a reasonable doubt of all facts beyond the guilt verdict that were necessary before such a sentence could be imposed, they should be reconsidered and overruled. (See, e.g., *People v. Dickey* (2005) 35 Cal.4th 884, 929-930 ; *People v. Griffin* (2004) 33 Cal.4th 536, 594-595; *People v. Cox* (2003) 30 Cal.4th 916, 971-972; *People v. Prieto* (2003) 30 Cal.4th 226, 263, 275.)

X

THE TRIAL COURT'S ERRONEOUS DISCHARGE OF A JUROR DURING PENALTY DELIBERATIONS AND INADEQUATE SUPPLEMENTAL INSTRUCTIONS TO THE JURY REQUIRE REVERSAL OF THE DEATH JUDGMENT

A. Introduction

During penalty phase deliberations two jurors, Deborah Pye and Lucille Rodriguez, separately told the court in camera that they did not want to continue serving on the jury because they were being subjected to intolerable pressure by the other jurors which was causing each of them severe distress. Both jurors also said that they were not comfortable with the guilt verdict. The trial court did not question any other jurors with regard to either of these juror's complaints, discharged Juror Rodriguez for cause, and sent Pye back in to deliberations. An alternate replaced Juror Rodriguez and two hours later the death verdict was announced.

Appellant opposed the dismissal of Juror Rodriguez on the ground that it was inappropriate if her problems in the jury room stemmed from lingering doubt about guilt, and asked the trial court to conduct an inquiry to determine whether she and Pye were being subjected to undue pressure to vote for death. Appellant also specifically objected to the discharge of Juror Rodriguez and requested that the trial court determine whether the jury was deadlocked.

As appellant explains below, the trial court committed reversible error because it:

(1) failed to conduct an adequate investigation into the possibility of misconduct on the part of the other jurors;

(2) erred in dismissing Juror Rodriguez for cause;

(3) gave an inadequate supplemental instruction after seating the alternate juror;

(4) erred in denying appellant's motion for a new trial.

Moreover, in the circumstances of appellant's case, the totality of the trial court's actions amounted to an impermissible directed verdict of death.

These errors violated appellant's rights to: a unanimous verdict under the state constitution (Cal. Const. Art. I, sec. 16), due process under the state constitution (Cal. Const. Art. I, sec. 15), due process under the federal constitution (U.S. Const. 14th Amend.), and a reliable sentence in a capital case under the federal constitution (U.S. Const. 14th, 8th Amends.I).

B. The Trial Court Failed to Conduct an Adequate Inquiry into the Possibility that Juror Misconduct Had Occurred

At 10:30 a.m. on May 6, 1996, which was the second[110] day of penalty phase jury deliberations, the trial court informed the prosecutor and appellant, who was appearing in propria persona,[111] that it had received a note stating that jurors Lucille Rodriguez and Debra Pye needed to speak

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[110]Penalty phase jury deliberations began on May 1, 1996, at approximately 11:15 a.m. and ended that day at approximately 3:00 p.m. There was a four-day recess between the first and second day. (RT 3318, 3324-2235.) The record does not indicate the length of the jury's lunch break on May 1, but the trial court commented on May 7, when denying appellant's motion to declare a deadlock, that the jury had been deliberating for one and a half hours. (RT 3382.)

[111]On April 25, 1996, the court placed attorneys Aquilina and Grossman on stand-by status for the special circumstance and penalty phases, and granted appellant's request to represent himself by remaining silent, not participating, and not presenting any mitigation evidence. (CT 1101, RT 3159.)

with the judge. (RT 3327.) At that point, the jury had engaged in about one and a half hours of deliberations on penalty. (RT 3382.) The court determined that the two jurors wanted to address the court "privately," cleared the courtroom of spectators, and brought the two jurors into the courtroom separately, with Juror Rodriguez first. (RT 3328-3329.)

1. The Trial Court Had a Duty to Conduct an Adequate Inquiry to Determine the Facts Before Discharging a Juror

Appellant acknowledges that the trial court's "discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeleer* (1995) 9 Cal.4th 953, 989.) But this Court has long held that, "[a] trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.' (*People v. Burgener* (1986) 41 Cal.3d 505, 519 [].)" (*People v. Davis* (1995) 10 Cal.4th 463, 547, parallel citation omitted, underlining added; accord, *People v. Farnam* (2002) 28 Cal.4th 107, 141.)

Also, "when a trial court learns during deliberations of a jury-room problem which, if unattended, might later require the granting of a mistrial or new trial motion, the court may and should intervene promptly to nip the problem in the bud. The law is clear, for example that the court must investigate reports of juror misconduct to determine whether cause exists to replace an offending juror with a substitute." (*People v. Keenan* (1988) 46 Cal.3d 478, 532; see *Perez v.* Marshall (1997) 119 F.3d 1422, 1424-1426 [distressed and irrational juror properly discharged after court questioned both juror and foreperson]; *People v. Johnson* (1993) 6 Cal.4th 1, 21 [juror

properly discharged for sleeping where court, two court deputies, and prosecutor all stated they saw him asleep]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 726 [court questioned every juror before discharging one for failure to deliberate]; cf. *People v. Marshall* (1996) 13 Cal.4th 799, 864 [no duty to inquire where defense counsel merely speculated jurors had read newspaper article, jurors had been admonished not to read newspaper, and no evidence any juror had done so]; *People v. Williams* (1997) 16 Cal.4th 153 , 229 [no duty to inquire where defense counsel claimed juror was inattentive to defense witnesses but trial court had carefully observed juror to be paying attention].)

Here, there was no reason for the trial court to think that either Juror Rodriguez or Juror Pye was an "offending juror." On the contrary, they were the ones complaining.

In a 1990 opinion cited by appellant at trial, this Court specifically pointed out that Evidence Code section 1150's rule against inquiring into the jurors' mental processes applies "only '[u]pon an inquiry as to the validity of a verdict . . . .'" (*People v. Haskett* (1990) 52 Cal.3d 210, 241, fn. 11, quoting the statute.) The *Haskett* court noted that there is a clear distinction "between the task of determining *whether* misconduct occurred and the concededly more delicate task of determining the *effect of misconduct* on jurors." (*Ibid.*) It is clear that the "effect" of misconduct which is an improper subject of inquiry is the effect on the jurors' reasoning process. For example, the *Haskett* opinion explains that in *In re Stankewitz* (1985) 40 Cal.3d 391, statements by one juror were found to be misconduct, but statements by other jurors "that they were not influenced or affected by the alleged misconduct" were inadmissible. (*Ibid.*) And there is no authority "for the proposition that every answer to a judge's questions

implicates the answering juror's reasoning process . . . ." (*Ibid.*)

Thus, the trial court at appellant's trial was free to inquire about what kind of things were being said or done by other jurors to make both Juror Rodriguez and Juror Pye ask the judge to let them off the jury. (See *In re Stankewitz* (1985) 40 Cal.3d 391, 400 [reversal for misconduct where juror explained points of law during deliberations based on personal experience and erroneously].)

Further, this Court has clarified that "although we recognized [in *People v. Cleveland* (2001) 25 Cal.4th 466] the importance of secrecy in deliberations, we also recognized that such secrecy *may* give way to reasonable inquiry by the court when it receives an allegation that a deliberating juror has committed misconduct. (*People v. Cleveland, supra,* 25 Cal.4th at p. 476.) Claims of misconduct may merit judicial inquiry even though they may implicate the content of deliberations." (*People v. Engelman* (2002) 28 Cal.4th 436, 443, italics in original.) This Court has cautioned that "any investigation must be conducted with care so as to minimize pressure on legitimate minority jurors." (*People v. Keenan* (2001) 46 Cal.3d 478, 533; see *People v. Cleveland* (2001) 25 Cal.4th 466, 478; *People v. Barber, supra,* 102 Cal.App.4th at p. 150.)

2. Statements by Two Jurors Raised the Possibility of Misconduct in the Jury Room

a. Juror Rodriguez's Initial Statements

Juror Rodriguez spontaneously told the court that she had been a hold-out during guilt phase deliberations and had voted for guilt only because she was pressured by other jurors. (RT 3329-3330.) Specifically, she told the court the following:

". . . I was pressured at the end into going with

something – going with a decision I was not 100 percent sure of. And the more I thought about it, I went over your rules and how we were supposed to weigh things, and I felt for myself that there was a lot of doubt. And I was pressured by other jurors.

"And frankly, the last day and a half was horrible. It was horrible for me. I was told things that I felt I was on trial. And I was reminded of things, of what I was doing, I was being pointed out – and frankly, I was the last one with the decision that I had, and every – it was awful.

"The second point, the weapon, frankly, everybody agreed because I said I would not go the other way with, if yeah, the weapon or – I can't even remember what exactly it said. And they basically agreed because they knew I would be there to argue that point, and I told them I would not change my mind.

"Now we're going on this third phase, and I can't do it, because I don't feel – I felt pressured. I felt a lot of pressure.

"There was a lot of doubt in my mind. I tried pointing that out, and like I said, frankly, I was told – I don't even want to go out in that room over there because of the way some of the people treated me, so –." (RT 3329-3330, underlining added.)

The trial court asked: ". . . are you telling me you're not comfortable with your original verdict in the guilt phase, or are you telling me you're not comfortable with your verdicts as to Mr. Thompson's prior?" (RT 3330.) Juror Rodriguez clarified that she was not comfortable with the conviction of murder in the guilt phase. (RT 3330-3331.) She then said, ". . . I know I was wrong, and I don't know what can happen to me, but I can't go on with the following phases with this problem." (RT 3331.) The court asked Juror Rodriguez if she wanted to "retract [her] verdict[,]" and she replied, "yes."

(RT 3331.)

After Juror Rodriguez left the courtroom, the prosecutor requested that the court ask her directly whether she could continue deliberating in the penalty phase, observing that it was "too late for her to withdraw her verdict . . . ." (RT 3331.) The trial court deferred any action or ruling. (RT 3331.)

b. Re-appointment of Counsel for Appellant

At appellant's request, the trial court re-appointed John Aquilina and Jay Grossman as his counsel "to deal with these issues." (RT 3332-3339.) The trial court announced that based on Evidence Code section 1150[112] the guilt verdict could not now be undone based on the mental processes of the jurors. (RT 3340.) Defense counsel asked the court to defer any ruling about whether there were grounds for a new trial. (RT 3341.)

c. Further Voir Dire of Juror Rodriguez

The trial court then brought Juror Rodriguez back into court to determine whether she could continue as a juror in the penalty phase. (RT 3341, 3343.) The court conducted the following questioning:

> "THE COURT: . . . What I need to know from you is whether you feel that you are capable of reaching a decision one way or the other.

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[112]Evidence Code section 1150 provides as follows: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

"JUROR RODRIGUEZ: No; no.

"THE COURT: All right. Are you able to continue deliberating with the other jurors?

"JUROR RODRIGUEZ: No; no.

"THE COURT: . . . Is the reason for this the fact that you have a fundamental disagreement with the other jurors? Without talking about the nature of the fundamental disagreement. [¶] My problem is that neither the attorneys nor I are permitted to go into the mental processes of what goes on in the jury room.

"JUROR RODRIGUEZ: Just the differences, and – I just can't – I just can't do it.

"THE COURT: Do you know if you're capable of functioning as a juror any longer?

"No."

(RT 3343.)

d. Juror Pye's Initial Statements

The trial court then brought in Juror Debra Pye, who addressed the court as follows:

". . . I don't feel comfortable being on the jury, that with this second phase that we're in deliberation of, I just can't do it. [¶] I feel that I was rushed on the first phase, and like this past weekend, I was sick the whole weekend, even went to my hairdresser. I'm losing my hair. I've got – I'm having migraines. [¶] I can't do it. I can't make a decision on this second phase, since I don't feel comfortable with what was done on the first phase." (RT 3344.)

The court asked if she meant that she was "physically and mentally incapable of continuing as a juror[.]" And Juror Pye answered, "Yes." (RT

3345.) The court also asked Juror Pye if she was "asking to be discharged from the jury[.]" (RT 3345.) She responded, "Yeah, because I am – I just don't feel – especially when we first went in for deliberation, everybody in that room had already made up their minds, even before paperwork had got in there, instructions, evidence. And we were –" (RT 3345.)

At that point the trial court cut her off saying it did not want to "go behind the processes of deliberation[.]" (RT 3345.) The court then questioned Juror Pye as follows:

> "THE COURT: What I'm asking you now is whether you feel that whatever is troubling you has rendered you incapable of continuing as a juror in the final phase of this case.
>
> "JUROR PYE: Yes.
>
> "THE COURT: Do you feel that you cannot deliberate with the other jurors under any circumstances?
>
> "JUROR PYE: No."

(RT 3345.) Juror Pye then left the courtroom. (RT 3346.)

Defense counsel argued that these two jurors should not be excused because they had lingering doubt about the guilt phase which was affecting their vote on penalty, since lingering doubt about guilt was an appropriate consideration in penalty phase deliberations. (RT 3346-3349.)

The trial court agreed that the jurors should not be removed for saying that they could not vote for death because they believed the evidence was insufficient for conviction, but that they should be excused "if they are incapable of deliberating any further," because that would be "a failure to follow their oath as jurors to continue deliberating." (RT 3349.) The trial court added, "They're completely free to continue deliberating, to vote for

life without possibility of parole. Any issues of coerced verdict or undue pressure, et cetera, can be brought up in a motion for new trial." (RT 3349.)

Defense counsel contended that if Jurors Rodriguez and Pye saying they could not "continue to deliberate" was actually a way of saying that their analysis of the guilt phase evidence left them with some residual doubt about appellant's guilt, that was an appropriate position for them to take. (RT 3350.)

Defense counsel suggested that the court ask whether the jurors were being pressured to arrive at a death verdict. (RT 3351.) The prosecutor argued that the jurors should not be questioned as defense counsel suggested, because then the prosecutor would ask them why they voted for guilt in the guilt phase, and that would be an inappropriate line of inquiry. (RT 3352.)

The trial court, however, believed that the two jurors were "not voting either way; they're simply not discharging their function as jurors." (RT 3351.)

e. Final Voir Dire, Findings and Excusal of Juror Rodriguez

The trial court next brought Juror Rodriguez back into court and asked her if she felt "capable at this point in time of continuing to deliberate with [her] fellow jurors," to which she responded, "No." (RT 3352-3353.) She added, ". . . frankly, right now I'm ready to run out that door. I do not want to be here any longer. I don't want to talk to any other jurors. I don't want to – I don't even want to be in here right now." In response to these remarks, the trial court said, "All right. So you feel unable to continue deliberating?" And Juror Rodriguez replied, "Right." (RT 3353.) So the trial court told her she would be excused. (RT 3353.)

Juror Rodriguez then told the court that she did not even want to use the elevator where the other jurors were standing, and the trial court said she could go out with the clerk and use a different elevator. (RT 3353.)

At that point, defense counsel began to ask permission to inquire about something, but the trial court interrupted counsel and denied the request. (RT 3354.)

After Juror Rodriguez exited, the trial court announced factual findings: that she was in very great distress, could hardly maintain her seat, and "all she wanted to do was get out of here." (RT 3356.) The court said that "[i]t would have been a cruel imposition to leave her in this situation on the jury, regardless of what else happens." (RT 3356.) The court also pointed out that "she says she's incapable of continuing to deliberate." (RT 3356.)

The trial court concluded, "I think that, judged on her demeanor and her physical behavior in the courtroom, she was both physically and mentally incapable of continuing with deliberations as a trial juror, regardless of the reasons behind that." (RT 3356.)

f. Final Voir Dire, Findings and Retention of Juror Pye

When Juror Pye was brought back into the courtroom, the trial court asked her if she felt "capable at this point in time of reaching a decision in the penalty phase of this case as to what the appropriate penalty should be?" (RT 3357-3358.) Pye asked, "My own decision, or a decision with everybody else?" When the court clarified that it had meant her own decision, Pye responded, "Oh, I feel comfortable with my decision." (RT 3358.)

The trial court then conducted the following questioning:

"THE COURT: . . . So you do feel capable of reaching a decision if left on this jury with the other jurors as to whether the penalty should be death or life without possibility of parole? Is that correct?

"JURY PYE: Yes.

. . .

"THE COURT: So it is not that you're incapable of deliberating at this point? Previously you told me that you weren't capable of deliberating or reaching a decision.

"JUROR PYE: Okay. I reached my own, but it's not with everyone else.

"THE COURT: That's no problem. [¶] All right. You are entitled to your own decision, providing that you also have engaged in the deliberative process with the other jurors.

"JUROR PYE: Okay.

"THE COURT: So if you've reached a decision, that's just fine. [¶] My understanding of what you said previously was that you weren't capable of deliberating with the other jurors and you weren't capable of reaching a decision, but what you're telling me now is a little bit different.

"JUROR PYE: Maybe I didn't – I'm capable of reaching a decision, it's just that it's – if I – well, if I have to go back in the jury – back in there with everyone else, we're not going to have an answer, we're not going to all agree.

"THE COURT: So be it. [¶] But I'm – I do not want to relieve you of your position on this jury if you feel that you're capable of deliberating and capable of reaching a decision, and that's all we're asking.

"JUROR PYE: Okay.

"THE COURT: I don't want to go behind that

decision.

"JUROR PYE: Okay.

"THE COURT: If you're comfortable staying on the jury on that understanding, that's fine.

"JUROR PYE: Okay.

"THE COURT: All right?

"JUROR PYE: Yes.

"THE COURT: You indicated you had some physical and mental problems over the weekend, worried about your hair falling out and so forth. Are you comfortable staying on the jury in that light? I don't want to – you know, cause you major distress, but my inclination is to leave you on the jury.

"JUROR PYE: Okay."

(RT 3358-3359.)

After Pye left the courtroom the trial court commented, that "Ms. Pye does seem a lot calmer and more comfortable than Ms. Rodriguez did, and Ms. Rodriguez was in very dire straits. [¶] Ms. Pye seems to be comfortable; let's put it that way." (RT 3360.)

At the prosecutor's request, the trial court brought Juror Pye back into court and instructed her that it was her job to participate in discussion with the other jurors. (RT 3361-3362.) Pye said that she felt capable of continuing to do that. (RT 3362.) The court then advised her that it was "perfectly acceptable" for her to have "formed conclusions and opinions" but added that "it's also your duty to discuss with the other jurors." (RT 3362.) The following exchange then occurred:

"THE COURT: Are you comfortable with that?

"JUROR PYE: Yes.

"THE COURT: And are you comfortable with staying on the jury?

"JUROR PYE: Yes.

"THE COURT: As comfortable as anyone can be in your position?

"JUROR PYE: Yes.

"THE COURT: All right, very good."

(RT 3362-3363, underlining added.) Pye left the courtroom. (RT 3363.)

3. The Trial Court Failed to Determine Whether the Two Jurors' Distress Was Caused by Misconduct

Stripped of all reference to the content of deliberations, the voluntary, separate reports that both Rodrigue and Pye gave to the court amounted to a clear allegation that the behavior of the other jurors was making their jury service so intolerable that they each wanted to go home. Appellant submits that it is unusual, though not unheard of, for a juror to ask to be excused from deliberations, absent physical illness or personal emergency, and because of the way he or she has been treated by the other jurors. But it is surely very rare for two jurors to come forward expressing very similar complaints of intolerable conditions in the jury room. This was a circumstance which would have alerted any reasonable trial court to the need to find out what was going on.

Juror Rodriguez told the court that she had been the final holdout in the guilt phase (RT 3330), that she had been "pressured" into voting for guilt against her better judgment, that her experience had been "horrible," and that the basis of the problems between herself and the other jurors was "just" her "differences" with them. (RT 3329, 3343.) She did not give any details of what the other jurors were saying to her or how they were behaving, but she did say that she had been treated as though she was "on

trial" (RT 3330) – an implication that there was a one-sided interrogation or "ganging up" going on rather than the give-and-take of all sides explaining their reasoning. The trial court should have questioned the other jurors to determine whether it was Juror Rodriguez or the majority who was refusing to deliberate.

Juror Pye told the trial court that the other jurors had made up their minds before the exhibits had even arrived in the jury room. (RT 3345.) This suggested that the other jurors were refusing to deliberate, i.e. that they were not prepared to listen to the opinions of minority jurors and to consider such matters as the lingering doubt about guilt that such jurors might have had. The trial court should have determined whether the majority jurors were refusing to deliberate, including whether they were refusing to allow full participation in deliberations by the minority jurors.

Under the authorities previously cited, it was the trial court's task to determine the nature of the problems in the jury room: specifically, were the jurors merely having the kind of spirited, intense and even distressing exchanges over the questions before them that is to be expected in the emotionally charged context of a capital case, or had one or more of the jurors committed misconduct? If other jurors were making highly personal or insulting remarks in an effort to force Rodriguez and/or Pye off the jury, or were threatening them in some credible way, the two beleaguered jurors were not the ones whose ability to deliberate should have been called into question. Yet the trial court's response was, in effect, to blame the victims.

The possibility that the real problem was misconduct by other jurors was only superficially recognized by the trial court when it said, apparently sarcastically, that it "could have had all the jurors in and asked them whether there'd been any weapons held to anybody's throats at any stage."

(RT 3378.) Appellant is not here suggesting that there were weapons in the jury room, but the point is that there is a range of conduct between mere spirited discussion and actually using a weapon against a fellow juror, and a line that may be crossed within that range by misconduct short of pulling a knife. The trial court's sarcasm notwithstanding, it should have taken a serious look at what was going on during deliberations that made one juror so fearful she refused even to walk past the other jurors on her way out of the courtroom, and made another juror's hair fall out.

Given the nature of the allegations by two jurors, the rest of the jury, or at least the foreman, should have been questioned with regard to whether anyone on the jury had failed to deliberate, i.e. whether anyone had refused or been unable, to listen to others or to share his or her own views.

Before deciding whether to discharge either juror or to require either to continue deliberating, the trial court needed to know: What caused Pye to lose sleep, be sick for the whole weekend, and start losing her hair? In what sense was Juror Rodriguez "pointed out" by the other jurors, and did that occur someplace other than the jury room? Were the other jurors personalizing their disagreements over the case? Had the others all actually announced that their minds were made up at the beginning, as Juror Pye alleged, so that in fact they were the ones who would not deliberate? Were credible threats of some kind occurring? Had the others goaded Pye and Rodriguez into telling the court they wanted out, or asked them to leave? Were the other jurors angry that these two, or either one of them, might cause the jury to hang on the question of penalty, and were they trying to hound them off the jury? A similar scenario has in fact happened before, although in the context of guilt deliberations in a non-capital murder case, as described in *Sanders v. Lamarque* (2004) 357 F.3d 943, a case arising

from a California trial.

In *Sanders* the foreperson had informed the state trial court that one juror was "incapable" of deliberating because she was not following its instruction "'not to be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" (*Id.*, at p. 945.) The trial court conducted an inquiry into this allegation by questioning the foreperson, the juror in question, and another juror and uncovered the fact that the juror in question was in fact a good-faith holdout juror. (*Ibid.*) The holdout juror testified that she had been "pressured" by the majority jurors, i.e. that they had been expressing frustration and disapproval toward her, for example telling her she was "'confused'" and "'acting like a kid '" and blaming her for preventing them from reaching a verdict, and that she felt "'beat up on.'" (*Ibid.*) In these circumstances, the trial court had properly concluded that the juror could not be discharged for "bias or inability to follow instructions." (*Id.*, at p. 946.[113])

Remarkably, the record below indicates that the trial court's discharge of Juror Rodriguez may have been influenced by its own completely unsupportable suspicion that she had lied during jury selection voir dire. The day after the trial court had discharged her, and before the jury resumed deliberations, the court remarked as follows:

> "Given the fact, quite frankly, that this jury has heard no evidence in mitigation, and really the only evidence in mitigation that's before them is the sympathy factor plus

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[113]The primary issue in *Sanders* was the trial court's discharge of the holdout juror for failure to disclose information during voir dire, which the federal district court on a writ of habeas corpus had found unsupported by the record, reversing the conviction. The Ninth Circuit affirmed. (*Sanders v. Lamarque, supra,* 357 F.3d at pp. 946-950.)

> lingering doubt, which was not addressed by anyone due to the unusual nature of the penalty phase, I do have questions in my mind as to whether the two jurors in question were following either the Court's instructions or whether they were totally honest with you in voir dire. But that is a side issue."

(RT 3375.) This gratuitous comment was revealing.

First, it was tantamount to a statement that the court believed that the penalty jury did not understand that lingering doubt was a valid consideration in the penalty phase, since no-one had argued that factor or explained that point to them. Second, the court apparently concluded that, since Juror Rodriguez did not know that she could consider lingering doubt about guilt as a mitigating factor, the fact that she was doing so meant that she must have been lying in voir dire when she answered the questions geared to uncover disqualifying bias under *Witherspoon v. Illinois* (1968) 391 U.S. 510.[114] But none of this amounted to a "side issue" or an issue at

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[114]Juror Rodriguez, a former police department employee who had been married to an employee of the Los Angeles Sheriff's office whom she described as an "honest and very good police officer," indicated in question 44 on her questionnaire that she was "strongly in favor" of the death penalty. (3rd Supp. CT-JQ 302, 307, 314, 315.) On question 43 she described her general feelings about the death penalty as: "I feel if you are found guilty of murder or of a violent crime you should be punished by the death penalty." (*Id.*, at p. 315.) The reason for that opinion, according to her answer to question 45, was "I feel it is the right thing to do." (*Id.*, at p. 316.) To question 32, asking if she could set aside sympathy, bias or prejudice, she wrote, "You must be fair and base everything on evidence and facts." (*Id.*, at p. 313.) She also indicated she would "sometimes" impose the death penalty for murder during a robbery or multiple murder, and "always" for murder of a police officer. (*Id.*, at p. 319.) And she indicated she would not change her opinion during deliberations merely because other jurors, or a majority of the other jurors, disagreed with her. (*Id.*, at p. 321.) She was questioned by the court and by counsel for both

(continued...)

all, except insofar as the comment may indicate a measure of unconscious bias on the part of the trial court against the two jurors who had revealed that they were uncomfortable with the guilt phase verdict.

4. Reversal is Required

The court's failure to conduct an adequate inquiry to determine whether misconduct was occurring and a mistrial should be declared was an abuse of discretion and a denial of appellant's right to due process under the state constitution and to a heightened degree of due process in the penalty determination of a capital case. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885.)

Moreover, the trial court's failure to conduct an adequate factual inquiry to determine whether misconduct occurred has resulted in the deprivation of appellant's due process right to meaningful appellate review based on a complete record. (See *Zant v. Stephens* (1983) 462 U.S. 862, 890 [important procedural safeguard in appellate review to protect against arbitrary and disproportionate sentence]; *Douglas v. California* (1963) 372 U.S. 353; *Griffin v. Illinois* (1956) 351 U.S. 12; *Marks v. Superior Court* (2002) 27 Cal.4th 176, 191.)

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[114](...continued)
sides during voir dire and indicated that she understood that the law required her to base her penalty decision on the evidence in the case. (RT 822-824 (questions by court); 845-848 (questions by defense counsel); 877, 881 (questions by prosecutor). Juror Pye's questionnaire is in the 3rd Supplemental Clerk's Transcript at pages 1408 et seq, and her voir dire is in the Reporter's Transcript at pages 1220-1223, 1257-1258, 1285-1287.)

C. The Discharge of Juror Rodriguez for Cause Is Not Supported by the Record

Section 1089[115] authorizes the trial court to discharge a juror only if it finds "good cause" to do so. The trial court's discharge of a seated juror is reviewed for abuse of discretion and will be upheld if the juror's inability to perform her or his duties appears on the record as a "demonstrable reality." (*People v. Cleveland, supra,* 25 Cal.4th at pp. 487-488 (conc. opn. of Werdegar, J.).) However, "[t]he law provides, of course, that the court may not discharge a juror for failing to agree with the majority of other jurors or for persisting in expressing doubts about the sufficiency of the evidence in support of the majority view [citation] but laypersons may not understand this." (*People v. Engelman* (2002) 28 Cal.4th 436, 446, underlining added.)

Even assuming, arguendo, that this Court concludes that the trial court was not required to make any inquiry into juror misconduct on the part of the majority jurors, appellant submits that in the penalty phase of his capital case, where it appears that a minority juror's severe emotional

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[115]Section 1089 provides, and provided at the time of appellant's trial, as follows in pertinent part (underlining added):

> "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

distress[116] was caused by the treatment of her by other jurors and by her own belief that her lingering doubt about guilt disqualified her for continuing service, it was improper for the trial court to discharge her without first: (a) informing the juror that residual doubt about guilt was a legitimate factor in mitigation; (b) informing the entire jury of that fact; and (c) determining the effect of these measures on the minority juror's emotional state and willingness to continue to deliberate.

1. Juror Rodriguez's Disqualification Did not Appear as A Demonstrable Reality on the Record

"A sitting juror commits misconduct by violating her oath, or by failing to follow the instructions and admonitions given by the trial court." (*In re Hamilton* (1999) 20 Cal.4th 273, 305.) And a trial court may remove "a juror who refuses to deliberate, on the theory that such a juror is 'unable to perform his duty' within the meaning of Penal Code section 1089. . . ." (*People v. Cleveland, supra,* 25 Cal.4th at p. 475, underlining added; accord, *People v. Engelman* (2002) 28 Cal.4th 436, 442.) However, "a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate." (*Cleveland,* 25 Cal.4th at p. 488 (conc. opn. of Werdegar, J.); *People v. Johnson* (1993) 6 Cal.4th 1, 21; *People v. Compton* (71) 6 Cal.3d 55, 60.)

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[116]Appellant does not here dispute the trial court's findings with regard to Juror Rodriguez's agitated emotional state when she asked to be excused from the jury. (RT 3356.) Indeed, as appellant has argued, *supra*, the extreme distress of both jurors who asked to leave should have alerted the trial court to possible misconduct by the other jurors, and Rodriguez should not have been discharged without an adequate inquiry.

That standard was not met in appellant's case, as the evidence here does not support a conclusion that Juror Rodriguez either failed or was unable to deliberate. Initially, Juror Rodriguez told the trial court that her experience on the jury in the guilt phase had been so "horrible" that she did not want to continue to be in the same room with the other jurors for penalty phase deliberations. (RT 3330.) She claimed that other jurors had made her feel she herself was on trial, and that she had been thwarted in some way when she tried to explain her views about the evidence to the other jurors. (RT 3330.) None of this information could reasonably be construed as establishing that Juror Rodriguez was unwilling or unable to listen to other jurors' views or explain her own views. (Compare *People v. Compton* (1971) 6 Cal.3d 55, 60 [disqualification probably not established where juror's extrajudicial statements indicating he might have been biased were ambiguous]; *People v. Marshall, supra,* 13 Cal.4th at pp. 844-846 [disqualification not established where juror told trial court her question asking bailiff about defendant hurting jurors if they found him guilty was a joke, but disqualification was established where negative outcome of juror's speeding ticket hearing, scheduled for same time as penalty deliberations, would cost him his job and juror told court he would not have his mind on deliberations].)

In *People v. Barber* (2002) 102 Cal.App.4th 145, the Court of Appeal pointed out that "[j]urors will sometimes make the mistake of concluding that a juror's strong disagreement with the majority is equivalent to a refusal to deliberate. (*People v. Engelman, supra*, 28 Cal.4th at p. 446.)" (*Barber*, 102 Cal.App.4th at pp. 152-153.) At appellant's trial it appears that Juror Rodriguez may well have made this mistake. When the trial court asked her if the reason she was saying she could not continue to

deliberate was that she had "fundamental disagreements" with the other jurors, she replied, "Just the differences, and . . . I just can't do it." (RT 3343.)

The Ninth Circuit Court of Appeals has held, in the context of the federal rules of procedure governing the dismissal of jurors, that "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Under such circumstances, the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial. *See Brown,* 823 F.2d at 596. This rule is attentive to the twin imperatives of preserving jury secrecy and safeguarding the defendant's right to a unanimous verdict from an impartial jury. We are confident that '[g]iven the necessary limitations on a court's investigatory authority in cases involving a juror's alleged refusal [or inability] to follow the law, a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence.' *Thomas,* 116 F.3d at 622." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1087, footnotes omitted, italics in original, underlining added; see *Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943,)

In *Symington*, as in the cases it cites, the reviewing court's focus was on the dismissal of a juror during deliberations in a non-capital case. Appellant submits that the same reasoning applies in the penalty phase of a capital case when it appears possible that the impetus for a juror's dismissal arises from the juror's lingering doubt about guilt, because that is a valid consideration in the penalty phase based on the juror's assessment of the sufficiency of the prosecution's case. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1279-1281; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238;

Model Pen. Code § 210.6(1)(4).)

Appellant acknowledges that this Court has rejected the "reasonable possibility" test of the Ninth Circuit, and has said that the question is, rather, whether the juror's disqualification is a "demonstrable reality" on the record. (*People v. Cleveland, supra,* 25 Cal.4th at p. 484.) Nevertheless, appellant submits that in his case, where in fact it does appear reasonably possible that Rodriguez was a minority juror and her request to be excused stemmed from her disagreement with other jurors on the merits of the issue to be decided, that fact must weigh against finding that Juror Rodriguez's disqualification was established on the record as a demonstrable reality.

Although not a capital case, the opinion in *People v. Bowers* (2001) 87 Cal.App.4th 722, cited with approval in *People v. Engelman*, *supra*, 28 Cal.4th at p. 446, is instructive. In *Bowers* the foreperson reported that one juror was not deliberating, and after questioning all the jurors, the trial court agreed. (*Id.*, at pp. 724-728.) The appellate court, however, held that good cause under section 1089 had not been established, reasoning that "[w]hile there was some evidence Juror No. 4 was inattentive at times during the deliberations and did not participate in the deliberations as fully as others, the record shows this conduct was a manifestation, effectively communicated to the other jurors, that he did not agree with their evaluation of the evidence-specifically, their credibility determinations. There appears no demonstrable reality that Juror No. 4 was unable to perform his function and he did not engage in serious and willful misconduct." (*Id.*, at p. 730.)

The reviewing court in *Bowers* specifically rejected the argument that the minority juror had failed to deliberate. (*Id.*, at p. 731.) The appellate court observed that although some jurors had testified that he "made up his mind early on and 'clammed up' at certain times, the jurors

admitted [he] took part in some of the discussions and made his opinion known." (*Id.*, at p. 732.)

Significantly, the *Bowers* opinion also considered the trial court's belief that the juror had failed to follow the admonition in CALJIC No. 17.41[117] and had "either made up his mind in the courtroom after hearing the first witness or almost immediately after deliberations started." (*Id.*, at p. 733.) The appellate court noted that "[t]hat conduct, identified in the instruction as 'rarely helpful,' does not amount to misconduct or a failure to deliberate." (*Id.*, at p. 733, underlining added.)

As this Court explained in *Cleveland*, "Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the

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[117]CALJIC 17.41was also given in appellant's case before guilt phase deliberations and again in the supplemental instruction in the penalty phase after Juror Rodriguez had been discharged. (RT 3047-3048, 3384.) It reads as follows: "The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts."

facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views. (See *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067 [].)" (*Cleveland, supra,* 25 Cal.4th at p.485, parallel citation omitted.)

There was no evidence that Juror Rodriguez refused to consider other points of view on the issue of penalty, that she refused to speak to the other jurors in deliberations, or that she ever attempted to separate herself from the others inside the jury room. On the other hand, it does appear that she disagreed with the majority about the significance of the guilt phase evidence in the context of the penalty deliberations. But this jury had also deliberated in the guilt phase, so there was a "reasonable period of time" for Juror Rodriguez to become clear about her residual doubt about appellant's guilt. And the jury had deliberated in the penalty phase for an hour and a half on the first day before she and Juror Pye came forward at the outset of deliberations on the second day. So, to the extent that Rodriguez's statements were an expression of her "fixed conclusion" that appellant should not be sentenced to death because she had some residual doubt that he was guilty, that was a reasonable position.[118] Under this Court's reasoning in *Cleveland*, the record does not support Juror Rodriguez's

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[118]The trial court itself later stated at the motion for new trial hearing on October 21, 1996, relying on *People v. Green* (1995) 31 Cal.App.4th 1001, that the fact that a juror makes up her mind at the beginning of deliberations is not misconduct. (RT 3468; see *Green, supra*, 31 Cal.App.4th at p. 1014.)

discharge for inability to deliberate.

The efforts of the trial court in *Perez v. Marshall, supra,* 119 F.3d 1422 to avoid discharging a known holdout juror are a dramatic contrast to the lack of such effort by the trial court in appellant's case. *Perez* was a non-capital case in which both this Court and the Ninth Circuit affirmed the conviction, finding that the trial court had properly discharged a holdout juror under section 1089. (*Id.*, at pp. 1425, 1428.) In *Perez* the juror asked to be excused, citing conflict in the jury room and her resulting personal distress. Before convincing the juror to return to the jury room after a lengthy dialogue, the trial court suggested to her that she could inform the bailiff or the foreperson if she decided she could not continue and offered to instruct the whole jury to conduct its deliberations properly. (*Id.*, at p. 1424.) When deliberations collapsed again, the court sent the jury home early; questioned the holdout juror, who had been crying and appeared to the court to be "an emotional wreck;" and the next morning questioned the foreperson, who reported that the juror in question had been in a "state" and "not rational" during deliberations. (*Id.*, at pp. 1424-1425.) Upon questioning the juror again that day, the trial court stated for the record that she was sitting with her head bowed and gave the impression that the courtroom was "ominous" to her. (*Id.*, at p. 1425.) The trial court concluded that she was "out of control" and excused her for cause. (*Ibid.)*

It is worth noting that the trial court in *Perez* went to considerable trouble, and took great care, before dismissing a juror known to be a holdout, and that was not a capital case, nor was there any suggestion that the holdout juror mistakenly believed that proper factors for consideration in the jury's decision-making process were actually improper. In appellant's case, where it appeared that Juror Rodriguez did hold such a

mistaken belief, the trial court's actions fell short of the heightened degree of due process required in a capital case. (*Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Gardner v Florida* (1977) 430 U.S. 349, 358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Juror Rodriguez had described a "horrible" experience in the jury room, including being made to feel she was "on trial" herself, and had said that she had tried to explain her residual doubt about appellant's guilt. Juror Pye had told the court that the majority jurors had made up their minds before the exhibits and verdict forms had even arrived in the jury room. (RT 3345.) Juror Rodriguez said to the trial court, "I don't know what can happen to me" (RT 3331), clearly referring, in context, to her interactions with other jurors during guilt phase deliberations, and the reasons she eventually voted for guilt in that phase. The trial court should have assured Juror Rodriguez that nothing could "happen to" her for whatever had transpired during guilt phase deliberations; and that she did not need to worry that her vote on guilt, or the reasons for it, would have any negative legal consequence.

Juror Rodriguez did not indicate that she was refusing to consider factors relevant to penalty, or to listen to what others thought, or to explain her position – rather, she thought her residual doubt about appellant's guilt disqualified her, and that the other jurors would subject her at least to verbal abuse, and possibly to words or conduct rising to the level of misconduct, because of that continuing doubt. Aside from her anxiety and fear of mistreatment by the other jurors, she thought there was no point in continuing to deliberate, because she did not understand that her residual doubt was not a transgression of some kind. (See RT 3331 ["I don't know what can happen to me"]; see section D, *post* [trial court failed to instruct

jury adequately on lingering doubt].)

Based on the obvious reasons for Juror Rodriguez's distress it is very likely that such correct information from the judge would have made all the difference to her attitude about staying on the jury and continuing to deliberate, especially if she had known that an appropriate admonition to the entire jury would be given. (See Section D, below.)

2. The Erroneous Dismissal of Juror Rodriguez Requires Reversal

The erroneous dismissal of Juror Rodriguez, where the impetus for her discharge stemmed from her substantive views of the merits of the prosecution's case, violated appellant's right under the Sixth and Fourteenth Amendments to a penalty trial by an impartial jury and requires reversal. (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080.)

Removing a holdout juror without cause was a denial of appellant's right to be tried in the penalty phase by an impartial jury and was structural error requiring reversal per se. (*Arizona v Fulminante* (1991) 499 U.S. 279, 310.)

D. The Trial Court's Supplemental Instruction After Pye Rejoined the Jury and the Alternate Was Seated Was Erroneous and Prejudicial

After Juror Rodriguez had made her rather ignominious exit escorted by the court clerk, the rest of the jurors returned to the courtroom and the trial court informed them that one person had been excused, admonishing them not to speculate as to the reasons for that. (RT 3367.) The trial court instructed the jury that when the alternate, Jacquelyn Gomez, joined the jury it must begin deliberations anew with regard to penalty. (RT 3368.) The jury was then excused for the day to allow time for contacting the alternate. (RT 3368.)

The next morning Alternate Juror Gomez was sworn and seated, and the trial court instructed the newly-constituted jury as follows:

> "If anything I said yesterday differs from these instructions, please go with the instructions that I am reading you now because this is the approved language. . . .
>
> "One of your number has been excused for cause and replaced by an alternate juror.
>
> "The alternate juror was present during the presentation of all of the evidence, arguments of counsel, and reading of instructions during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point.
>
> "For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial.
>
> "Your function now is to determine, along with the other jurors, in the light of the prior verdict or verdicts, and findings, and the evidence and the law, what penalty should be imposed.
>
> "Each of you who now compose the jury must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial.
>
> "The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong.

"Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts.

"The People and the Defendant are entitled to the individual opinion of each juror.

"Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. Each of you must decide the case for yourself, but should so only after discussing the evidence and the instructions with the other jurors.

"Do not hesitate to change an opinion if you're convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them favor such a decision.

"Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination."

(RT 3383-3385.) The jury then retired at 9:20 a.m. to deliberate. (RT 3382-3385.) At 11:30 a.m. the jury returned with the verdict of death and was individually polled at appellant's request. (RT 3386-3388.) The trial court thanked and discharged the jury. (RT 3388-3390.)

1. The Supplemental Instruction Was Misleading

In the context of appellant's trial, where the court had told the jury that the juror harboring lingering doubt about appellant's guilt had been dismissed "for cause," its supplemental instruction omitting any explanation of lingering doubt as an appropriate factor to consider in penalty deliberations left the jury with the impression that it was not appropriate. The supplemental instruction was therefore misleading and had the effect of withdrawing a mitigating factor from the jury's consideration. This was a violation of the long-established principle that the jury in a capital case must be allowed to consider all legally relevant factors in mitigation which

are applicable to the case before it. (*Skipper v. North Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

Appellant acknowledges that under previous decisions of this Court and the United States Supreme Court, he was not entitled at the outset of penalty deliberations to a sua sponte instruction that the jury could or should consider lingering doubt about his guilt. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173- 174; *People v. Johnson* (1993) 3 Cal.4th 1183, 1252.) However, this Court has pointed out that, "[s]ince the court has power to investigate and discharge jurors who refuse to adhere to their oaths, it may also take less drastic steps where appropriate to deter any misconduct or misunderstanding it has reason to suspect." (*People v. Keenan, supra,* 46 Cal.3d at p. 533.)

In appellant's case, the penalty jury knew that Juror Rodriguez had had some measure of doubt about appellant's guilt and knew that she had been excused "for cause."[119] (RT 3383.) The trial court certainly had ample reason to suspect that the jury misunderstood the law, i.e., the fact that lingering doubt about guilt was a valid mitigating factor in the penalty phase and that they were obliged to consider it.

The trial court prefaced its admonition to the newly-constituted jury with the comment that it was going to give the jury "the approved language." (RT 3383.) It is unclear whose "approval" the court was invoking, but it was probably referring to the fact that the language it used

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[119] Juror Pye had also mentioned to the trial court that she was "not comfortable" with the result of the guilt phase, but it was not established on the record whether the rest of the jury was aware of that. (RT 3330, 3344.)

was the pattern instruction CALJIC 17.51.1[120], which, according to the Comment of the Committee on Standard Jury Instructions of the Superior Court of Los Angeles County, which authored the instruction, was based on this Court's opinion in *People v. Cain* (1995) 10 Cal.4th 1. *Cain* was published in May, 1995, a full year before the penalty deliberations in appellant's trial took place.

In *Cain*, where a juror was discharged at the beginning of the penalty trial and an alternate substituted, this Court examined the trial court's instructions to the newly-constituted jury, focusing on "how its deliberations should be affected by the prior verdicts and the substitution." (*Id.*, at p. 64.) There, the trial court had specifically instructed that the alternate juror must accept that guilt of certain charges and the existence of two special circumstances had been proved beyond a reasonable doubt and that the defendant had been found not guilty of one charge. (*Id.*, at p. 65.) The trial court in *Cain* also instructed the jury as follows:

"'If you have any lingering doubt concerning the guilt

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[120]CALJIC 17.51.1 sets forth the following supplemental instruction, which was given at appellant's trial: "Members of the Jury: A juror has been replaced by an alternate juror. The alternate juror was present during the presentation of all of the evidence, arguments of counsel, and reading of instructions, during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point. For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial. Your function now is to determine, along with the other jurors, in the light of the prior verdict or verdicts, and findings, and the evidence and law, what penalty should be imposed. Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial."

of the defendant as to any of those charges of which he was found guilty, or if you have any lingering doubt concerning the truthfulness of any of the special circumstance allegations which were found to be true, you may consider that lingering doubt as a mitigating factor or circumstance.

"A lingering doubt is defined as any doubt, however slight, which is not sufficient to create in the minds of the jurors a reasonable doubt.

"The People and the defendant have the right to a verdict on the matter of penalty which is reached only after a full participation of the 12 jurors who ultimately return the verdict. This right may be assured in this phase of the trial only if the alternate juror participates fully in the deliberations, including such review as may be necessary of the evidence presented in the guilt phase of the trial.

"Therefore, the reasonable doubt of guilt and truthfulness of the charges and special circumstances as to which verdicts have been returned shall not be reexamined by the jury. However, for the purpose of determining if there is a lingering doubt concerning the guilt of the defendant on any charge as to which he has been found guilty, or a lingering doubt as to the truthfulness of any special allegation which has been found to be true, the jury shall begin its deliberations from the beginning with respect to the evidence presented in the guilt phase of this trial. You are instructed to set aside and disregard all past deliberations, if any, concerning whether there is any lingering doubt as to the guilt of the defendant or the truthfulness of any special allegation and begin deliberating anew. This means that each remaining original juror must set aside and disregard any earlier deliberations concerning a possible lingering doubt as if they had not taken place."

(*Id.*, at p.65, underlining added.)

This Court approved the trial court's instruction in *Cain* because it (a) informed the jury that it had to accept the defendant's guilt as proved

beyond a reasonable doubt, and (b) avoided the risk that the jury would fail to re-consider the guilt phase evidence to determine whether any residual doubt should be considered in mitigation. (*Id.*, at pp. 66-67.) Specifically, this Court observed that the instruction was "adequate to safeguard defendant's right to unitary jury deliberations[,]" because it "command[ed] the jury in clear and certain terms to set aside any previous discussion of guilt phase evidence relevant to lingering doubt, and in general to deliberate on their penalty verdict as an integrated group, including any review they conducted of the guilt phase evidence." (*Id.*, at p. 67, underlining added.) This Court explained that "the instructions made clear not only that lingering doubts as to guilt could be considered in mitigation, but also that the penalty phase jury was to deliberate on this question as an integrated whole, to set aside any previous discussion on the question, and to review in its common deliberations any relevant guilt phase evidence." (*Ibid.*, at p. 67, underlining added; see *People v. Kaurish* (1990) 52 Cal.3d 648, 708 [alternate juror who replaced juror discharged after penalty deliberations began was instructed "on the appropriateness of considering lingering doubt as a mitigating factor. Such an instruction made it clear that she could vote against the death penalty if she disagreed with the guilt phase verdict, and no further instruction was necessary."]; compare *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1234-1236 [no error in failure to instruct on lingering doubt where all members of penalty jury deliberated together from beginning of penalty deliberations].)

CALJIC 17.51.1 is inadequate under this Court's reasoning in *Cain* and the trial court erred in failing to instruct the jury in a manner consistent with the principles explained in that opinion.

The jury deciding appellant's fate needed to understand, as did the

jurors in *Cain* and *Kaurish*, that if one among them harbored any residual doubt about appellant's guilt after reviewing the guilt phase evidence during penalty deliberations, all the jurors were required to listen to that view and to give it due consideration.

But this was not the message that appellant's jury received. Rather, the trial court's dismissal for cause of Juror Rodriguez, who had told the jurors she had doubt about guilt, suggested to the rest of the jury that it was actually improper to consider such doubt in the penalty phase. And nothing in the instructions given after Alternate Juror Gomez joined the jury diluted or contradicted that suggestion, particularly in view of the fact that they included the instruction that the jury was to accept the guilt verdict as final, thereby effectively reminding it that appellant's guilt had been proven beyond a reasonable doubt.

In *Mills v. Maryland* (1988) 486 U.S. 367, the United States Supreme Court considered the problem of a verdict form and the jury instruction explaining it, which could be understood to require that the jury agree unanimously on the existence of a mitigating factor in order for it to be considered – a proposition that was contrary to state law. (*Id.*, at pp. 371-372, 375-376.) The high court held that such a construction would violate the federal constitution. In spite of the fact that there was "no extrinsic evidence of what the jury in this case actually thought[,]" the Supreme Court reversed the death judgment because there was "at least a substantial risk that the jury was misinformed." (*Id.*, at p. 381.) The court invoked "the high requirement of reliability on the determination that death is the appropriate penalty in a particular case[]" and concluded, "The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." (*Id.*, at pp. 383-384.)

Similar to the situation in *Mills*, in the case at bar there is no clear extrinsic evidence that the jurors who ultimately sentenced appellant to death believed that they could not consider lingering doubt about guilt as a mitigating factor. But the circumstances of the substitution of an alternate for the juror who had expressed lingering doubt, certainly suggested it, and as in *Mills*, there is a "substantial probability" (*id.*, at p. 384) that the jurors did think they were precluded from considering that factor.

2. The Instruction Was Prejudicial and Requires Reversal of the Death Judgment

One of the "weighty" justifications for retaining the same jury for both the guilt and penalty phases of a capital case is that, "[f]rom defendant's perspective, the use of a single jury may help insure that the ultimate decision-maker in capital cases acts with full recognition of the gravity of its responsibility throughout both phases of the trial and will also guarantee that the penalty phase jury is aware of lingering doubts that may have survived the guilt phase deliberations. (Cf. 1 Model Pen. Code, §§ 210.6(1)(f) and com., pp. 107, 134 (1980) [death penalty should not be imposed when 'although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt'].)" (*People v. Fields* (1983) 35 Cal.3d 329, 352, underlining added.)

An alternate juror who joins deliberations in the penalty phase, however, has not participated in guilt phase deliberations and cannot be "aware" of any lingering doubts that have "survived" those deliberations. Alternate Juror Gomez was in this position at appellant's trial.

Appellant's jury was instructed after Alternate Juror Gomez had joined the jury, to include in its deliberations "any review as may be necessary of the evidence presented in the guilt phase of the trial." (RT

3384.) But that language, standing on its own, did not clarify the jury's duty at that point to re-consider that evidence "relevant to lingering doubt." (*People v. Cain, supra,* 10 Cal.4th at p. 67.)

Nor was there any other instruction or guidance given to the jury on this point at any other time. The trial court's failure to inform the jury that it could and should consider any lingering doubt about appellant's guilt was an omission that infected the entire penalty determination process, and constituted a violation of appellant's right to due process under the federal constitution. (See *Henderson v. Kibbe* (1977) 431 U.S. 145, 154; *Menendez v. Terhune* (Sept. 7, 2005, Nos. 03-55863, 03-56023) ___ F.3d ___ [2005 WL 2140232].)

From the trial court's instructions before the presentation of evidence in the penalty phase, the jury knew that there were several ways in which guilt phase evidence could be relevant to their penalty decision under the factors listed in the statute governing penalty deliberations in a capital case. (RT 3232-3233; see § 190.3, subds. (a), (d), (e), (f), (g), (h), (i), (j), (k).) None of those factors, however, mentioned lingering or residual doubt about guilt, nor did the trial court mention it otherwise.

The prosecutor's closing argument[121] before the original jury retired to begin penalty deliberations was no help in this regard and was actually misleading. He argued strenuously that evidence which had been presented in the guilt phase justified imposition of the death penalty under various statutory factors. Notably, he argued under factor (a) that the murder of Gitmed was "heinous, " and "brutal," and deserving of the death penalty

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[121]Appellant represented himself during the penalty phase for the express purpose of not participating (RT 3158-3159), so there was no closing argument from the defense.

(RT 3304; see also RT 3309 [describing victim's terror]); and that under factor (i), appellant's age, being in his late 30s at the time of the crime, should be considered as aggravation because he was not merely a brash young man who had made a mistake (RT 3305.) The prosecutor also specifically argued there had been no evidence in mitigation under factors (d) [mental or emotional disturbance], (e) [victim's participation], (f) [belief in moral justification], (g) [acting under duress or domination], (h) [impairment from mental illness or intoxication], or (j) [minor role as accomplice]. (RT 3304-3306.)

Significantly, the prosecutor also told the jurors that the only mitigating factor they could find in appellant's case was "sympathy" under factor (k), if they felt "sorry for him." (RT 3306.) That was not true. The jury could also consider lingering doubt about guilt, and after Alternate Juror Gomez joined the jury, it had the affirmative duty to set aside any previous discussion about lingering doubt and to re-consider that issue. (*People v. Cain, supra,* 10 Cal.4th at p. 67.)

This Court has pointed out that "in *Franklin* the court expressly declined to find *any* basis for imposing an instructional obligation as to residual doubt, concluding instead that Eighth Amendment concerns are adequately met as long as the defendant is 'not deprived of any chance to have his sentencing jury weigh this element of his culpability.' (*Franklin v. Lynaugh, supra,* 487 U.S. at p. 676 [].) 'Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. [Citation.] Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities. . . ." (*People v. Cox* (1991) 53 Cal.3d 618, 676, quoting

from *Franklin v. Lynaugh, supra*, 487 U.S. at p. 676, parallel citation omitted.) In the circumstances here, it was more than advisable that the trial court give appellant's sentencing jury the guidance it needed; it was constitutionally compelled.

Instead, the trial court's incomplete instruction following the discharge of Juror Rodriguez, had the same effect as a failure to instruct in the guilt phase on an element of the offense, or an instruction directing the jury to find an element against the defendant. The court's supplemental instruction therefore violated appellant's Sixth Amendment right to a jury trial, as well as the Due Process Clause of the federal constitution. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348; *People v. Flood* (1998) 18 Cal. 4th 470.) The prohibition against directed verdicts includes situations in which the judge's instructions fall short of directing a verdict but which have the same effect by eliminating other relevant factual considerations, which was the situation at appellant's penalty trial. (*People v. Figueroa* (1986) 41 Cal.3d 714, 724; accord, *United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398 (right to jury trial violated when jury "not given an opportunity to decide a relevant factual question"); *United States v. McClain* (5th Cir. 1977) 545 F.2d 988, 1003; see also *United States v. Rockwell* (3rd Cir. 1986) 781 F.2d 985, 991 (instructions which "improperly invaded the province of the jury to determine the facts and assess the credibility of witnesses . . . [were] sufficiently misleading to deprive Rockwell of a fair trial.")

E. The Totality of the Trial Court's Response to the Complaining Jurors Requires Reversal of the Death Judgment

In the context of appellant's case, the dismissal of Juror Rodriguez combined with the trial court's failure to inform the jury that the issue of any lingering or residual doubt about appellant's guilt should be revisited had a coercive effect. As the Ninth Circuit Court of Appeals has observed, "[r]emoval of a holdout juror is the ultimate form of coercion." (*Sanders v. Lamarque, supra,* 357 F.3d at p. 944.) In *Sanders*, the appellate court was considering the validity of a guilt verdict in a non-capital case and was concerned with the risk that the unjustified discharge of a holdout juror "would enable the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case. Such a result is unacceptable under the Constitution." (*Id.*, at p. 945, citing *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596.) In appellant's case, the government obtained a sentence of death even though a member of the jury that began deliberations thought that the government had failed to prove that he should be executed, and that verdict is unconstitutional.

In addition to the argument and authority presented above, appellant submits that his death sentence must be reversed for the following reasons:

(1) When Pye returned to deliberations it was with the knowledge that the other minority juror who had spoken to the judge about having residual doubt and feeling seriously distressed by the treatment she had received from other jurors had been dismissed from service, and that the court had shown no interest in the conduct of other jurors. Pye and the rest of the jury knew for certain, therefore, that, whatever verbal abuse or

otherwise inappropriate conduct may have been occurring, the trial court would not support her in resisting it. She had been thrown back into the lions' den. And it does appear from the record that the pressure on her at that point was increased, as evidenced by the newly-constituted jury's quick return of the death verdict after only two hours of deliberation. (CT 1151.)

Moreover, since the trial court had dismissed "for cause" the juror who had tried to talk about lingering doubt about appellant's guilt, and in the absence of any instruction otherwise, it is very probable that the rest of the jurors concluded that such doubt was an improper subject for their consideration in the penalty phase. This was especially likely to be true of Juror Pye, since the trial court had explicitly told her that it would not consider any information concerning the content of the deliberations. (RT 3345, 3359.)

On this record there is much more than a "reasonable likelihood" (*Boyde v. California* (1990) 494 U.S. 370, 381) that, given the context of the trial court's actions and failure to act, appellant's jury interpreted the trial court's instructions to preclude their consideration of the mitigating factor of lingering doubt. That interpretation was virtually inevitable on this record, and reversal of appellant's sentence of death is required. (*Ibid.;* see *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

(2) The unjustified dismissal of a juror known to the trial court to have residual doubt about appellant's guilt, and the trial court's failure to conduct an adequate inquiry to determine whether jury misconduct had occurred, each constituted a violation of appellant's rights to an impartial jury under the Sixth and Fourteenth Amendments (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149); and to a reliable death verdict in a capital case (*Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Gardner v Florida,*

supra, 430 U.S. at p. 358; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

(3) The trial court's erroneous dismissal of Juror Rodriguez under section 1089 and state court opinions interpreting its provisions, and the court's failure to instruct the jury on the applicable law they needed to understand in order to weigh the relevant mitigating and aggravating factors under section 190.2, constituted separate failures to correctly apply state law in which appellant had a clear liberty interest and violated the Due Process Clause of the federal constitution. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1992) 997 F.2d 512, 522; see *People v. Marshall* (1996) 13 Cal.4th 799, 850-851).

Alternatively, even if this Court applies the standard of *People v. Watson* (1956) 46 Cal.2d 818 reversal is required because it is reasonably probable that, if Juror Rodriguez had remained on the jury, appellant would not have been sentenced to death, since it appears from the record that Juror Rodriguez, like the erroneously dismissed juror in *People v. Bowers, supra,* 87 Cal.App.4th 722, "steadfastly held to [her] belief" until she was discharged that there was still some measure of doubt that appellant was guilty. (*Id.*, at p. 736.)

XI

THE TRIAL COURT'S DENIAL OF APPELLANT'S POST-TRIAL MOTION FOR A NEW TRIAL REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

A. Introduction

On August 1, 1996, nearly two months after the jury had been discharged, the trial court granted appellant's request for permission to contact Juror Rodriguez, who had been discharged from the jury during penalty deliberations, ordering that contact must be made simultaneously by attorneys for both sides or their representatives.[122] (RT 3412.) The trial court granted the request based on Juror Rodriguez's statements that she was pressured during guilt phase deliberations, which established good cause to inquire about the nature of the pressure, and based on her statements that she had held firm on the gun use allegation, which established good cause to inquire whether there had been vote bartering. (RT 3416-3419.)

On September 13, 1996, the trial court also granted appellant's request to contact Juror Pye, again ordering that contact must be made jointly by both sides. (RT 3446, 3448.) The contact was for the purpose of determining whether Juror Rodriguez had committed misconduct in making certain statements, and whether other jurors had committed misconduct in making up their minds before deliberating (RT 3446-3448.)

On October 11, 1996, appellant filed a Notice of Motion and Motion

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[122]Juror Rodriguez gave permission for contact by the defense, but the trial court decided that it would be fair to release her information to both sides. (RT 3412, 3416.)

for New Trial, with declarations by Jurors Rodriguez and Pye[123] attached, and with a supporting Memorandum of Points and Authorities. (CT 1230-1255.) Appellant's motion, pursuant to section 1181,[124] requested a new trial on the grounds that; (1) the jury had committed misconduct; (2) the verdict had been decided by means other than a fair expression of opinion by the jurors; (3) the verdict was contrary to the law and the evidence presented; and (4) the evidence was insufficient to sustain the verdict. (CT 1231.) Appellant's motion also alleged that the trial court had discharged Juror Rodriguez without good cause. (CT 1252; see Argument X, *supra.*)

On October 21, 1996, the prosecution filed Points and Authorities in Opposition to Defendant's Motion for New Trial with a declaration by Deputy District Attorney Kevin J. Ruddy attached, arguing that no prejudicial misconduct by the jurors had occurred. (CT 1321-1336.)

The trial court heard oral argument on the motion on October 21, 1996, and denied it. (RT 3452-3476.)

On appeal the trial court's denial of a motion for new trial is generally reviewed under a "deferential abuse-of-discretion standard." (*People v. Navarette* (2003) 30 Cal.4th 458, 527; accord, *People v. Coffman*

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[123]The declaration of Juror Pye attached to appellant's motion when it was filed was unsigned. (CT 1240.) Her signed declaration is at pages 1337-1342 of the Clerk's Transcript.

[124]Section 1181 provided, in pertinent part, as follows: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:
. . . 3. When the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented;
4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors; . . .
7. When the verdict or finding is contrary to law or evidence . . . ."

(2004) 34 Cal.1, 128.) Moreover, "[b]ecause a ruling on a motion for a new trial rests so completely within the trial court's discretion, an appellate court will not disturb it absent a manifest and unmistakable abuse of discretion." (*People v. Earp* (1999) 20 Cal.4th 826, 838.)

Further, when a motion for new trial alleges that the verdict is contrary to the evidence, the question on appeal is whether the trial court's ruling was supported by substantial evidence. (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1252; *People v. Sheran* (1957) 49 Cal.2d 101, 109.)

In appellant's case the trial court's denial of his motion for a new trial meets was an abuse of discretion and contrary to the evidence adduced at trial, as appellant demonstrates below.

B. The Record Does Not Support the Trial Court's Findings on the New Trial Motion[125]

1. The Dismissal of Juror Rodriguez Was an Abuse of Discretion Requiring Reversal of the Penalty Judgment

At the October 21, 1996, hearing on appellant's new trial motion, appellant specified that one ground of his request for a new trial was the trial court's erroneous excusal of Juror Rodriguez at the outset of penalty phase deliberations. (RT 3459.) The trial court concluded that it had not abused its discretion in dismissing Juror Rodriguez because of her emotional state and what the trial court described as her inability to deliberate. (RT 3465-3466.)

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[125]In addition to the findings discussed in the instant argument, the trial court concluded that there was no evidence of misconduct in discussions held by jurors outside of deliberations, nor of voting by lot or vote trading. (RT 3472-3474.) Appellant raises no issue on direct appeal with regard to those findings, which are better addressed in collateral proceedings.

Appellant has previously established in Argument X, *supra*, that the trial court erred in dismissing Juror Rodriguez and hereby incorporates that argument by reference as if fully set forth herein. For the reasons explained in Argument X, there was no good cause to discharge Juror Rodriguez and appellant was entitled to a new penalty trial by a jury that had not been led to believe that it could not consider lingering doubt in mitigation of sentence, that understood its obligation to review the guilt phase evidence in order to give due consideration to any lingering doubt, and that in fact conducted such a review. The trial court's determination that it did not abuse its discretion with regard to the discharge of Juror Rodriguez was unsupported by the record and was manifest error.

2. The Jurors' Declarations Established that Other Jurors Had Predetermined Appellant's Guilt and Failed to Deliberate

At the hearing on the new trial motion, the trial court stated that no misconduct had occurred because the jurors' declarations[126] did not allege facts to support a conclusion that the other jurors had predetermined guilt and failed to deliberate. (RT 3467-3469.)

a. Juror Rodriguez's Declaration

Juror Rodriguez stated in her declaration under penalty of perjury that in the guilt phase, "[p]rior to the commencement of deliberations, several jurors (approximately eight), including the foreman, determined the defendant to be guilty. As a result of this predetermination, they refused to engage in any meaningful discussion or deliberation." (CT 1232,

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[126]The trial court referred to the declarations under penalty of perjury as "affidavits." The documents were titled "Declaration of Juror, Lucille Rodriguez" (CT 1232) and "Declaration of Juror, Debra Pye" (CT 1338).

underlining added.) She also stated that, "when I attempted to discuss my questions and doubts, the foreman stated that he did not want to go through all of the evidence." (CT 1232, underlining added.) Also, ". . . in response to [] my request to discuss the evidence, others replied that they did not want to spend the time doing so." (CT 1232, underlining added.)

Juror Rodriguez also alleged that other jurors had asked her in various ways how she could vote that appellant was not guilty, and that the foreman had shown her the victim's picture and asked her why she did not think he was dead. (CT 1233.)

b. Juror Pye's Declaration

Juror Pye stated in her declaration that, "Prior to the commencement of deliberations, several jurors, including the foreman, determined the defendant to be guilty. As a result of this predetermination, they refused to engage in any meaningful discussion or deliberation." (CT 1237, underlining added.) She also stated that, ". . . the foreman stated that he did not want to spend additional time going through all of the evidence. In this regard, the foreman, and a majority of the jurors, stated:

a. 'His guilt is as plain as day.'

b. 'We need to leave.'

c. We're not going to keep coming back to go over the same things again.'"

(RT 1237.)

c. The Trial Court Misstated the Record

The trial court concluded that there were no facts alleged by Jurors Rodriguez and Pye to support their "conclusion" that other jurors had predetermined guilt and refused to deliberate. (RT 3467.) The trial court stated that the affidavits indicated "that Juror Rodriguez was constantly

asked to justify her position by other jurors, that she was asked to view a photograph of the victim. If there [sic] isn't deliberation or part of deliberation, I don't know what is." (RT 3467.)

The trial court's characterization of the information contained in the declarations was not accurate. Jurors Rodriguez and Pye did not allege in their declarations that nobody deliberated. Juror Rodriguez said that "approximately eight" jurors predetermined guilt (CT 1232, ¶ 3.A) and refused to deliberate, and Juror Pye said it was "several jurors" (CT 1237, ¶ 3.A).

The only reasonable reading of the declarations of these two jurors is that they covered at least two aspects of the deliberations that were troubling to both jurors. Their first concern was the fact that several jurors – eight, according to Juror Rodriguez – had predetermined guilt and did not participate in any meaningful discussion. The quotations Juror Pye was able to remember and the conduct Juror Rodriguez described supported that allegation. (CT 1232, ¶¶ 3.A, 3.C, and 3.D; CT 1237, ¶ 3.C.)

Their second concern was the hostile and emotional atmosphere in the jury room. The quotations and behavior Juror Rodriguez remembered and the behavior Juror Pye remembered supported that allegation. (CT 1233, ¶¶ 3.E, 3.F, and 3.I; CT 1238, ¶¶ 4 and 5.)

The statement in both declarations that other jurors "refused to engage in any meaningful discussion or deliberation" is a statement of fact, not a conclusion. (CT 1232, ¶ 3.A; CT 1237, ¶ 3.A.) Those jurors who refused to deliberate were, presumably, not the ones who did discuss the issues with Juror Rodriguez; they were the ones who did not discuss anything. The jurors who were not deliberating were not deliberating.

The trial court was, in effect, faulting Jurors Rodriguez and Pye for

not being able to prove a negative, i.e., not being able to produce affirmative evidence of the absence of deliberation.

And if, as the trial court apparently concluded, the questions that Rodriguez remembered being asked can be fairly characterized as "meaningful discussion and deliberation," then logically, Juror Rodriguez was not referring to the people who asked those particular questions as the ones who were not deliberating. Rather, those questions were examples of the hostile environment and "pressure" that Juror Rodriguez remembered experiencing.[127]

To support its conclusion that all the other jurors had in fact deliberated, the trial court observed that ". . . Juror Rodriguez was constantly asked to justify her position by other jurors, that she was asked to view a photograph of the victim." (RT 3467.)

But the fact that some jurors were asking hostile or challenging questions of Juror Rodriguez, i.e. were deliberating, does not negate the statements in both declarations that several jurors did not deliberate.

Further, both jurors stated that the foreman, specifically, had stated "prior to the commencement of deliberations" that appellant was guilty and that he refused to review the evidence. (CT 1232, 1237.) Those were clear statements of fact by both jurors which cannot possibly support a conclusion that the foreman had deliberated and had not predetermined guilt.

Nor did the fact that at some point the foreman thrust the victim's picture in front of Juror Rodriguez, asking her what made her think that the

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[127]On the other hand, if those questions noted in Juror Rodriguez's declaration were not "meaningful discussion and deliberation," then those jurors were not deliberating either.

victim was not dead, be fairly characterized as deliberating. In his written opposition to the new trial motion the prosecutor pointed to opinions in other cases finding conduct such as a rhetorical threat to kill and a 10- to 15-minute emotional diatribe not to be misconduct. (CT 1326-1327, citing *People v. Keenan* (1988) 46 Cal.3d 478, *People v. Orchard* (1971) 17 Cal.App.3d 568.) But those cases do not stand for the notion that such conduct itself constituted deliberation; rather, the opinions hold that such conduct, occurring during deliberations, did not constitute an improper influence on the verdict. (*People v. Keenan, supra,* 46 Cal.3d at p. 542; *People v. Orchard, supra,* 17 Cal.App.3d at p. 574.) Thus, assuming, arguendo, that the foreman's conduct with the photograph was not misconduct, neither was it "meaningful discussion and deliberation," and it certainly is not an indication that the foreman had not predetermined appellant's guilt before deliberations began.

3. The Trial Court Ignored the Objective Evidence of Coercion of Juror Pye

At the October 21, 1996, hearing, the trial court concluded that its previous treatment of Juror Pye had not caused undue pressure on her in penalty phase deliberations and that the declarations submitted in support of the new trial motion did not present objective evidence of misconduct during the penalty phase. (RT 3474.)

Appellant has previously established in Argument X, *supra*, that the totality of the trial court's actions and omissions in response to the request of Jurors Pye and Rodriguez to be excused, and the facts that Juror Pye had been physically ill as a result of her distress during and after guilt phase deliberations, that she was the only holdout juror after Juror Rodriguez had been replaced by an alternate juror (CT 1238), that the jury had not been

instructed that it must review evidence from the guilt phase insofar as it related to lingering doubt, and that the jury returned the death verdict two hours after the alternate was seated, taken together, constituted coercion of the penalty verdict. Appellant hereby incorporates that argument by reference as if fully set forth herein and submits that there was ample objective evidence of coercion on the record.

Juror Pye's declaration is consistent with appellant's position that she was subjected to objectively identifiable undue pressure and coercion. (See CT 1341, ¶¶ 14, 15, 16.) The trial court's determination that its previous actions were not coercive and that the record does not contain objective evidence of undue pressure on Juror Pye was clearly erroneous.

4. The Trial Court Abused its Discretion in Determining that the Evidence Was Sufficient to Support the Verdicts

One of the grounds for new trial stated in appellant's motion was: "That the evidence presented at trial is insufficient to sustain the jury's verdict." (CT 1231, 1251; see § 1181, subd. 7.) At the October 21, 1996, hearing, the trial court reviewed the evidence and determined that it supported the guilt and penalty verdicts. (RT 3491-3495; see *People v. Rodriguez* (1986) 42 Cal.3d 730, 793-794.)

Appellant explains in Argument XII, *infra*, that the trial court's determination of the sufficiency of the evidence to support the guilt and penalty verdicts was not supported by the evidence and was therefore an abuse of its discretion. Appellant hereby incorporates that argument by reference as if fully set forth herein.

C. Appellant Was Entitled to a New Trial

For all the reasons explained above and in the arguments incorporated by reference, the trial court abused its discretion in denying appellant's motion for a new trial, in violation of appellant's right to a heightened degree of due process in a capital case, requiring reversal of the penalty judgment. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Gardner v Florida* (1977) 430 U.S. 349, 358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The trial court's erroneous finding that the evidence was sufficient to support the verdict of guilt and the existence of the special circumstance of robbery-murder requires reversal of the entire judgment to avoid a miscarriage of justice, violation of appellant's right to a fundamentally fair trial and reliable guilt and penalty determinations in a capital case. (Cal. Const., Art. 1, § 24; U.S. Const., 5th, 14th Amends.; *Jackson v. Virginia* (1979) 443 U.S. 307, 316-317; *Mullaney v. Wilbur* (1975) 421 U.S. 684; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Davis* (1995) 10 Cal.4th 463, 509; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

Assuming, arguendo, that this Court upholds the trial court's finding that a new trial was not necessary because of insufficiency of the evidence or juror misconduct, it should remand the case for a new penalty trial because the death verdict imposed on appellant was the result of undue pressure and coercion of the holdout juror. The trial court's contrary conclusion was as unreasonable as its previous decisions and actions which created those problems and violated appellant's rights to fundamental fairness (*Taylor v. Kentucky* (1978) 436 U.S. 478), trial by an impartial jury (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728; *Gray v. Mississippi* (1987) 481 U.S. 648, 659, fn. 9; *Duncan v. Louisiana* (1968) 391 U.S. 145,

149), and a reliable penalty determination in a capital case (*Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Gardner v Florida, supra,* 430 U.S. at p. 358; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

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XII

THE TRIAL COURT'S DENIAL OF APPELLANT'S AUTOMATIC MOTION TO MODIFY THE SENTENCE REQUIRES REVERSAL

A. Introduction

At the hearing on October 21, 1996, before appellant was sentenced, the trial court heard oral argument on his automatic motion to modify the penalty verdict under section 190.4, subdivision (e)[128] and denied the motion. (RT 3485-3495.)

The trial court's task in ruling on the modification motion was "to assess whether the jury's choice was contrary to the law or the evidence." (*People v. Alvarez* (1996) 14 Cal.4th 155, 245.) Specifically, the statute "requires a court ruling upon a motion for modification to reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict. [Citations.]" (*People v. Dickey* (2005) 28 Cal.4th 884, 932-933; *People v. Vieira* (2005) 35 Cal.4th 264, 301;

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[128]Section 190.4, subdivision (e) provided at the time of appellant's trial as follows: "In every case in which the trier of fact has returned a verdict of finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 1181. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstance are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings. [¶] The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes."

People v. Lang (1989) 49 Cal.3d 991, 1045.) The relevant factors in aggravation and mitigation of the sentence in a capital case are set out in section 190.3.[129]

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[129]Section 190.3 provides, in pertinent part, as follows: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence 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.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

B. Most of the Trial Court's Findings on Factors in Aggravation Were Unsupported By, or in Direct Conflict With, the Evidence

At appellant's trial, the court stated on the record the findings that led to its conclusion that the weight of the evidence supported the death verdict. (RT 3492-3494.) None of the trial court's findings, however, rested on substantial evidence in the record, and some were in clear contradiction of the record.

C. The Circumstances of The Crime Did Not Justify Imposition of the Death Penalty on Appellant

The trial court found that "the first degree murder of Ronald Gitmed was intentional and it was committed in the course of a robbery . . . ." (RT 3492.) Appellant does not dispute the trial court's conclusion that Gitmed was intentionally shot and killed by somebody, but that mere fact, stated in the abstract, does not weigh on the side of the death verdict for appellant unless there was substantial evidence that appellant was morally culpable for the murder as the direct perpetrator and as an aider and abetter, since the jury apparently relied on both theories[130] when it convicted appellant of robbery-murder at the same time it returned a finding that he was not the shooter. (See Argument IV and V, supra.) Indeed, the trial court acknowledged that it had to consider appellant's liability as an aider and abetter. (RT 3494.)

Appellant hereby incorporates Arguments IV and V, *supra*, by

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[130]It is clear from the finding that appellant did not personally use a weapon that at least some jurors convicted him as an aider and abetter. Some jurors, however, may have believed that he was the actual shooter. Thus, substantial evidence was required for both theories. (See Argument IV.)

reference, as if fully set forth herein, and reiterates that there was no credible evidence of appellant's guilt as the direct perpetrator of premeditated murder or of robbery, and no evidence at all of his guilt as an aider and abetter, let alone evidence so substantial that it could justify imposition of the death penalty on him. Further, as appellant has previously shown in Arguments IV, V, and VI, there was no evidence that Gitmed was in possession of personal property that was taken from him by force or fear at the time that he was killed, and no credible evidence that any property was taken from him at that time; in other words, there was no substantial evidence that Gitmed was robbed, nor that any robbery which, arguendo, occurred, was anything more than incidental to his murder. Appellant hereby also incorporates Argument VI by reference as if fully set forth herein.

1. The Conclusion that Appellant Was a Major Beneficiary of the Crime Was Not Supported by the Evidence

The trial court found that Gitmed was shot for the purpose of "taking his belongings from his person at the time of the killing, and for the purpose of acquiring his remaining belongings, which the defendant knew to be in storage, as well as for the purpose of acquiring his vehicle following the shooting[,]" and described appellant as a "major beneficiary" of the murder because he acquired "some" of Gitmed's property "and his vehicle." (RT 3492.)

These findings mischaracterized the record. As appellant has previously stated, for those jurors who believed that Mercurio was or might have been the actual shooter, there was no evidence of what happened at Canyon Lake, including whether anything was taken from Gitmed at the

time of the killing. (See Arguments IV, V, VI, *supra.*) In any case, whatever the jurors believed about who the shooter was, the record is completely devoid of any evidence whatsoever that appellant knew before Gitmed was killed that his belongings were in storage. Neither Mercurio nor any other witness testified to anything about that, nor was there any event or circumstance suggesting it. The trial court's statement that appellant did know this was rank speculation. Assuming, arguendo, that appellant and Mercurio obtained property that had been stored in Gitmed's locker after he was killed (People's Exhibit 20; RT 2201) that fact simply does not establish that they knew anything about it before he was killed.

Also, the finding that appellant was a "major beneficiary" based on appellant's acquisition of "some" of Gitmed's property and his car, is inaccurate in the context of the entire body of evidence. The car, of course, was taken into the desert and burned (RT 1905, 2044), so appellant cannot rationally be said to have benefitted by acquiring that. And even if assuming, arguendo, that some jurors believed Mercurio's version of events as told to the grand jury and reasonably concluded that appellant acquired some unspecified[131] items of property that Gitmed took out of his pockets (RT 2537), without evidence of what the items were or their value, their

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[131]Mercurio testified at appellant's trial that he did not remember seeing Gitmed take anything out of his pockets or hearing appellant say anything to Gitmed about emptying his pockets. (RT 1894.) He also testified, however, that when appellant got back into the truck after shooting Gitmed, he "might have had a wallet or some change or something like that" of Gitmed's. (RT 1896, underlining added.) To the grand jury he had testified that Gitmed took his "wallet or some change and stuff" out of his pockets and handed them to appellant. (RT 2537.) Appellant does not concede that any of this is evidence sufficient to support a finding that a robbery occurred. (See Arguments IV, V, and VI.)

acquisition cannot rationally be considered a "major" benefit for appellant.

The only other property appellant acquired, according to the evidence adduced at trial, was a jacket and a sports bag. (RT 1705 [no evidence found in first search of appellant's family's house]; 1815 [no evidence found in appellant's family's house during second search]; 1816 [bag and jacket deemed in appellant's possession found in trunk of appellant's mother's car]; see Argument III, *supra* [bag and jacket in appellant's possession illegally seized] .) There was no evidence that either of these was of more than minimal value. By comparison, Mercurio and his girlfriend acquired, at least, a television, a vcr, a vacuum cleaner, and furniture (RT 1734-1735; 1830-1834); surely that would make Mercurio the "major beneficiary," not appellant.

In any case, no property identified at trial as belonging to Gitmed was acquired through a robbery – that is, it was not taken from Gitmed's possession or immediate control out by Canyon Lake, and there is no evidence as to how or when Mercurio or appellant acquired access to any of it. (See Arguments IV, VI.) For all the record shows, Gitmed could have given his jacket and sports bag to appellant during the drive from Michelle Keathley's house to Santa Rosa Mine Road. Indeed, the trial court remarked at the pretrial suppression hearing, "Maybe the victim gave the defendant his property a few days beforehand." (RT 503.)

2. There Was No Substantial Evidence that Appellant Was a Major Participant in the Crime

Remarkably, the trial court next found that appellant was present at the scene of Gitmed's murder and was a "major participant" in the crime. (RT 3492.) These conclusions are, again, absolutely unsupported by the record evidence, given the finding that appellant was not the shooter.

Of course, there was no physical evidence whatsoever that linked appellant to the scene of the crime; only Mercurio's testimony did that. Mercurio's testimony was self-serving, uncorroborated (see Argument V), and some or all of the jurors manifestly did not believe it insofar as it described what appellant did after the men arrived at Canyon Lake.

The trial court, however, pointed to two things that apparently led it to the "major participant" conclusion. First was the fact that appellant had recently been released from prison, where he met Mercurio. (RT 3492.) Appellant never disputed that he knew Mercurio and that they met each other in prison, but that was not evidence that he was ever at the scene of the crime, let alone that he had any role in the murder, and certainly not that he was a major participant. To make that connection was an irrational conclusion by the trial court.

Additionally, the trial court remarked that appellant had "apparently initiated the sequence of events, which led to the remote area of the lake where the killing occurred." (RT 3492.) The evidence highlighted by the trial court to support this conclusion was the fact that appellant took Gitmed from Keathley's house to the Santa Rosa Mine Road and then went to the lake with him and Mercurio. (*Ibid.*) To the extent that the trial court was implying that appellant had some nefarious purpose in taking Gitmed to the Triplett compound, the implication is completely without support in the evidence. There is no indication whatsoever that appellant had any idea that Mercurio would, in the course of the evening and after they all took drugs together, drive him and Gitmed out in the desert to go off-roading. There is no evidence that appellant and Mercurio had ever done that before, nor that appellant had any reason to expect that it would happen that night, nor that he was the one who suggested they do it. (See subsection d., *infra*

[appellant not responsible for trip to Canyon Lake].)

The record does contain substantial evidence that appellant left Keathley's house with Gitmed on some night in August and did arrive at the Triplett compound with him on some night that month, which may or may not have been the same night. (See Argument V [no corroboration of dates].) But the trial court's suggestion that those facts established that appellant was the instigator of the fatal trip out to Canyon Lake, in the sense of having committed some kind of culpable conduct, seriously mischaracterized the record.

The fact that appellant took his new friend, Gitmed, to visit Mercurio, does not in any way support a conclusion that appellant had any idea that Gitmed would be harmed and certainly not that he would be shot. There was no evidence that appellant and Mercurio had ever committed any violent acts together, nor that appellant had any reason to suspect that Mercurio, who had never been convicted of murder, would have a gun with him and would shoot Gitmed. Appellant did not "initiate" the sequence of events that led to Gitmed's death in any culpable sense.

Appellant notes that the trial court mentioned that appellant, Gitmed, Mercurio, and "possibly other people" went to the lake the night Gitmed was killed. (RT 3492.) This comment is puzzling, since there was not a whit of evidence produced at trial to suggest that anyone other than those three took that trip, nor that anyone else was present when Gitmed was shot. Indeed, it was only Mercurio's word that placed appellant there, and he never mentioned anybody else being involved in any way. It appears that the trial judge was, understandably, trying to make sense of the case in spite of the dearth of evidence of what actually happened to Gitmed, so she came up with the idea that "other people" might have been there.

3. No Evidence Supported the Finding that Appellant Was an Aider and Abetter

The trial court next made the conclusory statement that, in spite of the jury having a reasonable doubt that appellant shot Gitmed, "there is more than sufficient evidence to so believe that if he did not, both the defendant and Tony Mercurio were present at the scene and aided and abetted each other, possibly others, in killing the victim for purposes of acquiring all his worldly goods." (RT 3492.) The trial court, however, did not state what that evidence was. The truth is that there was none.

Again, if appellant was not the shooter, there was no evidence of what he did, and none of what he intended. (See Arguments IV, V, and VI.) The trial court's conclusion that he and Mercurio "aided and abetted each other" has absolutely no support in the record. If Mercurio's story that appellant shot Gitmed while Mercurio stood passively by the truck was discounted, then for all the trial court could know based on the record evidence, appellant did not even see the shooting. There was the same amount of evidence that appellant assisted the killing as that he tried to stop it – exactly none. The trial judge simply superimposed her own irrational and unfounded belief that appellant was guilty as an aider and abetter onto a blank slate, and called it sufficient evidence. And, again, there absolutely was not "sufficient"– or indeed any – evidence that "possibly others" were present and also acting as aiders and abetters and the court's speculation about that notion was utterly baseless.

4. Appellant Did Not Take Gitmed to Canyon Lake and None of Gitmed's Property Was Found in the Possession of Appellant's Relatives

The trial court next stated its conclusion that because appellant took Gitmed to a remote location he demonstrated a "willful, deliberate and

premeditated intent to kill Gitmed for his belongings, many of which were subsequently found in the possession of the defendant's relatives as well as of Tony Mercurio and his friends." (RT 3493.) But that was not what happened, and the trial court's account of the evidence was inaccurate.

a. Driving Off-road

Appellant did not take Gitmed anywhere; Mercurio was driving the truck and appellant and Gitmed were both passengers. Even in his self-serving testimony Mercurio did not say anything about appellant having anything to do with the route they took or even that it was his idea to go off-roading. In fact, according to his own testimony, Mercurio drove first to his friends' house in Quail Valley, and finding them in bed, he continued on to Canyon Lake. (RT 1886-1888.) Mercurio also testified that he was familiar enough with the roads in that desert area to drive out there at night, but there was no evidence that appellant had any familiarity with those roads or the route to Canyon Lake. (RT 1886-1888.) Thus, the entire weight of the evidence was that Mercurio was responsible for taking Gitmed to the remote location where he died, not appellant.

Appellant submits that the person who took a gun along in the truck was the one who exhibited behavior consistent with deliberation and premeditation, and the evidence did not establish, according to the jury, that that person was appellant.

b. Gitmed's Property

The trial court's statement that "many" of Gitmed's belongings were found in the possession of appellant's "relatives" (RT 3493) was completely, flatly incorrect. Nothing belonging to Gitmed was found in the possession of any of appellant's relatives.

Again, it was Mercurio's friends who were in possession of many

items of Gitmed's property, not appellant's family.[132] (RT 1830-1834.)

The trial court found that appellant "showed no remorse," highlighting the facts that he burned Gitmed's car "to avoid detection" and that he made comments about a "'floater.'" (RT 3493.)

The trial court's consideration of the non-statutory factor of lack of remorse in aggravation of the sentence was error which violated appellant's rights under the Eighth and Fourteenth Amendments of the federal constitution, as well as state law. (*Eddings v. Oklahoma* (1982) 455 U.S. 104; *Lockett v. Ohio* (1978) 438 U.S. 586; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232; *People v. Boyd* (1985) 38 Cal.3d 763, 771-776.)

If the trial court had merely pointed to the lack of evidence of the mitigating factor of remorse, that would have been a proper consideration in re-weighing the balance of aggravation and mitigation in the context of appellant's motion to modify the penalty verdict. (See *People v. Bemore* (2000) 22 Cal.4th 809, 853; cf. *People v. Crittenden* (1994) 9 Cal.4th 83, 149-150 [trial court reviewed evidence showing lack of remorse after

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[132]Although the bag and jacket belonging to Gitmed were found by the police in the trunk of appellant's mother's car, the trial court correctly found that appellant had a reasonable expectation of privacy in Gitmed's bag and the other bag in which the jacket was found. (See Argument III, *above*.) The bag and jacket were the only items of evidence repeatedly identified by the prosecutor as having been found in appellant's possession. (RT 2921, 2928, 2935.) The prosecution cannot have it both ways. Either items were found in appellant's possession, as the police thought and the prosecutor stated at trial – in which case neither they nor any other property was found in the possession of any member of appellant's family and the trial court misstated the record – or the bag and jacket were found in appellant's mother's possession – in which case no property belonging to Gitmed was ever found in appellant's possession, and the prosecutor misstated the record and misled the jury even more fundamentally than appellant has previously argued. (See Arguments IV and VI, *supra*.)

commenting that it was not an aggravating factor].) Appellant concedes the record does not contain evidence that he affirmatively exhibited remorse following Gitmed's murder. That is a circumstance wholly consistent with innocence.

On the other hand, neither of the facts recited by the court can reasonably be understood as an affirmative indication of appellant's lack of remorse. As the trial court itself noted, appellant, along with Mercurio and Danny Dalton, burned Gitmed's car some time after the murder "to avoid detection." (RT 3493.) This conduct did not reflect any particular attitude toward Gitmed or his death; it simply does not indicate anything about whether appellant had remorse, assuming, arguendo, this Court concludes that there was substantial evidence of his guilt at all.

Nor did appellant's remarks to Danny Dalton and Barbara Triplett about a body found floating in the lake indicate a lack of remorse on his part. Appellant hereby incorporates Argument VII, *supra*, by reference as if fully set forth herein. As appellant has explained in Argument VII, the remarks were not probative of anything and should never have been admitted at trial, since they did not indicate that appellant knew anything more about the murder than what anyone could have read in the newspaper. The trial court's reliance on that testimony as establishing a non-statutory aggravating factor effectively demonstrates the prejudicial nature of that inadmissible evidence.

Appellant does not contest on direct appeal the trial court's finding that Gitmed was a vulnerable victim, nor that he was "unarmed." (RT 3493) The court's finding that Gitmed was "outnumbered" (RT 3493), however, was not supported by substantial evidence, since apart from Mercurio's self-serving testimony which was rejected by one or more jurors, there was

no evidence that appellant was present when Gitmed was shot. (See Arguments IV, V, VI, and VIII, *supra.*)

D. The Trial Court's Comments on Appellant's Past Criminal Activity Were Not Supported by the Record

1. Prior Murder

The trial court commented that appellant's prior murder case from Texas had been "extensively litigated" at the trial in the instant case and that appellant had killed the victim in Texas "for purposes of acquiring his worldly possessions." (RT 3493.) These comments were not supported by the record evidence.

First, the prior murder was not "litigated" at all even in Texas, let alone at appellant's trial. That is, there was never a contested hearing on his culpability for Floyce Fox's death. In Texas appellant was convicted on the basis of his signed confession and entry of a guilty plea (RT 3208-3212; People's Exhibit 44), and at the special circumstance proceedings in the case at bar he was representing himself and did not participate in any way beyond politely declining to make any objections or conduct any cross-examination. (RT 3212, 3213, 3219.)

Second, there was simply no evidentiary basis for the trial court's conclusion that theft was the motive for the Texas murder. He was convicted only of "murder" and not of robbery. (People's Exhibit 38-A [Plea of Guilty-Jury Waived and Sentence].) Moreover, the evidence produced at the special circumstance hearing in the instant case consisted of: (1) the testimony of Jesus Reyes, a former employee of the El Paso Sheriff's office, who testified about appellant's arrest and identified him in court, authenticated the charging document, and described the circumstances of appellant's confession, entry of plea, and conviction in

Texas (RT 3203-3210); (2) testimony by a fingerprint expert who concluded that the fingerprints from the Texas case records were appellant's (RT 3216-3219); (3) a copy of the grand jury indictment from Texas (People's Exhibit 37); (4) a packet of documents from the Texas penitentiary (People's Exhibit 38-A); (5) appellant's fingerprint card (Exhibit 38-B); (6) photographs of the victim and the scene of the crime in Texas (People's Exhibits 39-41); and (7) appellant's written confession (People's Exhibit 44).

There was nothing in any of this evidence to support a conclusion that the reason for the killing was that appellant wanted the victim's property. The only evidence of how and why the murder occurred was appellant's detailed, written confession, which stated that the victim was getting progressively drunker as they were traveling across the desert with appellant at the wheel, that the victim had given appellant his credit cards so he could buy gas, and that the victim probably lost his wallet on one occasion when he was drunk, got out of the truck, and fell on his face. (People's Exhibit 44.) Appellant's confession described the killing as occurring after the victim had accused him of stealing, when appellant stopped the truck, got out and opened the passenger door, and the victim, who was extremely drunk by that time, "fell" on him, and threatened to kill him.[133] (*Ibid.*) Appellant had confessed further that after he had stabbed the victim, he went through his pockets, took $15.00 in cash, and drove

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[133]At the hearing on entry of his plea in Texas, appellant's attorney told the court that appellant had said that this part of his confession was not accurate. The trial court took no further evidence, however, so there is no record of what changes appellant might have made to the confession. (CT 1318-1319.)

away in his truck. (*Ibid.*)

Appellant notes that if the prior murder had actually been litigated in Texas, rather than resolved through appellant's guilty plea, there may well have been legitimate defenses available to him – for example, self-defense, reasonable belief in the necessity to defend himself, heat of passion, sudden quarrel, or lack of intent based on his own intoxication, to name just a few possibilities.

2. Prior Possession of a Gun by Ex-Felon

The trial court noted that appellant had previously been convicted under section 12021, without further comment. Appellant raises no issue on appeal with regard to this evidence of prior criminal conduct.

E. Victim Impact

The trial court found that the impact of Gitmed's death on his family was magnified by the fact that he was closer to and more dependent on them than other men his age would be. Appellant raises no issue on direct appeal with regard to this finding or the evidence supporting it.

F. Evidence in Mitigation

The trial court considered in mitigation that appellant had behaved in exemplary fashion through the trial and that he may have taken methamphetamine on the night of the crime, although there was no evidence of the effect of it on his judgment. (RT 3494.)

Appellant raises no issue on direct appeal with regard to this evidence in mitigation.

G. The Trial Court's Finding of Fact Contrary to the Jury's Determination That Appellant Was Not the Shooter Was Unconstitutional

The trial judge acknowledged "the fact that the jury had a reasonable

doubt that the defendant was the shooter," but commented that she herself felt "the great weight of the evidence was to the contrary[.]" (RT 3494.) To the extent the trial court rendered its judgment that appellant deserved to die based on its own factual analysis concluding that appellant was the shooter, in direct contradiction of the jury's factual finding that he was not, its decision was improper and insupportable. Appellant was entitled to a determination by the jury of all facts on which his sentence was based. (*Blakely* v. *Washington* (2004) 542 U.S. 296; *Ring* v. *Arizona* (2002) 536 U.S. 584; *Apprendi* v. *New Jersey* (2000) 530 U.S. 466.) The trial court's duty to weigh the evidence in this context did not mean that it could of its own accord insert new facts into the record and then weigh those facts.

H. The Trial Court's Conclusion that Death Was the Appropriate Punishment Was Unreasonable in Light of the Lack of Evidence of Appellant's Individual Culpability

Appellant has shown, above, with citations to the record, that even if Mercurio's testimony that appellant shot Gitmed was believed, the evidence did not support the trial court's conclusions that appellant benefitted from the crime in any significant way, nor that he instigated it, nor that he was responsible for taking Gitmed to a remote location, nor that any of Gitmed's property was found in the possession of his family, nor that any other people were involved in the crime besides Mercurio, nor that the Texas murder case was thoroughly litigated, nor that appellant's motive for the Texas murder was to acquire the victim's property.

And when the jury's conclusion that appellant was not the shooter is taken into account and the record is examined for evidence outside of Mercurio's rejected testimony to support the imposition of the death penalty on him as an aider and abetter, it is clear that there was no evidence to

support the trial court's findings that he was present at the scene when Gitmed was killed, nor that he assisted Mercurio in robbing or shooting Gitmed, nor that he was a major participant in Gitmed's murder in any other sense.

Nevertheless, the trial court stated in conclusion that it had "considered the fact that the jury had a reasonable doubt that the defendant was the shooter," and noted that "[h]is liability would thus be that of an aider and abettor." (RT 3494.) However, rather than acknowledging the fact that the record was devoid of any evidence of appellant's conduct or intent with regard to Gtimed's murder other than Mercurio's testimony that appellant was the shooter, the trial court stated that it could not "find at this point that [appellant's] participation in the commission of this offense was minor in any way," and found that appellant had "a reckless disregard for human life in the commission of this offense." (RT 3494.)

These conclusions are absolutely unreasonable and even outrageous. There was no evidence of what appellant's "participation" in the offense was as an aider and abetter. Appellant commends to this court not only his review of the record at appellant's trial in Arguments IV and VI, but urges that his case be compared to all the other cases cited therein where reviewing courts have found specific, identifiable, actual evidence of conduct and intent in the record to support the defendants' convictions as aiders and abetters.

It is simply inescapable that, in the absence of evidence produced by the prosecution at trial to prove that appellant did something to assist Mercurio in committing the robbery or the murder and that at that time he acted with the requisite intent of an aider and abetter, the guilt phase jury's finding that appellant did not shoot Gitmed was fatal to the prosecution's

case against appellant, renders his conviction invalid, and makes the imposition of the penalty of death on him a shocking miscarriage of justice.

The trial court's utter disregard of the true state of the evidence and its consequent denial of appellant's automatic motion to modify the sentence constituted an egregious violation of appellant's federal constitutional rights to a heightened degree of due process and a reliable sentence in a capital case (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Gardner v Florida* (1977) 430 U.S. 349, 358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Appellant's death sentence must be reversed.

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XIII

THE DEATH PENALTY IS GROSSLY DISPROPORTIONATE TO APPELLANT'S INDIVIDUAL CULPABILITY FOR GITMED'S DEATH

It is a fundamental principle of death penalty jurisprudence in this country that the ultimate punishment may only constitutionally be applied on an individualized basis that takes into account the circumstances of the crime and the particular defendant's personal moral culpability. (U.S. Const., 8th, 14th Amends.; *Zant v. Stephens* (1983) 462 U.S. 862, 878-879; *Enmund v. Florida* (1982) 458 U.S. 782, 798-801; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-119; *Lockett v. Ohio* (1978) 438 U.S. 586, 605 ["an individualized decision is essential in capital cases"]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-305; *Proffitt v. Florida* (1976) 428 U.S. 242, 258 [death penalty must be based on "circumstances of each individual homicide and individual defendant"].)

The imposition of the death penalty on appellant, in all the circumstances of this case, is grossly disproportionate to his individual culpability and violates the Eighth Amendment primarily because, given the jury's finding that he was not the shooter, there is simply no way to know what involvement, if any, he had in Gitmed's death, as appellant has previously demonstrated in Arguments IV, V, VI, and VIII, *supra.* Appellant hereby incorporates all of those arguments by reference, as if fully set forth herein.

According to the evidence presented by the prosecution at appellant's trial, two people were present when Ronald Gitmed was shot to death by the shore of Canyon Lake. They were appellant and Anthony Mercurio. Mercurio testified that he stood passively next to the truck the

three had all arrived in while appellant and Gitmed stood facing each other at arm's distance, several feet away from Mercurio, and appellant suddenly shot Gitmed, then walked back to the truck; and the two drove away. Before the grand jury, Mercurio had added the detail that appellant told Gitmed at gunpoint to empty his pockets, although he did not remember this happening when he testified at appellant's trial.

The forensic evidence contradicted Mercurio's story: the bullets could not have been fired by a shooter standing face-to-face with Gitmed (RT 1543) and Gitmed could not have moved himself in the lake after he was shot (RT 1537, 1540-1541, 1549). So however it happened that Gitmed was shot, it was not what Mercurio described.

Further, Mercurio's testimony was uncorroborated by any other witness (see Argument V), and the jury did not believe that appellant shot Gitmed (CT 1096). That is, neither Mercurio's testimony at trial or before the grand jury, nor any other evidence, convinced the jury unanimously and beyond a reasonable doubt that appellant was the killer. One or more jurors, therefore, must have convicted appellant as a non-killer, i.e. as an aider and abetter.

But even assuming, arguendo, that there was sufficient evidence of the date appellant was with Mercurio and Gitmed, there was no other evidence of what appellant did after leaving the Triplett compound in the truck, apart from Mercurio's testimony – and therefore no evidence that appellant did or said anything at any point to assist Mercurio in accomplishing a murder or a robbery.

Nor was there any independent evidence of appellant's mental state with regard to Gitmed or to Mercurio's conduct, at any time relevant to the murder and robbery, if any. "American criminal law has long considered a

defendant's intention-and therefore his moral guilt-to be critical to 'the degree of [his] criminal culpability,' *Mullaney v. Wilbur*, 421 U.S. 684, 698 [] (1975), and the [United States Supreme] Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." (*Enmund v. Florida, supra*, 458 U.S. 782, 800, brackets and underlining in original, parallel citation omitted.) Imposition of the ultimate criminal penalty on appellant without substantial evidence that he harbored any criminal intent with regard to Gitmed would certainly be unconstitutionally excessive.

It is beyond dispute that one or more jurors believed that Mercurio was, or might have been, the actual killer, and that any such jurors had no basis in the evidence for convicting appellant of anything more serious than accessory after the fact (see Argument V and review of evidence of facts occurring on and after August 28, 1991), an offense that is not punishable by death. Moreover, as appellant demonstrated in Argument X, *supra*, a juror who almost certainly would have voted against the death penalty on the basis of her lingering doubt about appellant's guilt was improperly removed from the sentencing jury, and it is reasonably probable that the jury that ultimately sentenced appellant to die did not understand that it could and should consider lingering doubt about appellant's guilt when deciding whether he deserved to die. Appellant hereby incorporates Argument X by reference as if fully set forth herein.

The only evidence of appellant's role in the murder of Gitmed was Mercurio's self-serving, uncorroborated testimony which directly conflicted with the forensic evidence, and which the jury did not believe, and in exchange for which Mercurio avoided serving any prison time himself for his role in the crime.

Appellant's death sentence is shocking. The penalty verdict must be reversed under the Sixth, Eighth and Fourteenth Amendments and the numerous, previously cited United States Supreme Court opinions applying them in capital cases, because it is unreliable, unsupported by the evidence, and grossly disproportionate to appellant's culpability.

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XIV

CALIFORNIA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT

A. Appellant Was Entitled under the Federal Constitution to Written Jury Findings on the Factors on Which the Jury Based its Verdict of Death

Appellant was entitled to written findings of the factors which were the basis of his death sentence to protect his rights to meaningful appellate review (*People v. Martin* (1986) 42 Cal.3d 437, 449-450; *People v. Callahan* (1983) 149 Cal.App.3d 1183, 1188; see *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 [assessment of error possible because of written findings]), and a heightened degree of due process to ensure a reliable penalty verdict (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 187, 195).

The capital sentencing scheme in California as interpreted by this Court therefore violates the Eighth and Fourteenth Amendments of the federal constitution because no written findings of factors found by the jury as aggravating circumstances to be weighed in the sentencing process, nor of any reasons for the choice of sentence, are required. (§ 190.3; *People v. Fauber* (1992) 2 Cal.4th 792, 859.)

Moreover, since state law requires the sentencer in a non-capital case to state reasons for the sentence choice on the record (§ 1170, subd. (c)), the failure to require such a record in appellant's case violates the capital defendant's right to equal protection of the law under the Fourteenth Amendment. (See *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v.*

Arizona (2002) 536 U.S. 584, 607 [capital cases should not be treated differently from all other criminal cases by lightening constitutional protections and allowing more "leeway" to prosecutors in proving aggravating factors].)

To the extent that opinions of this Court allow the imposition of the death penalty on appellant in the absence of written findings of the factors on which his sentence was based, they should be reconsidered and overruled. And because appellant's sentence was obtained without these substantive procedural safeguards, it must be reversed.

B. The Preclusion of Inter-case Proportionality Review Violates the Eighth and Fourteenth Amendments

The prohibition against the arbitrary and capricious infliction of death as a punishment is the most fundamental principle underlying capital jurisprudence in this country. (*Furman v. Georgia* (1972) 408 U.S. 238; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In *Pulley v. Harris* (1984) 465 U.S. 37, the high court noted the possibility that a capital sentencing scheme could be so lacking in sufficient safeguards against arbitrariness that comparative proportionality review would be constitutionally compelled. (*Id.*, at p. 51.)

The California death penalty statute, as this Court's opinions have interpreted it, is such a scheme because, in effect, it permits the imposition of the death penalty based on a list of special circumstances so broad that it encompasses nearly every type of first-degree murder, as the drafters of the statute intended. (1978 Voter's Pamphlet, p. 34 "Arguments in Favor of Proposition 7.") Thus, virtually all felony-murders qualify for the death penalty, including "unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated

conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon* (1984) 34 Cal.3d 441, 477.) Further, the lying-in-wait special circumstance has been defined so broadly that it encompasses nearly all intentional murders. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) Thus, virtually any defendant accused of murder may be prosecuted under the California death penalty statute, a circumstance inviting the arbitrary and capricious imposition of the ultimate punishment in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Furman v. Georgia, supra*, 408 U.S. 238.)

Further, the prohibition against a proportionality review based on comparison to other cases prevents a determination of whether the California defendant has been sentenced to die for a crime that no other jurisdiction punishes by death, and therefore violates the principle that the state's death penalty scheme must comport with evolving standards of decency in human society. (*Trop v. Dulles* (1958) 356 U.S. 86, 100-101.)

Appellant's sentence must be reversed because it cannot be determined whether it is out of line with the punishments of others who have committed worse crimes or bear greater moral culpability for their crimes, including the accomplice in the case at bar, Anthony Mercurio.

C. The Conditions Placed on the Jury's Consideration of Mitigating Factors (d) and (g) Are Unconstitutional

Under the express terms[134] of Section 190.3 the sentencing jury may

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[134]Section 190.3 lists, inter alia, the following factors: "(d) Whether (continued...)

consider: (1) the defendant's "mental or emotional disturbance" only if such disturbance is "extreme;" (2) the effect of duress only if the duress is "extreme;" and (3) the fact that the defendant acted under the domination of another person only if the domination was "substantial."

It must be presumed that the jurors conscientiously tried to understand and apply the applicable law, and that they would not have considered the subject terms to be merely superfluous.

At appellant's trial Mercurio testified that appellant and Gitmed were arguing and that appellant's voice was becoming increasingly louder just before he shot Gitmed. (RT 1893, 1894.) This was evidence that appellant acted under the influence of mental or emotional disturbance which he was entitled to have the jury consider as a mitigating factor, but it is reasonably probable that those jurors who believed that appellant was the shooter concluded that it was not evidence of "extreme" disturbance, and excluded it from consideration.

Further, it is possible that those jurors who believed that Mercurio was the shooter might have concluded, based on his demeanor in the courtroom and his admitted dominant role as the driver and the one who took appellant and Gitmed out into the desert in the middle of the night to the remote location where the crime occurred (RT 1886-1888), that appellant was acting[135] at least to some extent under his domination–again,

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[134](...continued)
or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. . . . (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person."

[135]This argument assumes, arguendo, that this Court concludes there
(continued...)

a valid factor in mitigation of sentence that appellant was entitled to have the jury consider. But it is reasonably probable that such jurors would not necessarily have found Mercurio's domination over appellant to be "substantial."

The subject provisions violate the Sixth, Eighth and Fourteenth Amendments because they create an impermissible "barrier to the sentencer's consideration of all mitigating evidence." (*Mills v. Maryland* (1988) 486 U.S. 367, 375; *Lockett v. Ohio* (1978) 438 U.S. 586.) Reversal of appellant's death sentence is required on this basis.

D. The Death Penalty Is Cruel and Unusual Punishment

The death penalty is "an excessive and unnecessary punishment that violates the Eighth Amendment." (*Furman v. Georgia, supra,* 408 U.S. 238, 358-359, conc. opn. of Marshall, J.) Moreover, as appellant has demonstrated, *supra*, the California death penalty scheme is "fraught with arbitrariness, discrimination, caprice, and mistake." (*Callins v. Collins* (1994) 510 U.S. 1141, 1144, dis. opn. of Blackmun, J.) This is because there is an irreconcilable conflict between the requirements of individualized sentencing under *Lockett v. Ohio, supra*, 438 U.S 586 and of consistency under *Furman v. Georgia, supra,* 408 U.S. 238. (*Callins v. Collins,* supra, 510 U.S. at pp. 1155-1157.) For the reasons explained in Justice Marshall's concurring opinion in *Furman* and Justice Blackmun's dissenting opinion in *Callins v. Collins* the imposition of the death penalty on appellant violates his right under the Eighth Amendment to be free from

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[135](...continued)
was sufficient evidence of appellant's conduct and intent as the non-shooter to support his conviction as an aider and abetter. (See Arguments IV, V, and VI, *supra.*)

cruel and unusual punishment and his sentence should be reversed. (*Furman v. Georgia, supra,* 408 U.S. 238, 315-372, conc. opn. of Marshall, J.; *Callins v. Collins, supra*, 114 S.Ct. at pp. 1128-1138.)

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CONCLUSION

Appellant is entitled to a complete reversal of his conviction and sentence because the prosecution failed to prove its case against him even as a direct perpetrator, and presented no evidence at all to show that he was an aider and abetter, and he was convicted on insufficient evidence in a trial where inadmissible, prejudicial evidence was used against him; admissible, relevant evidence in his defense was excluded; and the prosecutor secured a conviction by misstating the law and the evidence in closing argument. Under the constitutional prohibition against double jeopardy, he may not be re-tried.

Appellant is also entitled to a complete reversal because the jury that convicted him was unrepresentative of the community from which it was drawn because eighteen citizens were improperly excluded from the venire before voir dire, and the process that excluded them unfairly discriminated against people opposed to the death penalty; and also because two African-American venire members perfectly well-qualified to serve as jurors were excused by the prosecutor's exercise of peremptory challenges based on the venire members' race.

Further, appellant is entitled to reversal of the judgment of death because it is grossly disproportionate to his personal culpability in the charged crime. Also, the trial court failed to instruct the jury on all the legal principles applicable to the sentencing determination; a juror who had lingering doubt about appellant's guilt was improperly dismissed from the jury during penalty phase deliberations; and the trial court's treatment of two holdout jurors had a coercive effect on the jury that ultimately sentenced appellant.

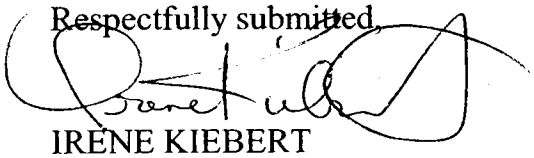
In addition, the death penalty scheme in California is

unconstitutional on its face and as applied to appellant, and the death penalty itself is unconstitutional because of the irreconcilable conflict between the requirements of individualized sentencing and of equal protection of the laws.

Therefore, for all the reasons explained herein and under the authorities cited, appellant's conviction and sentence must be reversed to prevent a serious and irreparable miscarriage of justice.

DATE: September 29, 2005

Respectfully submitted,



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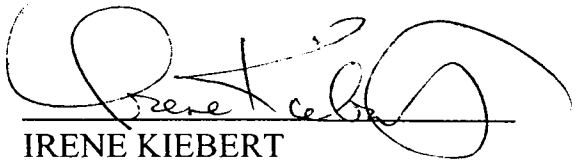
CERTIFICATE OF WORD COUNT

I, IRENE KIEBERT, counsel on appeal for appellant JAMES A. THOMPSON in Automatic Appeal No. S056891, certify that Appellant's Opening Brief consists of 108,842 words excluding tables, proof of service, and this certificate, according to the word count of the word-processing program with which it was produced. (Cal. Rules of Court, rule 36(b)(1)(A).) Appellant has separately filed "Appellant's Application to File Overlength Opening Brief (Rule 36 (b)(5)."

DATE: September 29, 2004



IRENE KIEBERT
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Counsel for Appellant

DECLARATION OF SERVICE

Re: People v. James A. Thompson

Automatic Appeal
No. S056891
Riverside Super. Ct. No. CR-45819

I, VICTORIA MORGAN, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, Suite 1000, San Francisco, California 94102; that on September 29, 2005, I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
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and that each said envelope was then, on September 29, 2005, sealed and deposited in the United States mail at San Francisco, California, in the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2005, at San Francisco, California.

_____

DECLARANT

AMENDED
DECLARATION OF SERVICE

Re: People v. James A. Thompson

Automatic Appeal
No. S056891
Riverside Super. Ct. No. CR-45819

I, VICTORIA MORGAN, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, Suite 1000, San Francisco, California 94102; that on September 29, 2005, I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

HONORABLE VILIA SHERMAN, JUDGE
4100 Main Street
Riverside, CA 92501-3526

and that each said envelope was then, on September 29, 2005, sealed and deposited in the United States mail at San Francisco, California, in the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2005, at San Francisco, California.

Victoria Morgan

DECLARANT