COPY SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY 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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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Respondent	)	**Automatic Appeal**
v.	)	**No. S056891**
JAMES ALVIN THOMPSON,	)	(Riverside Co. Superior Ct.
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INTRODUCTION TO ARGUMENT

Appellant limits his argument in the instant Reply Brief to those points on which further written argument, clarification, and/or authority will be most helpful to this Court. Appellant does not, by his omission of discussion on any other point, concede that respondent's argument on that point is correct.

Since appellant has the burden of persuasion on appeal, he expects that this Court will first consider his own arguments, as set out in his opening brief, before turning to respondent's argument. However, for the convenience of the Court in considering appellant's reply to respondent's specific points, the instant reply brief is organized under the same argument numbers as the opening brief, but sub-headings are given the numbers respondent has used, which do not always correspond with the development of the issues in appellant's opening brief. To the extent that respondent has failed to address any aspect of appellant's opening brief because of this re-numbering and re-organizing, appellant stands by his opening brief on those points and urges this Court to consider the entirety of appellant's briefing on each issue.

All references to statutes are to the Penal Code unless otherwise indicated.

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

Appellant has identified the trial court's use of written questionnaires alone to excuse eighteen potential jurors without the benefit of actual voir dire as a violation of his rights to a heightened degree of due process in a capital case and to trial by an impartial jury, and of the equal protection clause, and as error under the state and federal constitutions that is reversible per se. (U.S. Const. Amends. VI, XIV; Cal. Const. Art. 1, §§ 15, 16; see AOB[1] 26-27, 34-51, 105-111.)

Of the eighteen prospective jurors dismissed by the trial court on the basis of their written questionnaires, three were neutral with regard to the death penalty, ten[2] were strongly against it, and five were strongly in favor of it. Respondent contends that appellant stipulated to all the excusals and that the relevant questionnaires demonstrated substantial impairment. (RB

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[1]Appellant uses the following citation form for pleadings in the instant case: "AOB" for Appellant's Opening Brief, "RB" for Respondent's Brief.Citations to the record are consistent with those in the opening brief. (AOB 1.)

[2]Respondent has correctly pointed out that prospective juror Nicolette Sands was strongly against the death penalty, and that appellant had identified her as pro-death penalty. (RB 49, fn. 20.) Appellant apologizes for this misrepresentation, which was inadvertent.

24.) For the reasons explained in his opening brief and below in the instant brief, both of these contentions are wrong.

A. Appellant Did Not Waive His Right to Challenge the Trial Court's Exclusive Reliance on Jury Questionnaires to Dismiss Eighteen Jurors

Respondent argues preliminarily that appellant has "waived" his right to challenge the questionnaire-only procedure because his trial counsel requested it. (RB 25-33.) This argument should be rejected because neither the right to trial by an impartial jury nor the concomitant right to voir dire for bias is waivable by any means. Alternatively, if actual voir dire of prospective jurors is waivable, a personal waiver was required, and appellant did not personally waive that right.

1. Facts Surrounding the Trial Court's Use of Questionnaire-Based Dismissals Do Not Include a Personal Waiver of the Right to Voir Dire

Appellant did not personally waive his right to an unbiased jury or to voir dire of potential jurors, and respondent has not alleged that he did. Respondent's review of the record of the trial court's decision to dismiss jurors on the basis of their questionnaires, while accurately reflecting that appellant's trial counsel advised the court to do so, does not contain any reference to any form of personal waiver of anything by appellant. (RB 29-31.)

2. Appellant Has Not Waived the Right to Challenge the Questionnaire-based Dismissals Because of His Trial Counsel's Conduct

Having chosen trial by jury, appellant could not waive his right to an unbiased jury. (See *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [right to jury trial guarantees trial by impartial jurors].)

It was primarily the duty of the trial court to insure that appellant received a fair trial, and specifically "to prohibit bias." (Cal. Stds. Jud. Admin., §10.20.) The California Standards of Judicial Administration provide that a trial judge should ensure that proceedings are conducted in a fair and impartial manner; prohibit conduct that exhibits bias against any party; and ensure that all rulings and decisions are free of bias and the influence of stereotypes. (*Ibid.*)

Not every duty of the trial court may be waived by the parties. (See *People v. Breverman* (1998) 19 Cal.4th 142, 155, [obligation to instruct on lesser included offenses exists even where defendant expressly objects, because, "'Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense.' [Citation.]"].) And, in the words of the United States Supreme Court, "[w]ithout 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* (1982) 451 U.S. 182, 188, underlining added; see also *Morgan v. Illinois* (1992) 504 U.S. 719, 729-730.)

Since voir dire of prospective jurors is necessary to securing an impartial jury, it would have been impermissible under the federal constitution for appellant to waive jury selection voir dire for bias, i.e. the *Witherspoon/Witt* voir dire at issue here.[3] (See *Morgan v. Illinois, supra,*

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[3]Appellant has not claimed that he had a personal right to participate in the voir dire process because there was no error in this regard. When the trial court conducted actual voir dire of some prospective jurors at

504 U.S. at p. 731; *Wainwright v. Witt* (1985) 469 U.S. 412, 423-424; *Witherspoon v. Illinois* (1968) 391 U.S. 510,)

Appellant commends to this Court the reasoning of the United States Supreme Court in the seminal opinion of *Witherspoon v. Illinois* (1968) 392 U.S. 510. In *Witherspoon*, the trial court had conducted voir dire of the venire members. The high court found reversible error nevertheless because the trial court excused: (a) six jurors who said they "'did not believe in the death penalty'" without trying by further voir dire "to determine whether they could nonetheless return a verdict of death[]" (*id.*, at p. 515, fn. omitted); and (b) thirty-nine prospective jurors who "'acknowledged having "conscientious or religious scruples against the infliction of the death penalty" or against its infliction "in a proper case"'" without trying by further voir dire "to find out whether their scruples would invariably compel them to vote against capital punishment." (*id.*, at p. 516). The *Witherspoon* court noted: "It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." (*Id.*, at p. 515, fn. 7.) The trial court's duty not only to conduct voir dire, but to use that questioning to be sure that venire members understood the law and to explore beyond the juror's initial statements about their attitudes and beliefs before disqualifying them, was the primary focus of the pertinent discussion in

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appellant's trial, counsel for both sides were allowed to ask questions.

Witherspoon.[4] Appellant submits that there is no authority in law or logic for dispensing with voir dire at his trial, nor for the notion that his right to voir dire could have been waived.

Because the right to be tried by an unbiased jury requires an explicit, knowing and intelligent waiver of that right by a criminal defendant (U.S. Const., Amends. V, VI, XIV; Cal. Const. art. I, § 16; *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *People v. Ernst* (1994) 8 Cal.4th 441, 444-445), and because personal examination of prospective jurors by the trial court is "part of the guarantee of a defendant's right to an impartial jury" (*Morgan v. Illinois* (1992) 504 U.S. 719, 729) and was required by state statute at the time of appellant's trial (Civ. Proc. § 223), the trial court could not constitutionally dispense with jury selection voir dire absent such a personal waiver by the defendant after advisement by the trial court of the nature of the right he would be giving up. (See AOB 26, 34-41, 59-60; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237 [acknowledging authority for principle that questionnaire-based excusals without actual voir dire can never be constitutional in a capital case, citing *Turner v. Murray* (1986) 476 U.S. 28, 35-36, *Wainwright v. Witt, supra*, 469 U.S. at p. 424, *Darden v. Wainwright* (11th Cir. 1985) 767 F.2d 752, 761 (dis. opn. of Clark, J.), and *Moore v. Gibson* (10th Cir. 1999) 195 F.3d 1152, 1168.]; see also *United*

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[4]The *Witherspoon* court also said: "The most that can be demanded of a venireman . . . is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 523, underlining added.)

States v. Gordon (D.C. Cir. 1987) 829 F.2d 119, 125 [defendant's Fifth Amendment right to be present at voir dire required personal waiver]; *People v. Ernst, supra*, 8 Cal.4th at p. 449 [state constitution requires personal waiver of right to jury trial].)

This Court's discussion of the relationship between written questionnaires and in-person voir dire in *People v. Robinson* (2005) 37 Cal.4th 592, an opinion filed after appellant's opening brief, is instructive. The *Robinson* defendant argued on appeal, *inter alia*, that the voir dire conducted by the trial court had been "insufficiently comprehensive" (*id.*, at p. 614), and this Court concluded that the voir dire had been adequate, observing that the prospective jurors had filled out lengthy questionnaires containing both pointed and open-ended questions, and that these had "adequately probed the prospective jurors' backgrounds and views in numerous relevant areas and, together with the trial judge's follow-up questions, provided an adequate basis upon which the parties were able to exercise challenges for cause as well as peremptory challenges." (*id.*, at p. 618). Significantly, the *Robinson* opinion includes the following quotation from *People v. Boulerice* (1992) 5 Cal.App.4th 463, 477: "'If there is sufficient questioning to produce some basis for a reasonably knowledgeable exercise of the right of challenge, voir dire by the trial judge alone does not deprive a defendant of the right to adequate voir dire under the Sixth and Fourteenth Amendments.'" (*Robinson, supra*, 37 Cal.4th at pp. 618-619, underlining added.)

Thus, in appellant's case, even if the trial court could have been excused from its duty to conduct voir dire because trial defense counsel thought it was not necessary or was affirmatively undesirable, the United States Constitution still required, particularly in this capital case where a

heightened degree of due process was mandated (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 US 349, 358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305), that appellant personally execute on the record a knowing and intelligent waiver of his right to actual voir dire of prospective juror that has historically been recognized and utilized as essential to the process of securing an unbiased jury.

Where a personal waiver is required it must be expressed on the record in words by the defendant, and neither his actions nor the actions or words of counsel can be substituted. (Cal. Const. art. I, § 16; *People v. Ernst, supra,* 8 Cal.4th at pp. 444-445.)

The trial court did not advise or caution appellant with regard to his right to an adequate voir dire to secure an impartial jury, and appellant did not personally waive these rights. Thus, even if appellant could have constitutionally waived his right to voir dire, he did not. His trial counsel's conduct does not change this fact. Respondent's attempt to preclude this issue from the appeal on the basis that it was "waived" must be rejected.

3. If Trial Counsel Invited the Error by Requesting Questionnaire-based Dismissals They Provided Ineffective Assistance of Counsel

To the extent that this Court may deem respondent's assertion of "waiver" to be in the nature of an argument that trial counsel invited the error, it must fail for the reasons already explained. Neither appellant nor his counsel acting on his behalf had any legal right to invite the trial court to dispense with voir dire, which was a duty of the trial court triggered by appellant's choice of a jury trial.

In any case, invited error may be found only where trial counsel "expresses a deliberate tactical purpose" for requesting or agreeing to a trial

court's error. (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) But invited error will not be found when defense counsel acts out of ignorance or mistake, rather than for a tactical reason. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.) Here, it appears from the record that appellant's trial counsel did not understand that the trial court's duty in a capital case to conduct actual voir dire of jurors in order to determine *Witherspoon/Witt* or any other kind of bias, was constitutionally compelled, and this court should not apply the punitive doctrine of invited error against appellant.

Assuming, arguendo, that this Court concludes that a personal waiver was not required and that appellant's trial counsel invited the error of excusing jurors without voir dire, appellant has asserted alternatively in his opening brief that the issue should be reviewed because counsel afforded appellant ineffective representation in violation of his right to competent counsel under the Sixth and Fourteenth Amendments. (AOB 67-68.)

Respondent argues that defense trial counsel's performance was not ineffective assistance under *Strickland v. Washington* (1984) 466 U.S. 668 because they had a tactical reason for encouraging questionnaire-based excusals, namely, to avoid "giving the prosecutor an opportunity to rehabilitate" those venire members. (RB 32.) This argument actually supports appellant's position that only voir dire could establish which people were actually so substantially impaired by their views on the death penalty that they were unqualified to serve on the jury. But the proper function of voir dire by either side in the case was not "rehabilitation," in the sense of somehow coaching or artificially creating a qualified juror out of a person who was in fact unqualified. Rather, the function of voir dire

was to enable the trial court to be certain that each prospective juror understood the duties of a juror including any legal principles relevant to such understanding, and that he or she was giving truthful answers, regardless of which side was putting the questions. Thus, "rehabilitation" was a proper use of voir dire only if respondent means, by "rehabilitation," the process of revealing that some people whose questionnaire responses made them initially appear biased and unqualified were actually able to be impartial and were otherwise qualified to serve on the jury.

Respondent's suggestion that thwarting the trial court's ability to determine actual bias could have been a legitimate tactical choice by the defense should be rejected. There is no question that using voir dire "for tactical advantage rather than for the elimination of an undesirable juror[]" (*People v. Crowe* (1973) 8 Cal.3d 815, 818) is "misuse" (*ibid.*) of the voir dire process. This Court has observed that "[i]t is settled that it is not a proper function of the examination of prospective jurors to seek to educate them as to the particular facts of the case, compel them to commit themselves to vote a particular way, indoctrinate them, or otherwise prejudice them for or against a particular party. (See *People v. Crowe*, *supra*, 8 Cal.3d at pp. 824, 828, and cases cited.)" (*People v. Wright* (1990) 52 Cal. 3d 367, 419.)

Respondent's argument amounts to saying that it was reasonable for appellant's counsel to anticipate that the prosecutor would mis-use voir dire and fool the trial court into allowing unqualified people to sit on the jury, so forestalling that misconduct by eliminating voir dire of prospective jurors, including those desirable to the defense, was a rational tactical choice. This is a bizarre view of the duties of trial counsel and should be rejected.

Appellant is not claiming, and has never argued, that he had the right to keep pro-death penalty citizens off the jury if they were able to evaluate the evidence in the guilt and penalty phases impartially, and to follow the law with regard to sentencing, including whether to impose the death sentence on appellant. Outside of the exercise of peremptory challenges (see *People v. Robinson, supra,* 37 Cal.4th at p. 623, fn. 15), he did not have that right, and respondent's implication that he did should be rejected.

Alternatively, the only other conceivable strategic purpose in trial defense counsel's advocacy of questionnaire-based excusals was to save time. But since the large majority of venire members were, predictably, kept in the pool of people to be voir dired, the time saving in fact to be achieved was negligible. In any case, such a purpose "does not reach constitutional dimensions[]" (*Copley Press, Inc. v. Superior Court* (1991) 228 Cal.App.3d 77, 84), and was not a rational choice in view of the required sacrifice of appellant's primary, fundamental, constitutionally-based interest in the careful selection of an impartial jury.

On this record, there was no other conceivable tactical reason for trial counsel to deliberately invite the trial court to violate appellant's rights under the Sixth and Fourteenth Amendments by dispensing with actual voir dire of prospective jurors. On the contrary, counsel should have preserved appellant's right to object to the questionnaire-based excusals, as an ordinarily competent defense attorney in a capital case would have done. The general duty of trial attorneys to make a record for appeal is well-recognized. (See *People v. Ochoa* (1998) 19 Cal. 4th 353, 428; *People v. Hart* (1999) 73 Cal. App. 4th 852, 858-860.)

Further, as appellant pointed out in his opening brief, it appears that his trial counsel may have been unaware of the constitutional significance

of the trial court's personal observation of prospective jurors during jury selection in a capital case, and erroneously believed that questionnaires could be substituted for voir dire because they were signed under oath. If so, counsel's invitation to the trial court to commit the error involved here was not an informed, competent tactical choice. Appellant's trial counsel had an affirmative duty to know the law governing jury selection and the purpose of voir dire; otherwise, he could not make an "informed tactical choice within the range of reasonable competence[.]" (*People v. Pope* (1979) 23 Cal.3d 412, 425). And "where the record shows that counsel has failed to research the law . . . in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel." (*Id.*, at pp. 425-426; see *People v. Cooper* (1991) 53 Cal.3d 771, 830 [counsel inviting error based on mistake of law is ineffective assistance of counsel].)

The determination of disqualifying bias during jury selection in a capital case is a "serious duty" of the trial court. (*Wainwright v. Witt, supra,* 469 U.S. at p. 429.) The proper function of the examination of prospective jurors is to give the trial court the opportunity to make credibility determinations, and specifically, in a capital case, to distinguish who is able to perform the duties of a juror from those who are not, whatever their personal opinions of the death penalty. So respondent's argument that trial defense counsel could reasonably choose to deprive appellant of the benefits of such examination conflicts with the entire rationale, expressed in numerous state and federal court opinions, of deference to the trial court's determinations of credibility of prospective jurors during voir dire. The argument should be rejected.

Moreover, as a practical matter it was predictable that excusing prospective jurors solely on the basis of their questionnaires would not protect appellant's interests, since some anti-death-penalty people who were otherwise desirable jurors from a defense point of view would be summarily eliminated, as in fact they were. (RT 759.)

Thus, to the extent the trial court's excusal of anti-death-penalty prospective jurors without voir dire was attributable to trial counsel's actions, counsel's conduct fell below the standard of vigorous advocacy required of defense counsel in a capital case. (*Strickland v. Washington, supra,* 466 U.S. at pp. 691-692; *Cuyler v. Sullivan* (1980) 446 U.S. 335, 343; *Harding v. Davis* (11th Cir. 1989) 878 F.2d 1341, 1344-1345; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *People v. Pope, supra,* 23 Cal.3d at p. 422; *People v. Borba* (1980) 110 Cal.App.3d 989, 997.) And trial counsel's substandard performance led to error that is reversible per se, since the trial court dismissed eighteen people without voir dire, ten with serious reservations about the death penalty, some of whom were probably qualified to serve; and the erroneous excusal of even one qualified juror requires reversal. (*Gray v. Mississippi* (1987) 481 U.S. 641, 660, 665.) Assuming, arguendo, that the errors are not reversible per se, appellant submits that respondent has not shown, and cannot show, beyond a reasonable doubt, that the elimination of anti-death-penalty and death-penalty-neutral prospective jurors had no effect on the outcome of either phase of appellant's trial, and reversal is therefore required under *Chapman v. California* (1967) 386 U.S. 18, 26.

4. The Issue is Reviewable Because it Alleges Violation of a Fundamental Constitutional Right

"A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (See [*People v.*] *Saunders* [1993] 5 Cal. 4th [580] at p. 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal. 2d 442, 443-444 [constitutional right to jury trial]; cf. *People v. Walker* [1991] 54 Cal. 3d [1013] at pp. 1022-1023 [non-constitutional nature of claim that trial court failed to advise of consequences of guilty plea subjects defendant's claim to rule that error is waived absent timely objection].)" (*People v. Vera* (1997) 15 Cal. 4th 269, 276-277, parallel citation omitted.)

Even assuming, arguendo, that this Court concludes that trial defense counsel could and did invite the error and that their representation was nevertheless constitutionally sufficient, it may nevertheless address the merits of the issue because it involves appellant's fundamental constitutional right to trial by an impartial jury under the Sixth and Fourteenth Amendments of the federal constitution and under Article I, Section 16 of the state constitution. Appellant urges the Court to do so.

B. The Trial Court's Dismissal of Prospective Jurors Based Solely on Questionnaires That Did Not Demonstrate Substantial Impairment Was Erroneous

Appellant argued in his opening brief that, assuming arguendo the process of excusing prospective jurors based solely on their written questionnaires was constitutionally permissible in the abstract, the questionnaire used in his case was inadequate, biased and used in a biased manner, and that the trial court abused its discretion when it excused eighteen jurors without actual voir dire because their questionnaires

included conflicting or ambiguous responses requiring follow-up questioning. (AOB 51-111.)

Respondent concedes that the trial court's conclusions are entitled to no deference on appeal because they were not based on the court's own observations of the excused panel members' demeanor, attitudes, and credibility. (RB 33.)

Respondent urges de novo review, but that suggestion again begs the question. That is: appellant's primary point is that the questionnaires alone were not a sufficient basis on which to determine whether the prospective jurors were qualified to serve, so a review of those same questionnaires by this Court cannot correct the trial court's error. The trial court's error was one of omission, a failure to assess the demeanor of the venire members, and to be satisfied, based on personal observation, that they understood the applicable law and its relationship to the duties of a juror, and that their answers were truthful. De novo review by this Court of the very written questionnaires that are the crux of the problem is no solution. (But see *United States v. Chanthadara, supra,* 230 F.3d 1237, 1270 [concluding de novo review is appropriate where prospective jurors were dismissed without voir dire].)

Appellant submits that it is impossible to assess the reasonableness of the trial court's conclusions about the degree to which these venire people were impaired when all that is available to this court is their written questionnaires. This Court's comment in *People v. Box* (2000) 23 Cal.4th 1153 is consistent with that view: "To the extent Esther J.'s answers were equivocal or conflicting, we are bound by the trial court's determination. To the extent they were not so, substantial evidence supports the trial court's conclusion." (*Id.*, at p. 1182.) This passage demonstrates that where the

trial court did not observe the prospective jurors who gave equivocal or conflicting answers, the reviewing court cannot review the trial court's conclusions, and has no basis for assuming that they were correct – there is nothing in the record to indicate one way or the other.

Appellant's argument is not that any of the prospective jurors improperly dismissed were qualified to serve, but that they might have been, and it is just as impossible for this Court to know whether that was the case without in-person voir dire, as it was for the trial court. The questionnaires can only suggest who might have been substantially impaired and therefore required follow-up questioning in person. But they cannot be a basis on appeal any more than at trial, for a reasonable conclusion that they definitely were disqualified.

Certainly there were individuals whom the trial court and/or counsel believed were not biased based on their questionnaires, yet they turned out to be unable to perform a juror's duties and were excused by agreement of both parties and the court. (See, e.g. RT 810-812, 829-831 (Griffith); 814-815, 829-831 (Armbruster); 819-822, 829-831 (Moser).) Given the realities of what happens during voir dire, and how different a person's ultimate responses may be from the original questionnaire, it is more than reasonably probable, it is likely, that the trial court wrongfully dismissed qualified people, and reversal of the entire judgment is required.

Assuming, arguendo, that this Court concludes that it is in a position to assess the correctness of the trial court's questionnaire-based excusals by examining the record, appellant turns to respondent's arguments in defense of the trial court's actions.

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1. This Court Should Review the Trial Court's Dismissal of Prospective Jurors Based on Their Questionnaires Because Appellant's Counsel Either Adequately Preserved the Issue or Provided Ineffective Assistance in Failing to Do So

Respondent argues that all the excusals should be upheld because defense counsel "expressly agreed" to the excusals in what amounted to "stipulations." (RB 35.)

Appellant and respondent have both reviewed the record of trial defense counsel's words as the trial court went through the process of evaluating prospective jurors' questionnaires for *Witherspoon* bias. Appellant agrees with respondent that his trial attorney requested or stipulated to the excusal of most of the potential jurors who had expressed strong support for the death penalty. (AOB 33, 63; see RT 730, Supp. CT 83 [Porter]; RT 732-733, Supp. CT 137 [Packler]; RT 751-752, Supp. CT 542 [Marsh]; RT 757, Supp. CT 786 [Riegler]; RT 775, Supp. CT 1218 [Herr]; RT 772, Supp. CT 1272 [Sands (Ellis)].)[5] But this was not the case for potential jurors who expressed anti-death penalty views. Defense counsel consistently refused to stipulate to those excusals.

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[5]Appellant notes that respondent has used initials instead of last names to refer to the prospective jurors at appellant's trial. There is no rule requiring such a practice, and respondent has not explained why it is necessary or desirable. Rule 8.332 provides in pertinent part: "(c) Potential jurors. Information identifying potential jurors called but not sworn as trial jurors or alternates must not be sealed unless otherwise ordered under Code of Civil Procedure section 237(a)(1)." There is no order under section 237 in the instant case and prospective jurors' names appear unedited in the record of jury selection proceedings and on their questionnaires preserved in the clerk's transcript. For ease of reference, therefore, appellant continues to refer to prospective jurors by their names as they appear in the record.

Respondent concedes that trial counsel used the term "stipulate" to mean an affirmative agreement, but argues that counsel's use at other times of the terms "submitting" or "not objecting" was "creative wordplay." (RB 37.)

In the interest of judicial economy appellant will not reiterate here all the words of the trial court and counsel which reflect the trial court's understanding that appellant's attorney was trying to preserve the issue of the excusal of anti-death penalty jurors for review on appeal, but refers the Court to the explication of the record in his opening brief (AOB 60-67, 68-70) and offers just one more illustrative passage demonstrating the understanding of the court and both parties that the phrase "submit" was not intended by trial counsel, nor understood by the trial court, as the equivalent of an agreement or stipulation:

"THE COURT: You're stipulating on Tina Turner?

"MR. GROSSMAN: No, I won't stipulate, but the Court can find –

"THE COURT: You'll submit?

"MR. GROSSMAN: Yes.

"THE COURT: Do you have any problems with excusing Tina Turner, Mr. Ruddy?

"MR. RUDDY: No, your Honor.

"THE COURT: All right I think there are significant problems iwth Ms. Turner's feelings on the death penalty, and her beliefs which substantially impair her ability to apply the law. On those grounds, I will ask the clerk to call Tina Tuner, she will be excused. Same with respect to Thomas Sympson.

"MR. GROSSMAN: Yes, But I want the record to reflect I'm not the moving party, I'm just not objecting based on the questionnaires.

"THE COURT: I understand.

"MR. GROSSMAN: Okay.

"MR. RUDDY: That's fine, your Honor.

"THE COURT: I'll make the same findings with respect to Thomas Sympson, and the answers on his questionnaire."

. . .

"THE COURT: . . . Nicolette Sands Ellis?

"MR. GROSSMAN: Stipulation as to her, your Honor.

"THE COURT: Do you stipulate with respect to Ms. Sands Ellis?

"MR. RUDDY: Yes, your Honor.

"THE COURT: Thank you. . . . ."

(6 RT 772.)

Clearly the record of the questionnaire excusals as a whole indicates that appellant's trial lawyer thought that saying he "submitted" the decision on individual jurors while explicitly stating that he did not "stipulate" to their excusals would preserve the issue, and that the trial court understood and accepted these terms as reflecting that intent.

Assuming, arguendo, that this Court finds that appellant's trial counsel did affirmatively agree or stipulate to the questionnaire-based excusals of Prospective Jurors Cheek, Smith, Bennett, Turner, Valenzuela, Juniel, Sympson, Scalise, Knight, and Sands (Ellis), then he provided constitutionally deficient representation. It is obvious from his express words on the record that although not entering formal objections that he

believed would be futile, he was trying not to forfeit the issue or invite erroneous exclusions. Appellant stands by his assertion in his opening brief that, to the extent his trial counsel failed to object sufficiently to the excusal of anti-death penalty jurors, the record is clear that he had no reasonable tactical purpose for that failure, which constituted ineffective assistance of counsel. (AOB 68-69.)

2. The Trial Court Erroneously Dismissed Eighteen Prospective Jurors for Cause Based on Their Answers to Jury Questionnaires that Did Not Establish Substantial Impairment

Appellant highlighted in his opening brief the ambiguities, contradictions, confusion and bias in the relevant questionnaires that established the need for voir dire, and rendered the trial court's dismissals an abuse of discretion. (AOB 51-59.)

Respondent argues that there is sufficient evidence in the written questionnaires to support the trial court's findings of substantial impairment. (RB 33-67.)

a. The Court Failed to Conduct A Thorough and Adequate Voir Dire of All Prospective Jurors

Strangely, respondent erroneously asserts that appellant "acknowledges" United States Supreme Court authority allegedly "holding" that there is no constitutional right to voir dire (RB 39). There is no United States Supreme Court opinion with such a holding and appellant has not indicated that there is. On the contrary, the controlling United States Supreme Court opinions cited in appellant's opening brief make it clear that actual in-person questioning of venire members is integral to the process of selecting an impartial jury, and compel reversal of the judgment against appellant because of the trial court's failure to voir dire 18 prospective

jurors. (See AOB 34-41.) Respondent utterly fails to address this body of authority, although conceding that the high court opinions "place great emphasis on a trial court's observations of a prospective juror's demeanor for the purpose of evaluating his or her impartiality." (RB 40.) Instead, respondent merely states that this Court has held that personal observation is not required where prospective jurors have written "disqualifying" answers on questionnaires, citing *People v. Ervin* (2000) 22 Cal.4th 48, *People v. Stewart* (2004) 33 Cal.4th 425, *People v. Benavides* (2005) 35 Cal.4th 69, and *People v. Avila* (2006) 38 Cal.4th 491. (RB 40-41.) Appellant was referring to such opinions in his opening brief when he asserted after discussion of controlling authority that, "[t]o 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 exists to exclude them from the venire and may exclude them without such voir dire, they should be reversed." (AOB 49-50.) Since respondent now relies on them, however, appellant offers the following brief analyses demonstrating that this Court's prior opinions are in error and/or distinguishable.

People v. Ervin, supra, 22 Cal.4th 48 held that the issue of questionnaire-based excusals had been forfeited by trial counsel's agreement to the procedure and the excusals themselves, and observed that the procedure "benefitted all parties by screening out overzealous 'pro-death' as well as 'pro-life' venirepersons, and by substantially expediting the jury selection process, 'culling out' prospective jurors who probably would have been unable to serve as jurors in any event." (*People v. Ervin, supra,* 22 Cal.4th at p. 73.) Appellant, of course, unlike the defendant in

Ervin, did not "agree" to the excusals of "pro-life" venire members, but submitted those decisions to the court's discretion intending to preserve the issue, and explicitly did not agree to them. (6 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].) In any case, neither overzealousness nor probable inability to serve was the correct standard for excusal of prospective jurors under *Witherspoon* and *Witt*, which required a focus not on whether prospective jurors were pro- or anti-death-penalty, but an actual determination of whether they were able to set aside their personal opinions, however zealous they were, and conscientiously perform the duties of a juror. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; *Wainwright* v. *Witt, supra,* 469 U.S. at p. 424; *Adams* v. *Texas* (1980) 448 U.S. 38, 45*; Witherspoon v. Illinois, supra,* 391 U.S. at p. 515, fn. 7; *People v. Stewart, supra,* 33 Cal.4th at p. 446.) Moreover, *Ervin* did not discuss the constitutional underpinnings of jury selection voir dire or the United States Supreme Court opinions on which appellant relies in the case at bar. "It is axiomatic a decision does not stand for a proposition not considered by the court." (*People v. Dickey* (2005) 35 Cal. 4th 884, 901; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

The finding of forfeiture in *People v. Benavides, supra,* 35 Cal.4th 69 was discussed and distinguished in appellant's opening brief (AOB 64-66). The conclusion in *Benavides* that excusals based solely on written questionnaires were reasonable because the individuals in question were "probably" unqualified (*Benavides* 35 Cal.4th at p. 89*)* failed to recognize or discuss the constitutional underpinnings of voir dire in jury selection and United States Supreme Court authority emphasizing its importance (AOB 34-41). That conclusion by this Court begs the question of the trial court's

duty to make an actual determination of fitness to serve, based on demeanor and other indicia of credibility. "Probably" unqualified is not enough. Again -- if a prospective juror whose actual voir dire indicates probable disqualification must be further questioned, as the United States Supreme Court has repeatedly held (*Boulden v. Holman* (1969) 394 U.S. 478, 482-484; *Maxwell v. Bishop* (1970) 398 U.S. 262, 264-265; *Witherspoon v. Illinois, supra,* 391 U.S. at pp. 515-516), then certainly mere answers on a questionnaire are per se unreasonable as a basis for disqualification.

In *People v. Stewart, supra,* 33 Cal.4th 425 this Court performed a *de novo* review[6] of the trial court's questionnaire-based excusals since, in the absence of in-person questioning, no deference was due to the trial court's assessments of the prospective juror's qualifications. (*Stewart* at pp. 450-451.) In *Stewart* the defense had objected at trial both to the procedure of using questionnaires in lieu of voir dire and to the excusals of five jurors, and this Court found that the record did not support those excusals, but reserved judgment on the question whether a trial court could ever be justified in excusing venire members solely on the basis of written questionnaire answers. (*Id.*, at pp. 449-450.)

Finally, in *People v. Avila, supra,* 38 Cal.4th 491, this Court squarely held that "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear

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[6]Again, appellate court review of written questionnaires begs the question at issue here, which is the trial court's failure to conduct in-person voir dire in order to determine whether the prospective jurors actually understand the duties of a juror in a capital case and can perform them, regardless of the strength of their opinions and feelings about capital punishment or anything else.

from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law. (See *Lockhart v. McCree* [1986] 476 U.S. [162] at p. 176.)." (*Avila, supra,* 38 Cal.4th at p. 531, brackets added.)

The *Avila* court's reliance on *Lockhart v. McCree, supra,* 476 U.S. 162 bears examination. While that case supports the proposition that prospective jurors who will not follow the law are excludable for cause (*id.*, at p. 179, 184), it is definitely not authority for the notion that a trial court may substitute written questionnaires for in-person voir dire. In *McCree* the trial court had conducted voir dire for bias using *Witherspoon* standards, the defendant argued on appeal that the *Witherspoon* process produced a jury unfairly prone to returning verdicts of guilty, and the high court concluded that, even if it does, a "conviction-prone" jury is constitutionally permissible. (*Id.*, at pp. 169-173.) The question before the *McCree* court simply had nothing to do with substituting questionnaires for voir dire, or any question analogous or relevant to such a procedure.[7] (*Id.*, at p. 165.)

Respondent implies that appellant has accepted this Court's holding in *People v. Bittaker* (1989) 48 Cal.3d 1046 that there is no constitutional right to voir dire and has merely distinguished appellant's case from the facts in *Bittaker*. (RB 39.) But the clear and unequivocal point of appellant's discussion of *Bittaker* was to demonstrate that this Court's previous opinions finding no constitutional right to voir dire were not

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[7]The sole issue in *Lockhart v. McCree* was "Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial?" (476 U.S. 162, 165.)

supported by United States Supreme Court authority and should be overruled.[8] (See AOB 49-50.)

In *Bittaker, supra,* 48 Cal.3d 1046, this Court said that voir dire is like peremptory challenges, being merely a means to the end of selecting an impartial jury, and that, like peremptory challenges, it is not constitutionally required. (*Id.*, at p. 1086.) *Bittaker* cited *People v. Coleman* (1988) 46 Cal.3d 749 and *Ross v. Oklahoma* (1988) 487 U.S. 81 (*ibid.*), and appellant pointed out "that neither *Coleman* nor *Ross* is authority for the proposition that jury selection voir dire is not required by the federal constitution." (AOB 47.) Briefly – *Ross* had nothing to do with the question of whether criminal defendants have a constitutional right to voir dire of the jury. In the trial under review in *Ross,* voir dire had occurred, and no issue was raised on appeal with regard to that. The *Ross* opinion was about the use of peremptory challenges to exclude biased jurors, not about the right to voir dire. (See AOB 47-49.) Nor was an issue about voir dire raised in *Coleman*, which also dealt solely with the wrongful inclusion of a biased juror and the exercise of a peremptory challenge. (See AOB 48.)

Appellant stands by his claim that the authority which has established that it does not violate the United States Constitution when a defendant has to use a peremptory challenge to excuse a juror who was voir

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[8]In fact, appellant's position, as stated in his opening brief in the context of discussing *Bittaker* and the authority on which it erroneously relied, is that, "to the extent that previous opinions of this Court may be understood as holding that the trial court may, consistent with the federal constitution, entirely dispense with in-person voir dire of potential jurors to determine whether *Witherspoon* cause exists to exclude them from the venire and may excuse them without such voir dire, they should be reversed." (AOB 49-50, footnote omitted, underlining added.)

dired and who should have been excused for demonstrating disqualifying bias during that voir dire (*Ross v. Oklahoma, supra,* 487 U.S. at p. 88), does not support a conclusion that it is constitutional to exclude potential jurors for bias without any voir dire by the trial court or the parties.[9] The latter situation, which occurred in appellant's case, is governed by *Morgan v. Illinois, supra,* 504 U.S. 719, *Gray v. Mississippi, supra,* 481 U.S. 641, *Wainwright v. Witt, supra,* 469 U.S. 412, *Patton v. Yount* (1984) 467 U.S. 1025, *Rosales-Lopez, supra*, 451 U.S. 182, 188 and the other United States Supreme Court opinions on which appellant relied in his opening brief. (AOB 34-41.)

Appellant draws this Court's attention to the high court's remands for inadequate voir dire in *Maxwell v. Bishop, supra,* 398 U.S. 262 and *Boulden* v. *Holman, supra,* 394 U.S. 478[10], where jurors had stated in voir dire that they had fixed opinions against the death penalty and would never impose it in any case[11]. The *Boulden* Court pointed out that, ". . . it is

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[9]Appellant does not raise an issue in the instant appeal concerning a party's right to participate in voir dire rather than voir dire being conducted solely by the court, which was the issue in *Bittaker*. Rather, appellant's contention here is that the trial court had a duty to conduct voir dire, i.e. actual in-person questioning of potential jurors, whether the questioning was by the court or counsel or both. (See Code Civ. Proc. § 223.)

[10]"During the two years following *Witherspoon*, the Court twice reaffirmed its holding in brief opinions demonstrating its correct application. See *Boulden v. Holman*, 394 U.S. 478, 481-484 (1969), and *Maxwell v. Bishop*, 398 U.S. 262, 264-266 (1970) (per curiam)." (*Gray v. Mississippi, supra,* 481 U.S. at p. 660, fn. 8.)

[11]In *Boulden* two of the wrongfully excluded jurors said that they had a "fixed opinion" against capital punishment. (394 U.S. at p. 482, fn. 6) One of them answered "Yes, sir," to the question: "You think you would

entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror 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. 483-484.)

The careful analysis of the record in *Adams v. Texas, supra,* 448 U.S. 38 is instructive. In that case, a certain state statute allowing prospective jurors to be dismissed because of their attitudes about the death penalty was at issue. The high court reasoned as follows:

> "Based on our own examination of the record, we have concluded that §§ 12.31 (b) was applied in this case to exclude prospective jurors on grounds impermissible under Witherspoon and related cases. As employed here, the touchstone of the inquiry under §§ 12.31 (b) was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt. Rather, the touchstone was whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors who

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never be willing to inflict the death penalty in any type case?" and the other answered, "That's right." to the question, "You mean you would never inflict the death penalty on [*sic*] any case?" (*Ibid.* ["sic" notation in original].)

stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. n7 Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." n8 But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law."

(*Id.*, at pp. 49-50, underlining added.) Similarly, in appellant's case, the exclusion of potential jurors who had strong views about the death penalty but who stated on their questionnaires that they were able to follow the judge's instructions, or whose ability and willingness to do so could have been revealed through actual voir dire, violated the Sixth and Fourteenth Amendments.

b. The Questionnaire Used in this Case Was Inadequate for Screening out Disqualified Prospective Jurors

Appellant pointed out in his opening brief that there were numerous problems with the way the questionnaire was written and how it was used. (AOB 51-58.) Appellant asserted that these problems resulted in a method of jury selection that fell short of the heightened degree of due process required in a capital trial under the federal constitution. (AOB 54.)

Specifically, appellant pointed to terms of art used without any guidance or explanation in questions 56 and 57 ("mitigation" and "aggravation") and questions 48, 54, 55, 56, 57 and 58 ("special circumstances") and pointed out that the trial court itself actually questioned whether prospective jurors "really understand" (RT 753) concepts like special circumstances in the context of a capital trial. (AOB 53-54.) Also, appellant demonstrated that Question 58 was used to eliminate death penalty opponents who answered they would "never" impose the death penalty, but not to eliminate death penalty proponents who answered that they would "always" impose it. (AOB 57.) And finally, appellant showed how the wording of Question 60 suggested the "correct" answer for death penalty proponents, but not for death penalty opponents. (AOB 57-59.)

Respondent has not answered any of these specific criticisms, instead relying on this Court's opinion in *People v. Avila, supra*, 38 Cal.4th 491, to support an argument that the questionnaire was adequate because it asked specific and unambiguous questions–namely questions 54, 55, 56, 57, 58 and 60–whose answers could indicate substantial impairment under *Witherspoon/Witt* standards.[12] (RB 42-43.) Respondent argues that since the questionnaire used words like "no matter what," "always,""never," "automatically," and "refuse," there were no ambiguities like the ones this Court found problematic in *People v. Stewart, supra.*

Appellant, however, has identified different problems with the questionnaire used at his trial than the criticisms proferred with regard to the questionnaires in either *Avila* or *Stewart*.

Respondent has not disputed, and cannot dispute, the record facts of most significance: (1) the questionnaire used highly specialized legal terms that lay people could not reasonably be expected to understand cold; (2) the trial court eliminated from the pool three people who said that they would never impose the death penalty but did not eliminate a single one of the four people who said, in answer to the same question, that they would always impose it; and (3) the wording of question 60 was not neutral. It is significant, with regard to (1) and (2), that when the trial court remarked that people might not understand "special circumstances," it was reviewing the questionnaire of Prospective Juror Rofkahr, who had answered that he could not see himself, in an appropriate case, rejecting the death penalty and

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[12]As appellant has explained, *supra*, *Avila* was wrongly decided and should be overruled. Appellant does not, by the instant discussion, concede that *Avila* is a valid precedent.

choosing a sentence of life without possibility of parole, and that he would "always" choose death. The trial court decided that juror should be voir dired.

c. The Trial Court Erroneously Found Substantial Impairment Based on the Dismissed Jurors' Questionnaires

Appellant has carefully reviewed the questionnaires of the dismissed venire members and compared them with the trial court's stated reasons for the excusals.

i. The Dismissals of Prospective Jurors Hunckler, Alfaro and Rutherford Were Not Supported by the Record

The trial court's dismissal of Prospective Jurors Hunckler, Alfaro, and Rutherford are a clear warning of the slippery slope that lies ahead in the landscape of this Court's previous rulings culminating in *People v. Avila*, in which it was held that a trial court could base a finding of *Witherspoon/Witt* bias on written questionnaires alone.

If this Court approves of the trial court's excusal of these three venire members it will call into question the necessity of ever conducting voir dire at all even more clearly than *Avila* already has. After all, if a trial court can determine from questionnaires alone that an individual is disqualified to serve on the jury for reasons having nothing to do with hardship or attitudes about the death penalty, then why voir dire anybody? There will be nothing to prevent any trial court, or any county jury commissioner, from doing away entirely with the need for citizens to come to court to be examined with regard to their fitness and availability for jury service. Authorities can simply send out questionnaires to the venire and sort the returned questionnaires into piles: qualified and unqualified. All

those like Hunckler, who have a family member charged with a crime or in some other kind of distressing situation, all those like Alfaro, whose written answers could be attributable to difficulties with the language and whose questionnaires contain internal contradictions, and all those like Rutherford, who seem to have an "attitude" and are worried about having to sit still for some indefinite period of time – such people can simply be declared unfit to serve. One wonders how quickly people wanting to avoid jury service would take to learn how to fill out those questionnaires in order to be excused from jury duty–probably not long. The potential for abuse is enormous.

Appellant submits that there is no authority whatsoever for the procedure used in this case to excuse prospective jurors who, according to the trial court, were not disqualified under *Witherspoon/Witt*, but whom the trial court or counsel or both apparently decided, based solely on their written questionnaire responses, they would rather not take the time to voir dire.[13]

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[13]Respondent takes issue with appellant's characterization of Hunckler and Alfar as "neutral" on the death penalty, and considers them to be "pro-death penalty." (RB 45, fn. 18.) Obviously, respondent and appellate counsel have picked up on different aspects of the questionnaires of these people. This very confusion over how to label these jurors from their questionnaires alone is a handy illustration of the limited usefulness of such documents for determining the true nature of prospective jurors' attitudes in all their complexity, depth and breadth. Note that appellant has not raised an issue based on dismissals of people after actual voir dire, both because the trial court's perceptions of them are entitled to deference and also because the in-person questioning created a clearer picture of the venire members' disqualifying characteristics and opinions.

Given the over-all character of the answers these three people gave on their respective questionnaires (see AOB 72-81) it is highly probable that at least one, and possibly all, of them would have survived traditional voir dire and peremptory challenges and been seated on the jury. Under the rule that the dismissal for cause of even one qualified juror requires reversal (*Gray v. Mississippi, supra*, 481 U.S. at p. 660, 665), appellant's conviction and sentence must be reversed. Alternatively, because the failure to voir dire these three people implicates appellant's fundamental constitutional rights to due process in jury selection and to trial by an impartial jury, if this Court concludes that reversal per se is not required, then the burden is on respondent to establish beyond a reasonable doubt with regard to each of these people that the failure to voir dire them and to seat them on the jury had no effect on the outcome of appellant's trial. (*Chapman v. California, supra,* 386 U.S. at p. 26.) Appellant submits that respondent has not met and cannot meet this burden, and reversal of the entire judgment is required.

Raymond Hunckler (Raymond H.)

Appellant pointed out in his opening brief that Mr. Hunckler did not ask to be excused from jury service and affirmatively indicated that there was no reason that he would prefer not to serve.[14] (AOB 72-73.) Respondent argues that the trial court's concern that the fact Mr. Hunckler's son had been charged with serious crimes would "prevent him from giving his full attention to the case." (RB 46.) It is true that, while Hunckler did

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[14]Respondent is correct that defense counsel agreed to the excusal of Mr. Hunckler and Ms. Alfaro. (RB 46, 47 But appellant's personal right to have prospective jurors questioned in open court could not be waived. (See AOB 59-62; and appellant's discussion of waiver and invited error in section A, *supra*.)

not answer "yes" or "no" to the question asking whether there was anything that might distract him, he did note his son's charges and court date, which was the following day, and a few days before actual voir dire of prospective jurors began. (Supp. CT-JQ 134.) The record does not indicate whether Hunckler's son was held to answer.

To uphold the excusal of Hunckler requires this Court to hold that any prospective juror with a close relative charged with a serious crime should be automatically excused from jury service without voir dire, regardless of their attitudes about their relative's situation, their desire to serve on a jury, and the fact that they are qualified, available, and otherwise able to be an impartial juror. Appellant submits that such a holding would be unreasonable and would irrationally discriminate against many people, who, like Mr. Hunckler, would probably be perfectly fine jurors. Mr. Hunckler should not have been excused without at least determining, through in-person questioning, what was happening in his son's case, what his attitudes about that were, and whether he would be substantially impaired because of it. Voir dire was necessary to determine whether he should be disqualified, and the trial court's dismissal of him was an abuse of its discretion.

Angelina Alfaro (Angelina A.)

Appellant accurately reported in his opening brief that the trial court excused Prospective Juror Alfaro because it agreed with defense counsel that her questionnaire did not present a "Hovey[15] issue" but the court thought that her answers were "all over the map," and for some completely inexplicable reason the court had concerns about her "reliability." (RT

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

767.) Respondent has not presented any argument or authority for the notion that inconsistent answers are a reason to dispense with voir dire and summarily dismiss a prospective juror, nor has respondent pointed to anything in the record that supports the trial court's suspicion that Ms. Alfaro was unreliable. Instead, respondent has called attention to certain responses in Alfaro's questionnaire concerning her attitudes about the death penalty, which, manifestly the trial court did not base its conclusion on.

Respondent does mention that the trial court noted that Alfaro had written "no" to the strangely-worded question no. 37, which asked "In a criminal case, the defendant is presumed to be innocent, will you follow this instruction?" As appellant said in his opening brief, this was an anomalous response on her questionnaire taken as a whole and should have been explored on voir dire. (AOB 75-76.)

Richard Rutherford (Richard R.)

The issue of Mr. Rutherford's questionnaire responses is joined, and appellant refers this Court to his discussion in the opening brief of this interesting fellow's responses, which were not as the trial court described them. (AOB 76-81.) Appellant also urges this Court to note the possible effect of the trial judge's obvious personal reaction to the fact that Mr. Rutherford was born in the 1960s and generally disliked attorneys, on her ability to evaluate his qualifications to serve on the jury, or even to read his questionnaire responses accurately. (AOB 78, 80.) The trial court's dismissal of this individual, whom respondent and appellant agree had "neutral" attitudes about capital punishment, was an abuse of its discretion.

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ii. The Questionnaires of Prospective Jurors Cheek, Smith, Bennett, Turner, Valenzuela, Juniel, Sympson, Scalise, Knight and Sands Ellis[16] Did Not Establish Substantial Impairment

In appellant's opening brief, he identified nine excused people as anti-death penalty. They were Prospective Jurors Cheek (Patricia C.), Smith (Lowell S.), Bennett (Deborah B.), Turner (Tina T.), Valenzuela (Carolyne V.), Juniel (Joe J.), Sympson (Thomas S.), Scalise (Ross S.), Knight (Lenora K.).[17] In addition, respondent is correct in identifying Prospective Juror Sands Ellis (Nicolette S.) as being opposed to capital punishment. (RB 49, fn. 20.)

Thus, a total of ten prospective jurors who indicated on their questionnaires that they were opposed to the death penalty were excused for cause by the trial court.

a) Questionnaires of Anti-death Penalty Prospective Jurors

Appellant did not stipulate to the excusals of seven of the anti-death penalty individuals excused for cause by the trial court. They were: Prospective Jurors Cheek (Patricia C.), Smith (Lowell S.), Bennett (Deborah B.), Turner (Tina T.), Valenzuela (Carolyne V.), Sympson

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[16]Nicolette Sands wrote her name on her questionnaire as "Nicolette Sands (Ellis)." (5 Supp. CT 1275.) Apparently the name on court records, however, was Ellis, and the trial court and counsel used both names. (6 RT 768, 770-771.) The name Ellis was used in appellant's opening brief, and appellant uses both names in the instant brief. Respondent refers to this juror as "Nicolette S." (RB 49.)

[17]The first names and initials in parentheses are the designations given to the prospective jurors in respondent's brief.

(Thomas S.), and Scalise (Ross S.). (See AOB 82-94.) His trial counsel, however, did agree or stipulate to the excusals of Juniel[18] (RT 773), Knight (RT 756), and Sands Ellis (RT 772). The trial court's decisions to excuse all of these prospective jurors, however, were made primarily on the basis of its own independent assessment of their questionnaires, and not because they were requested or agreed to by either party. (AOB 82-94 and record citations therein.)

In addition, as appellant has explained in his opening brief, these people's answers, recorded as they were on a questionnaire with poorly worded and biased questions, very likely did not reflect their true abilities to perform as competent jurors. (See appellant's summary of each of these juror's questionnaires compared to the trial court's reasons for excusing them, at AOB 82-94.) And the trial court's failure to apply the substantial impairment standard even-handedly, so that pro-death-penalty individuals were given the benefit of the doubt and anti-death penalty individuals were not, even assuming this was done unconsciously, constituted a biased procedure that resulted in the dismissal of anti-death-penalty people who were in fact able to perform the duties of a juror at appellant's trial. (See AOB 55.)

Appellant submits, based on the entire record of the questionnaire-based excusal process taken as a whole, that the erroneous exclusion of all–or at least seven–of these people who were opposed to the death penalty

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[18]Appellant's statement in his opening brief that his counsel had submitted the decision on Juniel to the court's discretion was an inadvertent error. Although initially trial counsel submitted the decision on Juniel to the court's discretion (RT 771), he later stipulated to Juniel's excusal (RT 773).

requires reversal per se under *Gray v. Mississippi, supra,* 481 U.S. at p. 660, 665.

b) The Trial Court's Findings of Substantial Impairment of These Death Penalty Opponents Were Erroneous Because They Were Not Supported by the Record

As appellant demonstrated in his opening brief, assuming, argueno, that questionnaire-based excusals were constitutionally permissible, the trial court's dismissals of each of ten anti-death penalty individuals were abuses of discretion because their questionnaires contained inconsistencies and ambiguities that required follow-up in voir dire. (AOB 82-94.)

Respondent's review of selected answers from the questionnaires of each of these jurors (RB 49-56) simply fails to counter appellant's point that each one contained other answers that were inconsistent and that these inconsistencies should have been cleared up on voir dire.

iii. Appellant's Challenge to the Dismissal of Pro-death Penalty Prospective Jurors Should Be Considered by this Court; Appellant Has Not Waived the Issue of the Trial Court's Failure to Conduct Oral Voir Dire of Pro-death Penalty Prospective Jurors; and the Trial Court Did Not Apply the Same Standard for Excusing Pro-death Penalty and Anti-death Penalty Venire Members

In his opening brief, appellant asserted that the trial court erred in excusing pro-death penalty Prospective Jurors Packler (Gary P.), Marsh (Heloise M.), Riegler (Marna R.), Herr (Richard H.), and Porter (Carol P.)[19]

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[19]As appellant has previously noted, in his opening brief Prospective Juror Ellis (aka: Sands Ellis, Nicolette S.) was erroneously identified as a pro-death penalty juror. In fact, she was opposed to the death penalty.

on the basis of their questionnaires because it was impossible to evaluate whether they were in fact substantially impaired by their views from the questionnaires alone without follow-up voir dire. (AOB 33, 59.) Appellant also contended in his opening brief that the use of a more lenient standard to evaluate the questionnaires of pro-death-penalty Prospective Jurors Griffith (Gwyneth G.), Rofkahr (Lillias R.), Valdez (Esther V.) and Poirier (Michael P.), as compared with the assessment of the questionnaire responses of anti-death-penalty people, led to the latter being eliminated from the jury pool while the former were personally questioned in voir dire, which violated the right to equal protection of not only appellant, but of the anti-death penalty individuals who were excused without voir dire. (AOB 95-96, 106.)

Respondent argues that appellant has waived his right to raise the issue of the trial court's exclusion of pro-death-penalty individuals and the issue of the use of a different standard for pro- and anti-death-penalty people. (RB 59-60.) Respondent also argues that the trial court used the same standard for both. (RT 60.)

Respondent misapprehends the nature of the issue appellant has raised with regard to the trial court's excusal of pro-death penalty jurors on the basis of their questionnaires alone. It is appellant's contention that it was the trial court's duty to conduct voir dire of all prospective jurors, that it was impossible to determine substantial impairment from written

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Further, respondent is correct that Carol Porter should be included in the list of pro-death penalty prospective jurors who were erroneously excused, as appellant initially indicated in section C.1. of Argument I his opening brief. (AOB 33.) The omission of her name from the list in section G.3. was inadvertent.

questionnaires alone, that all prospective jurors had the right to be voir dired and considered for jury service under the equal protection clause, and that the failure to voir dire pro-death penalty jurors was reversible error for all the same reasons that failure to voir dire anti-death penalty individuals requires reversal per se. (AOB 26-51, 95.)

Respondent has also misunderstood the point to appellant's contentions with regard to the pro-death penalty prospective jurors who were voir dired, which was not to protest the denial of challenges for cause. (See RB 60.) Appellant has no quarrel with the rule that an appellant may not raise such an issue on appeal where peremptory challenges were available and used to prevent unqualified people from sitting on the jury. The point to appellant's discussion of the questionnaires of Prospective Jurors Griffith (Gwyneth G.), Rofkahr (Lillias R.), Valdez (Esther V.), and Poirier (Michael P.) was to demonstrate the trial court's use of a <u>different standard</u> for the prospective jurors in favor of the death penalty, from the criteria it used to eliminate prospective jurors opposed to the death penalty. For example, appellant contrasted the trial court's view of the <u>unimportance</u> of Griffith's response of "always" on question 58 with its view of the <u>importance</u> of the answer of "never" in response to that question on the questionnaires of <u>anti</u>-death penalty individuals, and observed that Griffith had "at least as much of a 'consistent pattern' of answers on her questionnaire as the anti-death penalty [prospective] jurors the trial court excused." (AOB 98.) Similarly, appellant pointed to Rofkahr's choice of "always" in answer to question 58, and the fact that the district attorney defended her by highlighting certain questions she had answered appropriately, which the excused anti-death penalty people had <u>also</u> answered appropriately. (AOB 100.) With regard to Valdez, appellant

highlighted the fact that the trial court thought that, in spite of her extreme views she might be "rescuable"–a consideration she did not extend to any anti-death penalty people with comparable questionnaires. (AOB 100.) As an illustration, appellant pointed out that Valdez had indicated on Question 55 "she would always vote guilty and find a special circumstance true in order to proceed to the penalty phase in a capital case[,]" while the equivalent answer to the mirror of this question (Question 56) was repeatedly mentioned by the trial court when it found death penalty opponents substantially impaired. (AOB 101-102.)

As for Poirier, the trial court's disparate treatment of him was actually raised by trial defense counsel. (AOB 102-105.) This was the person who had written in answer to questions 57 and 58 that he would always vote for the death penalty for a murder with special circumstances, and would always impose death for each special circumstance listed in the questionnaire – yet whom the trial court found worthy of follow-up questioning "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." (AOB 104.) Obviously, no anti-death penalty individual was cut slack like that.

Thus, the point to appellant's discussion of the trial court's application of the so-called "substantial impairment" standard to these prospective jurors was to compare it to the application of supposedly the same standard to those who had expressed opposition to the death penalty. What the comparison reveals is that the trial court did not in fact use the same standard. In fact, the record of the trial court's different treatment of the two groups is striking, and the most likely explanation is that the trial

court–perhaps unconsciously--believed that people who were in favor of the death penalty should have the opportunity to explain their written answers, and to be educated with regard to relevant legal principles, while people opposed to capital punishment should be summarily dismissed. The former view was the correct one, but it should have applied equally to all venire members, regardless of their feelings about capital punishment. That was what the federal constitution and controlling United States Supreme Court opinions required.

C. CONCLUSION

The United States Supreme Court has observed 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." (*Wainwright v. Witt, supra*, 469 U.S. at p. 429.)

It is absolutely fundamental–and normally goes without saying–in the American judicial system that, when a credibility determination is necessary to the finding of a fact, the fact-finder must personally observe the person on whose statements the finding will rest. That is why appellate courts defer to trial court findings based on credibility. That is why witnesses are personally called into court. That is why hearsay testimony is inadmissible. And that is why citizens up for jury duty must personally appear in court to be questioned. It is hard to think of a more obvious and universal principle in our jurisprudence.

No exception should be made to this rule for selecting juries in capital cases. Aside from the potentially revolutionary precedential effect of such a ruling, such a departure would fly in the face of an entire body of

United States Supreme Court opinions concerning the critical importance of the impartiality of jurors in all criminal cases and explaining the standards and procedure, which has always included voir dire, for determining whether that impartiality exists in capital cases in particular.

The entire judgment should be reversed without regard to a showing of prejudice because the failure to voir dire prospective jurors for bias is a fundamental error that goes to the very heart of trial by an impartial jury. Alternatively, appellant submits that reversal is required because respondent cannot possibly meet the burden of establishing beyond a reasonable doubt that the elimination of anti-death-penalty and death-penalty-neutral prospective jurors had no effect on the outcome of either phase of appellant's trial. (*Chapman v. California, supra,* 386 U.S. at p. 26.)

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

Appellant established in his opening brief that the entire judgment must be reversed under *Batson v. Kentucky* (1986) 476 U.S. 79, *People v. Wheeler* (1978) 22 Cal.3d 258, and their progeny because the prosecutor's peremptory challenges of two reasonable, fair-minded African-American prospective jurors were racially motivated . (AOB 112-134; U.S. Const., Amends. VI and XIV; Cal. Const. art. I, § 16; see also *Powers v. Ohio* (1991) 499 U.S. 400.)

A. The Trial Court Correctly Found a Prima Facie Case of Racial Discrimination

Appellant demonstrated in his opening brief that the trial court was correct in finding a prima facie case of racial discrimination under the standards of *Batson* and *Wheeler*. (AOB 113-115.)

Respondent argues that the trial court's finding of a prima facie case is not supported by the record. At trial the prosecutor did not object to the finding of a prima facie case. On the contrary, he agreed to explain his reasons, saying, "I think the Court should rule on them. . . . It's up to the Court to decide whether or not my reasons are sufficient." (RT

1180-1181.) The issue of the correctness of the trial court's finding of a prima facie case is forfeited.

In any case, the record does support the trial court's conclusion that appellant had established a prima facie case of race-based challenges. "[A] defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170.) Appellant met this requirement by pointing out to the trial court that the prosecutor had used three of his first nine peremptory challenges against African-American venire members. (RT 1178-1179.) Considering the trial court's awareness that there were only five African-American people in the group of venire members from which the jury was being selected (RT 1084), the court reasonably decided to ask the prosecutor to explain his use of peremptory challenges.

Respondent contrasts the facts in appellant's case with those in *People v. Huggins* (2006) 38 Cal.4th 175, 227, to support the argument that the trial court erred in finding a prima facie case of discrimination. (RB 71-72.) In *Huggins*, this Court found substantial evidence to support the trial court's finding of a prima facie case where the prosecutor used eight of its first fifteen peremptory challenges against African-Americans (*id.*, at p. 228, fn. 13). But there is nothing in *Huggins* to suggest that it was setting any kind of minimum standard or percentage or any other arbitrary or abstract rule about what evidence can reasonably raise an inference of discrimination, nor is appellant aware of an opinion by a state or federal court that has done so. On the contrary, the law has long been that the trial court may look to "the totality of the relevant facts" (*Batson v. Kentucky,*

supra, 476 U.S. at p. 94) to infer racial discrimination in the prosecutor's use of peremptory challenges.

At appellant's trial the prosecutor had already excluded two African-Americans, one of whom was a correctional officer, from the venire members seated in the jury box, leaving two African-Americans among the eleven still in the box. (RT 1083, 1180.) When the prosecutor peremptorily excused another African-American, leaving just one African-American in the jury box, the trial court found a prima facie case in the totality of the circumstances, requiring the prosecutor to explain himself. (RT 1179.) There was substantial evidence to support that finding.

Moreover, "The Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. See 476 U.S., at 97-98, 90 L. Ed. 2d 69, 106 S. Ct. 1712. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. []" (*Johnson v. California, supra*, 545 U.S. p. 172, citation omitted.) Keeping in mind that "peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate[,]" (*Batson v. Kentucky, supra*, 479 U.S. at p. 80), the trial court's decision to obtain a direct answer from the prosecutor in appellant's case was entirely reasonable and justified on the facts before it.

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B. The Trial Court's Finding of No Purposeful Discrimination in the Prosecutor's Exercise of Peremptory Challenges Was Not Supported by the Evidence and the Trial Court Applied the Wrong Standard

Appellant demonstrated in his opening brief that the prosecutor's purported reasons for excusing two African-American individuals by peremptory challenge were both implausible and unsupported by the record, constituting a violation of the Sixth and Fourteenth Amendments of the federal constitution and of Article 1, Section 16 of the California Constitution. (AOB 112-134.)

Respondent agrees with appellant about the governing law–that is, that, having found a prima facie case of racial discrimination, the trial court was required to assess both the race-neutral character and the genuineness of the prosecutor's proffered reasons for excusing the African-American prospective jurors at issue here. (RB 72-73, AOB 129-130 and cases cited therein.)

In his opening brief appellant established that the trial court did not understand and failed to perform the second prong of the evaluation required under *Batson/Wheeler*, i.e. a serious evaluation of whether the prosecutor's stated reasons were the genuine ones. (AOB 130-133.)

The trial court mistakenly believed that the prosecutor merely had to give race-neutral, "non-ridiculous" reasons. (RT 1192.) Respondent necessarily concedes that "the court misstated the standard" but argues that it applied the right standard anyway. (RB 80.)

Appellant submits that the trial court's express statement of the wrong standard, and the fact that the prosecutor's reasons were both implausible and inaccurate, taken together, indicate that the trial court did

not apply the correct standard, especially in the absence of any clear language or reasoning indicating that it was doing so. The fact is that the trial court simply never indicated that it understood that its task was not to determine merely whether the prosecutor's reasons were race-neutral and "non-ridiculous" but also whether they were genuine. This point is critical to this Court's review of the record of the *Wheeler/Batson* hearing.

Basically, the trial court's reasoning was: (1) the prosecutor said his reason was X; (2) X is race-neutral; (3) therefore the prosecutor did not discriminate on the basis of race. The correct logical sequence is: (1) the prosecutor said his reason was X; (2) X is race-neutral; (3) X was in fact the real reason the prosecutor excused the person; (4) therefore the prosecutor did not discriminate on the basis of race. There is no indication on the record that the trial court ever took the third step in its evaluation process, and several indications that it did not.

Appellant has thoroughly explained why this Court should find that the trial court's acceptance of the prosecutor's challenges to Prospective Jurors Maiden and Anderson-Johnson[20] was unsupported by the record. In the additional briefing below, appellant limits discussion to those points raised by respondent on which further discussion may be helpful to the court.

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[20]Respondent refers to Prospective Juror Maiden as "Rodell M." And Prospective Juror Anderson-Johnson as "Doryanna A." As in Argument I, *supra*, in the instant brief, appellant refers to the prospective jurors in the instant argument by the names that appear in the record. (See Arg. I, fn. 5, *supra.)*

1. Prospective Juror Anderson-Johnson (Doryanna A.)

Respondent's defense of the prosecutor's challenge to Prospective Juror Anderson-Johnson mischaracterizes the record.

First, respondent faults appellant for pointing out that the prosecutor did not question Ms. Anderson-Johnson about her attitudes toward prisoners or whether she knew any of the witnesses in the case, although he later claimed that these concerns were the reasons that he had excused her. (RB 75; see AOB 125-128.) Respondent argues that the prosecutor said he had given her a negative rating based on her questionnaire before he knew her race, so he had already concluded based on her questionnaire that asking her about these matters would be pointless. (RB 75.) That is a distortion of the record. The prosecutor never said that he had given Anderson-Johnson a negative rating because of anything to do with her attitudes toward prisoners or the possibility she would recognize a witness. Instead, the prosecutor told the trial court at the Batson-Wheeler hearing that he had given Ms. Anderson-Johnson a "negative" rating because of what she had written on her questionnaire about why she did not drink alcohol. (RT 1184.) Respondent's suggestion that the prosecutor failed to question Anderson-Johnson about her attitudes toward prisoners because her questionnaire had made such questions pointless, should be rejected. And there is nothing in the record to indicate that the trial court gave any significance to the prosecutor's remarks about Anderson-Johnson's statements about alcohol.

Next, respondent argues that the prosecutor's concern about Anderson-Johnson possibly having affinity for prisoners or recognizing a witness was a legitimate reason for using a peremptory challenge against

her and cites *People v. Williams* (1997) 16 Cal.4th 153 to support the argument. But in *Williams*, where the prosecutor had been worried that the excused venire member might be sympathetic to members of the Bloods gang, the prospective juror had lived in the neighborhood of the Bloods, gone to school with them, and testified that "the whole school" would have run their enemy gang out if they had come to the school. (*Id.,* at p. 191.) In those circumstances, this Court found that the prosecutor's focus on the African-American person's place of residence was legitimate. (*Id.,* at p. 191.) There is an enormous difference between the facts in *Williams* and those in appellant's case, where the excused juror was a prison guard for the population the prosecutor claimed he thought she would have an affinity for, not a neighbor or schoolmate or the equivalent. *Williams* does not support respondent's argument that the fact that Ms. Anderson-Johnson participated in the incarceration, and therefore the punishment, of prisoners provided a reasonable basis for the prosecution to think that she had an affinity for prisoners – especially since, as appellant pointed out in the opening brief, the prosecutor's questions in voir dire focused on her bias in favor of the police, not the defendant. (AOB 125.)

Oddly, respondent next argues that appellant's discussion of Anderson-Johnson's apparent pro-law enforcement orientation was contradicted by the fact that she had "witnessed 'tremendous' assaults by prisoners." (RB 76; see AOB 125-127.) Actually, Anderson-Johnson never testified that she had "witnessed 'tremendous' assaults[.]". (RB 76.) Instead, she stated on her questionnaire that she had been a witness in proceedings against prisoners who had committed assault with deadly weapons. (Supp. CT-JQ 449.) This just means she testified, and the subject of her testimony was not necessarily an eyewitness account of the

assault; it could have been about prison policies or practices or innumerable other matters. And when defense trial counsel questioned her in voir dire about whether people she worked with had been murdered, Anderson-Johnson replied, "We've been victims currently at our institution, assaults on staff. . . . Tremendous assaults on staff." (7 RT 853.) She was not asked, and did not state, whether she herself had ever seen such an assault. In any case, it is a non-sequitur for respondent to argue that having been a witness against prisoners, or having friends who had been victims of attacks by prisoners could possibly have made the prospective juror pro-prisoner.

At the same time, respondent argues that the prosecutor might have thought that Anderson-Johnson's pro-law enforcement bias would operate to the prosecution's disadvantage because the prosecution's main witness, Anthony Mercurio, had tried to run down police officers in a car chase. (RB 76; see RT 1911-1912, 2020, 2488-2492, 2495-2499) This argument fails on two grounds. First, it is purely speculative. The prosecutor never claimed to have based his peremptory challenge of Anderson-Johnson on the belief that she was pro-law enforcement. In any case, this Court cannot retroactively inject such a completely unsupported reason into the record in order to uphold the trial court's ruling, since there is no indication whatsoever that the trial court thought this was a reason for the prosecutor's challenge, let alone a legitimate and genuine reason.

The argument also fails because respondent cannot have it both ways. If the prosecutor challenged Anderson-Johnson because he believed she had "affinity towards prisoners" (RB 75) then he did not challenge her because he believed she had "pro-law enforcement" feelings (RB 76). It is simply not reasonable to argue both that the prosecutor challenged

Anderson-Johnson because he thought she was pro-prisoner and that he challenged her because he thought she was pro-law enforcement.

Respondent argues further, without citation to the record, that Anderson-Johnson "acknowledged that she had special insight into the lives of prisoners sentenced to death or to life without possibility of parole." (RB 76.) The relevant passage is probably the following:

> "MR. GROSSMAN: Have you had – Do you feel that based on your experience you might have a special insight into – let's say life without possibility of parole, that it's kind of an easy sentence. [¶] Would you have any feelings like that?
>
> "PROSPECTIVE JUROR ANDERSON[-JOHNSON]: It is not an easy sentence, but I do have insight, because I've worked with the clientele."

(RT 860.) Respondent implies, by isolating this testimony, that somehow having "insight" into the nature of incarceration for life was the same as having "sympathy" or some basis for a pro-defendant bias. In context, however, this comment does not reasonably suggest that Ms. Anderson-Johnson "might feel a connection to [appellant]" in the sense of having any sort of pro-prisoner, let alone pro-defense, bias, as respondent implies (RB 76), especially when considered in the wider context of all the other information contained in her questionnaire and testimony, which appellant discussed in his opening brief. (See AOB 125-128.)

In fact, the prospective juror's simple remark about "insight" – which Anderson-Johnson ratcheted down from "special insight," the phrase used by counsel–is rather ambiguous, but most likely she was merely

stating the obvious, which was that since she had worked in corrections for many years, she had insights into prisoners. It would be virtually impossible for someone with her experience not to have developed some understanding of the prison population; in fact, such insight is probably necessary to surviving in that world. But "insight" is a neutral term, and does not by itself reveal anything about how any insights she had acquired had affected her view of criminal defendants, let alone her approach to being a juror in a capital case. Frankly, having insight into prisoners and criminals from daily exposure is more likely to lead to skepticism, a sense of difference, and awareness of constant danger, than to affinity. That is undoubtedly why trial counsel followed up and asked her whether her specific knowledge of prisoners "would cause [her] a problem in deliberating or deciding" the issue of penalty in appellant's case. (RT 861.) Anderson-Johnson's response, while inartful, could not have been more ideal in its clear meaning. She said, "No. I don't think it would cause a problem, because I would go based on the facts of with the trial that I would be going there." (RT 861.)

Appellant submits that respondent has not, and cannot, demonstrate on this record that the prosecutor's challenge of this African-American woman was other than racially motivated.

2. Prospective Juror Maiden (Rodell M.)

Respondent argues first that the trial court properly found that the prosecutor excused Prospective Juror Maiden because he thought that Maiden's neutrality with regard to the death penalty was insincere and that he was trying to conceal his actual bias. (RB 78.) But, even assuming, arguendo, that this was what the prosecutor intended to give as a reason for

challenging Mr. Maiden, the trial court rejected it, presumably based on its own determination of the prospective juror's credibility in that area. The court said, "With respect to Mr. Maiden, I had more of a problem. He did appear to be very neutral. He appeared at first blush to be [a] perfectly acceptable juror, and one would wonder in the face of things why anyone would excuse him other than the fact that he was Black." (8 RT 1188, underlining added.) The reason accepted by the trial court, then, was not Maiden's neutrality, and appellant has discussed in his opening brief why the prosecutor's remarks about that reason are, in any case, not supported by the record. (AOB 117-120.)

Respondent next attempts to defend the prosecutor's purported concern over Maiden's report, in answer to a specific question, that he had been falsely accused of missing a bed-check when he was in the Army. (RB 79, see AOB 120-122.) Respondent points to the trial court's observation that Maiden was "apparently still concerned" about that incident. (RB 80; 8 RT 1189.) Respondent argues that this observation by the trial court demonstrates both that the court believed that it was true Maiden was still concerned about the Army incident, and that the trial court impliedly found that this was the prosecutor's genuine reason for excusing him. (RB 80.) But that makes no sense on the record, and this is the point where the trial court's failure to understand its duty to assess the genuineness of the prosecutor's explanation is most evident. The relevant passage, in pertinent part, is the following:

> "But I think based on the answer to question 11, that [Maiden] was wrongfully accused in the army, again, it does not rise to the level of cause, but that is not the standard. The standard is

does he have a reason that an ordinarily competent prosecutor might use that is unrelated to race. And he is apparently still concerned about it 28 years later, it does seem to be a minor thing. And I think that that is of a sufficient reason."

(8 RT 1188-1189.) Of course, as appellant and respondent have agreed, this description of "the standard" by the trial court was wrong. But respondent argues that the prosecutor may have seen something during Maiden's voir dire testimony that made him think that Maiden was still upset by the bed-check incident. (RB 79.) This is more speculation and in any case was not the trial court's focus, which was Maiden's response to "question 11" on the questionnaire, not his testimony. (RT 1189.) Appellant urges this Court to review his opening brief discussion of this purported reason. (AOB 120-122.)

It is apparent from the entire record of Maiden's written and oral responses that the prosecutor did not articulate satisfactory reasons for excusing him, and that possibly because of a failure to understand the correct standard to be applied in evaluating those reasons, the trial court erred in accepting them.

Reversal of the entire judgment is required.

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

Appellant established in his opening brief that the search of two bags found in the trunk of appellant's mother's car was unlawful because at the time of the search the police did not have probable cause to believe they contained evidence connecting appellant to Gitmed's murder, that the bag and jacket introduced into evidence as a result of the search were inadmissible, and that this evidence was prejudicial, requiring reversal. (AOB 135 et seq.)

Respondent argues that the police had probable cause for the search, that they inevitably would have discovered the evidence, and that in any case the bag and jacket seized were not sufficiently prejudicial to warrant reversal. (RB 82.)

A. Police Did Not Have Probable Cause to Search the Two Bags Found in the Trunk of Appellant's Mother's Car

Respondent concedes that the trial court was mistaken when it said that the police had information from appellant's sister's roommate that he had some of Gitmed's property. (RB 87; see AOB 143.) Respondent argues nevertheless that "to the extent it was relevant[,]" the gist of the trial court's statement was correct, because police knew from Tony Mercurio that

appellant had "property" belonging to Ronald Gitmed. (RB 87; see 4 RT 493.)

Respondent reads too much into the record. At the suppression hearing the prosecution did not establish that Mercurio told the police that appellant possessed anything belonging to Gitmed.[21] Rather, Sergeant Fitzpatrick simply answered "yes" to the prosecutor's question on re-cross examination: "Sergeant Fitzpatrick, when you were interviewing Tony Mercurio, were you made aware that the defendant had in his possession personal property of the victim, aware he had obtained personal property of the victim?" (RT 493.) The lack of an obvious follow-up question– "how were you made aware?" or "who made you aware?–is a glaring omission that leaves an unbridgeable gap in the evidence produced by the prosecution at the suppression hearing.

The prosecution simply did not establish that Mercurio told the police anything about appellant It was the prosecution's burden to produce the evidence which justified the police's conduct, and it failed to do so.

Even assuming, arguendo, that this Court concludes that Fitzpatrick's terse answer was sufficient to establish that Mercurio had told her appellant had property belonging to Gitmed, respondent's argument should be rejected because neither Abney's nor Mercurio's information provided a reasonable basis for the police to believe that they would find anything in Churder's car to connect appellant to Gitmed's murder. (See AOB 141-144.)

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[21]Appellant erroneously stated in his opening brief that Fitzpatrick's testimony at the suppression hearing was that Mercurio had told the police that appellant had obtained Gitmed's property. (AOB 158.) Appellant now recognizes that Fitzpatrick did not so testify. This error was inadvertent and not intended to mislead the court.

Abney, of course, never told the police that appellant had anything of Gitmed's, so the police could not have relied on her information for probable cause to believe that anything at Churder's house would connect appellant to the murder.

Nor was the information the police obtained from Mercurio enough, since the prosecution produced no evidence at the suppression hearing that Mercurio had told the police that appellant had obtained Gitmed's property at any particular time or in any particular manner. As the trial court had observed earlier about Abney's evidence – even if Mercurio told the police that appellant had Gitmed's property, maybe Gitmed gave it to him. (See 4 RT 503.)

As appellant argued vigorously at the suppression hearing, the mere fact that appellant was a suspect in Gitmed's murder did not create probable cause for the police to search everything appellant owned. (4 RT 496-497; see AOB 141-142.)

The trial court reasoned as follows: (1) the fact that the police knew that Gitmed had been murdered and that Abney said appellant had moved the victim's property from her house to his mother's was not enough to establish probable cause because there was no connection between the property and the murder (4 RT 503-504), but (2) once the police had been told by Mercurio that appellant had shot Gitmed, then there was a sufficient nexus between the murder and the property to establish probable cause. (4 RT 505.) But, as appellant has shown, in addition to the fact that Abney never said anything about appellant having Gitmed's property, there was not substantial evidence that Mercurio had ever said this either.

This means that the prosecution failed to establish that any witness had told the police that appellant had any of Gitmed's property. The trial court's reasoning therefore collapses, and so does respondent's argument.

Respondent also concedes that the trial court erred in its statement that the search of Bag B was justified by the police having found something belonging to Gitmed in Bag A, since nothing was found in Bag A (RB 88), but argues that the trial court correctly found the search of Bag B justified because of Keathley's initial identification of Bag A as Gitmed's, though nothing was found inside it. (RB 88; see 4 RT 481.) The problem with this argument is that, as appellant pointed out in his opening brief, Keathley was acting as an agent of the police when she came to Churder's house, and was therefore prohibited under the Fourth Amendment from inspecting either the bags or their contents. (See AOB 144 and cases cited therein.) The police's reliance on Keathley's information was unconstitutional and required the suppression of the evidence it led to. (See AOB 144 and cases cited therein.)

Respondent does not even consider the restrictions the Fourth Amendment places on the conduct of a private citizen acting solely at the instigation of the police to obtain incriminating evidence, effectively conceding appellant's explication of the applicable law.

Respondent argues that the evidence of Gitmed's ownership of Bag A and the jacket found in Bag B would inevitably have been discovered if the police had waited until Michelle Keathley arrived before they opened the bags. (RB 91-92.) This argument begs the question of Keathley's role as an agent of the police, since she was summoned to the Churder residence by the police for the express purpose of finding evidence that would incriminate appellant. (AOB 144.) It is like saying that it was permissible for Officer A

to illegally seize the evidence because it was inevitable that Officer B was going to come along and illegally seize it anyway. The inevitable discovery doctrine is inapplicable here because, under the reasoning and authority set out in appellant's opening brief, Keathley could not lawfully inspect the bags to determine their ownership any more than the police could.

A warrant was required before the police could inspect Bag A, Bag B, or the contents of either, regardless of whether either bag was opened before or after Keathley arrived to inspect any of these items as the agent of the police. The evidence should not have been admitted at appellant's trial.

B. The Evidence Was Prejudicial and Reversal is Required

Appellant described the prejudicial effect of the evidence concerning the bag and the jacket at appellant's trial, which respondent cannot possibly demonstrate had no effect on the jury's verdict. (See AOB 145-146 [citing Argument IV at pp. 156-157, 183-184].)

Respondent misstates the standard for reversal, claiming that erroneously admitted evidence does not require reversal unless it contributed to the conviction. (RB 95.)

The correct standard is that evidence obtained in violation of the Fourth Amendment and erroneously admitted at trial requires reversal unless the prosecution can demonstrate on appeal that the evidence did not contribute to the conviction. As "'the beneficiary of a constitutional error,'" the prosecution must "'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, the "'question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction . . . An error in admitting plainly relevant

evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless.'" (*Id.*, at pp. 23-24, underlining added; see *Yates v. Evatt* (1991) 500 U.S. 391, 403.) Thus, *Chapman* sets an extremely high standard for reversal, much stricter than the test in *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Cahill* (1993) 5 Cal.4th 478, 510 ["'the *Watson* standard is less demanding than the harmless-beyond-a-reasonable-doubt standard mandated by the applicable federal constitutional authorities'"]; *People v. Napoles* (2002) 104 Cal.App.4th 108 [*Chapman* test is more stringent than *Watson* test].)

Respondent basically argues that because there was "substantial additional evidence" (RB 97) to show appellant's connection to other property of Gitmed, the evidence of the bag and jacket was cumulative and did not contribute to the verdict. (See RB 95-97.) Appellant does not concede the existence or strength of any other evidence sufficient to sustain the guilt verdict, but assuming, arguendo, that this Court accepts respondent's assertion of such evidence, submits that the *Chapman* test cannot be met merely because the remainder of the case against appellant was "'reasonably strong.'" (*Chapman v. California, supra*, 386 U.S. at p. 25.) When evidence has been admitted in violation of the federal constitution, this Court's role is not to act as a second jury to decide whether, based on all the other evidence, appellant was probably guilty. (*Neder v. United States* (1999) 527 U.S. 1, 19.) As this Court has repeatedly observed, "'a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.' [Citation.]" (*People v. Arcega* (1982) 32 Cal.3d 504, 524, underlining added.)

Further, review of federal constitutional error requires this Court to consider the effect of the error on the guilty verdict in appellant's actual case, not on an abstract notion of a reasonable verdict. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, italics in original.) Put another way: unless respondent can now show that the illegally obtained evidence was not a factor eroding the jury's presumption that appellant was innocent, the error is prejudicial. (*Chapman v. California, supra,* 386 U.S. at p. 26.) Respondent cannot possibly make that showing here, where the Eighth and Fourteenth Amendments require the highest level of scrutiny of the soundness of the guilt verdict in appellant's capital case. (*Beck v. Alabama* (1980) 447 U.S. 625; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gregg v. Georgia* (1976) 428 U.S. 153, 187; *In re Winship* (1970) 397 U.S. 358, 364.)

Appellant will not repeat here his explanation of how the prosecution used the evidence of the bag and the jacket at appellant's trial, but refers this Court to the relevant portion of his opening brief. (AOB 145-146, 156-157, 183-184.) Suffice to say that the prosecutor repeatedly identified this evidence as proving that appellant had robbed Gitmed and was involved in his murder; he even identified it as appellant's "motive." (See, e.g., RT 2938.)

By any rational review of the trial record, the prosecutor's argument, and respondent's argument, it is inescapable that the evidence that Gitmed's bag and jacket were found in Churder's car, and that they had suspiciously

been moved around by appellant's family members while he was in jail, possibly contributed to the jury's perception that there was no reasonable doubt of appellant's guilt. Certainly respondent has not established, and cannot establish beyond a reasonable doubt that this evidence did not even contribute to the verdict, as would be required to avoid reversal under *Chapman*. Appellant's conviction of guilt and the entire judgment must be reversed.

IV.

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

Appellant established in Argument IV of his opening brief that there was insufficient evidence presented at trial to sustain his conviction of first degree robbery-murder as the direct perpetrator or as the aider and abetter of Anthony Mercurio under section 187; that the trial court gave erroneous instructions on aiding and abetting; that defense counsel were ineffective for failing to keep out evidence pertaining to a wallet found in appellant's bedroom; and that the prosecutor misstated the law and the evidence in argument to the jury. (AOB 147-198.) Appellant also established in Argument VI of his opening brief that there was insufficient evidence to support the separate finding of special circumstance robbery-murder under section 190.2, and that the trial court's erroneous instructions and the prosecutor's misleading argument lightened the prosecution's burden of proof and led the jury to return an invalid finding of the robbery-murder special circumstance. (AOB 227-256.)

Respondent has conflated the response to these two arguments. (RB 155.) Appellant urges this Court to fully consider Arguments IV and VI separately, as they were presented in his opening brief. For the convenience of the Court, however, appellant deals with respondent's arguments on both issues under the instant heading and argument number, as respondent has done.

Appellant and respondent agree that there was overwhelming evidence that Gitmed was murdered by gunshot. It is also beyond dispute that Gitmed was killed by the shots from one gun, that the prosecution's case was that only Mercurio and appellant were present when Gitmed was shot, and that they were the only candidates for the role of shooter. It follows that any juror who was not convinced that appellant was the shooter may have concluded that Mercurio was the actual killer, particularly given the fact, among others, that he was the one who drove the truck to a remote location that only he knew about. (15 RT 1888.)

Respondent claims that "overwhelming evidence established that either Thompson or Mercurio shot Gitmed, and that the killer acted intentionally and with premeditation and deliberation or while committing a robbery, and that the robbery was not merely incidental to the murder." (RB 98.) Respondent argues that the guilt verdict and the special circumstance finding were supported by substantial evidence (RB 98-124), that the trial court's instructions were correct (RB 124-126), that appellant's defense attorneys were not ineffective (RB 127-129), that appellant has waived the claim of prosecutorial misconduct (RB 129-130) and that the prosecutor correctly stated the law and the evidence to the jury or if not, the misconduct was harmless (RB 130-141).

At trial, the prosecution relied primarily on the eyewitness testimony of Anthony Mercurio to convince the jury that appellant was the one who shot Gitmed. There was no other substantial evidence of the identity of the shooter, and the jury's specific finding that appellant did not personally use a gun meant that the jurors were not unanimously convinced beyond a reasonable doubt that appellant was the shooter or used a gun at all. It may

be that some jurors did believe that appellant was the direct perpetrator, and others thought he was an aider and abettor, but if so, these conclusions–particularly the latter–were attributable to misunderstanding the law to be applied as the result of the trial court's erroneous instructions and the prosecutor's misleading argument. This was far from a case with overwhelming evidence of the defendant's guilt of the first-degree murder of Gitmed, particularly on the theory that he actually assisted Mercurio to accomplish the robbery or the killing. (See AOB 170-172 and cases cited therein.) And there was no credible evidence that, while assisting Mercurio, he himself harbored the specific intent to kill Gitmed or acted with reckless indifference to life. (*Ibid.*)

For the reasons explained in appellant's opening brief and below, respondent's claims are incorrect and should be rejected.

A. There Was Not Substantial Evidence to Support Appellant's First Degree Murder Conviction and the Robbery-murder Special Circumstance as the Direct Perpetrator or as an Accomplice

Appellant has no quarrel with the "either/or" doctrine available in California law, which "allows a jury to convict a defendant for murder without unanimous agreement as to whether he was guilty as an aider and abettor or as a direct perpetrator." (*Santamaria v. Horsley* (9th Cir. 1998) 138 F.3d 1280, 1280; see *Schad v. Arizona* (1991) 501 U.S. 624, 627-645.) Essentially, under the either/or doctrine, if the prosecution presents evidence to support two or more different theories of guilt of the charged offense, the jurors do not have to agree on one theory in order to convict. But the doctrine does not alter the bedrock principle that any theory on which the defendant is convicted must be supported by substantial evidence.

Appellant did not argue in his opening brief that the jury as a whole necessarily convicted him on the theory that he was an aider and abetter. It does not matter which theory the jury convicted him under and it was permissible to convict him under both theories, so long as each theory wass were supported by substantial evidence. But if one theory was unsupported and it cannot be determined that the jury relied on the other theory, which was supported, then reversal is required under the Sixth and Fourteenth Amendments of the federal constitution and Article I, section 24 of the state constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 316-317; see AOB 150-151 and cases cited therein.)

Respondent takes issue with appellant's statements that the non-gun-use finding necessarily means that any jurors were convinced beyond a reasonable doubt that appellant was Mercurio's accomplice rather than the direct perpetrator. Appellant concedes that the non-gun-use finding indicates only that the jury was not unanimously convinced that appellant was the shooter, but submits that this leaves open the possibility that one or more jurors did find that appellant was an accomplice. And by the same token, the gun use finding precludes a finding on appeal that no juror convicted appellant of aiding and abetting the robbery-murder. The gravamen of the issue is the very real possibility that one or more jurors convicted appellant as an aider and abetter on insufficient evidence.

The United States Supreme Court has explained that "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts

based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested." (*Zant v. Stephens* (1983) 462 U.S. 862, 881, underlining added; *Yates v. United States* (1957) 354 U.S. 298, 312, overruled on other grounds in *Burks v. United States* (1978) 437 U.S. 1; *Stromberg* v. *California* (1931) 283 U.S. 359, 368; *Keating* v. *Hood* (9th Cir. 1999) 191 F.3d 1053, 1062, overruled on other grounds in *Payton v. Woodford* (9th Cr. 2003) 346 F.3d 1204.) Moreover, under this principle, where the jury is given "two theories of guilt, one of which is untenable, and we cannot discern upon which theory the jury convicted, structural error has occurred." (*Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034, 1036.) Nothing in *Schad v. Arizona, supra,* 501 U.S. 624, or any other case cited by respondent, contradicts this rule.

Schad focused on an Arizona statute which permitted conviction of murder where evidence was presented at trial to establish the defendant's culpability under two different theories.[22] The high court upheld the statute, ruling that Due Process did not require that the jury agree unanimously on one theory. (*Id.*, at pp. 673-645.) Nothing in *Schad* suggests, however, that the jurors relying on a particular theory may constitutionally convict the defendant in the absence of sufficient evidence to prove all the elements of the offense under that theory.

The principle appellant is relying on is very simple: the jury may convict on alternative theories so long as each theory is supported by

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[22]The victim in *Schad* had been found near a highway, strangled with a rope, and the defendant had taken and used his Cadillac and credit cards for several weeks. Premeditated murder and robbery-murder were submitted to the jury as alternative theories. (*Schad v. Arizona, supra,* 501 U.S. at p. 628.)

substantial evidence. (*Ibid.*; *Jackson v. Virginia, supra*, 443 U.S. at pp. 316-319.)

1. There Was Insufficient Evidence to Establish That Appellant Was the Direct Perpetrator of a Premeditated Murder[23]

Appellant has demonstrated in his opening brief that even if the jury believed Mercurio's account of the shooting, there was insufficient evidence of deliberation to convict appellant under a premeditated, deliberate murder theory, and cited several cases illustrating the kinds of evidence that must be present to establish the element of deliberation. (AOB 152-154 and cases cited therein.)

Respondent first focuses on evidence that appellant asked Gitmed to give him a ride to Temecula[24] to collect $6000, as he had earlier requested of Eric Arias. (RB 102; 13 RT 1603-1606; 1618.) Respondent argues that the jury could reasonably have concluded that, since appellant and Gitmed went to Mercurio's instead of to Temecula, appellant intended to kill Gitmed at the point they left Keathley's house. (RB 102.) This argument makes no sense because there was no evidence before the jury that appellant had asked Gitmed to take him to Temecula that evening, so there was no basis for the jury to find anything suspicious in the fact that they

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[23]Appellant does not concede, by addressing respondent's contentions in the context of this argument, that the evidence established that the night he and Gitmed left Keathley's to go to Mercurio's was the same night that Gitmed was murdered. (See AOB 215-221.)

[24]According to the internet service Mapquest, it is approximately 41 miles from Riverside City Hall to Temecula City Hall. (www.mapquest.com/directions [3900 Main St., Riverside, to 43200 Business Park Dr., Temecula].)

went someplace else. Neither Arias nor Keathley[25] testified that there was any urgency in appellant's request for a ride, or any particular time frame for making the trip. The jury could not reasonably have found that appellant and Gitmed taking off for a social evening of taking drugs with appellant's friends had anything at all to do with idea of going to Temecula at some undefined time; there was no logical link between the two, and no testimony connected them. The evidence that appellant offered Gitmed money for a ride to Temecula sometime and the evidence that the two men left Keathley's that evening to go to Mercurio's were simply not connected to each other and certainly not in conflict, and the jury could not rationally have found their trip to Mercurio's suspicious, let alone inferred from it that appellant was planning any kind of harm to Gitmed.

Respondent makes the unsupportable assertion, with no citation to the record, that there was no discussion of the trip to Temecula after appellant and Gitmed arrived at Mercurio's house. (RB 102.) This Court should reject respondent's attempt to create a record in the absence of any testimony about this. The point is of dubious relevance to the instant issue, but in any case the record is simply silent as to whether there was such conversation and does not support an affirmative conclusion either way.

Nor was the evidence that Mercurio drove appellant and Gitmed to a remote location (RB 102-103) a basis for the jury to conclude that appellant was planning a murder. As appellant pointed out in his opening brief (AOB

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[25]Erickson Arias testified that sometime earlier in the month of August, appellant had asked for a ride to Temecula, which Arias eventually refused to provide. (13 RT 1603-1604.) Michelle Keathley testified that she heard appellant and Gitmed talking about appellant getting a ride to Temecula from Gitmed. (13 RT 1616-1617.)

365), although Mercurio testified that he was familiar with that area of the desert (RT 1888) he did not say, nor was there any other evidence to suggest, that appellant knew those back roads at all. The jury could not reasonably have held appellant responsible for the fact that Mercurio drove the truck out to Canyon Lake. There was simply no evidence that appellant had any idea of where Mercurio was going to drive the truck, let alone that he chose, or participated in the choice, of the remote place where Mercurio stopped. Respondent's suggestion that the jury could rationally have concluded that appellant not only chose the location but had a nefarious purpose in doing so (RB 103) is completely unsupported by the record evidence and should be rejected. The jury may make all reasonable inferences raised by the evidence presented, but "[a] speculative possibility does not constitute substantial evidence to support a verdict or finding." (*People v. Coddington* (2000) 23 Cal.4th 529, 599, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

Implicitly recognizing that the story Mercurio told about the shooting was self-serving and unconvincing, respondent has attempted to state a motive for the killing, arguing that the jury could have believed that appellant wanted to kill Gitmed in order to use his car to go to Temecula. (RB 104.) The record evidence does not support this idea, and the jury could not reasonably have come to this conclusion.

First, respondent's statement that appellant was unable to get a ride to Temecula misstates the record. (RB 104.) While Eric Arias testified that he refused to take appellant to Temecula, the jury could not have rationally concluded from that evidence that appellant was unable to get a ride from anybody, particularly since there was no evidence before the jury that he had

to make the trip at any particular time or that he asked anyone besides Arias and Gitmed. Also, respondent's argument that the jury could have thought that appellant killed Gitmed to avoid paying Gitmed $1000 for the ride ignores the fact that appellant was offering people that amount; it is not as though Gitmed had conditioned giving him a ride on a payment of that amount. (RT 1618.) And most importantly, there was no evidence that appellant drove Gitmed's car to Temecula after he had been murdered nor that he attempted to do so; rather, the car was taken into the desert and burned. On this state of the evidence, no rational juror could have thought that appellant killed Gitmed to get his car so he could drive to Temecula (RB 104.) As appellant pointed out in his opening brief, Mercurio and Dalton both testified that the two of them and appellant actually burned the car. (AOB 361; 15 RT 1905, 2044.)

Thus, neither the remote location evidence, nor the ride-to-Temecula evidence, nor these pieces of evidence taken together, could have been the basis for a reasonable conclusion that appellant was planning to murder Gitmed.

Respondent also argues that the manner of killing could have supported a conclusion that appellant premeditated the killing, because the jury could have believed that appellant lulled Gitmed into a false sense of security and suddenly shot him without provocation. (RB 103-104.) That is not, however, a rational conclusion, because it is inconsistent with the evidence, which was that appellant and Gitmed were arguing face-to-face at increasing volume when suddenly the gun was fired. (15 RT 1893.) This scenario does not support a finding of deliberation. (See AOB 152-154 and cases cited therein.) In any case, there is nothing in the record that could

conceivably be a reason for a juror to reject the coroner's testimony about the physical evidence which conflicted with Mercurio's description of the shooting (12 RT 1543). As appellant has discussed in his opening brief and in Argument V, *post*, that testimony concerned the angle of the bullet wounds and the fact Gitmed's boy was found in the lake. (AOB 203-205.) A conclusion that appellant killed Gitmed in a way that was impossible would have been unreasonable per se.

Viewing all, and only, the relevant evidence actually in the record, this Court must conclude that there was insufficient evidence to support a rational conclusion beyond a reasonable doubt that appellant, if he was the shooter, deliberated before shooting.

2. There Was Insufficient Evidence to Support Appellant's Conviction, and the True Finding on the Robbery-murder Special Circumstance, on the Theory That He Was the Direct Perpetrator of a Felony-murder

Appellant has pointed out in his opening brief, that, assuming arguendo that this Court concludes there was sufficient evidence to convict him as the direct perpetrator of Gitmed's murder–i.e., the shooter, his conviction must nevertheless be reversed because it is impossible to determine from the jury's verdict that no juror convicted him as an aider and abetter. The finding of no personal gun use leaves open that possibility.

Appellant submits that he does not have the burden of establishing that any jurors necessarily did convict him as an aider and abetter, but that unless it is evident from the record that not one juror did so, there must be substantial evidence in the record of every element of aiding and abetting murder to support a conviction based on that theory. As appellant explained

in his opening brief, the prosecution failed to present solid, credible evidence of the elements of aiding and abetting a robbery felony-murder. (AOB 167 et seq.) Appellant therefore stands convicted of an offense the prosecution did not prove beyond a reasonable doubt to all the jurors, in violation of his right to due process under the state and federal constitutions. (See AOB 150-151 and authority cited therein.)

First, there was no solid, credible evidence that Gitmed had any property in his possession that was taken at the time he was killed to support a conclusion that he was killed to enable the killer to take that property. (AOB 154-155, and see cases cited therein setting out the elements of robbery-murder.)

Respondent argues that the jury could have found from circumstantial evidence that Gitmed was in possession of property taken from him when he was murdered.

When the evidence on a particular issue is circumstantial, the court must scrutinize that evidence even more closely to determine whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.) In this regard, "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence, it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755; see *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Johnson* (1980) 26 Cal.3d 557, 578 [substantial evidence must be "reasonable, credible, and of solid value"], and *People v. Kunkin, supra*, 9 Cal.3d 245, 250.) Thus, inferences may constitute substantial evidence, but they must be the product of logic and

reason. Speculation or conjecture alone is not substantial evidence. (*People v. Marshall* (1999) 15 Cal.4th 1, 35; *People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543.)

Here, respondent contends that Gitmed "may" have been in possession of clothing, car keys, a wallet, and drugs, and that the evidence established that appellant took his clothing. (RB 107.) The first contention is legally insufficient and the second is unsupported by the record. Respondent's argument should be rejected.

Respondent argues that the jury could have found that appellant took a wallet from Gitmed because (a) Mercurio told the grand jury that Gitmed gave items to Thompson that "may have included a wallet or some change[;]" (b) Thompson had an empty wallet among his possessions at his mother's house, and (c) Gitmed's wallet was not found. (RB 108.) This argument is flawed on all three counts.

First, the jury could not reasonably have found beyond a reasonable doubt that appellant took any of these items from Gitmed based on mere speculation that Gitmed might have had them. Second, the empty wallet found at appellant's mother's house was not identified as Gitmed's, or even as possibly belonging to Gitmed. Finally, witnesses close to Gitmed included his mother, his brother, and his cousin, yet none of them testified that Gitmed always or habitually carried a wallet, let alone that the wallet admitted in evidence looked like his.[26] Not everyone carries a wallet and

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[26]Respondent's argument that this stray wallet was incriminating evidence supports appellant's contention that it should never have been admitted. See AOB 173 and section C of the instant argument, *post.*

since there is no reason, based on trial evidence, to believe that Gitmed was carrying one the night he was with Mercurio and appellant, the fact that none belonging to him was found was of no evidentiary value.

And respondent's argument about Gitmed's car keys is also pure speculation and unsupported by the trial evidence. (RB 107-108.) Respondent argues that appellant "knew" that Gitmed was "likely" to have car keys in his pocket, so he must have taken them, since Mercurio testified that Gitmed had given some small items to appellant, and the next day he was driving Gitmed's car. (RB 107-108.) Facts may be established by circumstantial evidence but not by guesswork, and the prosecution has the burden at trial of presenting actual evidence of the relevant circumstances that give rise to the inference of the facts the prosecution hopes to prove. (See, e.g., *People v. Hamilton* (1985) 41 Cal.3d 408, 427.)

Respondent's argument here should be rejected because there was no evidence that Gitmed had any keys with him or any basis for discerning what appellant may have thought, let alone known, about the location of the keys.

Here, if the prosecution had presented evidence (a) that Gitmed had taken his car keys with him to the scene of the murder or even (b) that appellant was in possession of the keys after the murder and before he was seen driving Gitmed's car, the jury could have made the inference that respondent now argues for. For example, if the prosecution had presented evidence that Gitmed always put his keys in his pocket after he drove his car and that he was likely to do so even if he was high on drugs, then the jury could reasonably have surmised that appellant driving the car the day after the murder meant that he had taken the keys from Gitmed. This would have been evidence similar to that in cases appellant cited in his opening brief

where appellate courts have found substantial evidence that a victim was in possession of property taken during a robbery. (AOB 161 and cases cited therein.) But the prosecution did not present such evidence at appellant's trial. And in the absence of any evidence of what Gitmed did with his car keys after arriving at Mercurio's, there was no basis for the jury to conclude anything about what appellant might have been aware of, let alone to believe specifically and beyond a reasonable doubt that appellant "knew" that Gitmed had car keys on him. Maybe he left them in the car, maybe he dropped them on the kitchen table, maybe he handed them to somebody to get something from the car; the possibilities are endless, and there is no evidence of any of them, just as there is no evidence that he had the keys in his pocket. And if Gitmed left his keys in his car or elsewhere, then the fact that appellant was driving Gitmed's car the next day is irrelevant to proving what happened when Gitmed was killed. That scenario is as speculative as respondent's, of course, and the evidence fails to support either.

Moreover, respondent's claim that the evidence showed that appellant "took Gitmed's clothing" is incorrect. (RB 107.) Mercurio did testify that appellant told Gitmed to remove his clothing, and that Gitmed took off his shirt or jacket. (15 RT 1894; 1955-1957.) Mercurio did not testify that appellant told Gitmed to give the clothing to him, nor that appellant took the clothing that Gitmed took off. Respondent does not cite to anything in the record that established what happened to whatever clothing Gitmed removed, and there was no such evidence. So respondent's claim that the evidence "clearly established" (RB 107) anything about that is inaccurate.[27]

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[27] No evidence linked the jacket found approximately a month after the murder in the trunk of Jean Churder's with the one that Mercurio said Gitmed might have been wearing the night of the murder. The prosecution

Respondent takes issue with appellant's reliance on *People v. Morris, supra,* 46 Cal.3d 1 (overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5]), where there was no evidence the victim had personal property in his possession when he was killed, and the defendant could have obtained the victim's property later found in his possession by legal means. (*Id.*, at p. 20; AOB 159; RB 109.) Appellant submits that his case is analogous to the facts in *Morris*, as explained in his opening brief.

Further, respondent compares the state of the evidence at appellant's trial generally, with the facts in *People v. Marks* (2003) 31 Cal.4th 197 (RB 107), one of the cases cited in appellant's opening brief to demonstrate the kind of affirmative evidence from which it is reasonable to infer that a victim was in possession of property which was taken by his murderer at the time he was killed. (AOB 161.) As respondent and appellant have both pointed out, in *Marks* the victim was a taxi driver and it was known that he normally carried $1 bills, but no bills were found on his body, and the defendant had several $1 bills in his possession when he was arrested, which was particularly significant because there was also evidence that the defendant did not have any money on him just before the murder. (*Id.*, at p. 230; see AOB 161.) At appellant's trial, in clear contrast to the facts in *Marks*, there was only speculative and uncertain evidence that Gitmed had cash or keys or a wallet in his pockets at the time he was killed, and

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presented no testimony by Mercurio or any other evidence that would have supported such a conclusion. Again, according to the prosecution's case, both Mercurio and Keathley saw Gitmed the night he was killed, and although Keathley identified the jacket found a month later as Gitmed's, neither she nor Mercurio was asked whether Gitmed was wearing that jacket that night.

respondent's speculation that he may have had such items cannot fill the evidentiary gap.

Appellant submits that respondent's strained and unsupportable arguments reflect the lack of evidence in the prosecution's case and the jury could not reasonably have concluded that Gitmed had any personal property that appellant took when he was killed.

3. There Was Insufficient Evidence To Support Appellant's Conviction on the Theory That He Aided and Abetted Mercurio in the Commission of a Premeditated Murder or a Felony Murder, or that He Did So With the Intent to Kill or as a Major Participant with Reckless Indifference to Life

Appellant demonstrated in his opening brief that, even assuming arguendo that a juror who believed that appellant was the shooter could have concluded that he committed robbery-murder, there was not sufficient evidence to support his conviction as an aider and abetter. This is of critical importance in the instant appeal because the jury's finding that appellant did not shoot Gitmed opens the possibility that some or all of them convicted appellant as an aider and abetter. Simply put, if some jurors believed that Mercurio was the shooter, they had no evidence from which they could determine what appellant's role in the crime was after he, Gitmed and appellant left the Triplett compound. (AOB 167-172.)

Appellant also established in Argument VI of his opening brief that there was insufficient evidence of the special circumstance of felony-murder on the theory that appellant was an accomplice because no rational juror could reasonably have found that, in assisting Mercurio to commit murder or robbery, appellant himself harbored the specific intent to kill Gitmed, or that he was acting with reckless indifference to human life. (AOB 231-235.)

Respondent states that appellant's position that there was insufficient evidence to sustain the theory that he was an aider and abettor assumes that one or more jurors affirmatively concluded that Mercurio was the shooter. (RB 114.) To the extent that appellant has framed the issue in that way, it is a misstatement of appellant's position.[28] The primary import of appellant's discussion of the implications of the jury's finding that appellant did not personally use a gun is that one or more jurors may have found that Mercurio was the shooter, and respondent has not and cannot point to any indication in the record that they did not so find.

Respondent argues that the no-personal-gun-use finding does not affirmatively establish that the jury as a whole or any part of the jury, believed that Mercurio was the shooter; rather, it indicates only that the jury believed appellant was either the direct perpetrator or an accomplice. (RB 115.) Respondent is, to some extent, unnecessarily mincing words. If the the only evidence presented at trial about how Gitmed died was that he was shot, and the only possible perpetrators the jury could have been considering were appellant and Mercurio, and the jury may have concluded that appellant

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[28]The heading for subsection D in Arugument IV in appellant's opening brief should read "The Jury's Split Verdict Establishes that Some Jurors May Have Actually Convicted Appellant as an Accomplice." (AOB 164.) Subsequent references to the notion that one or more jurors definitely did convict appellant as an accomplice or aider and abetter are misstatements, but can be read as assertions that the jurors may have done so. Since respondent cannot demonstrate that no jurors did so, the legal issue remains the same. Appellant apologizes for the inconsistencies in his descriptions of the significance of the jury's failure to agree that appellant was the shooter, which of course was the result of appellate counsel's inadvertence and not the fault of appellant himself.

was or may have been an accomplice, then it is fair to say that the jury–or some jurors–may have believed that Mercurio was the shooter.

In any case, as appellant has recognized in his opening brief, and as respondent agrees, the no-personal-gun-use finding clearly indicates that the jury was not unanimously convinced beyond a reasonable doubt that appellant was the shooter. (AOB 164-165.) Appellant does not need to show that the jury was unanimously convinced he was not the shooter, nor that it was unanimously convinced that Mercurio was the shooter, but the no-gun-use finding, in the context of the evidence presented at appellant's trial, indicates a reasonable probability that one or more jurors did not believe Mercurio's story, believed he was the shooter, believed that appellant was somehow involved, and believed thanks to the court's instructions and the prosecutor's argument, that appellant was an accomplice. On appeal, unless respondent can establish that the guilt verdict and special circumstance finding were not affected by such an unsupportable finding, they must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Respondent mistakenly relies on the decisions of this Court and other state courts which have held that a jury may convict a defendant of murder when evidence of alternative and conflicting theories of the defendant's role have been presented at trial and the jurors do not unanimously agree about what role the defendant played. (RB 120.) As long as each juror is convinced beyond a reasonable doubt that appellant is guilty of murder under one theory or the other, the jury may properly return a verdict of guilty. Appellant refers to this body of law as the "either/or doctrine."

Respondent's reliance on these cases is misplaced, however, because the courts that have developed the either/or doctrine have been concerned

with jury unanimity as to theory. In the leading opinion of *Schad v. Arizona, supra,* 501 U.S. 624, the high court held that a state statute defining the single offense of murder by two theories that would depend on different and conflicting sets of facts, does not violate the Due Process clause of the federal constitution. But nothing in *Schad* or the cases cited by repondent suggests that a jury may convict a defendant on a theory that lacks sufficient evidentiary support as required under the federal and state constitutions. The point to the doctrine is that the prosecutor does not have the burden of convincing all the jurors of which of two possible sets of facts is true. But it does still have the burden of convincing jurors beyond a reasonable doubt of the relevant set of facts to support the legal theory the jurors actually rely on. The law on split verdicts is not in conflict with the principle that a defendant may be convicted only on the basis of substantial evidence, whatever legal theory and state of facts the jury believes; the two doctrines can and do co-exist.

Since the no-gun-use finding indicates at least a reasonable probability that some jurors convicted appellant as an aider an abetter, and respondent cannot show otherwise, the murder verdict must be reversed, requiring reversal of the entire judgment.

Respondent also argues that appellant has relied on the premise that the jury rejected, or this Court must reject, all of Mercurio's testimony since the jury rejected the theory that appellant was the shooter. (RB 114.) Respondent insists that a juror who rejected Mercurio's testimony that appellant shot Gitmed could still have convicted him as an aider and abettor on the basis of the rest of Mercurio's testimony about "the events surrounding the robbery and murder of Ron Gitmed[.]" (RB 118.)

Respondent argues that various pieces of evidence were sufficient to establish appellant's guilt as an aider and abettor.

First, respondent asserts that during the week before the murder Thompson was looking for a ride to Temecula and "said he planned to bring a gun," and that appellant "brought a gun" to the scene of the murder. (RB 122.) The first assertion is inaccurate and the second is incorrect.

There was no evidence that in the week before Gitmed died appellant "said" he "planned" to take a gun anywhere. Possibly respondent intends to refer to Erickson Arias's testimony about a conversation he had with appellant sometime during the month of August, 1991–which means it could have been over three weeks preceding the murder that occurred at the end of the month. According to Arias, appellant said he "was able to have a gun with him." (13 RT 1604.) Appellant acknowledges that the jury could have concluded that appellant believed he was able to bring a gun if he and Arias went to Temecula, but it could not have concluded beyond a reasonable doubt that he planned to do so.

More important is respondent's second contention: that the jury could reasonably have concluded beyond a reasonable doubt that appellant brought a gun for Mercurio's use because it could have believed from Arias's testimony that what appellant had told him was true and appellant did have access to a gun, and could also have believed Charlene Triplett's testimony that the day after the murder appellant was cleaning a gun when he and Mercurio were together burning some papers. (RB 122, fn. 43.) Appellant submits that, even if the jury or some jurors believed both of those pieces of evidence, without some evidence linking one of the guns mentioned to Gitmed's wounds or at least to the scene of the crime, they

were not enough to establish that appellant brought the murder weapon. The trial court actually made this point during a discussion of jury instructions at the end of the guilt phase, when it concluded that there was no evidence that Mercurio was the shooter, observing in support of that conclusion that there was no "circumstantial evidence of the gun that did the shooting in Mr. Mercurio's possession or place to which he had access . . . ." (21 RT 2711.) Obviously, Mercurio had access to the gun that appellant was cleaning the day after the murder, and if that was not evidence to incriminate him as the shooter, then it was not evidence to incriminate appellant. There was no evidence to show that this was "the gun that did the shooting." (21 RT 2711.) The important point here is that a juror who was not convinced by Mercurio's testimony that appellant had used a gun at all when Gitmed was killed, could not rationally have found beyond a reasonable doubt, that merely because he had access to a gun sometime before the murder, and he (and Mercurio) had access to a gun the day after the murder, that appellant was the one who brought "the gun that did the shooting" (21 RT 2711) to the crime scene.

Nor could the jury have reasonably concluded from the fact that appellant knew Mercurio, went to Mercurio's house with Gitmed, and then got into the truck Mercurio was driving, that appellant aided and abetted Mercurio in killing Gitmed. (RB122.) As appellant has pointed out in his opening brief, to establish that he was an aider and abetter it was not enough to show that he knew the people involved in the crime, or even to prove that he was present at the scene. (AOB 169.) What was required was actual evidence of appellant's role in assisting someone in the robbing and killing of Gitmed.

Respondent's attempt to cobble together substantial evidence of aiding and abetting out of these bits and pieces fails, as is evident when the state of the evidence at appellant's trial is compared to the quantum and quality of evidence described in the state court opinions appellant has cited in his opening breif which have found substantial evidence of aiding and abetting sufficient to sustain a conviction on that theory. (AOB 170-171 and cases cited therein; see also *People v. Dickey* (2005) 35 Cal.4th 884, 898-899, 904.)

B. The Trial Court Gave Erroneous Jury Instructions on Aiding and Abetting

Appellant demonstrated in his opening brief that the trial court erred in instructing the jury on aiding and abetting because there was no evidence of any act done or words spoken by appellant that the jury could possibly have found to be evidence of <u>how</u> he facilitated, encouraged, or assisted Mercurio (or any other theoretically possible killer[29]) in robbing or shooting Gitmed. (AOB 174-177.) Appellant commented in his opening brief that the trial court may have intended the instruction to apply to Anthony Mercurio but, since it did not limit the instruction, the jury was probably misled by it. (AOB 175.)

Respondent argues that the issue of the trial court's failure to limit the instruction is "waived," because appellant's trial counsel did not ask for the standard instruction to be modified. (RB 124-125.)

Respondent has misunderstood appellant's comment, which was <u>not</u> an allegation that the failure to modify the definition of aiding an abetting

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[29]At sentencing, the trial court remarked that "possibly other people" were present. (28 RT 3492.)

was in itself a separate error. Rather, appellant was merely highlighting the fact that, since the instruction was not limited, it probably misled the jury when combined with the prosecutor's improper closing argument suggesting that the jury could convict appellant as an aider and abetter. (AOB 175.)

Alternatively, appellant cannot be held to have forfeited this aspect of the issue because it is clear from the record that a request to limit the instruction to Mercurio would have been futile. This is because the trial court's decision to give the instruction as it did was based on its own misunderstanding of the "either/or" doctrine and the law of aiding and abetting, and this misunderstanding led the trial court to think the instruction was required. (See account of trial court's reasoning, below.) The trial court would therefore not have granted any request to limit the instruction, and trial counsel were not required to make futile objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587; *People v. Birks* (1998) 19 Cal.4th 108,116, fn. 6; *People v. Hill* (1998) 17 Cal.4th 800, 822; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [objection not required where issue had previously been extensively argued].)

The record of how and why the trial court decided to give the aiding and abetting instruction supports appellant's position. On the morning of April 17, 1996, the trial prosecutor told the court repeatedly that the only theory of the prosecution was that appellant shot Gitmed and Mercurio was an eyewitness and accessory after the fact, and that there was no evidence that Mercurio himself was the shooter. (21 RT 2702:11-15; 2706:3-6, 19-20; 2706:28-2707; 2740:20-23.) The prosecutor did not want accomplice/aiding and abetting instructions to be given, because if the jury found appellant guilty as an aider and abetter, that would mean they believed

Mercurio was the shooter. (See RT 2702:16-18.) The trial court, however, decided to give the accomplice instructions because it believed there was substantial evidence from which the jury could conclude that Mercurio was an accomplice, and this necessitated instructing on the definition of principals and therefore on aiding and abetting. (21 RT 2707-2708, 2711, 2724.) The trial judge affirmatively stated that she did not believe there was "a shred of evidence" that Mercurio was the shooter and appellant the aider and abettor, and that was not the reason she believed the instruction was required. (21 RT 2710.)

After the trial court had made its final decision to include accomplice instructions the prosecutor asked if the court would "inform the jury this only applies to Tony Mercurio, the accomplice instructions?" (21 RT 2731.) The trial court said that was accomplished in another instruction, where Mercurio's name was inserted, but told the prosecutor he could clarify this in argument. (21 RT 2731.) Obviously, the prosecutor wanted the instruction limited in application to Mercurio, which would mean appellant was the direct perpetrator, because otherwise it could be applied to appellant, which would mean the jury could conclude that Mercurio was the direct perpetrator. The prosecutor was adamant that "the only evidence is that the defendant shot and killed Ronald Gitmed as witnessed by Tony Mercurio, or the defendant was not there[30] at all." (21 RT 2740.)

During the afternoon session on April 17, 1996, the trial court articulated another reason to give accomplice/aiding and abetting instructions, which was that the jury might not know who the shooter was.

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[30]This is undoubtedly a reference to the alibi testimony of Richard Hartenbach. (20 RT 2578-2590.)

The trial court suggested this basis for the instruction to the prosecution, and asked if he was going to give the jury "alternative theories." (21 RT 2746.) The prosecutor initially said that was not his plan (21 RT 2746), but later changed his mind. He ultimately requested the aiding and abetting instruction, saying, "In light of the accomplice instructions that are going to be given, you know, I now believe – who knows what the jury may come up with." (21 RT 2757.) The trial court asked whether the prosecutor's theory now was to "[go] on either one of them, it doesn't much matter, basically." (21 RT 2759.) When the prosecutor agreed that was one theory, the court reiterated: "Doesn't matter if Mr. Mercurio was the shooter, presumably?" (21 RT 2759.)

The next morning, on April 18, 1996, defense counsel expressed the understanding that aiding and abetting instructions would be given "based upon the possibility of the jury finding that Mr. Thompson had aided and abetted Mr. Mercurio." (22 RT 2788.) The trial court said that was the initial basis, but now the prosecutor "is potentially going on a theory it doesn't really matter who fired the shot if they were aiding and abetting each other." (22 RT 2788.) Defense counsel persisted, pointing out that, considering previous statements by the judge and the prosecutor that there was no evidence Mercurio fired the gun, "then I don't understand how the People would be allowed to proceed on an aiding and abetting theory." (22 RT 2788-2789; see also RT 2789:11-16.)

The prosecutor explained that he did not want appellant to "walk away" from a felony murder conviction if the jury concluded that he was "involved in the robbery and the death of the [victim]" and that Mercurio was also involved "up to his eyeballs." (22 RT 2789.) Most critically, the

prosecutor added that what he wanted "to present to the jury is if they get to a point where they're not exactly sure what happened, they know both these people participated in the robbery and death."[31] (22 RT 2788-2789.)

It was the trial court's responsibility to instruct the jury correctly on the applicable law. Appellant had no duty to object to or correct a legally erroneous instruction.

To be crystal clear: appellant's claim on appeal is not that the trial court erred in failing to limit the subject instruction, but that it erred in giving the instruction at all.

The problem with the court's reasoning is that there is no such thing as "aiding and abetting each other." The crime of aiding and abetting does not exist if there is no direct perpetrator. "If the defendant himself commits the offense, he is guilty as a direct perpetrator. If he assists another, he is guilty as an aider and abettor. It follows, therefore, that for a defendant to be found guilty under an aiding and abetting theory, someone other than the defendant must be proven to have attempted or committed a crime; i.e., absent proof of a predicate offense, conviction on an aiding and abetting theory cannot be sustained." (*People v. Perez* (2005) 35 Cal. 4th 1219, 1225.) Mercurio and appellant could not have been "aiding and abetting each other" and this was an error of law on the part of the trial court.

It thus appears that the trial court gave aiding and abetting instructions because it did not understand California law on alternative

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[31]The trial judge added that another reason for the instruction was that the evidence supported an inference that Mercurio aided and abetted a robbery committed by appellant, a view she had expressed the previous day. (22 RT 2790.)

theories of liability. As appellant has explained, jurors are not free to convict appellant as an aider and abetter just willy-nilly because they don't know what they think of the evidence. They may properly convict a defendant of murder if they find that there is substantial evidence of his guilt as the direct perpetrator and also substantial evidence of his guilt as an accomplice and they are not sure which he actually was. But they may not find him guilty under a "we-don't-know-which-one-he-was" theory without substantial evidence of appellant acting in both roles. As appellant has explained above, the jury as a whole does not have to reach unanimity on which role appellant played, but if the jurors rely on two conflicting theories of his role, there must be substantial evidence in the record to support both theories.

When the trial court instructed the jury that it could find appellant guilty as the aider and abetter after a trial in which there was, as the trial judge observed, "not one shred of evidence" (21 RT 2710) that Mercurio was the direct perpetrator because it thought that the jury could convict appellant if they found he and Mercurio "were aiding and abetting each other," it committed an error of law. Because respondent cannot possibly demonstrate that nobody on the jury convicted appellant as an aider and abetter, reversal is required.

C. Trial Counsel Were Ineffective for Failing to Object to Evidence of a Wallet

Appellant demonstrated in his opening brief that evidence that an unidentified wallet was found in a bedside table in his room should not have been admitted into evidence and that his trial counsel should have moved to exclude it as irrelevant.

Respondent contends that an objection would have been futile because the wallet was relevant evidence. (RB 127.)

Respondent claims that the "evidence taken as a whole had a tendency in reason to prove it was connected to Gitmed" and that it was relevant "to prevent the jury from inferring that no wallet had been taken during the robbery based on an erroneous assumption that no wallet had ever been found." (RB 128.) This is nonsense. Finding just any wallet in Thompson's possession had no tendency in reason to prove anything. Even though they had a search warrant to look for Gitmed's property in connection with a robbery, the police did not even seize the wallet as evidence in the case, since they had no description of Gitmed's wallet. (14 RT 1819.) The police's view that the wallet had no evidentiary value because it lacked a foundation was correct.

Nevertheless, respondent argues that evidence of merely finding a wallet–any wallet, apparently–was admissible because Mercurio testified that appellant took Gitmed's wallet, Marc Bendlin testified that a wallet was among appellant's possession that had been moved from Eva Thompson's house to appellant's mother's house, where he was living, and the police found a wallet in appellant's nightstand. (RB 128.) But neither Bendlin nor Mercurio described the wallet that Mercurio testified Gitmed might have had, and as appellant has previously pointed out, even though Gitmed's mother, brother, and cousin testified, none of them described any wallet belonging to Gitmed. And of course none of these witnesses was ever asked to identify the wallet found in appellant's bedroom, since it was not even an exhibit. So there was no tendency in reason for the jury to conclude that the wallet found in appellant's room had anything to do with Gitmed.

Respondent also argues that the fact the wallet did not contain identification evidence raised the inference that the wallet had been in Gitmed's possession, removed by force by appellant, and its identifying contents removed to avoid detection of the robbery. This is all pure speculation, not logical inference. It is not uncommon for a person to have an old wallet lying around, and respondent neglects to acknowledge that the only thing the wallet contained was the card of a motel where appellant had once stayed. (14 RT 1818, 1820.)

It is really inescapable that there was no evidence from which the jury could reasonably conclude that the wallet found in appellant's bedroom had anything to do with Gitmed or any logical relevance to the prosecution's case. If trial counsel had moved to exclude this evidence as irrelevant under Evidence Code section 350 or as more prejudicial than probative under Evidence Code section 352, the trial court would have been compelled to grant the motion.

D. The Prosecutor Committed Misconduct and This Issue Is Not Waived

Appellant amply demonstrated in his opening brief that the prosecutor seriously misstated both the law and the facts in his guilt phase closing argument to the jury. (AOB 177-187.) He repeatedly said that appellant could be convicted of felony-murder if he was "involved" in a robbery (23 RT 2919) and implied that property taken from Gitmed in a robbery was later found in appellant's possession (23 RT 2938)

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1. The Issue of Prosecutorial Misconduct is Cognizable on Appeal or Trial Counsel Provided Ineffective Representation

Respondent argues that appellant has "waived" the issue of prosecutorial misconduct because his trial counsel failed to object and request admonitions. (RB 129-131.)

Appellant urges this Court to review this issue on its merits for the reasons explained and under the authorities cited in his opening brief. (AOB 187-192.)

2. The Prosecutor Committed Misconduct

Appellant established in his opening brief that the prosecutor's erroneous and confusing statement of the law and the facts fell far short of the high standard required of the state's representative in a criminal trial, and especially in a capital case. (AOB 178.)

Respondent argues that the prosecutor's remarks were not misconduct. (RB 131.)

a. Misstatements of Law

Respondent argues basically that the fact that the prosecutor told the jurors they could convict appellant of capital murder if they found he was "involved in a robbery," was not important because the prosecution's primary theory was not felony-murder, but was that appellant was the direct perpetrator of deliberate, premeditated murder. (RB 131)

But the prosecution did in fact offer the jury two theories of guilt. That was the whole basis for the prosecution's request for instruction on accomplice liability and aiding and abetting. (22 RT 1788-2789.)

So primary theory or not, the jury was asked to decide whether appellant had aided and abetted the robbery/murder of Ronald Gitmed. Respondent cannot erase either the words or the effect of the prosecutor's clear misstatement of its burden, i.e., that "[a]ll 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; see AOB 178-182 and cases cited therein.) Respondent's attempt to minimize the importance of the prosecutor's argument relating to the felony-murder theory must be rejected.[32]

Respondent also argues that there is no chance the jury understood from the prosecutor's argument that appellant could be convicted if he was involved in the crime but not an accomplice because there was no basis in the evidence for that conclusion. (RB 133.) Appellant agrees there was not enough evidence to convict appellant as an accomplice, but there was evidence which the jury might have thought was enough to show that appellant was "involved" in the crimes, especially after the prosecutor's argument: appellant knew Mercurio, went off in the truck with him and Gitmed, went with Mercurio to Gitmed's storage locker, drove Gitmed's car after the murder, etc. And the crux of the issue here is that the prosecutor told the jury that that was enough for conviction; he equated mere involvement with accomplice status in a felony-murder context.

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[32]Respondent also makes the bald statement that the prosecutor's references to accomplice liability for felony-murder were "factual" and that the jury would not have thought they were explanations of the law. (RB 133.) With no citations to the record, it is impossible to know what respondent means, and this aspect of respondent's argument should be rejected.

Appellant submits that the prosecutor fully intended to tell the jury that if they weren't sure what role appellant had played in Gitmed's death, they could convict him anyway if they thought he was involved at all. Based on what he said during jury instruction discussion, this was how he hoped to get around his evidentiary burden, in the event that the jury was unable to conclude unanimously that appellant was the shooter. (22 RT 2788-2789.)

Appellant also established in Argument VI of his opening brief that there was insufficient evidence of the special circumstance of felony-murder, and that the prosecutor's argument purporting to explain the law of special circumstance felony-murder was erroneous, confusing and misleading. (AOB 227-256.)

Respondent argues summarily that the same evidence that supported a conviction of non-capital felony murder also supported the finding of the special circumstance of robbery-murder. (RB 155.) Appellant agrees that there was no evidence to support the special circumstance finding beyond that on which respondent has relied to support the non-capital murder conviction.

But the elements of the two kinds of felony-murder are not the same, and appellant commends to this Court's attention his review of the relevant differences in his opening brief. (AOB 231.) They are critical, and the lack of proof of the mental state required for accomplice liability in capital murder is particularly significant here, because the prosecution presented no evidence on that element in any way comparable to the evidence in other cases where reviewing courts found substantial evidence of that element. (See AOB 232-235 and cases cited therein.) Yet it is highly probable that those jurors who were not convinced that appellant was the shooter

convicted him of special circumstance murder anyway, as an accomplice, encouraged to do so by the prosecutor's closing argument. (See AOB 244-251.)

The prosecutor obfuscated the difference between non-capital felony murder under section 189 and the special circumstance of murder during the commission of a felony under section 190.2. (See AOB 247-251.) The over-all thrust of his argument was that if the jury did not believe that appellant was the shooter, it could convict him on a felony-murder theory if it found that he was "involved" in a robbery and acted with reckless indifference to human life and could acquit him only if they believed appellant had "absolutely nothing to do with [the crime]." (23 RT 2929, underlining added.) This was not a correct statement of the law, as appellant has explained in his opening brief. (AOB 178-179; see *People v. Lewis* (2001) 26 Cal. 4th 334, 368-372 [discussion of evidence inadequate to support finding individual was accomplice]; *People v. Dickey, supra,* 35 Cal. 4th at p. 901.)

Appellant has identified in his opening brief what preliminary facts the jury had to find in order to make the ultimate finding of the special circumstance of robbery murder under section 190.2. (AOB 231 and cases cited therein.) Briefly, the jurors had to be convinced beyond a reasonable doubt either that appellant was the actual killer (which some jurors may have found was not the case), or that he did or said something that assisted someone else–who, as a practical matter, would have been Mercurio–in a major way in robbing Gitmed or in shooting him so that he could be robbed, and that while he was assisting that crime, he specifically intended for Gitmed to die or acted with reckless indifference to his life. The

prosecutor's truncated statements were wrong and it is very likely that the jury was misled by them.

In spite of all the incorrect statements by the prosecutor of what the jury had to decide, respondent argues that the prosecutor was not explaining the law, but how to apply the law to the facts. (RB 134, 136.) A review of the prosecutor's argument, however, reveals that he did not draw the jury's attention to any particular evidence in the record that would establish facts to satisfy the legal requirements he was describing or that the court would describe. To take an example from respondent's brief, the prosecutor told the jury that ". . . 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." (23 RT 2930, RB 134.) Merely re-wording a partial legal standard cannot be deemed to be a discussion of how to apply that standard to the evidence in the case.

b. Misrepresentation of Evidence

Appellant demonstrated in Argument IV in his opening brief that the prosecutor tried to cover his failure of proof of the elements of robbery-murder by misrepresenting the evidence in his guilt phase closing argument to the jury. (AOB 182-184.) Specifically, appellant reviewed his comments concerning property taken when Gitmed was killed and appellant later having "the car, the bag." (AOB 183.)

Respondent argues that the prosecutor's remarks were fair comment on the evidence, and that the prosecutor did not suggest that the car or bag were fruits of the robbery of Gitmed. (RB 137.)

Appellant directs the court's attention to the entire passage quoted in his opening brief where the relevant passage of the prosecutor's argument is discussed, and particularly to the fact that the prosecutor said, in pertinent part: "a robbery occurs, property is taken and someone is killed. The motive? They wanted the property. . . . 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." (23 RT 2938.) Appellant submits that, in context, the prosecutor told the jury that the car and bag were the property that "they wanted" that was "taken" when the "robbery occur[red]." (23 RT 2938.)

Respondent argues that what the prosecutor meant, and what the jury would have understood, was that all sorts of things–wallet, change, car, clothing, and maybe drugs–were the motive for the murder. (RB 139.) But that is not what he said, directly or indirectly. In fact, the omission of a reference to those other items probably reflects the prosecutor's own realization that the jury was not going to find that any of them were property taken during a robbery, because the prosecution had not presented solid, credible evidence that they were. So the prosecutor capitalized on something there was evidence of, namely, appellant having Gitmed's car and bag after the murder, and led the jury to think of them as being not just the motive for the robbery, but the property taken during the crime. (See AOB 154-164, 182-184.) This argument misstated the evidence.

c. The Misconduct was Prejudicial

Appellant explained in Argument IV of his opening brief the seriously prejudicial effect of the prosecutor's argument on the non-capital count of felony murder. (AOB 192-194.) He also established in Argument VI that the prosecutor's confusing argument, which blurred the distinction

between ordinary first degree murder and capital murder, lightened the prosecution's burden of proof. (AOB 244-251.)

E. The Failure of Evidence of the Robbery-Murder Special Circumstance Requires Reversal of the Death Judgment

Appellant argued in his opening brief that reversal of the special circumstance finding and the sentence based on it was required on various grounds. (AOB 194-198, 253-256.)

Respondent argues that even if there was not sufficient evidence to support a finding of the special circumstance, "there is no reasonable probability" that the jury would have sentenced appellant to a sentence less than death because of the circumstances of Gitmed's murder and the jury's finding of the special circumstance of prior murder. (RB 141.) That is not the correct standard of reversal when a reviewing court re-weighs the evidence in a capital case to determine whether an invalid special circumstance finding is harmless error. Appellant has no burden on appeal to show such a "reasonable probability." The correct approach is the standard set out in *Chapman v. California, supra,* 386 U.S. at p. 24; (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753), which requires respondent to affirmatively establish beyond a reasonable doubt that, in the absence of the robbery-murder special circumstance, the jury would have sentenced appellant to death. Respondent has not met this burden, and reversal is required for the reasons and under the authority set out in appellant's opening brief.

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. The Jury Could Have Found Mercurio Was an Accomplice So His Testimony Required Corroboration

Appellant explained in his opening brief that the prosecution's star witness, Anthony Mercurio, qualified as an accomplice, that his testimony inculpating appellant as the actual killer was inherently incredible and that the evidence presented at trial failed under section 1111[33] to corroborate his testimony connecting appellant to the crimes charged rather than merely to another person who was present at the crime. (AOB 199-226.) Appellant pointed out that Mercurio's testimony of how Gitmed died was physically impossible and contradicted the forensic evidence (AOB 202-205), that no physical or testimonial evidence independent of Mercurio's testimony connected appellant to the commission of the robbery or murder of Gitmed (AOB 206-214), and that no evidence other than Mercurio's testimony even established that appellant was with Gitmed the night he was killed (AOB 215-220). Appellant reviewed other cases which have found sufficient

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[33]Section 1111 provides: "A conviction cannot 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. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

evidence corroborating an accomplice and demonstrated that the record of appellant's case lacks comparable evidence. (AOB 221-224; see *People v. Lewis* (2001) 26 Cal.4th 334, 368-372 [discussing insufficient evidence to sustain finding that individual was accomplice]; *People v. Dickey* (2005) 35 Cal.4th 884, 904.)

Respondent argues that Mercurio was not an accomplice and that if he was, his testimony was sufficiently corroborated. (RB 142-154.) Respondent claims that since there was no direct evidence that Mercurio was the shooter, and there was evidence that he was an accessory, he was not an accomplice. (RB 144.) Respondent has failed to point to trial evidence that corroborates Mercurio's testimony that connected appellant to the commission to the charged crimes, i.e. to the act of robbing or shooting Gitmed.

First, the fact that there is no "direct," i.e., eyewitness, testimony that Mercurio was the shooter is irrelevant to whether he was an accomplice. An accomplice is not the direct perpetrator.[34] (§§ 31, 1111; see *People v. Lewis*, *supra*, 26 Cal.4th AT pp. 368-372; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) And the fact that Mercurio admitted his involvement in various activities with appellant <u>following</u> Gitmed's robbery and murder and his role

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[34]Appellant acknowledges that both respondent and appellant have mis-used the term "accomplice" as if it refers to both the direct perpetrator and an aider and abetter. This is erroneous. Both the direct perpetrator and an aider and abetter are <u>principals</u> in the crime, but they play different roles. Whoever killed Gitmed is the direct perpetrator of the murder, any other party who aided and abetted him is his accomplice, and they are both liable as principals. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) Appellant regrets any confusion that may have arisen from conflating the notions of accomplice and principal.

as an accessory, does not negate the evidence that, the jury could reasonably have concluded, before the crimes and during them, Mercurio's mental state and conduct amounted to aiding and abetting appellant in the murder and robbery of Gitmed.

The trial court gave accomplice and aiding and abetting instructions at the request of both sides, on the theory that the jury could reasonably conclude that either appellant or Mercurio was an accomplice.[35] (21 RT 2757-2759.)

The trial court's determination that the jury could reasonably conclude that Mercurio was an accomplice was correct. (21 RT 2709, 2759.) The court correctly reasoned that, while appellant had the burden of establishing that Mercurio was an accomplice, that burden could be met by the prosecution's evidence. (21 RT 2709.) There was ample evidence that Mercurio was an accomplice: (a) he admitted that he took drugs with Gitmed and appellant before going off-roading with them (15 RT 1884-1885); (b) also by his own admission, he drove the victim to the remote location where he was killed, taking him and appellant as passengers in a stolen truck around back roads and stopping at the shore of Canyon Lake (15 RT 1885-1888); (c) he was present when Gitmed was killed (15 RT 1894-1895); (d) he did not report the killing that he claimed came as a surprise to him (13 RT 1716); and (e) he and his family members acquired several pieces of Gitmed's furniture and major appliances 13 RT 1732-1734; 14 RT 1830-1832). On this evidence, a reasonable juror who believed that appellant was

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[35]See appellant's argument, *supra*, in Argument IV, that these instructions were erroneous because, while there was substantial evidence that Mercurio was the shooter, there was no evidence that appellant was his accomplice.

the actual shooter could have concluded that Mercurio was as culpable for Gitmed's death as appellant was, and that he had the intent to kill, particularly since he was the driver who enabled the murder to take place by driving Gitmed to the remote location where he died, and was also the one who most profited by Gitmed's death. Appellant submits that this body of evidence could reasonably be understood as probative of Mercurio's guilt as an aider and abetter than, given his admitted conduct as the driver and his admission that he was present when Gitmed died. By contrast, there was no physical evidence, and no testimonial evidence other than Mercurio's self-serving testimony, to link appellant to the scene.

On this record, the trial court was correct in its conclusion that the jury could reasonably find that Mercurio was an accomplice, and if it did so, that finding triggered the requirement that his testimony be corroborated. (§ 1111.)

B. Independent Evidence Did not Corroborate Mercurio's Testimony

Appellant demonstrated in his opening brief that, while the evidence supported a conclusion that on an uncertain date appellant met Gitmed at Michelle Keathley's, went to Santa Rosa Mine with him in his car, spent some time at Mercurio's place, and got into the truck that Mercurio was driving, there was no substantial evidence linking him to the scene of the crime and nothing tending otherwise to link him to the commission of the robbery, if any, or the murder, of Gitmed. (See AOB 206-226.)

In spite of a lengthy review of the evidence, respondent has not pointed to any relevant, properly admitted evidence outside of Mercurio's own testimony that has any tendency in reason to connect appellant to the commission of the crimes. As this court explained long ago, corroborating

evidence "is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense . . . and therefore must relate to some act or fact which is an element of the crime . . . ." (*People v. Lyons* (1958) 50 Cal.2d 245, 257.)

1. Ride to Temecula

Respondent argues that appellant asking Arias for a ride to Temecula sometime earlier in the month, which Arias refused to provide, was evidence that appellant had a motive to kill Gitmed. (RB 146-147; 13 RT 1597-1605.) Respondent does not explain what connection the jury could rationally have made between Arias's testimony and the murder, but appellant presumes that the point is the same as respondent's argument in a different context, which was that the jury could have believed that appellant shot Gitmed to get his car so he could drive himself to Temecula. (Argument IV, *supra*.) But there was no evidence that after Gitmed was dead appellant drove his car to Temecula, and no evidence that there was any reason at all that he could not have done that. Instead, what appellant, Mercurio, and Dalton all did together was to destroy Gitmed's car, a fact totally inconsistent with the car being the motive for anybody to kill him. (15 RT 1905-1906.) The suggestion that appellant's desire to take Gitmed's car so he could drive to Temecula was his motive to commit murder is irrational on this state of the evidence, and the jury could not rationally have concluded that the fact appellant had asked Arias for a ride sometime earlier connected him to the robbery/murder of Gitmed.

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2. Gitmed's Body Found Shirtless

Respondent also contends that the fact that Gitmed's body was found shirtless corroborates Mercurio's testimony that appellant ordered him to take off his clothes. (RB 147.) This is illogical. It is like arguing that the fact that Gitmed was found dead from gunshot wounds corroborates Mercurio's testimony that appellant shot him. There was nothing about Gitmed's partially clothed body that was connected to appellant, other than through Mercurio's testimony about appellant's conduct. Corroborating evidence must connect the defendant to the crime "without aid from the accomplice's testimony[.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 986.)

3. Possession of Property that Was Not in Gitmed's Possession When He was Killed

Respondent's reliance on *People v. Fauber* (1992) 2 Cal.4th 792 to support the argument that appellant's possession of various items of property could have served as corroboration is misplaced. In *Fauber*, as in all similar cases of which appellant is aware, there was evidence that the property found in the defendant's possession, which had a tendency to connect him to a robbery, had been in the victim's possession at the time of the robbery. In appellant's case, there was no such evidence with regard to any of the items of Gitmed's property respondent has identified: not the car, the gun, the wallet, the furniture, the bag or the jacket.

a. Bag, Jacket and Wallet

Respondent's contention that Gitmed's bag and jacket, found by police in appellant's mother's car a month after the murder, connected appellant to the commission of robbery and murder (RB 147-148), is as

erroneous as respondent's argument to the jury to the same effect (see Argument IV, *supra*) and demonstrates the prejudicial effect of this illegally seized evidence. In any case, respondent is wrong. Without evidence that Gitmed was in possession of these items when he was killed, the jury could not possibly have found that the fact that appellant had them later, connected him to the commission of robbery or murder. Gitmed's cousin, Don Fortney, testified that he remembered the bag from the day he was helping Gitmed move things out of the apartment into storage. (13 RT 1584.) No evidence was presented to show how or when appellant acquired them, and there was evidence that weeks after the murder both appellant and Mercurio had many items of personal property that had been taken from Gitmed's locker–Mercurio more than appellant, actually. (14 RT 1830-1832.)

And respondent's argument that the jury could have connected appellant to the robbery and murder of Gitmed from the fact that "a wallet" was found in appellant's former bedroom and Gitmed's wallet was "never found," must be rejected in the absence of substantial evidence that (a) Gitmed was in possession of a wallet when he was killed, and (b) the wallet in appellant's former room bore some resemblance to Gitmed's wallet. (See Argument IV, *supra*.) The jury could not rationally have connected appellant to the commission of the crimes from this evidence, especially since the prosecution did not even introduce the wallet into evidence, so nobody close to Gitmed who could be expected to be familiar with the appearance of his wallet was even asked to look at the wallet the police found. The idea that the jury could have connected appellant to the robbery and murder of Gitmed because they heard testimony that Gitmed had had "a wallet" and that appellant had left "a wallet" in his room borders on the ludicrous. What color was Gitmed's wallet? What color was appellant's

wallet? What style was Gitmed's wallet? Was there any reason to think that the wallet in appellant's night stand bore any resemblance to Gitmed's, let alone was his actual wallet? How many people have old wallets lying around?

To affirm appellant's death sentence on the basis that the jury could have considered some wallet not even brought into court as an exhibit as corroboration that appellant had robbed and killed Gitmed, who may not even have been carrying a wallet that night, would be a gross miscarriage of justice. This argument must be rejected.

b. Car and Keys

Respondent also claims that the following pieces of evidence corroborate Mercurio's "account of the robbery": that before the robbery, Gitmed drove appellant to Mercurio's house, that Gimed's keys were "never found," and that Thompson was driving Gitmed's car "the day after they were together." (RB 148.) Again, respondent does not explain how the jury could logically and reasonably have connected appellant to what happened at Canyon Lake from any of these. Gitmed driving appellant to Mercurio's house–whatever night that may have occurred–merely establishes that appellant was acquainted with both Gitmed and Mercurio. That was not disputed by the defense at trial and was not enough to inculpate appellant in any crime. (See *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543 ["evidence must connect the defendant with the crime, not simply with its perpetrators"]; see also AOB 199-201.) That Gitmed's keys were "never found" does not implicate appellant in any way, since there was no evidence that Gitmed was ever in possession of keys. This contention is merely speculation on speculation. Gitmed's keys were never found, and there was

no evidence that appellant ever had them. The gun that shot Gitmed was "never found" either, and that fact cannot connect appellant to the shooting any more than the missing keys–if Gitmed had keys–connects him to the robbery.

Respondent also claims that Charlene Triplett's testimony that appellant was driving Gitmed's car, and that he and Mercurio burned some papers and cleaned a gun[36] "the day after they were together" was corroborative of Mercurio's testimony, but once again, since Gitmed, appellant, and Mercurio were together either August 26 or 27, Triplett could have seen appellant in Gitmed's car on Tuesday afternoon, August 27. Indeed, Mercurio told Charlene on the day appellant drove up in Gitmed's car that appellant had borrowed it from Gitmed. (17 RT 2237.) It was not until "a few days after" seeing Mercurio and appellant that Charlene Triplett learned that Gitmed had been killed and Mercurio told her appellant did it. (17 RT 2183, underlining added.)

In any case, there was no evidence that the gun, the papers, or the car were in Gitmed's possession at the time he was killed, and they do not logically connect appellant to the commission of robbery or murder, i.e. they did not "relate to some act or fact which is an element of the crime . . . ." (*People v. Lyons, supra,* 50 Cal.2d at p. 257, underlining added.) Even assuming, arguendo, that any of this could be considered to be circumstantial

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[36]Again, there was nothing to link that gun to the murder, and Mercurio lived on a property with drug dealers and stolen cars. In any case, many people in that area possess guns for personal use; as appellant has previously pointed out, nine of the seated jurors owned guns themselves or had close relatives who did. (AOB 299.)

evidence of appellant's guilt, it is not corroboration, which is a narrower concept. Not all circumstantial evidence corroborates an accomplice.

4. 3:30 am conversation with Michelle Keathley

Respondent argues, further, that Michelle Keathley's testimony that appellant told her around 3:30 a.m. some morning that there had been a scuffle and Gitmed would be along soon or might have gone home, was evidence corroborating Mercurio's testimony that appellant robbed and shot Gitmed. (RB 148-149.) Again, respondent does not trace the connection between this evidence and appellant's participation in the robbery and murder that occurred at Canyon Lake. If, for example, this conversation occurred in the wee hours of Tuesday morning, August 27, rather than Wednesday morning, August 28, then it had no significance at all. Moreover, if Mercurio, Gitmed and appellant were out in the truck together Monday night and around 3:30 a.m. on Tuesday appellant went back to Keathley's to get his bicycle, what he said about Gitmed could have been true, and he could have genuinely expected that Gitmed would turn up at Keathley's later. In any case, even if it was Wednesday morning that he made these remarks, they do not connect him to the commission of any crime against Gitmed. They are, in fact, in conflict with a conclusion that he knew anything about Gitmed's murder. Possibly respondent is suggesting that these statements were untrue, i.e. that appellant was trying to cover up the murder–but again, that inference would have to be based on the presupposition that appellant had been present at the scene of the crime or somehow knew that Mercurio had been shot, and there is no evidence of that other than Mercurio's testimony. There was no evidence on which the jury could have concluded that, during the time period of late night August 26 to

early morning August 27, there had not been a scuffle, or that Gitmed was not down the road, or that Gitmed did not just decide to go somewhere else rather than return to Keathley's.

Respondent's argument is another invitation to extrapolate backwards – this Court has to first assume that appellant was present at the scene and/or knew what had happened to Gitmed, before it can conclude that his conversation with Michelle Keathley was a cover-up. Respondent's argument that evidence of this conversation constitutes corroboration of Mercurio's story that appellant committed the crimes must be rejected.

5. Evidence of Appellant's Conduct After the Murder Did Not Corroborate Mercurio's Testimony Conduct

Respondent points to evidence of appellant's conduct and statements occurring after the date that Gitmed was murdered and argues that they corroborate Mercurio's story of how appellant shot him. These include, in addition to evidence discussed, *supra*: that appellant gave furniture from Gitmed's storage unit to Charlene Triplett and Mercurio and said that he was emptying his own storage unit (15 RT 2202-2203, 2238-2239, 2183): that within a week of the day appellant was driving Gitmed's car he told Mercurio to get his family to go along with whatever Mercurio told them to say, including making it look as though they had never met appellant (16 RT 2197, 2204-2205;17 RT 2224); that appellant made remarks to Barbara Triplett and Danny Dalton about somebody floating in a lake (15 RT 2282-2283); that Dalton, Mercurio and appellant burned Gitmed's car (15 RT 2044-2045); that Dalton sold a stereo at appellant's request (15 RT 2045-2046) and that appellant offered Dalton furniture in exchange for a car (15 RT 2120-2122.) (RB 149)

As usual, respondent does not explain what logical connection the jury could have made between any of these parts of the prosecution's case and Mercurio's story of what happened to Gitmed at Canyon Lake. Appellant has not disputed that the furniture, the car and the stereo were Gitmed's, but they do not connect appellant to the acts of robbing or murdering him since they were not in Gitmed's possession at the time he was killed, and the only rational conclusion from all the evidence is that appellant acquired them at some point after Gitmed's death. Appellant's statements to Mercurio, Dalton and Barbara Triplett did not reveal any special knowledge about what happened to Gitmed. Even assuming, arguendo, that this Court concludes that appellant's inchoate statements to Dalton and Triplett were admissible (see AOB 257-289 and Argument VII, *post.*), they did not connect him to the crimes: since the statements were made after newspaper stories about bodies floating in a lake had appeared, there is nothing in the statements from which the jury could rationally conclude that appellant knew anything that only the perpetrators would know.

Basically, all of this evidence is either irrelevant or more corroborates appellant's involvement in events that occurred after the murder, which would make him an accessory after the fact. They do not connect him to the events Mercurio described that were the charged crimes at appellant's trial, i.e. to the commission of those crimes.

C. Mercurio's Testimony Significantly Conflicted With the Physical Evidence

Respondent takes issue with appellant's position that Mercurio's testimony conflicts with the forensic evidence, arguing that "common sense" supports a conclusion that the physical evidence proved that appellant stood

facing Gitmed as he fired and then fired the fatal shot as Gitmed's body changed position. Appellant submits that such matters as the trajectory of bullets and how a fatal wound was inflicted routinely require expert assessment, and in this case the qualified expert testified that (a) it was impossible to determine the position of the body when it was shot or (b) the order in which the shots occurred. (12 RT 1543, 1547.) But he also testified that for Gitmed to be standing facing the shooter when he was shot, the shooter would have had to be ten feet tall. (12 RT 1543.) Mercurio's testimony was that Gitmed and appellant stood facing each other at arm's distance. (15 RT 1959-1960.)

Even if, arguendo, Mercurio's testimony about the shooting itself can be reconciled with the forensic evidence, his unequivocal testimony that he did not see Gitmed's body in the water when he left the scene (15 RT 1965:28-1966:1) was undeniably in conflict with the fact that the body was found floating in the lake (12 RT 1502). Nothing in respondent's statements about this conflict change that fact. (RB 151-152.) The fact that Mercurio had previously testified that Gitmed fell at the water's edge (RB 151) does not contradict his statement at trial that he never saw Gitmed in the water. In view of the prosecution's expert evidence that the water in that lake was still, without tides or surges (20 RT 2648), and the uncontroverted evidence that Gitmed was dead before he entered the water, having died of gunshot wounds within seconds of being shot and not of drowning (12 RT 1537, 1540), it is beyond dispute that Mercurio's testimony of what happened immediately after Gitmed was shot was in conflict with this evidence.

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D. Conclusion

The trial court was correct in leaving for the jury the question whether Mercurio was an accomplice to the crimes charged against appellant. If any of the jurors did conclude that, they could not rationally have found his testimony about the crimes corroborated.

Respondent has essentially hashed over a great deal of evidence which tended to show: that appellant was acquainted with Gitmed, Keathley, Mercurio, the Tripletts, and Dalton; that he went off in a truck with Mercurio and Gitmed either on the fatal night or the night before that; that after Gitmed was dead appellant was in possession of property that had no connection to Gitmed and also some property that came from his storage locker; and that after Gitmed's death appellant made vague statements that did not indicate any special knowledge of what had happened to Gitmed. Respondent's effort to find corroboration for Mercurio's story that appellant robbed and shot Gitmed fails. Mercurio's testimony was not corroborated by independent evidence, and for all the reasons explained above and in appellant's opening brief, appellant's guilt conviction must be reversed

VI.

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FELONY-MURDER SPECIAL CIRCUMSTANCE

Appellant established in his opening brief that the prosecution failed to establish beyond a reasonable doubt the existence of the additional elements required for purposes of special circumstance felony-murder under section 190.2, subdivision (a)(17)(i), beyond those facts necessary to establish non-capital felony murder.

Respondent has conflated the arguments on this issue with its response to Argument IV, *supra*, which concerns the failure of proof on the elements of non-capital felony murder.

For the convenience of this Court, appellant has replied to the points raised by respondent under the Argument IV heading, *supra*. Appellant urges this Court, however, to consider his briefing on this separate issue as it is presented in his opening brief, and particularly commends to the Court his briefing on: (1) the fact that some jurors may have believed that appellant was or might have been an aider and abettor, and the prosecution's failure to present solid, credible evidence that appellant either acted with the specific intent to kill or was a major participant who acted with reckless indifference to human life (AOB 232-235); (2) the failure to present solid, credible evidence that the murder was not merely incidental to the robbery (AOB 236-243); and (3) the prejudicial misstatements of the law of special circumstance felony-murder and misstatements of the evidence in closing argument by the prosecutor (AOB 244-252).

Appellant stands by his position that reversal of the sentence of death is required as stated in his briefing on Argument VI in his opening brief.

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

Appellant asserted correctly in his opening brief that the trial court erred in denying appellant's motion to strike irrelevant evidence of vague statements appellant made to Danny Dalton and Barbara Triplett sometime after the newspapers had reported that a body had been found floating in Canyon Lake, and Dalton's opinion that appellant was guilty of Gitmed's murder, and also erred in excluding a prior statement by Dalton that he would testify that Mercurio had shot Gitmed and left him in the lake. (AOB 257-289.)

Respondent argues that appellant has waived his claim concerning the irrelevance of Barbara Triplett's testimony (RB 157), and that the trial court did not err in allowing Danny Dalton and Triplett to testify to vague statements made by appellant (RB 158). Respondent also argues that appellant has "waived" his claim that the trial court erred in denying his motion to strike Dalton's testimony that in his opinion appellant was guilty, and that the trial court's admonition to the jury about lay opinion testimony was sufficient. (RB 161). Respondent further argues that the trial court did not err in excluding Dalton's prior inconsistent statement, and alternatively, that the error was harmless. (RB 163.)

Respondent mischaracterizes appellant's position on the motion to strike and focuses only on Dalton's opinion testimony (RB 161), but at trial and on appeal, appellant's concern has been all of Dalton's testimony relating to "any statements Mr. Thompson told him." (16 RT 2084.) The fact is that the statements Dalton and Triplett attributed to appellant had no tendency to prove anything at all that was at issue in the case, because appellant did not say anything revealing any particular knowledge of anything that happened to Gitmed that would not have been known to the public at large. Yet both the prosecutor, in closing argument (23 RT 2928) and the court in denying appellant's motion to modify the sentence (28 RT 3493) referred to these statements as if they were genuinely incriminating evidence against appellant.

A. The Issue of the Trial Court's Error in Admitting Barbara Triplett's Testimony about Appellant's Statement Is Cognizable on Appeal

Appellant pointed out in his opening brief that if trial counsel had moved to strike Triplett's testimony that appellant had said something to her about somebody left floating, the trial court would have denied the motion, just as it did when the defense moved to strike Dalton's testimony that appellant had said something to him about somebody left floating. (AOB 264-265.) Since an objection would have been futile, the fact that appellant did not object or move to strike the testimony does not bar the issue on appeal.

Respondent argues that the issue is barred for failure to object. (RB 157.) Assuming, arguendo, that this Court concludes that the trial court would have struck Triplett's testimony on appellant's request even though it had allowed Dalton to testify that appellant had said virtually the same thing

to him, then trial counsel rendered ineffective assistance for failing to make the appropriate motion. Given defense counsel's desire to exclude or minimize the impact of Dalton's testimony that appellant had talked about "some dude floating," (15 RT 2044), there is no conceivable tactical reason why it would have been acceptable to the defense for the jury to consider Barbara Triplett's testimony that appellant had made some statement about somebody floating in Canyon Lake "that wasn't able to make decisions for theirself anymore." (17 RT 2282.) There could be no tactical advantage to appellant in letting this evidence go to the jury, and appellant's trial attorneys should have taken appropriate steps to keep it out. To the extent that their omission was the cause of the trial court's failure to exclude or strike this testimony, appellant's counsel failed to provide the vigorous advocacy required of defense attorneys in a capital case. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; *cf.*, *Wiggins v. Smith* (2003) 539 U.S. 510.) Appellant should not be penalized for his counsel's incompetence, and this Court should consider his claim concerning Triplett's testimony on its merits.

B. The Testimony by Danny Dalton and Barbara Triplett about Appellant's Vague Statements Was Irrelevant and Inadmissible

Respondent's argument that Dalton's and Triplett's testimony about appellant's statements was relevant evidence because it tended to "prove" that appellant was familiar with and involved in Gitmed's murder is wishful thinking. (RB 158) If appellant had said anything about the crimes that indicated that he had at least been present when it occurred, then his statements would have been relevant. But there was no evidence that he said any such thing.

Basically, respondent argues that a witness in a capital case may testify that the defendant said some things to him that related in some way to a crime that had been committed and as a result, he thought that the defendant committed the crime–but without revealing more than a vague description of what the defendant had said. This argument is worse than absurd; it is seriously constitutionally deficient. Surely if a statement by a capital defendant is going to come into evidence against him, at the very least the prosecution has to establish what the statement was. Facts on which a jury relies to convict a criminal defendant must be proved beyond a reasonable doubt. (U.S. Const., Amends. V, XIV; Cal. Const., art. 1, § 24; *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.)

Here, the jury needed solid, credible evidence of what appellant said, and, to evaluate the significance of whatever that was, needed to know when and where and in what context he said it. Dalton was obviously a reluctant witness, and perhaps it was difficult for the prosecutor to get him to testify fully or helpfully about anything. But that was the prosecution's problem to solve, and appellant cannot be expected to overlook the fact that Dalton simply did not produce usable evidence about whatever statements appellant may have made. Since he did not even testify to what appellant said, the jury could only speculate about what it was that made Dalton think that appellant was Gitmed's murderer.

Appellant urges this Court to review the relevant portions of these two witnesses' testimony (15 RT 2042-2044, 2090-2092; 17 RT 2282), appellant's argument in his opening brief and the reasoning of the court in

Piaskowski v. Bett (7th Cir. 2001) 256 F.3d 687, which is very apt in the context of this issue. Appellant is aware that the issue in *Piaskowski* was, as respondent points out, the sufficiency of the evidence, and has cited the case not for the authority of its holding but for its reasoning in the evaluation of one item of evidence, the testimony of a witness who reported a vague statement made by the defendant. (AOB 263.) In *Piaskowski*, the reviewing court reasoned that even if the defendant's phone call to the authorities reporting that a crime had occurred (i.e. that there had been "some shit going down"), proved that "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." (*Ibid.*) The *Piaskowski* court said that the idea 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." (*Id.*, at p. 693.)

Respondent misrepresents the holding and significance of *People* v. *Guerra* (2006) 37 Cal.4th 1067. (RB 159.) There, a witness had testified that a rape victim had said that the defendant had come into her house while she slept with her door open, and the statement was admitted because it showed her state of mind, explaining why she jerked away from defendant when he later approached her, and because her fear of defendant was relevant to the element of lack of consent to sexual intercourse. (*Id.*, at p. 1113.) Even if she had dreamed the event, it would explain why she was afraid, so the issue in that case was not whether the statement was reliable, as respondent implies (RB 159); in fact, the *Guerra* jury was explicitly admonished that the victim's "statements could not be considered to prove defendant was in fact in [her] house as she slept, but were admitted only for the purpose of explaining her subsequent actions, if relevant." (*Id.*, at p.

1113.) There was no similar purpose in appellant's case for admitting the statements at issue.

Nor is *People v. Jablonski* (2006) 37 Cal.4th 774 or *People v. Chatman* (2006) 38 Cal.4th 344, cited by respondent, helpful. In *Jablonski* a sexually suggestive letter the defendant had written to the victim before he raped and murdered her was held to be relevant evidence since it directly revealed his longstanding prurient interest in the victim. (*People v. Jablonski, supra,* 37 Cal.4th at p..) In *Chatman* the only eyewitness was a seven-year-old child who had been two-and-a-half years old when he saw his father stab the victim, and his mother's testimony that he woke up screaming and had nightmares after the event was relevant to the child's credibility. (*People v. Chatman, supra,* 38 Cal.4th at pp. 354, 357, 371.) Respondent claims that "similarly" the statements appellant made to Dalton and Triplett tended to prove he was "connected to Gitmed's murder." (RB 160.) This is frankly a non-sequitur. And it is wrong, as the statements at issue here are not like those found relevant in *Jablonski* and *Chatman.*

Unlike in *Jablonski*, nothing in appellant's statement connected him to the crime itself, since his comments were made after the fact of the murder and after it was public knowledge and did not suggest that he had any particular animosity toward the victim. It is noteworthy that appellant referred only to "somebody" (17 RT 2282) or perhaps "some dude" (15 RT 2044) when he mentioned the body found in the lake, never suggesting that he even realized this was Ron Gitmed, although he knew Gitmed personally by name. And unlike in *Chatman*, appellant's statements did not indicate any extraordinary emotional state comparable to the emotional disturbance of a traumatized child; there simply was nothing in what he said that

reflected that he himself had seen the actual murder, let alone that he was himself criminally involved in it.

C. The Issue of the Trial Court's Prejudicial Error in Refusing to Strike Dalton's Testimony about Appellant's Statements is Cognizable on Appeal

Appellant asserted in his opening brief that the trial court erred in refusing to strike Dalton's vague testimony about appellant's statements and his opinion about appellant's guilt. (AOB 264.) The trial court denied the motion to strike all of Dalton's tesimony relating to appellant's statements, but acknowledged that Dalton's opinions lacked foundation, and gave an admonition, albeit a deficient one, to the jury with regard to the opinion testimony. (16 RT 2084.)

1. Motion to strike testimony about statements

Respondent's claim that appellant did not identify "a particular statement" he wanted stricken from Dalton's testimony misrepresents the record. (RB 162.) The dialogue between the trial court and defense counsel was as follows, in pertinent part:

> "MR. AQUILINA. "But as far as Mr. Dalton is concerned, although I have not, we have not yet received a copy of the transcript, as best I can put Mr. Dalton's direct testimony toether, there were a couple of key phrases that he made concerning Mr. Thompsoson's statements.
>
> "On, and I'm just quoting, Mr. Thompson or Tex was bragging about bullshit, 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 that owned the blue car.

. . .

". . . [It's] our contention that Mr. Dalton's testimony concerning what he believes Mr. Thompson was talking about constitutes nothing more than speculation, is objectionable and is inadmissible.

"Now that we've heard the foundation, we're interposing an objection and moving to strike Mr. Dalton's testimony as it relates to Mr. Thompson's statements concerning killing . . . .

. . .

"THE COURT: How do you want any instruction at this stage worded then, Mr. Aquilina? . . . ¶ What's your suggestion?

"MR. AQUILINA: The jury should not give any weight to any opinion of a lay witness or any inferences drawn by the witness. They should disregard the testimony relating to opinions or inferences drawn by the witnesses themselves.

"THE COURT: Well, you had originally asked for testimony to be stricken.

"MR. AQUILINA: Yes, but this is an alternative, because I see where the Court's going. I mean, personally I think Mr. Dalton's testimony should be stricken as far as it relates to any statements Mr. Thompson told me."

"THE COURT: . . . I think the opinions . . . lack sufficient foundation. . . . I will give them an instruction that they are not

to give weight to opinions of lay witnesses or inferences drawn unless there are facts to substantiate the basis for those opinions and inferences."

(RT 2082-2084, underlining added.)

Thus, appellant identified Dalton's testimony about appellant's "floating" statements, whatever they were, and his testimony that appellant had been talking about "bullshit," whatever that might have meant, and Dalton's opinions of appellant's guilt based on all the various things appellant had said to him – again, whatever those might have been. Trial defense counsel clearly asked that the trial court strike all of Dalton's testimony that related to statements he claimed appellant had made to him. (16 RT 2082-2084.) The trial court did not deny appellant's motion as untimely or as non-specific. Rather, it is clear from the dialogue above, that the trial court understood that appellant's motion was to strike all of the identified testimony about appellant's statements, and that it denied the motion with regard to all such statements except for Dalton's testimony about his own opinions, which it decided to remedy not by striking it but by admonition to the jury.

The issue of the trial court's denial of appellant's motion to strike all of Dalton's testimony about statements by appellant – his account of statements about "somebody" or "some dude" "floating" or "left floating," his characterization of some unspecified and undescribed statements by appellant as "bragging" about something and as "bullshit," and his testimony that he had concluded from appellant's statements that appellant had killed Gitmed–is properly before this Court.

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2. Deficient Admonition about Opinion Testimony

Respondent also argues that appellant has "waived" his contention on appeal that the trial court's admonition was insufficient and states that the trial court "agreed to the instruction proposed by trial counsel." (RB 162.) That is incorrect.

Accepting that the trial court had decided not to strike all of Dalton's testimony about statements made by appellant, trial defense counsel requested, in the alternative, that the trial court tell the jury not to "give any weight to any opinion of a lay witness or any inferences drawn by the witness. They should disregard the testimony relating to opinions or inferences drawn by the witnesses themselves." (16 RT 2084.)

The trial court did not give the admonition appellant requested, instead telling the jury it could consider an opinion of a witness if the opinion was "based on facts to which the witness has testified." (16 RT 2085.)

Not only was that not the instruction appellant had requested, it was, as appellant pointed out in his opening brief, legally incorrect. Under Evidence Code section 800, lay opinion testimony is admissible if it is based on the witness's own in-person, physical perceptions–not if it is based on an impression gained from indirect statements the witness has heard. (See AOB 266-271 and authority cited therein.) Additionally, the admonition actually invited the jury to consider Dalton's testimony that he had concluded appellant was guilty since those opinions were, according to his own testimony, based on "facts to which [he] had testified"–namely, that appellant had done "bullshit bragging," had said "something" about "somebody floating," etc.

Respondent's arguments that the issue is waived and that the admonition was adequate, are not supported by the record or the law and should be rejected.

D. Dalton's Prior Inconsistent Statement That He Would Pin Gitmed's Murder on Mercurio Should Have Been Admitted

Appellant has briefed a second and related issue arising from Dalton's testimony. That is that the trial court, having allowed Dalton to testify that appellant had made various statements referring to Gitmed's murder and that he believed based on these statements that appellant had killed Gitmed, subsequently refused to allow appellant to present evidence that before trial, Dalton had told the defense investigator that he was going to pin the whole crime on Anthony Mercurio. (AOB 271-285.) On the prosecutor's motion and after a section 402 hearing, the trial court ruled this evidence more prejudicial than probative.

Respondent argues that the exclusion of Dalton's prior statement was not error because the statement was irrelevant, misleading, hearsay, and did not constitute a prior inconsistent statement. (RB 163.)

Respondent makes the remarkable argument that Dalton's prior statement to the defense investigator that he was going to "pin" Gitmed's murder on Mercurio was not inconsistent with his trial testimony because at trial, he did not testify about what he intended to testify to. (RB 168.) This is nonsensical. As a matter of simple logic, Dalton's statement in February of 1996 that he planned to testify in court that Mercurio had killed Gitmed, which raised the inference that he had reason to think that Mercurio was in fact guilty, was inconsistent with his later actual testimony at trial that, in his opinion, appellant had killed Gitmed.

Respondent also argues unpersuasively that Dalton's prior statements were properly excluded under Evidence Code section 352 because they could have confused the issues in the sense that the jury might have concluded that Mercurio had confessed his guilt to Dalton. (RB 168.) Such an inference was, of course, entirely permissible under California law, as appellant has explained in his opening brief. (AOB 281-285.) Respondent's flat characterization of such a conclusion as "erroneous" is insupportable since there is no way to know what Mercurio told Dalton about his involvement in Gitmed's murder, and respondent cannot possibly know whether he said something inculpatory – particularly since, as appellant and respondent have both observed, Mercurio and Dalton had lived together for some time and were closely associated (AOB 276, RB 168-169), so the jury certainly could have reasonably inferred that Mercurio had discussed this with Dalton, based on Dalton's statements to the defense investigator.

Respondent also inaccurately states that, in spite of the fact that the defense investigator's notes indicated that he had advised Dalton that he represented appellant, Dalton might have "assumed" he "was working for Mercurio." (RB 168.) Dalton never suggested that he had had any such assumption and there is absolutely nothing in the record that could possibly support the notion. On the contrary, the evidence supports appellant's position that (a) Dalton knew that the defense investigator had come to talk with him on behalf of appellant, and that (b) it made no sense for the prosecutor to argue, or the trial court to conclude, that Dalton would want to "pin" the murder on Mercurio if he was angry at appellant's investigator's visit.

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E. The Trial Court's Erroneous Rulings on Dalton's and Barbara Triplett's Testimony Were Extremely Prejudicial

Appellant has clearly demonstrated in his opening brief that the combination of the trial court's erroneous rulings on Dalton's testimony, especially when combined with Triplett's testimony, had a devastating prejudicial effect at his trial because of the state of the evidence at the close of the guilt phase, and additionally, because the trial judge herself was swayed by this evidence in making the decision to deny appellant's motion to modify the sentence. (AOB 286-289.) Moreover, these errors violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments, as he has explained in his opening brief, and reversal is required under the *Chapman* standard. (AOB 288-289; *Chapman v. California* (1967) 386 U.S. 18, 26.)

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

Appellant established in his opening brief that the trial court erred in dismissing Juror Rodriguez for cause and in failing to instruct the jury properly after an alternate was seated to replace her. (AOB 304-345.)

Respondent argues that the discharge was proper and the trial court's supplemental instructions were appropriate. (RB 173.)

A. The Trial Court Failed to Conduct an Adequate Investigation into Juror Misconduct Before Dismissing Juror Rodriguez and Appellant Has Not Forfeited the Issue

As appellant showed in his opening brief, the trial court failed in its duty to conduct an adequate jury investigation after learning information from two jurors that alerted it, and would have alerted any reasonable trial judge, to the possibility that serious misconduct had occurred during penalty deliberations. (AOB 305 et seq.)

Respondent contends first that appellant has "waived" this issue, and secondly that the trial court conducted an adequate inquiry. (RB 184-188.) Respondent also argues that the discharge of Juror Rodrigue was not an abuse of the trial court's discretion.

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1. This Issue Is Cognizable on Appeal

Under the numerous authorities appellant has cited in his opening brief, the trial court had a duty to conduct a sufficient inquiry for an informed exercise of discretion in its decision whether to discharge a juror. (AOB 305-321 and cases cited therein.) That duty derived from the court's responsibility for conducting a fair trial and in particular, for protecting appellant's right to trial by an impartial jury. (See *Estelle v. Williams* (1976) 425 U.S. 501, 504 ["courts must do the best they can" to protect right to fair trial].)

To paraphrase this court's statement of the trial court's duty in a comparable context, "once the court is put on notice of the possibility a juror [has committed misconduct during deliberations] it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error. [Citation.]" (*People v. Burgener* (1986) 41 Cal. 3d 505, 520, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Cleveland* (2001) 25 Cal.4th 466, 477.)

Respondent argues that appellant has "waived" the issue of the trial court's failure to conduct an adequate inquiry into jury misconduct after hearing what Jurors Pye and Rodriguez reported. (RB 184-185.) This argument must be rejected.

Appellant has identified the trial court's error as a violation of his basic constitutional rights to trial by an impartial jury, due process, and a reliable determination of penalty in a capital case. (AOB 344-345.) This Court may review any issue on appeal involving a criminal defendant's fundamental rights regardless of whether an objection was entered below (§

1259) and should do so here, especially in light of the constitutional requirement of a heightened degree of due process in a capital case (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; see *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Shaw* (2004) 122 Cal.App.4th 453, 456, fn. 9; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249.)

This Court's opinion in *People v. Ramirez* (2006) 39 Cal.4th 398, cited by respondent (RB 185-187), is inapposite. There was no allegation of juror misconduct in that case to trigger the trial court's independent duty to conduct an inquiry. Rather, one of the jurors had been murdered in circumstances totally unrelated to the case and, on appeal, the defendant argued that the trial court should have questioned the jury about whether they had been exposed to publicity about the murder and what effect that publicity had had on them. (*Id.*, at p. 459-460.) The trial court had admonished the jury both that the murder had no connection to the case, and also that the jury should avoid exposure to media accounts of the murder, and there was no indication that any juror had disobeyed the admonition, but on appeal the defendant argued that the trial court should have inquired about the jurors' exposure to such media accounts. (*Id.*, at pp. 459-460.) In those circumstances, this Court held that the issue was forfeited for failure to request such questioning at trial, although this Court also considered the merits of the issue. (*Id.*, at p. 460.) The *Ramirez* defendant also contended on appeal that before the jurors resumed deliberations on the day after they had learned of their fellow juror's death, the trial court should have asked them certain questions about the effect of the murder on them. (*Ibid.*) The trial court did, however, question the foreperson, and satisfied itself from the foreperson's responses and its own observations that the jury was able to

continue. (*Id.*, at p. 460.) So the issue in *Ramirez* was whether the appellant could raise the issue of the trial court's failure to pursue particular line of inquiry on a theoretical possibility and not, as in appellant's case, its failure to make any inquiry of the jury at all, into the actual misconduct it had reason to believe had occurred. The *Ramirez* opinion cannot be used to excuse the trial court from its duty to make an adequate inquiry into jury misconduct, when it has been alerted that misconduct may have occurred.

Alternatively, if the trial court's failure to conduct an adequate inquiry into the possibility of juror misconduct is attributable to trial counsel's failure to request it, then appellant's attorneys failed to provide the effective representation to which he was entitled under the Sixth and Fourteenth Amendments, and their ineffectiveness is apparent on the appellate record. (See *People v. Pope* (1979) 23 Cal.3d 412, 424-426; *Strickland v. Washington* (1984) 466 U.S. 668, 689.)

After the trial court re-appointed appellant's attorneys to deal with the situation, one of them, Mr. Grossman, immediately asked the court not to make any findings with regard to Juror Rodriguez before counsel had an opportunity to think about the situation and produce written briefing; then counsel focused on trying to persuade the trial court not to excuse either juror for failure to deliberate, pointing out that they had lingering doubt about appellant's guilt, which was a legitimate reason not to vote for the death penalty, and not something that would change in discussions about the penalty phase evidence. (27 RT 3342, 3361-3362, 3373.) Appellant's other attorney, Mr. Aquilina, began to make a request asking to "inquire briefly," just before the trial court sent Juror Rodriguez home, but the court cut him off, saying, "That will be denied at this point in time." (27 RT 3354.) It is

clear that the trial court had already decided to discharge Juror Rodriguez, as it promptly did. (*Ibid.*) Trial counsel did ask the court to question the jury to determine whether they were deadlocked, given what the court had learned about the situation in the jury room from the two jurors who spoke up. (27 RT 3374.) The trial court refused that request on the ground that it was too soon to find the jury deadlocked. (27 RT 3375.) On this record, it is clear that trial counsel were trying to protect appellant's right to a fair trial, and had no tactical reason whatsoever for tolerating or failing to uncover the kind of misconduct by other jurors that was apparently causing two hold-out jurors to be so severely distressed they were having physical symptoms. A reasonably competent attorney would certainly have requested that the other jurors be questioned to establish, for example, whether the "horrible" treatment that made Juror Rodriguez feel that she "was on trial," (27 RT 3330) rose to the level of misconduct, and whether Juror Pye's allegation that the other jurors were refusing to deliberate, i.e. "had made up their minds" before the instructions and evidence even arrived in the jury room (27 RT 3345), was true. Trial counsel's performance at this critical point in the proceedings fell below the standard of vigorous advocacy and "extraordinary efforts on behalf of the accused" required of criminal defense attorneys in a capital case. (American Bar Association Standards for Criminal Justice, Standard 4–1.2, http://www.abanet.org/crimjust/standards/dfunc_blk.html#1.2;) If trial counsel had requested a genuine and thorough inquiry of the jury before Juror Rodriguez was dismissed, it is reasonably probable that the trial court (a) would have uncovered misconduct requiring a mistrial and retrial of the penalty phase, or (b) would have discovered the need to instruct the jury on lingering doubt about guilt as a valid factor to consider in penalty

deliberations in a capital case, enabling Juror Rodriguez to remain on the jury. Either of these would have been results more favorable to appellant.

2. Inadequate Inquiry into Jury Misconduct

Appellant's position is that, after hearing from two jurors with lingering doubt about guilt, that other jurors were using bullying tactics and refusing to deliberated, the trial court had a duty to question the other jurors to determine whether misconduct had occurred. (AOB 305-307)

Respondent argues that questioning Jurors Pye and Rodriguez themselves was sufficient. (RB 187.)

Respondent cites *People v. Davis* (1995) 10 Cal.4th 463 in support of its position and notes that *Davis* cites *People v. Ramirez* (1990) 50 Cal.3d 1158, 1175, for the principle that the trial court has a duty to conduct "whatever inquiry is reasonably necessary" once it is on notice that "improper or external influences are being brought to bear on a juror[.]" (*People v. Davis, supra,* 10 Cal.4th at p. 535; RB 186-187.) Appellant agrees with that principle and relies on it here.

In *Davis* the question was whether an extrinsic event, i.e. a juror's conversation with the victim's grandmother, had influenced a particular juror, and the trial court questioned both the juror and the grandmother. (*Id.*, at pp. 534-535.) There was no reason for the trial court to think that any other juror had heard the conversation, and the juror in question said she had not discussed it with anyone. (*Id.*, at pp. 535-536.)

Even if the complaints of Juror Rodriguez alone would not have triggered the trial court's duty to question the jury, surely the extraordinary circumstance of two jurors reporting misconduct of other jurors inside the jury room would have signaled any reasonable trial court

that something was amiss inside the jury room. The trial court should have talked with more than just the complaining jurors; such further inquiry was "reasonably necessary" to determine whether extreme behavior rising to the level of misconduct, or other jurors' refusal to deliberate, had occurred. The trial court's failure to exercise its duty to make a serious inquiry into the allegations that had been made independently by two different jurors was an abuse of discretion, and the death penalty verdict returned against appellant is unreliable, requiring reversal. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

B. The Trial Court Abused its Discretion in Discharging Juror Rodriguez (Lucille R.)

Appellant has demonstrated in his opening brief that Juror Rodriguez should not have been discharged, and that a reasonable trial court would have taken steps to insure that she understood she had done nothing wrong and would have admonished the rest of the jury that lingering doubt about guilt was a valid mitigating factor which should be considered during penalty deliberations. (AOB 322-331.)

Respondent argues that the discharge of Juror Rodriguez was not an abuse of the trial court's discretion. (RB188.)

People v. Boyette (2002) 29 Cal.4th 381, on which respondent relies, is not helpful to the instant case because there, the juror asking to be discharged "made it clear he could no longer be objective" because of relating some of the evidence he had heard to his own relationship with his son. (*Id.*, at p. 462.) This Court affirmed the discharge of that juror because there was substantial evidence he could not be objective or follow the court's instructions. (*Id.*, at p. 463.) In appellant's case, however, Juror Rodriguez did not indicate, and there was no other reason for the trial court to think,

that she was unable to be objective. The record is clear that what troubled Rodriguez most was the conduct of other jurors, which she characterized as "horrible." (27 RT 3330.) Also, she had voted for guilt but now had some doubt about that verdict, and she was worried that she had done something wrong because of that. (See AOB 330-331; 27 RT 3331.)

Respondent also argues that the case at bar is like *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422. Appellant has already discussed that case, as follows:

> "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.)"

(AOB 329-330.) Respondent asserts that the discharge of Juror Rodriguez is similar to the discharge of the juror in *Perez* because the trial court determined that her "emotional state" made it impossible for her to continue. (RB 191-192.) Respondent is mistaken because, unlike in *Perez*, the trial court in appellant's case did not have sufficient facts on which to base such an assessment, since (a) it did not offer to admonish the jury about how to conduct deliberations properly, including the importance and validity of considering lingering doubt about guilt in the penalty phase of a capital trial;

(b) it did not allow a cooling off period overnight or anything comparable to it; and (c) it did not question the foreperson or any other jurors to determine whether the basic problem was truly the juror's emotional incapacity or whether it was misconduct by one or more of the other jurors.

Perez is a good example of a trial court that exercised its discretion carefully and properly, and supports appellant's position that the trial court in the instant case abused its discretion in discharging Juror Rodriguez. As appellant has pointed out in his opening brief, the removal of a holdout juror without cause was structural error requiring reversal of his death sentence. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080; see AOB 331.)

C. The Supplemental Instructions to the Jury after the Alternate Was Seated Were Inadequate

Appellant explained in his opening brief that the trial court's instructions to the jury after replacing Juror Rodriguez with Juror Gomez were inadequate because they effectively withdrew lingering doubt from the jury's consideration of factors in mitigation. (AOB 331-342.)

Respondent argues that this issue is "waived," and that the instructions given were adequate. (RB 192.)

1. The Issue Is Cognizable on Appeal

Respondent contends that appellant has "waived" his right to raise on the issue of the inadequate supplemental instructions as an issue on appeal because he did not object to the trial court's proposed instructions or request elaboration or additional instructions. (RB 192-293.)

Considering the need for a heightened level of due process and the importance of a reliable penalty verdict in a capital case, and the fact that

appellant's claim here is based on his fundamental rights under the Sixth, Eighth, and Fourteenth Amendments (see AOB 304, 321, 331, 338, 340, 342), this Court should review the merits of the issue under its statutory discretion to do so (§ 1259) and reverse appellant's sentence regardless of any omission by trial counsel.

In *People v. Lewis* (2001) 26 Cal.4th 334, on which respondent relies, this Court held that the appellant in that case had forfeited the right to complain on appeal about the trial court's failure to instruct the jury on "the attendant circumstances of the crime, or defendant's age, experience, and understanding," as amplification of an instruction the court had given which mirrored the language of section 26. (*Id.*, at p. 380.) But in *Lewis*, the trial court had no particular reason to think that the jury would not consider such factors, and the jury had no reason to think that such factors were not appropriate for their consideration. In particular, no juror in *Lewis* had been discharged after expressing to the other jurors that she strongly believed that those factors were important. In appellant's case, by contrast, the remaining jurors knew that the discharged juror had been considering her lingering doubt about appellant's guilt.

Appellant submits that, under the authority and reasoning cited in his opening brief, and in the unusual circumstances of his case, the trial court's duty to instruct the jury on the law it needed in order to decide the issue before it in the penalty phase meant that it was required to tell the jury that it must consider lingering doubt about guilt as a factor in mitigation of the sentence.

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2. The Supplemental Instructions Were Inadequate and Misleading

Appellant established in his opening brief, relying in large part on this Court's reasoning in *People v. Cain* (1995) 10 Cal.4th 1, that there was a reasonable likelihood that the supplemental instructions given by the trial court after Juror Gomez was seated left the jury under the impression that it could not or should not consider lingering doubt from the guilt phase in its deliberations on penalty. (AOB 334-337.)

Respondent argues that the instructions given were adequate and refers briefly to this Court's opinion in *Cain* but omits any acknowledgment of the critical, lengthy instruction on lingering doubt which had been given by the trial court in that case, and which this Court approved for the reasons appellant has described in his opening brief. (AOB 334-337.)

Appellant submits that *Cain* supports his position that such an instruction was necessary and reversal is required for all the reasons given and under all the authority cited here and in his opening brief.

XI

THE TRIAL COURT'S DENIAL OF APPELLANT'S POST-TRIAL MOTION FOR A NEW TRIAL REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

Appellant demonstrated in his opening brief that the trial court's denial of his motion for a new trial was a manifest abuse of discretion because the factual findings on which it based its ruling were unsupported by the record. (AOB 346-356.)

Respondent argues that the trial court's findings were supported by substantial evidence. (RB 200-204.)

Appellant pointed out in his opening brief that the affidavits of Juror Pye (Debra P.) and Juror Rodriguez (Lucille R.) that were submitted in support of the motion contained two types of allegations about what went on in the jury room: (1) refusal of some jurors to deliberate; and (2) a hostile environment created by undue emotional pressure from other jurors. (AOB 352; see 5 CT 1230-1255.)

With regard to failure to deliberate, both Juror Rodriguez and Juror Pye described behavior by other jurors, and specifically by the foreman, that constituted a clear refusal to deliberate. They both said that some of the jurors, before deliberations began, and before exhibits had even been brought into the jury room, announced their conclusion that appellant was guilty and then refused to discuss the evidence or deliberate. Both jurors' declarations contained the foreperson's explicit statement that he did not want to review the evidence, which was so memorable that each juror separately reported it when interviewed two months later. (5 CT 1231, 1237.)

With regard to a hostile environment, Jurors Rodriguez and Pye reported various statements made to them and tactics used to pressure them to vote for guilt. (CT 1233, 1238; 27 RT 3329-3331, 3343, 3353-3355 [Rodriguez]; 3344-3346, 3357-3359 [Pye]; see AOB 350-354.) The trial court pointed to that behavior as evidence that the jurors were deliberating, which, as appellant points out, begs the question of the behavior of the other jurors, who, logically, were not the ones arguing with Jurors Rodriguez and Pye. (See AOB 350-353.)

Respondent has made the same error as the trial court, arguing that the hostile questioning by the deliberating jurors was substantial evidence that nobody was refusing to deliberate. (RB 200-201.) This argument utterly fails to address appellant's point that the fact that some jurors were deliberating by arguing with Jurors Rodriguez and Pye is no evidence whatsoever that the other jurors, whom the affidavits described as refusing to discuss the evidence, were deliberating. Obviously, the jurors discussing the evidence and the issues in the case were not the non-deliberating jurors. Respondent's argument misses the point and should be rejected.

CONCLUSION

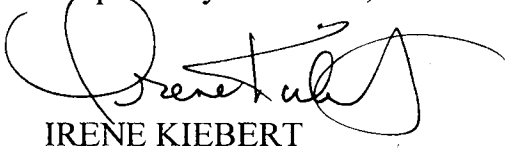
Appellant has been sentenced to die by a jury from which the judge excluded numerous anti-death penalty and death-penalty neutral jurors without even voir diring them, and two fully-qualified African-American prospective jurors who were challenged by the prosecutor because they were Black. Most egregiously, the trial court removed a seated juror in the penalty phase who had committed no misconduct, and who was a holdout with lingering doubt about guilt; failed to conduct an inquiry into whether other jurors were refusing to deliberate or creating an unreasonably hostile environment for two holdout jurors; and failed to instruct the jury after seating the alternate that it should consider any lingering doubt any juror might have.

This was not, by any stretch of the imagination, a case with overwhelming evidence of guilt. Appellant was convicted of capital murder primarily on the uncorroborated, self-serving testimony of an accomplice, and at least two jurors had lingering doubt about guilt as they entered penalty deliberations. There was weak to no evidence that the victim had had any property taken from him when he was killed; the trial court admitted irrelevant evidence as well as improper and highly prejudicial opinion testimony by a witness who was not allowed to testify that he had earlier said he would testify that the star prosecution witness was actually the perpetrator; and the prosecution never even established that appellant was with the victim on the night that he died.

Appellant's conviction and sentence are a miscarriage of justice, and respondent has failed to meet its burden under *Chapman v. California* (1967) 386 U.S. 18 of establishing beyond a reasonable doubt that the numerous

errors of constitutional dimension at appellant's trial did not affect either the guilt or penalty verdict, or both. For all the reasons explained and under all the authority cited in the instant brief and in appellant's opening brief, this Court should reverse the entire judgment.

Respectfully submitted,



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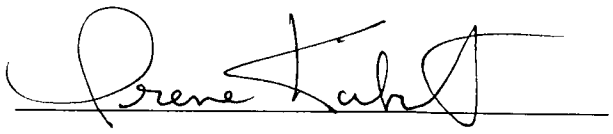
CERTIFICATE OF WORD COUNT

I, IRENE KIEBERT, counsel on appeal for appellant JAMES A. THOMPSON in Automatic Appeal No. S056891, certify that Appellant's Reply Brief consists of 39,136 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 8.630, sections (b)(1)(B) and (b)(2).)

DATE: May 15, 2007



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CERTIFICATE OF SERVICE

Re: People v. James A. Thompson Automatic Appeal No. S056891

I, Irene Kiebert, certify that I am an active member of the California State Bar, Member No. 107472, and not a party to the within cause; that my business address is 3020 El Cerrito Plaza, #412, El Cerrito, California 94530; that on May 16, 2007, I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Attn: Melissa Mandel, D.A.G.
110 West A Street, Suite 1100
San Diego, CA 92101

California Appellate Project
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Clerk of the Superior Court
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Each said envelope was then, on May 16, 2007, sealed and deposited in the United States mail at El Cerrito, California, with the postage thereon fully prepaid.

Executed on May 16, 2007, at El Cerrito, California.

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DECLARANT