IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JAMES ALVIN THOMPSON,** Defendant and Appellant.	S056891 **CAPITAL CASE**

Riverside County Superior Court No. CR45819
The Honorable Vilia G. Sherman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On December 24, 1992, the Riverside County District Attorney filed an information charging Thompson with the murder of Ronald Gitmed (Pen. Code, § 187). The information alleged Thompson personally used a firearm in the commission of the offense (Pen. Code, §§ 12022.5, subd. (a), 1192.7, subd. (c)(8)) and charged Thompson with the special circumstances of having previously been convicted of murder (Pen. Code, § 190.2, subd. (a)(2)), and committing a murder during the course of a robbery. (Pen. Code, § 190.2, subd. (a)(17)(i).) (1 CT 189-190.)

Thompson was arraigned on the information and entered a not guilty plea. (1 CT 197-198.) On July 28, 1994, the People filed a notice of intent to seek the death penalty. (2 CT 383-385.) On June 7, 1995, the case was assigned to Judge Vilia Sherman for all purposes.[1/] (2 CT 484.)

In limine motions were heard on March 18-25, 1996. Thompson's motion to exclude the testimony of accomplices was denied, as was his motion to suppress evidence pursuant to Penal Code section 1538.5. (4 CT 892-899.) Thompson's motion to admit the criminal histories of witnesses was granted in part and denied in part; his motion to exclude evidence of his prior murder

1. The case had previously been assigned to two other judges.

conviction was reserved until after his testimony; and the People's motion to admit evidence pursuant to Evidence Code section 1101, subdivision (b), was denied. (4 CT 904-915.)

Jury selection commenced on March 25, 1996. (4 CT 916.) Thompson's *Wheeler*[2] motions were denied. The jury and alternates were sworn on April 1, 1996. (4 CT 925.) Opening statements and presentation of the evidence in the guilt phase commenced on April 1 and 2, 1996.[3] (4 CT 925-927.) Following the presentation of evidence, instructions and arguments, the jury retired for deliberations on April 22, 1996. (4 CT 967-969.)

On April 24, 1996, the jury returned verdicts finding Thompson guilty of murder as charged in count one, and setting the degree at first degree. The jury found true the robbery-murder special circumstance. They found the allegation that Thompson personally used a firearm within the meaning of Penal Code section 12022.5 not true. (5 CT 1095-1100.) Thompson's motion to relieve appointed counsel and represent himself during the remaining portions of the trial was granted. Thompson's lawyers were placed on standby. (5 CT 1100-1105.)

On April 30, 1996, jury trial was held on the special circumstance of Thompson's prior murder conviction. Thompson presented no evidence. The jury found the special circumstance to be true. (5 CT 1107-1118.)

The penalty phase commenced the same day. (5 CT 1118.) Thompson presented no evidence. Thompson requested and was granted reappointment of counsel after two jurors informed the court they could not continue to

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2. *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.

3. The trial proceeded in three phases. During the first phase, the jury was asked to decide Thompson's guilt on the murder charge, and whether the robbery-murder special circumstance was true. During the second phase, the jury was asked to decide whether the prior murder special circumstance was true. The final phase was the penalty phase.

deliberate. One of the jurors was excused and an alternate was seated. (5 CT 1124-1126.) On May 7, 1996, the jury set the penalty at death. (5 CT 1127-1128, 1150-1153.)

On October 21, 1996, Thompson's motion for a new trial was denied. His motion to strike the special circumstance was denied. His motion to modify the sentence was denied, and he was sentenced to death for the murder of Ronald Gitmed. (5 CT 1343-1355.)

On October 24, 1996, Thompson filed a notice of appeal. (5 CT 1356-1358.)

STATEMENT OF FACTS

Guilt Phase

Introduction

Thompson met Tony Mercurio in prison in June or July 1991. Both were released later that summer. In August 1991, Thompson became acquainted with Michelle Keathley. Thompson visited Keathley at her home two or three times during the latter part of the month. During one of his visits, Thompson met Eric Arias, Keathley's sister's boyfriend. Thompson, who did not have a car, asked Arias for a ride to Temecula to collect $6000, but Arias refused. During his last visit to Keathley's house, Thompson met Keathley's cousin Ron Gitmed and asked him for a ride to Temecula in exchange for $1000. Ron agreed. They left together in Ron's blue Toyota Tercel.

They did not go to Temecula but instead went to the home where Mercurio had been staying with his girlfriend. Mercurio and Thompson took Gitmed to a remote part of Canyon Lake in Riverside County in a stolen truck, allegedly to go "four-wheeling." They pulled up to the water's edge and as Gitmed enjoyed the scenery, Thompson pulled out a gun and pointed it at

Gitmed, yelling at him to take off his clothes. Thompson robbed Gitmed and then shot him three times, killing him almost instantly.

In the days after the murder, Thompson drove Gitmed's car, took items of furniture from Gitmed's storage unit and tried to sell Gitmed's car stereo. Thompson, Mercurio and another acquaintance eventually took Gitmed's car to a secluded location and set fire to the car, destroying it completely.

Discovery Of The Body

On August 28, 1991, a group of people heading for a day of jet-skiing found the body of a man floating in Canyon Lake in Riverside County. (12 RT 1499-1504, 1510, Ex. 2 - 6.) The man's identity was unknown until September 11, 1991, when he was identified as 25-year-old Ronald Gitmed. (12 RT 1484-1486, 13 RT 1624-1626.) An autopsy revealed that Gitmed had suffered three gunshot wounds, including an immediately fatal wound which perforated his right lung and went through his heart. (12 RT 1536-38.)

Events Preceding The Murder

One night in mid-August 1991, Michelle Keathley played pinball into the middle of the night at Mr. Q's in Riverside and struck up a conversation with Thompson. (13 RT 1611-1614, 1645-1647.) They left together and Michelle went to her home on Acacia Street in Riverside while Thompson waited down the street until Michelle's husband Kerry Keathley left to go to work. After that, Thompson came in to the house and cooked breakfast for himself, Michelle, Michelle's sister Alicia Levenson, and Alicia's boyfriend Eric Arias. Thompson, Michelle, Arias and Levenson stayed at the Keathley home for several hours and used crystal methamphetamine. (13 RT 1591-1595, 1597, 1606, 1611, 1613-1614, 1645-1647.)

While they were there, Thompson asked Arias to give him a ride to the Lake Elsinore/Temecula area to collect something that was owed to him. (13 RT 1597, 1603.) He told Arias he would split $6000 if Arias gave him a ride. (13 RT 1603.) Thompson said he would have a gun with him. (13 RT 1604.) Arias initially agreed to give Thompson a ride but then decided not to. Arias talked to Thompson on the phone later that night and told Thompson he would not give him a ride. (3 RT 1604-1605.)

Thompson came to Michelle's house five or six days after his initial visit and may have come another time. He traveled by bike or on foot but did not drive a car. (13 RT 1605, 1613-1614.) Gitmed also visited Michelle at her home several times a week during the month of August 1991. Gitmed and Michelle were close and he visited her often. He had lived with her for a while when he was in high school. (13 RT 1611, 1648-1649.) Gitmed drove a blue Toyota Tercel. (12 RT 1489-1490, Ex. 10.)

The Murder Of Ronald Gitmed

In the early evening of Monday, August 26, 1991, or Tuesday, August 27, 1991, Gitmed was at Michelle's house when Thompson arrived unexpectedly.[4/] It was after 5:00 p.m. because Ronada Briggs French was there,

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4. The prosecution's theory was that the murder probably occurred on the night of Tuesday, August 27, 1991, but may have occurred the night before. The People presented evidence that Gitmed was alive into the evening of Monday, August 26, 1991, and that he was dead on August 28, 1991. That evidence included the testimony of Gitmed's acquaintance, Don Fortney, who helped Gitmed move from an apartment into a storage facility until 3:00 p.m. on August 26 when he drove Gitmed back to the apartment where Gitmed had parked his car. (13 RT 1582-1584.) Gitmed's mother testified that he went to her home that same evening at approximately 7:00 p.m. (12 RT 1485-1492.) Gitmed's last bank and credit card transactions took place on August 26, 1991. (19 RT 2410-2411.) During Michelle Keathley's September 11, 1991 interview with police, she recalled that it was either Monday, August 26 or Tuesday,

and French worked until 5:00 p.m. on weekdays. Thompson and Gitmed talked. (13 RT 1614-1617, 17 RT 2398-2402.) Gitmed told Michelle that Thompson was going to pay him $1000 for a ride, and then Gitmed was going to have dinner at his grandmother's house in Lake Elsinore. (13 RT 1618-1619.) Thompson and Gitmed left together but returned five minutes later to get some drugs which Michelle had purchased using Gitmed's money.[5/] Gitmed told Michelle that Thompson had said he could get Gitmed's money back for the drugs. Thompson told Michelle they were going to "Tony's." He said they were going to a friend's house and he needed a ride. He also said he was going to collect $6000. Thompson and Gitmed left again in Gitmed's blue Toyota Tercel. (13 RT 1619-1622, 1699, 15 RT 1882-1883, 17 RT 2400-2402.)

Tony Mercurio was a parolee who was released from prison in August 1991. He had met Thompson earlier that year when the two were in prison together. Mercurio lived on Santa Rosa Mine in Riverside County with his girlfriend Charlene Triplett and her mother, Barbara Triplett. (15 RT 1879-1882, 16 RT 2175-2176, 17 RT 2277-2279, 23 RT 2888.) It was a rural property with several trailers and a house on top of a hill. (15 RT 1879.) The Santa Rosa Mine property was also the home of Danny Dalton, who was Barbara's brother and Charlene's uncle. Dalton ran a chop shop on the

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August 27 that Thompson and Gitmed were at her house together, although she believed it was a Tuesday. (13 RT 1626-1628.) Tony Mercurio testified that the events happened either the Monday or the Tuesday after he took his girlfriend Charlene to the hospital on Sunday, August 25, 1991, but on cross-examination testified the events could have occurred a week later. (15 RT 1898, 1975.) Charlene Triplett testified that it was either the Monday or the Tuesday after August 25, 1991, the date she went to the hospital, that Thompson and Gitmed came to the house to see Mercurio. She had previously told police the date was Tuesday, August 27, 1991, and testified that was probably correct. (16 RT 2179-2181, 2246.)

5. Michelle would use Gitmed's money to buy drugs and then sell the drugs and give Gitmed his money back. (13 RT 1650-1651.)

property. (15 RT 1879, 2032-2033, 2042, 16 RT 2129-2130, 2175, 17 RT 2279.)

Thompson and Gitmed arrived unexpectedly to see Mercurio at the Triplett's home that evening. They arrived in a blue Toyota Tercel. Thompson had been there before, but Mercurio had not met Gitmed before that evening. (15 RT 1882-1883, 1888, 1899, 2042, 16 RT 2176-2182, 17 RT 2279, Ex. 9.)

Thompson and Gitmed went into the house and talked with Mercurio, and then went to go get hamburgers and returned. Thompson, Gitmed and Mercurio used Gitmed's methamphetamine. They went outside and Gitmed showed off his car stereo. (15 RT 1883-1885, 1944, 16 RT 2180, Ex. 10.) Gitmed's car was filled with trash bags and clothing, as Gitmed was in the process of moving. (13 RT 1582-1584, 15 RT 1897.)

Thompson, Gitmed and Mercurio walked around the outside area of the house and saw a stolen red pickup truck.[6] They decided to take the truck "four-bying" and had to use a screwdriver to get it started.[7] (15 RT 1884-1886, 1888, 16 RT 2236, Ex. 19.)

It was dark when the three headed through the hills towards Canyon Lake. Mercurio was driving. They stopped at the home of two of Mercurio's friends along the way, but his friends were in bed so they left and continued on to the rural area of Canyon Lake over rough terrain. (15 RT 1887-1888.) They

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6. Mercurio testified the red truck had been on the property since he moved in with the Tripletts a week or two earlier. (15 RT 1885-1886.) Danny Dalton testified that the red truck belonged to Mercurio who had stolen it, but that everybody used to drive it. (16 RT 2119-2120.) Charles Heintschel testified the red truck was owned by his nephew, was stolen on August 26, 1991, and was reported stolen the next day. (19 RT 2442-2444.)

7. Charlene Triplett testified that before the three left, Mercurio told her they were going to buy a truck that Clint Campbell had for sale, and that there was also some discussion about Thompson buying or selling drugs to Clint Campbell. (16 RT 2235-2236.)

drove into Quail Valley through the hills, "four-wheeling" and heading towards the lake. They drove to an area within thirty to forty feet of the water's edge, near the causeway, in a remote and unpopulated area, where a peninsula sticks out into the water. (15 RT 1888-1891.)

Mercurio parked the truck at the spot where the peninsula juts out. He got out and stood by the driver's side door, and Thompson and Gitmed got out on the passenger side, walked to the front of the truck onto the peninsula and looked at the sky. Gitmed seemed to enjoy the area and said he had never been there before. (15 RT 1892.)

Thompson and Gitmed began to argue. (15 RT 1892-1893, 1947-1951.) Thompson's voice got louder and he became angry and told Gitmed to take off his clothes. (15 RT 1893-1894.) Gitmed took off his shirt or his jacket. Thompson was arm's length away from Gitmed and pointed a gun towards Gitmed's chest or waist. Gitmed removed items from his pockets, such as a wallet or some change.[8/] Two or three shots were fired in rapid succession, as if from a semiautomatic weapon, from a distance of three or four feet away. (15 RT 1957-1960, 1963-1964, 19 RT 2543-2539.)

Mercurio got back into the truck, started it and sat there. (15 RT 1894-1895.) Thompson took some small items that belonged to Gitmed, which may have been a wallet or some change, from the hood of the truck. Thompson got into the truck and threw something in the back. They drove away without speaking to each other. (15 RT 1895-1896, 1969.) They went back to the Triplett's house and Mercurio went directly inside. Thompson stayed outside and went through Gitmed's car, and then drove it away. (15 RT 1896-1897.)

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8. Mercurio made this statement during his grand jury testimony which was presented at trial. At trial Mercurio testified he did not recall Thompson telling Gitmed to take items from his pockets or Gitmed doing so.

Thompson returned to Michelle's house at approximately 3:30 the next morning to get his bike, which was tied to a tree. Michelle asked Thompson where Gitmed was, and Thompson initially said Gitmed was down the street and would be there in a couple of minutes. A little later, she asked again and Thompson said there had been a scuffle and Gitmed had gotten scared. When Michelle continued to ask Thompson about Gitmed, Thompson told her Gitmed might have gone home. Thompson left on his bike. Michelle heard a car start about a minute after Thompson left. (13 RT 1622-1623, 1630.) Michelle saw Thompson a few days later at a 7-11 store where she met him to get some drugs and to give him a ride. (13 RT 1624.)

A few weeks passed and Michelle did not hear from Gitmed. Michelle contacted the Perris police department after she learned that the newspaper had published articles about a body found in a lake, and she realized that Gitmed's family had been looking for him. (13 RT 1624-1625.) On September 11, 1991, Michelle went to the Perris police department and spoke to Sergeant Betty Fitzpatrick. Michelle identified Gitmed from a picture and she was told he was dead. (13 RT 1625-1626, 1702-1703.)

Thompson's Activities Following The Murder

The day after the murder, Thompson came back to the Santa Rosa Mine property around noon, and went through Gitmed's car again, taking bags of trash to the dumpster. There were boxes and personal items, such as deodorant and soap, in the car. Thompson had a semiautomatic gun on the hood of the car. (15 RT 1900-1901, 16 RT 2182.)

Thompson burned papers and cleaned the gun by a trash dumpster. Mercurio asked Charlene for lighter fluid, which Thompson used on the gun. (16 RT 2202-2203, 2238-2239.) Charlene confronted Mercurio and asked him what was going on. Mercurio told Charlene they had gone "four-bying" at

Canyon Lake and then got out to look at the water. Mercurio told Charlene that Thompson and Gitmed were standing in front of the truck when Thompson shot Gitmed. (16 RT 2202.)

A couple days later, either Thompson or Mercurio took some trash bags out of the dumpster and put them into the red truck. (15 RT 1974.) Within a week of the shooting, Thompson asked Mercurio to go with him to Riverside to get some furniture. Thompson said he was breaking up with his wife or girlfriend and leaving town, and wanted to give the furniture to Mercurio and Charlene as a wedding gift. Mercurio drove the red pickup and Thompson drove Gitmed's car to a storage facility in south Riverside where Gitmed had stored some belongings. Thompson pulled into the facility and placed an identification card in the security box which opened the gate. Thompson drove to a storage locker and opened it. They loaded small items of furniture, including a TV, a VCR, a TV stand, and a table, into the truck. Thompson took the trash bags from the truck and put them into the storage locker, and then they drove back to the Triplett's house. (15 RT 1903-1904, 1981, 16 RT 2183, Exs. N, O.) Thompson and Mercurio gave some of the items to Danny Dalton, including the TV and VCR, and then Mercurio took some of the items back from Dalton to give to Charlene. (15 RT 1984, 2120-2122, 16 RT 2242-2243.) Thompson said the items belonged to him. (15 RT 2120-2122.)

Within that same week, Charlene was in her mobile home when she overheard a conversation between Thompson and Mercurio, who were on the porch. Thompson told Mercurio, "Whatever you do, you've got to get your girlfriend and her family to go along with our story." (16 RT 2205.) Thompson told Mercurio to make Charlene and her family go along with whatever he told her to go along with. (15 RT 2224.) Thompson asked Charlene if she wanted to buy a stereo or if she knew anyone who did. (16 RT 2241.) Some time after the shooting, Thompson came back to the Triplett's

house and spent most of the night talking to Barbara Triplett on the porch. (15 RT 1899.) Thompson said something to Barbara about a person floating in Canyon Lake who could not make decisions for himself anymore. (17 RT 2282-2283.) At some point, Thompson bragged to Danny Dalton about leaving someone floating in a lake. Thompson told Dalton he had told Charlene and Barbara. (15 RT 2043-2044, 2048, 2091, 2094.)

Thompson asked Dalton to sell a stereo for him. Dalton sold the stereo for $300 and gave Thompson $200. (15 RT 2045-2046, 2122-2124, see 16 RT 2241.)

Within the same week, Thompson returned to the Triplett's house. He wanted to give Gitmed's car to Danny Dalton because Dalton was in the business of stripping cars, but Mercurio warned Dalton not to get involved with Thompson or the car, so Dalton refused. Instead, Mercurio and Dalton agreed to help Thompson dispose of the car. Dalton and Mercurio drove to a nearby hill on Santa Rosa Mine, and Thompson drove separately in Gitmed's car. When they arrived, Thompson set fire to the car. Thompson went with Dalton and Mercurio back to the Triplett's house, and then Barbara drove Thompson to a motel in Corona. (15 RT 1985-1986, 1904-1906, 17 RT 2282.)

Some time prior to Thompson's arrest in September 1991, he brought a suitcase and some boxes and clothes to the home of his sister, Eva Thompson, and asked to keep the items there because he did not know where he would be staying. (17 RT 2394-2396, Ex. 11.) After Thompson's arrest, Eva's son Marc Bendlin did not want his mother to be involved in anything, so he took the items from Eva's house to the home of Jean Churder, Thompson's mother. There were boxes, a bag, some clothing and a wallet which had business cards inside of it but no identification. (15 RT 2143-2148, 17 RT 2395-2396.)

Investigation

The jet-skiiers who discovered the body at Canyon Lake on August 28, 1991 drove to a Circle K store and called police, leaving one member of their party behind to make sure that no one disturbed the scene. (12 RT 1505.) Police arrived at the Circle K and were directed to the scene around noon. The body was removed from the water wearing pants, socks and a watch. (12 RT 1510-1514, 1517.)

The body remained unidentified until September 11, 1991, when Michelle contacted police and identified the dead man as Gitmed. Police interviewed Michelle and learned that Gitmed had been with Thompson the day before his body was found in the lake. (13 RT 1704.)

On September 13, 1991, members of the Perris Police Department went to Jean Churder's home on Rogers Street in Riverside. The residence was searched but no property connecting Thompson to Gitmed's murder was found at that time.[9/] Thompson was arrested. (13 RT 1703-1708, 15 RT 2151-2156, 16 RT 2172.)

At the time of his arrest, Thompson waived his Miranda[10/] rights and was interviewed on tape. Thompson told police he had met a woman named Michelle while they were playing pinball at Mr. Q's approximately two and a half to three weeks earlier. He said he went to Michelle's house that morning and had coffee. Thompson said he spent the day at Michelle's house and met her cousin, whose name was Eric. He stayed until 7 or 8 at night and met Michelle's husband Kerry. (Ex. 22A.)

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9. Marc Bendlin did not bring the property Thompson had stored at Eva Thompson's house to Jean Churder's house until after the search and Thompson's arrest on September 13. (15 RT 2143-2148, 17 RT 2395-2396.)

10. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Thompson said he went back to Michelle's house the next day. Michelle's cousin Ron was there when Thompson arrived in the late afternoon or evening.[11/] Michelle was busy with a friend. (16 RT 2156, Ex. 22A.)

Thompson entertained Michelle's young daughter in the kitchen and played video games with Gitmed who was sitting on the couch, while Michelle talked to two tall thin men and went in and out of the back bedroom. At one point Michelle left with the two men to pick up a car, and Thompson, Gitmed and Michelle's young daughter were in the house by themselves. Thompson stayed until approximately 7 p.m and left to go to Mr. Q's. (Ex. 22A.) Thompson said he may have gone over to Michelle's house a third time. The last time he saw Michelle was approximately a week and a half before his arrest. Thompson said he was talking with a friend at a 7-11 store on Sierra and Magnolia when Michelle drove up and asked Thompson and his friend if he knew where they could get some pot. Thompson told her he did not smoke pot. Michelle said she wanted to get the pot for Gitmed. Michelle knew Thompson's phone number and they had several phone conversations. Thompson said he never went to Michelle's house after seeing her at 7-11. (Ex. 22A.)

Thompson said that every time he went to Michelle's house, he rode his bike. He denied ever leaving Michelle's house with Gitmed. Thompson said the events involving him and Michelle occurred over a three day period, either Monday through Wednesday, or Tuesday through Thursday. (Ex. 22A.)

Thompson acknowledged knowing a person named Tony. He said Michelle and Eric offered him money to do something. Thompson said they offered him a percentage of the drug if he worked a deal with them. (Ex. 22A.)

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11. Thompson identified Gitmed from a photograph as the person he met at Michelle's house that day. (16 RT 2156, Ex. 22A, 24.)

Thompson said he was with his uncle Dick at a Denny's restaurant in Perris four or five weeks earlier. Thompson spent the night at his uncle's apartment and they stopped in Perris on the way back. Thompson said he had been to Canyon Lake before when he worked as a delivery person for Culligan water company in 1990. He denied having been there recently, or in Temecula, and claimed he was in Perris only once as he passed through with his uncle. (Ex. 22A.)

On September 17, 1991, members of the Perris Police Department conducted a narcotics search warrant at the Triplett's residence, located at 18885 Santa Rosa Mine Road in Mead Valley. The property was in a rural area with a main residence, a mobile home, small storage sheds and a camper fitting. There were several stolen vehicles and vehicle parts laying around the property. (13 RT 1710-1713.) Tony Mercurio, Danny Dalton, Charlene Triplett and Barbara Triplett were present at the time the warrant was executed. (13 RT 1711-1712.)

In the main residence, police found an address book which belonged to Barbara Triplett. The book contained the name "Tex" which was written above the name "James." During her interview with police, Michelle had referred to people named "Tex," "Barbara," and "Tony." Police looked around the property for "Tony" and found Anthony Mercurio. (13 RT 1714-1715, 17 RT 2279-2281, Ex. 18.) An officer asked Mercurio if he knew "Tex" or "James", and Mercurio responded, "I knew you guys were going to talk to me about this before you left today." At the time Mercurio made that statement, police had not mentioned Ron Gitmed or a body or a homicide investigation. (13 RT 1715-1716.)

At the Triplett's residence, Officer Betty Fitzpatrick was shown some furniture and other items she was told had belonged to Ron Gitmed. The items were taken from the main residence to the police department. (13 RT 1734-

1735, 14 RT 1831.) A red pickup truck was impounded. (13 RT 1732-1733, Ex. 19, W, X.) Danny Dalton was arrested, but Barbara Tripplett and Tony Mercurio were not arrested. (13 RT 1731-1732.) Mercurio was interviewed at length at the police department and provided information about the Gitmed murder. (13 RT 1715-1716.)

On September 24, 1991, Officer Fitzpatrick went to Gitmed's storage locker and seized shoes, plastic bags, and other items. (13 RT 1735-1736.) During a second search of Jean Churder's home on September 25, 1991, Jean Churder drove up as police were searching the home. Officers found a green London Fog jacket which had belonged to Gitmed in the trunk of Churder's car. Gitmed had been wearing the jacket on Monday, August 26, 1991 when he was with his mother. (12 RT 1485-1492, 14 RT 1815-1816, 1820, Ex. 8.) Also found in Churder's car that day was Gitmed's blue and white bag which had been in his apartment on August 26, 1991 when he was moving. (13 RT 1585, 14 RT 1813-1816, Ex. 11.) A tattered wallet was found in the house, in a nightstand drawer in the bedroom that had been occupied by Thompson before his arrest. The wallet contained business cards but no identification. (14 RT 1818.)

Forensic pathologist Dr. Richard Choi conducted an autopsy on Gitmed at the Riverside County Coroner's office.[12/] Gitmed had gunshot wounds on his chest, back and forearm. (12 RT 1533.) The wound to the chest was an immediately fatal wound, meaning it caused death within one second to one minute. (12 RT 1537-1538, 1541-1542, 1548.) The gunshot perforated the right lung and then went through the heart, and entered the body at approximately a 40 degree downward angle and a 5 degree backward angle. (12 RT 1536-1537, 1542-1543.) The other wounds were not fatal wounds. (12 RT

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12. Gitmed was still unidentified at the time of the autopsy on August 29, 1991.

1537-1538.) None of the wounds contained soot or gunshot residue. (12 RT 1538.) There were no signs of tattooing or gun powder burns, which would have been present if the gun had been fired from less than two feet away, and would not have washed off in the water. (12 RT 1538-1539.) There was no water in the airway so Gitmed had not drowned. (12 RT 1540.) Gitmed could have been in any number of positions when he was shot. (12 RT 1542-1543.) Rigor mortis was present and the body was fresh and not decomposed, indicating Gitmed could not have been dead for many days. (12 RT 1550.) Two .22 caliber bullets and a wristwatch were taken from Gitmed during the autopsy. (17 RT 2257-2263.)

The last transactions on Gitmed's credit card and bank account occurred on August 26, 1991. Fingerprints found on the lighter fluid at the Triplett's home did not match Thompson or any known individual, and no match was found for fingerprints found on furniture inside the storage locker. (17 RT 2410-2411.)

Defense

Thompson's defense was that he was at Michelle's house with Ronald Gitmed on Sunday, August 25, 1991; that Gitmed was alive and swimming in Canyon Lake on the evening of Tuesday, August 27, 1991; and that Tony Mercurio lied about Thompson's involvement in the murder in order to further his own self-interest.

Marvin Avery testified that he lived in the Perris area in August and September 1991 and he often went to Canyon Lake. He contacted police after seeing an article about a person found dead in the water because he had been at Canyon Lake on that date. The police came to talk to him and he took investigators out to the area. (19 RT 2422-2423.)

Avery had been fishing at Canyon Lake four days before he saw the article. While he was fishing, he heard shots fired on the other side of the lake and he moved away because his wife and son were with him. The shots seemed to be fired in his direction but he did not report the shots because people shoot there all the time. (19 RT 2425.)

At around 10 p.m., Avery saw four other males and one female in the area. They arrived in an early 1990's model three quarter ton pickup with a black tool box and rack utility boxes. The people set up chairs and built a fire. (19 RT 2425-2427.) One man from the group was singing and having fun and walked through Avery's campsite. He was wearing whitish jeans and no shirt. The man dove into the water. He was a good swimmer and swam pretty far out into the lake. Avery identified a photo of Gitmed as the person swimming in the lake who had walked through his campsite. (19 RT 2428-2439, Exs. 7, 24.)

The red truck driven by Mercurio on the night of the murder was registered to Charles Heintschel and used by his uncle, Gordon Grimes. (19 RT 2442.) The truck was stolen the night of August 26, 1991 and Grimes reported it stolen the next morning. (19 RT 2444.)

During the execution of the search warrant on September 17, 1991, at the Triplett's home, sheriff's deputies found methamphetamine and drug paraphernalia. (19 RT 2450.) There were vehicles and parts of vehicles strewn around the property. (19 RT 2451.) Several vehicles and parts of vehicles were determined to be stolen and they were seized and impounded. (19 RT 2452-2453, 2540-2541.)

Sheriff's deputies received information about a vehicle involved in a homicide and found the burned Toyota which was registered to Diane Gitmed. The car was found in a rural area and burned, so no items were recovered from the vehicle. (19 RT 2542-2545.)

On August 22, 1991, Paul Gitmed leased storage unit 1140 from Tyler Mall Mini Storage in Riverside. It was a month to month lease. Paul provided on the application that Ronald and Bruce Gitmed were permitted to access the storage unit. Clients at the facility were given an access code which had to be used to get in and out of the property. The locker itself is locked with a padlock and key supplied by the customer. (19 RT 2457-2459, Ex. 20.)

On August 26, 1991, there was an entry at 2:12 p.m and an exit at 2:24 p.m, another entry at 3:46 p.m. and an exit at 4:01 p.m., and another entry at 5:45 p.m. and an exit at 6:01 p.m. There were no entries into the storage unit on August 27, 1991. On August 28, 1991, there was an entry at 12:45 p.m., an exit at 1:02 p.m., an entry at 4:24 p.m., and an exit at 4:41 p.m. (19 RT 2462-2463, Ex. 20.)

The defense presented evidence of Mercurio's criminal history. A Riverside County Deputy Sheriff testified that on January 3, 1992, at approximately 3 a.m., Mercurio was involved in a vehicle pursuit that lasted nearly an hour and spanned approximately 20 miles. Mercurio drove erratically through residential areas, disobeyed traffic laws and endangered civilian motorists who had to swerve to avoid him. Mercurio drove his car head on towards police units who also had to take evasive action to avoid being hit. Mercurio then fled on foot. Police caught up to him and a scuffle ensued before he was apprehended. (19 RT 2485-2507, 2521-2522, See Ex. AA.)

During Mercurio's prior testimony in front of the grand jury, Mercurio testified that he, Thompson and Gitmed had gotten out of the truck at Canyon Lake and stood around for 10 or 15 minutes. Gitmed was looking around and no one else was in the area. They walked around during that time and Gitmed talked about his family. They all walked back towards the truck and Mercurio leaned into the driver's side door when he heard Thompson yelling. Thompson was less than a couple of feet from Gitmed, pointing a gun. Gitmed took off

his clothes and removed items from his pockets, such as a wallet and some change. He handed the items to Thompson who placed the items on the hood of the truck and then stepped back towards Gitmed and told him to walk towards the water onto the peninsula. Mercurio heard shots and Gitmed fell down right at the water's edge. The stereo was still in the car when they burned it. (19 RT 2543-2539.)

Mercurio entered into an agreement with the district attorney's office which required him to plead guilty to one felony count of fleeing from a police officer and one count of being a felon in possession of a firearm in the case involving the pursuit, and to plead guilty to one count of accessory to commission of a felony in the Gitmed murder. In exchange, he was given sentencing consideration and required to testify at Thompson's trial. (Ex. 23.)

Lori Knoefler testified that in August or September 1991, Danny Dalton gave her a stereo in exchange for a quarter ounce of methamphetamine, which is valued at approximately $250. (19 RT 2546-2549, Exs. 17-D, J.)

Kerry Keathley testified that he met Thompson twice at his home in 1991. The first time was between 11 and 12 a.m. when Thompson was using Keathley's tools to work on his bike and Keathley came home from work for lunch. The second time was late one night about a week later, when Thompson knocked on the door waking Keathley up and said he had left his wallet at the house. Keathley found a wallet and gave it to Thompson. (20 RT 2567-2571.)

Richard Hartenbach, Thompson's "uncle Dick," testified that he was with Thompson on the evening of August 27, 1991. Hartenbach testified he had been working that day and came to Riverside to pick up Thompson at Jean Churder's house between 5 and 5:30 p.m. They went to dinner and then to a bar, and he took Thompson home again around 10:30 or 11:00 p.m. (20 RT 2580-2582.)

Hartenbach testified that on September 13, 1991, after Thompson was arrested, Jean Churder called Hartenbach and told him that Thompson had been arrested for a murder that occurred on Tuesday, August 27. Hartenbach told Churder that was impossible because he recalled being with Thompson that night, and knew it was a Tuesday because Thompson had a Wednesday morning meeting scheduled with his parole officer. (20 RT 2589.) On cross-examination, Hartenbach acknowledged that he did not report to the police or the District Attorney that Thompson had an alibi for the date of the murder. (20 RT 2630-2631.)

Officer Betty Fitzpatrick testified that Marvin Avery contacted police on August 30 after police released a composite of Gitmed, who was still unidentified. Avery told officers he had seen the person in the autopsy photograph at Canyon Lake on August 27, 1991. (22 RT 2792-2795.) On cross examination, Fitzpatrick testified that Avery took police to the spot where the person had been swimming and he pointed out a spot that was west on the channel and slightly south of where Gitmed's body was found. Mercurio later directed them right to the location where the body was found. (22 RT 2803-2806.)

Gitmed was Robert Rogoff's stepson. His testimony was presented to impeach Deken's claim that Gitmed was at her home on August 26, 1991. (22 RT 2835-2837.) On August 25, 1991, Gitmed called Rogoff and said he wanted to have dinner that evening. Gitmed came over around 2:00 or 3:00 in the afternoon and left around 7:00 p.m. from Rogoff's Fountain Valley residence, which was approximately 15 minutes from where Dekens lived. Rogoff gave Gitmed coupons he had clipped from the paper and told Gitmed to go to his mother's house. (22 RT 2839-2840.) Their dinner together could not have been on Monday, August 26, 1991, because Rogoff left directly from

work in Pico Rivera for a 7:30 meeting in Culver City, as indicated by a notation for "King's Booster Club" in his date book. (22 RT 2841.)

Rebuttal

Canyon Lake is an artificial lake. There are no tides or surges, and little water movement because there is no energy to make it move. In August 1991, the only flow in the lake was from wind movement. On August 26, 1991, the elevation in Canyon Lake was 1377.40 feet, on August 27 it was 1377.32 feet, and on August 28 it was 1377.24 feet. (20 RT 2644-2649, Exs. 35A, 35B, 35C.)

Gitmed was fearful and anxious around lakes and water. He was a worrier who was tense and to others, he appeared to be slow and almost retarded. He would not go into the water when the family went to the beach. Gitmed's mother once forced him to take swimming lessons but he had a hard time and did not continue to swim after the lessons. Gitmed was very self conscious about his body because he was very thin. He wore big, bulky clothes and never took his shirt off. (20 RT 2667-2670, 22 RT 2812-2813.)

Thomas Crompton, the defense investigator who interviewed Richard Hartenbach for the first time on April 1, 1994, testified that he recalled Hartenbach saying that August 27, 1991 was the night he was with Thompson. He did not put the date in his report; instead, he reported that they were together on the date of the murder which he believed was August 27. (22 RT 2818.)

The court took judicial notice that Thompson was charged with Gitmed's murder on May 21, 1992. Mercurio did not receive immunity for any of the events involving Gitmed. (23 RT 2888.)

Special Circumstance Trial[13/]

In 1976, Jesus Reyes worked for the El Paso County Sheriff's Department. On September 22, 1976, Reyes began investigating the death of Floyd Fox, whose body was found on the side of Interstate 10 East. Reyes tracked Thompson by following his use of Floyd's credit cards as he traveled throughout the western United States. (25 RT 3204-3207.)

Thompson was arrested and brought back to Texas where he was charged with Fox's murder. On March 11, 1977, Thompson entered a guilty plea and was convicted of murder. (25 RT 3207-3212, Exs. 37, 39, 40, 41.) Thompson's fingerprints match those on the fingerprint card in his Texas prison packet. (25 RT 3216-3219, Exs. 38-A, 38-B.)

Penalty Phase Trial

Floyd Fox, the victim in the Texas murder, was a carpenter. In September 1976, Fox packed his Chevy truck with his belongings, including his clothing, tools and equipment, and told his friend Paul Robeson that he was moving to Texas. That was the last time Robeson saw Fox. (26 RT 3274-3277.)

Naomi Dekens testified that her son Ronald Gitmed was an unusual person who was childlike with a beautiful smile. He was sweet and embracing. He suffered from an anxiety disorder that made him disruptive. Gitmed was emotionally retarded and was placed in a handicapped educational program after repeating kindergarten twice. At age 12, Gitmed spent a year in a mental ward at the University of California at Irvine. At age 19, Gitmed finally earned his high school degree which was a big accomplishment celebrated by the

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13. Thompson elected to discharge his attorneys and represent himself through the remaining phases of his trial. He wanted to stand moot and receive the death penalty. (24 RT 3080-3175.)

whole family. He was very naive and gullible, and unusually trusting of people. He had always had emotional problems. Dekens had hoped to see her son outgrow his problems and grow into "Ron" instead of "Ronnie" but he never did. (26 RT 3279-3284.)

Dekens has often thought about the way her son died. She feels that the manner in which he died is one of many examples of times when she wanted to protect him but was unable to. Dekens feels helpless and responsible for Gitmed's death, because he would still be alive if she had not let him leave her apartment that night. (26 RT 3284-3286.)

Ronald Gitmed's younger brother Bruce Gitmed testified that he owned a business and gave Ron opportunities to work there. Bruce testified his business is now successful, he has a place for Ron, and he had looked forward to the day when Ron would work with him. (26 RT 3287-3290.)

ARGUMENT

I.

EIGHTEEN PROSPECTIVE JURORS WERE PROPERLY DISMISSED BY STIPULATION BASED ON INFORMATION THEY PROVIDED IN THEIR QUESTIONNAIRES WHICH DEMONSTRATED SUBSTANTIAL IMPAIRMENT

Thompson contends reversal is required because the trial court dismissed eighteen prospective jurors solely on the basis of their answers to questionnaires in violation of his constitutional rights. (AOB 26-111.) The issue is waived. In any event, there was no error, and no violation of Thompson's constitutional rights, from the court's reliance on juror questionnaires or its determination of substantial impairment as to any particular prospective juror.

A prospective juror may be excused for cause based on his or her views on the death penalty where those views would "'prevent or substantially impair' the performance of his or her duties as a juror in accordance with the trial court's instructions and his or her oath." (*People v. Avila* (2006) 38 Cal.4th 491, 529, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841], and *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) Jurors may not be excluded for voicing general objections to the death penalty, or expressing conscientious or religious reasons for objecting to capital punishment. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776.) "Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law." (*People v. Avila, supra,* 38 Cal. 4th at p. 529, citing *Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137], and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) A prospective juror may be excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including

the death penalty where appropriate. (*People v. Cunningham, supra*, 25 Cal. 4th at p. 975.)

A. Thompson Has Waived The Right To Challenge The Court's Exclusive Reliance On Jury Questionnaires To Dismiss Eighteen Prospective Jurors Because The Procedure Was Used At His Request

At Thompson's insistence, the court utilized a pre-screening process before conducting oral voir dire. After reviewing the jury questionnaires, the court and the parties discussed the questionnaires of those prospective jurors whose answers indicated they were substantially impaired in performing the duties of a juror. Prospective jurors were dismissed without oral voir dire when the court and the parties agreed their questionnaires alone demonstrated substantial impairment. Thompson acknowledges his trial counsel agreed that the court could excuse venire members based on their questionnaires alone as long as the same standards were used for death penalty supporters and death penalty opponents. (AOB 32.)

1. Facts Surrounding The Trial Court's Use Of Questionnaire-Based Dismissals

As the court and the parties began discussing juror questionnaires, defense counsel asked the court not to orally voir dire those jurors whose questionnaires demonstrated substantial impairment, but instead to dismiss them based on their questionnaires alone. The court and the prosecutor expressed concerns about this approach and the court did not initially rule on the request, but proceeded to discuss those jurors whose questionnaires indicated they might not be qualified to serve. During those discussions, generally, the court identified the jurors whose questionnaires raised those concerns, and the court and the parties then discussed the jurors' answers. If all agreed, the

questionnaire was set aside pending a final ruling by the court as to whether such jurors would be dismissed without further questioning.

During those discussions, which occurred over several days, defense counsel repeatedly urged the court to engage in questionnaire-based dismissals and ultimately, the court agreed to the process and dismissed the jurors whose questionnaires had been set aside. Thompson now claims the process violated his constitutional rights. Respondent contends this is a clear case of waiver or invited error. Accordingly, to demonstrate Thompson's persistence on this matter in the trial court, Respondent sets forth in detail defense counsel's statements which ultimately persuaded the trial court to use the process and dismiss the agreed-upon jurors without additional questioning.

On February 26, 1996, the court and counsel agreed to use a questionnaire which had been reviewed and modified by a judge who had previously been assigned to the case. (1 RT 34-52.) On March 11 and 12, 1996, the trial court distributed forms to panels of venire members who were asked to disclose whether financial hardship, medical issues, vacation plans, or public hardship would prevent them from serving. Those prospective jurors who could not serve due to hardship were excused. (2 RT 128-129, 132-138, 158-159, 165-170, 172-173, 3 RT 229-251, 254-258.) The parties agreed to the dismissal of each prospective juror that requested to be dismissed due to hardship. (2 RT 175-222, 3 RT 230-251, 258-278, 281-295, 300-317, 320-324, 347-355, 5 RT 540, 6 RT 764-765, 773-775.) Questionnaires were distributed to the remaining venire members who were instructed to fill them out individually. (3 RT 339-347, 358-371.)

Thereafter, defense counsel proposed eliminating certain jurors based solely on the answers provided in their questionnaires. During a series of discussions on the matter, defense counsel consistently urged the court to use

the process, and the prosecutor repeatedly urged the court to conduct oral voir dire of all prospective jurors.

On March 20, 1996, defense counsel first asked the court to use the process, and informed the court that after having reviewed the questionnaires, he felt there were many prospective jurors that could be excused by stipulation without further questioning. (6 RT 615-617.) On March 21, 1996, the court and counsel reviewed the first 30 questionnaires. (6 RT 718.) Defense counsel again asked the court to employ questionnaire-based dismissals, and assured the court he would be even-handed by noting that there were three anti-death penalty prospective jurors who were apparently disqualified and he would not object to the prosecutor's request to dismiss those jurors. (6 RT 718.) The prosecutor expressed concern about using the pre-screening process and asked the court to conduct oral voir dire, noting that sometimes, prospective jurors' written answers are extreme. (6 RT 719.)

Defense counsel continued to advocate for the process, and specifically requested the dismissal of several prospective jurors without additional questioning. When defense counsel requested dismissal of prospective juror Raymond H. based on his questionnaire, the prosecutor agreed due to Raymond H.'s unique circumstances[14/] but again asked the court to conduct oral voir dire on the remaining prospective jurors. (6 RT 721, 729-730.)

As they proceeded through the pre-screening process, defense counsel again asked the court to proceed with questionnaire-based dismissals and the prosecutor again objected. Defense counsel argued that a prospective juror should be excused when his or her questionnaire reveals a predisposition to always impose or not impose the death penalty. He urged against further

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14. Raymond H. suggested in his questionnaire that he would be distracted by the fact that his son was being prosecuted for robbery in the same courthouse. (1 Supp. CT 134.)

questioning of such prospective jurors, expressing concern that prospective jurors with strong feelings, who were substantially impaired, might be talked out of their positions. In urging the court to use questionnaire-based dismissals, counsel pointed out that the questionnaires are filled out under oath, and that the process was fair to both sides, again noting that in the first group, there were three anti-death penalty prospective jurors he agreed should be excused based on their answers to the questionnaires alone. (6 RT 722-728.) The prosecutor said he did not think the process was proper. (6 RT 740.)

The court agreed with the prosecutor that prospective jurors who have expressed strong feelings should be questioned further. (6 RT 722.) The court agreed with defense counsel, however, that in some cases, a prospective juror's written answers may indicate such firm convictions that dismissal is appropriate without further questioning. (6 RT 724-728.) When the issue was raised again, defense counsel stated that dismissal was appropriate where the court could determine from the questionnaire that a prospective juror was not fit to serve. The prosecutor again objected to the process. (6 RT 730-736.)

Without a final ruling, the court and counsel continued to go through the questionnaires, and both counsel stipulated to those prospective jurors that would be excused if the court agreed to use the process. Defense counsel continued to zealously advocate for questionnaire-based dismissals. The prosecutor continued to object. The court reserved a final decision but indicated it might dismiss prospective jurors based solely on their questionnaires if their answers made it apparent they were substantially impaired. (6 RT 737-740, 749-754.)

Before the court formally dismissed any of the agreed-upon prospective jurors, the prosecutor asked for clarification of the procedure and of Thompson's position. Defense counsel stated that with respect to those prospective jurors with anti-death penalty views, his position was that he was

not objecting to the court finding substantial impairment based on the questionnaires alone. The court then finalized its ruling that certain prospective jurors would be dismissed without further questioning based on the court's finding that their questionnaires alone demonstrated substantial impairment. (6 RT 758-761.) As the court proceeded reviewing the questionnaires with counsel, she clarified that she was applying the substantial impairment test to the prospective jurors' written answers to determine whether they should be dismissed or whether further inquiry was required. (6 RT 769-770.) Eighteen prospective jurors were then dismissed based on their questionnaires.

2. Thompson Has Waived The Right To Challenge The Trial Court's Use Of Questionnaire-Based Dismissals Because The Procedure Was Used At His Request

In *People v. Benavides* (2005) 35 Cal.4th 69, the trial court submitted two questionnaires to prospective jurors; one regarding hardship, and the other specific to death qualification. The court and counsel conducted voir dire of groups of prospective jurors. After several days, the court stated,

> Counsel have indicated also, yesterday, that, having reviewed the questionnaires from today, and having the benefit of extensive voir dire of a number of other individuals in this particular case, that, in the interest of time, and more particularly in the interests of justice, they are prepared to agree that certain of our prospective jurors for this morning may be excused.

(*Id.* at p. 88.) Thereafter, counsel stipulated to the removal of eight jurors based solely on the answers they provided in their jury questionnaires. On appeal, the defendant claimed the process violated his right to an impartial jury. (*Ibid.*) This Court held the defendant was barred from raising the issue on appeal because he acquiesced in the procedure. Citing *People v. Ervin* (2000) 22 Cal.4th 48, 73, this Court stated,

> While the parties are not free to waive, and the court is not free to [forgo], compliance with the statutory procedures which

> are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. [Citations.] ([Citation]; see also Cal. Const., art. VI, § 13 [no reversal for procedural errors absent a 'miscarriage of justice'].)

(*People v. Benavides, supra*, 35 Cal.4th at p. 88.)

In *Ervin,* with the agreement of counsel and to avoid lengthy delays, the court developed a screening process that allowed counsel jointly to review juror questionnaires to screen out those prospective jurors who appeared to be strong candidates for dismissal, because their questionnaires demonstrated they would automatically vote for death, they would never vote for death, or they suffered from a hardship. Using this process, the court eliminated more than 600 prospective jurors by stipulation of the parties. (*People v. Ervin, supra,* 22 Cal.4th at p. 72.) The Court rejected the defendant's challenges to the process, noting that "the defendant, through his counsel, stipulated to every aspect of the challenged procedure and further agreed to excuse every prospective juror he now asserts was improperly excused." (*Id.* at p. 73.) The Court held the defendant was barred from raising on appeal defects in the procedure in which he acquiesced. (*Ibid.*)

In contrast, in *People v. Stewart* (2004) 33 Cal.4th 425, this Court held the defendant's challenge to the court's use of questionnaire-based dismissals was not waived. There, the Court found that nothing in the record indicated the defendant either implicitly or explicitly conceded the propriety of using such a procedure; the trial court repeatedly assured counsel it would conduct oral voir dire to address any ambiguous responses; and thereafter, defense counsel repeatedly objected to each of the five excusals on the basis that the answers provided in the questionnaires did not demonstrate substantial impairment. (*Id.* at p. 452.)

Here, Thompson not only acquiesced in the court's use of questionnaire-based dismissals, the procedure was his idea. And he repeatedly asked and ultimately persuaded the court to use the procedure notwithstanding the concerns expressed by the prosecutor. Accordingly, any objection to the court's use of questionnaire-based dismissals is waived.

3. Trial Counsel's Request To Use Questionnaire-Based Dismissals Did Not Constitute Ineffective Assistance Of Counsel

There is no merit to Thompson's claim that his counsel was ineffective for requesting the pre-screening procedure. (See AOB 67-68.) A successful claim of ineffective assistance of counsel has two components. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674]). In evaluating counsel's performance the court must be highly deferential, avoiding the "distorting effects of hindsight" and "indulg[ing] in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." (*Id.* at p. 689.) Second, the defendant must show that counsel's deficient performance deprived him of a fair trial; i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

In *Ervin, supra*, 22 Cal.4th at page 78, the Court rejected a similar claim, stating,

> We find no incompetence here. Defense counsel may well have had tactical reasons for avoiding the lengthy delays usually involved in capital case voir dire. As we previously stated [ ] the procedure benefitted all parties by substantially expediting the jury selection process and "culling out" prospective jurors who probably would have been unable to serve.

The record in the instant case reveals clear tactical reasons for trial counsel's zealous and repeated requests to proceed with questionnaire-based dismissals. As the prosecutor noted, Thompson used the procedure to his advantage by identifying those prospective jurors he intended to challenge, and attempting to obtain a stipulation to avoid further questioning by the prosecutor.[15/] (7 RT 726.) The prosecutor asked the court to conduct oral voir dire of all the prospective jurors, noting that often during oral voir dire, prospective jurors have a tendency to back off from the strong positions taken in their questionnaires. (6 RT 754.) Defense counsel expressed concern that prospective jurors with strong feelings might be talked out of their positions. (6 RT 722-728.) By obtaining the prosecutor's agreement to dismiss prospective jurors based on their questionnaires, counsel hoped to eliminate those prospective jurors he found objectionable without giving the prosecutor an opportunity to rehabilitate them.

Nor was there any prejudice from counsel's request to have the court utilize the pre-screening process. While it is true that slightly more death penalty opponents were eliminated than death-penalty supporters (10 as compared to 7), Thompson benefitted by having those pro-death penalty prospective jurors removed without subjecting them to questioning which may have shown their ability to serve was other than it appeared to be on paper. The stipulated procedure benefitted all parties by screening out overzealous pro-death and pro-life prospective jurors, expediting the process, and eliminating prospective jurors who probably would have been unable to serve. Moreover, once the preliminary screening process concluded, the court and counsel

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15. The prosecutor also commented that he would not agree to excuse prospective jurors based on a single answer in the questionnaire "just to save [defense counsel] some time." (7 RT 726.)

conducted the usual voir dire in selecting the actual jurors that would try Thompson's case. (See *People v. Ervin, supra*, 22 Cal.4th at p. 73.)

B. The Trial Court Properly Dismissed Prospective Jurors By Stipulation Based Solely On Their Answers To Jury Questionnaires Which Demonstrated Substantial Impairment

Assuming arguendo the issue is not waived, there was no error in the trial court's use of the pre-screening process. The dismissal of each prospective juror was properly based on the stipulation of the parties, irrespective of any showing of substantial impairment. Moreover, the questionnaire was well worded to screen out disqualified jurors, and enabled the trial court to properly determine that each of the dismissed prospective jurors was substantially impaired.

An appellate court reviews a trial court's conduct of the voir dire of prospective jurors for an abuse of discretion. Thus, the trial court's decision to utilize a process of pre-screening jurors based on their answers to questionnaires is reversible only where it falls outside the bounds of reason. (*People v. Benavides, supra,* 35 Cal.4th at p. 88.) Ordinarily, a trial court's decision to exclude prospective jurors for cause is given deference on appeal, because the trial court is uniquely situated to gain information from interacting with jurors and observing their tone, demeanor and confidence. But where the ruling is based solely on the jurors answers in a questionnaire, no such deference is warranted, as the same information used by the trial court in its ruling is available on appeal. (*People v. Avila, supra*, 38 Cal.4th at p. 529, citing *People v. Stewart, supra,* 33 Cal.4th at p. 451.) Accordingly, this Court reviews de novo the application of the substantial impairment standard to each individual juror.

1. This Court Should Not Review The Trial Court's Application Of The Substantial Impairment Standard Because All Of The Challenged Prospective Jurors Were Excused By Stipulation Of The Parties

The 18 prospective jurors at issue in this case were dismissed by stipulation of the parties. This Court should not review the trial court's ruling that the prospective jurors were substantially impaired because the parties agreement to excuse them provided an independent and adequate reason for their dismissal.

Witt sets forth the standard to be applied when a trial court rules on an adversary's *challenge* to a prospective juror. It does not follow that the same standard applies where the parties stipulate to the dismissal of a prospective juror. In *Stewart, supra,* this court interpreted *Witt* as holding "Before granting a challenge for cause concerning a prospective juror, *over the objection of another party*, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the prospective juror's views would "'prevent or substantially impair'" the performance of his or her duties . . . '" [Citation.] (*People v. Stewart, supra,* 33 Cal. 4th at p. 445, emphasis added.) Accordingly, the *Witt* standard should not be applied to prospective jurors who were dismissed by stipulation.

In *Ervin, supra,* the court excused more than 600 prospective jurors after counsel stipulated to their dismissal based on their questionnaires. Although the trial court had initially reviewed the questionnaires, it ultimately left the decision to counsel as to which jurors should be dismissed. (*People v. Ervin, supra*, 22 Cal.4th at p. 72.) The dismissals were upheld although there was no judicial finding that any of the dismissed jurors were substantially impaired, suggesting the stipulation itself was a sufficient basis for excusing those prospective jurors irrespective of whether their questionnaires demonstrated they were substantially impaired in performing the duties of a juror.

Thompson argues that here, although the parties agreed to the dismissal of each excused prospective juror, the trial court independently determined that the questionnaire of each excused prospective juror demonstrated substantial impairment. Thus, he contends, the trial court itself challenged most of the excused prospective jurors. He claims that in the particular circumstances of this case, "whether trial counsel objected to the excusals is immaterial to this court's review of the issue because the trial court based its rulings at least with regard to Carol P., Gary P., Patricia C., Lowell S., Gwyneth G., Deborah B., Lillias R., Esther V., Lenora K., and Marna R. primarily on its own objections to the prospective jurors, not counsel's." (See AOB 60-62.)

It is true that the trial court here took a more active role than the *Ervin* court in identifying those prospective jurors whose questionnaires demonstrated they were not qualified to serve. In most instances, the trial court here informed the parties of the names of the prospective jurors it proposed excusing, and then gave the parties an opportunity to be heard. The trial court made it clear it was relying on the substantial impairment standard. Nonetheless, the parties expressly agreed to excuse each prospective juror that was ultimately dismissed. Those stipulations, standing alone, justified the trial court's actions in excusing the prospective jurors, irrespective of whether the court correctly determined the prospective jurors were substantially impaired.

Case law supports the notion that the substantial impairment test governs a trial court's ruling on an opposed challenge for cause but is not relevant to an agreed-upon excusal. In *Avila, supra,* 38 Cal.4th page 491, the trial court used the same approach used in the instant case; it proposed the dismissal of prospective jurors for cause based on the answers in their questionnaires. The defendant objected to the dismissal of four of the fourteen proposed prospective jurors. On appeal, the defendant challenged, and this Court reviewed, the application of the substantial impairment standard to the four challenged

prospective jurors but did not suggest that the standard should apply to the prospective jurors who were dismissed by stipulation. (See *People v. Avila, supra,* 38 Cal.4th at p. 527.)

In *Benavides, supra,* eight jurors were excused by stipulation. The defendant attempted to distinguish *Ervin* on the basis that the trial court requested the parties to state a legitimate reason for agreeing to the excusals. By doing so, the defendant argued, the trial court rendered the procedure to be one based upon judicial discretion rather than stipulation of the parties. This Court disagreed. (*People v. Benavides, supra*, 35 Cal.4th at p. 88.)

This Court in *Benavides* stated that the record did not show the trial court was passing on the adequacy of the reasons for the stipulations. Apparently in *Benavides*, the parties first agreed as to which jurors should be dismissed and then presented those jurors to the court. Here, the process was more like that used in *Ervin*. In most instances the trial court identified the jurors it felt demonstrated substantial impairment from their questionnaires, and then asked the parties for their input as to whether each juror should be dismissed.

The dicta in *Benavides* should not be taken to mean that a judicial determination of substantial impairment nullifies an otherwise valid dismissal by stipulation. To the contrary, the *Witt* standard should not be applied at all to stipulated dismissals. To hold otherwise would lead to an absurd result, in that a stipulated dismissal would be subject to appellate review if the trial court approved of the parties' determination of substantial impairment, but immune from appellate review if the trial court did not know the reasons behind the stipulation. Thompson has provided no reason for such a rule, and it has not been applied in other cases. In *People v. Stewart, supra,* 33 Cal.4th at page 425, for example, the court and counsel reviewed the questionnaires of prospective jurors, and then the court met with counsel "to rule on a number of

stipulated challenges for cause – that is, the elimination of those prospective jurors who both counsel agreed should be excused for cause." (*People v. Stewart, supra,* 33 Cal. 4th at p. 443.) Although the trial court had "rule[d] on" the stipulated challenges, this Court did not review the trial court's determination that the agreed-upon jurors were substantially impaired, but simply noted that many of their answers revealed unambiguous and entrenched support for, or opposition to, the death penalty. (*Id.* at p. 444, fn. 11.) This Court reviewed only the dismissal of five prospective jurors who were excused without oral voir dire over the defendant's objection on the prosecutor's challenge for cause. (See *People v. Stewart, supra,* 33 Cal. 4th at pp. 440-455.)

Thompson attempts to avoid the effect of his stipulations by focusing on the creative wordplay of his trial counsel. As Thompson acknowledges, trial counsel apparently used the phrases "submitting" and "not objecting" when he wanted to indicate to the trial court that he agreed to an action but nevertheless wanted to preserve an issue or protect his client, as opposed to the term "stipulate" which he used to indicate an affirmative agreement. (See AOB 63.) In the trial court, the prosecutor attempted to get defense counsel to clarify his position. The following colloquy took place:

> [Prosecutor]: Your Honor, just as to the procedure here: ¶ [Defense counsel] has used three phrases: First he said "stipulate," then he said "challenge," and then he said if the Court makes a finding he won't object. ¶ I'm going to be agreeing to all of these [prospective jurors] but the one, but I'd like to know what procedure are we actually following here.
>
> [Defense counsel]: Well, "I do not object," I choose to use the words "do not object" on people who are so strongly against the death penalty. ¶ I think, frankly, having those clients on a jury would be in my client's best interest, but they're not going to be on the jury. And if the Court excuses them, I'm not going to object to them. ¶ I don't know how much plainer - -

> The Court: I think what [defense counsel] is saying, I think what both of you are saying is that there is, based on the questionnaires alone and the vehemence with which these people express their opinions, and the number of times they express their opinions, that the Court is justified in making a finding of substantial impairment within the meaning of the law.

(6 RT 759.)

Particularly on the facts of this case, differentiating between the affirmative phrases "I do not object," and "I stipulate" would amount to a judicially sanctioned wink and nod. Thompson was a strong advocate for the process used by the court, and acknowledged that he intended to apply the same standards to anti-death prospective jurors as well as pro-death penalty prospective jurors. Thompson essentially asks this Court to find that the language used by trial counsel here creates some permissible middle ground between a stipulation and an objection, whereby his words alerted the trial court that he agreed with and even desired a particular action, yet still preserved the right to challenge that action on appeal. To draw the semantic distinction requested by Thompson is incongruous with the doctrine that a defendant cannot challenge on appeal defects in jury selection to which he "did not object or in which he has acquiesced." (*People v. Benavides, supra,* 35 Cal. 4th at p. 88, citations omitted.)

2. The Trial Court Properly Dismissed Eighteen Prospective Jurors For Cause Based On Their Questionnaires Because It Properly Determined That Each Of The Prospective Jurors Was Substantially Impaired

Assuming *arguendo* this Court reviews the trial court's finding of substantial impairment as to each dismissed prospective juror, there was no error. The questionnaire used in this case provided an adequate screening device to identify disqualified prospective jurors. The trial court applied the correct standard and properly dismissed each prospective juror for cause.

a. The Court Conducted A Thorough And Adequate Voir Dire Of All Prospective Jurors

Thompson argues the trial court failed to conduct voir dire, in violation of his rights under the First and Fourteenth Amendments, as well as his fundamental right to an impartial jury drawn from a cross-section of the community. (AOB 34-51.) Thompson's premise is flawed, because as he acknowledges, there is no constitutional right to voir dire, and also because the extensive inquiries in the questionnaire constituted thorough and adequate voir dire of all prospective jurors.

Thompson claims the trial court violated his constitutional right to voir dire. But he acknowledges the United States Supreme Court and California Supreme Court authority holding that there is no such constitutional right. (See AOB 47, citing *People v. Bittaker* (1989) 48 Cal.3d 1046; *People v. Coleman* (1988) 46 Cal.3d 749; and *Ross v. Oklahoma* (1988) 487 U.S. 1 [108 S.Ct. 2273, 101 L.Ed.2d 80].) He distinguishes these cases on the basis that they involved the problem of an erroneously included juror, rather than an erroneously excluded juror. (AOB 48-49.)

That distinction does not change the rule that there is no constitutional right to voir dire. It is relevant, if at all, on the issue of whether the exclusive reliance on juror questionnaires impacted the defendant's constitutional right to an impartial jury. (See *Bittaker, supra*, 48 Cal.3d at p. 1086.) Here, Thompson has not alleged that the jury actually seated was incompetent or biased, so there was no violation of his right to an impartial jury.[16/] (*Ibid.*)

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16. Respondent acknowledges that the wrongful exclusion of an anti-death penalty prospective juror requires reversal. The issue of whether the court improperly applied the substantial impairment standard to any particular juror is a separate question from the issue raised here; whether the reliance on juror questionnaires was a deprivation of a constitutional right to voir dire.

Further, the trial court did conduct voir dire. The court distributed a 25 page questionnaire which asked thorough questions pertaining to the prospective juror's background, employment, education, family, interests, military service, knowledge of participants, experience with the judicial system, experience with law enforcement, experience with crime, prior jury service, attitudes about and ownership of guns, attitudes about and use of alcohol, familiarity with the case, ability to follow particular instructions, attitudes about the death penalty, and expectations regarding his or her conduct during the deliberation process. (2 CT 414-438.)

The questionnaire itself was part of the voir dire process. In *People v. Lewis* (2001) 25 Cal.4th 610, 630, the Court failed to administer the oath required by Code of Civil Procedure section 232 to prospective jurors before they filled out their questionnaires. The prosecutor argued the questionnaires were simply a guide to the oral questioning, so no oath was necessary. The Court disagreed, stating that ". . . recent decisions describing *the judicial practice of conducting voir dire in a capital case by having prospective jurors give written answers to a jury questionnaire* imply that a juror questionnaire is part of the "examination" for purposes of Code of Civil Procedure section 232. [Citations.]" (*People v. Lewis, supra,* 25 Cal. 4th at p. 630, emphasis added.)

Thompson claims "There is no suggestion, direct or indirect, in any of [the relevant cases], that a written questionnaire could ever substitute for actual voir dire. On the contrary, the opinions have consistently emphasized the importance of the prospective jurors' physical presence in court for questioning so that they can be observed by the trial court." (AOB 36.) Respondent does not dispute that the cases cited by Thompson place great emphasis on a trial court's observations of a prospective juror's demeanor for the purpose of evaluating his or her impartiality. It does not follow, however, that such observations are necessary where the juror's written answers reveal

"unambiguous and entrenched" disqualifying positions. (See *Stewart, supra,* 33 Cal.4th at p. 444, fn. 11.) In fact, the opinions of this Court hold otherwise. (See *People v. Avila, supra*, 38 Cal.4th at p. 491; *People v. Ervin, supra, 22* Cal.4th at p. 48; *People v. Benavides, supra,* 35 Cal.4th at p. 69.)

Nor is there any merit to Thompson's claim that the process violated Code of Civil Procedure section 197, requiring jurors to be selected at random from a representative cross-section of the population. (AOB 41.) The jurors were randomly selected and then disclosed attitudes that all agreed substantially impaired their ability to perform as fair and neutral jurors in the case.

b. The Questionnaire Used In This Case Was Well Worded To Screen Out Disqualified Prospective Jurors

In *Avila*, this Court upheld the dismissal of four prospective jurors for cause based on the answers provided in their jury questionnaires.[17] (*Avila, supra,* 38 Cal.4th 491 at p. 530.) This Court 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 from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*Id.* at p. 531.)

Central to the decision in *Avila* was the adequacy of the questionnaire, which asked whether a prospective juror held such conscientious objections to the death penalty that, regardless of the evidence or the strength of the proof, he or she would "automatically" refuse to return a verdict of first degree murder, find a special circumstance to be true, or impose the death penalty. This Court held that any juror who would "automatically" vote in ways that

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17. In *Avila*, the defendant objected to the removal of four of the fourteen jurors that were dismissed by this process. (*People v. Avila, supra*, 38 Cal.4th at pp. 528-529.)

precluded the death penalty would clearly be disqualified. (*People v. Avila, supra*, 38 Cal.4th at p. 531.) The court found the questionnaire included detailed and expansive questions on capital punishment, which gave the jurors a clear opportunity to disclose any views they had which were strong enough to disqualify them on a death penalty case. Further, in *Avila,* this Court found that the responses of each of the challenged jurors were sufficiently unambiguous to allow the court to identify disqualifying biases based on their questionnaires alone. (*Ibid.*)

Avila distinguished *People v. Stewart, supra,* 33 Cal.4th at page 425. In *Stewart*, the defendant challenged the trial court's dismissal of four prospective jurors over the defendant's objection based on the questionnaires alone, without any oral voir dire. Noting that even *Stewart* upheld the stipulated dismissal of 17 jurors based on questionnaires revealing "'unambiguous and entrenched support for or opposition to the death penalty,'" the dismissal of the remaining prospective jurors was problematic because their answers to the questionnaire failed to make it clear whether they would be able to put aside their personal beliefs and follow the law. The questionnaire asked the jurors whether they had a conscientious opinion or belief about the death penalty that "'would prevent *or make it very difficult*' for the juror to vote for first degree murder, find a special circumstance true, or impose the death penalty." (*People v. Stewart, supra,* 33 Cal. 4th at p. 530, emphasis in original.) Further questioning was required of those jurors whose questionnaires did not inquire whether they could put aside their personal reservations and properly weigh and consider the aggravating and mitigating factors. (*Ibid.*)

Here, as in *Avila*, the questionnaire asked specific, unambiguous questions to which certain answers were unequivocally disqualifying under the substantial impairment test.

Question 54 asked:

> Are you so strongly against the death penalty that *no matter what the evidence shows, you would refuse to vote for guilt as to first degree murder or refuse to find a special circumstance true* in order to keep the case from going to the penalty phase, where death or life in prison without the possibility of parole is considered?

(2 CT 432, emphasis added.)

Unlike the question asked in *Stewart*, the inquiries here were framed so that an affirmative answer indicated an unambiguous refusal to follow the law.

Question 55 asked:

> Are you so strongly in favor of the death penalty that *no matter what the evidence shows, you would always vote guilty as to first degree murder and find a special circumstance true* in order to proceed to the penalty phase, where death or life in prison without the possibility of parole is considered?

(2 CT 432, emphasis added.)

Question 56 asked:

> Are you so strongly against the death penalty that, if the jury found a defendant guilty of intentional first degree murder and found a special circumstance to be true, *you would automatically vote against death, no matter what other evidence in aggravation or mitigation might be presented* at the penalty hearing in a case?

(2 CT 432, emphasis added.)

Question 57 asked:

> Are you so strongly in favor of the death penalty that, if the jury found a defendant guilty of intentional first degree murder and found a special circumstance to be true, *you would always vote for death, no matter what other evidence in aggravation or mitigation might be presented* at the penalty hearing in a case?

(2 CT 433, emphasis added.)

Question 58 asked the jury to state whether they would "always," "sometimes" or "never" impose the death penalty where a person was previously convicted of first degree murder and he was charged with any of five special circumstances. (2 CT 433.) Question 60 stated:

> There are no circumstances under which a jury is instructed by the court to automatically return a verdict of death. No matter

> what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole. ¶ A. Given the fact that you will have two options available to you, *can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole instead*? ¶ B. Given the fact that you have two options available to you, *can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty instead*?

(2 CT 434, emphasis added.)

There is no merit to Thompson's claim that the questionnaire used in the instant case included specialized vocabulary not readily comprehensible by lay people, or that the questions were slanted in favor of death penalty supporters or otherwise misleading. (AOB 52-59) The questionnaire in the instant case used terms such as "no matter what," "always," "never," "automatically," and "refuse," thus avoiding the ambiguities inherent in the *Stewart* questionnaire, which asked prospective jurors whether they would find it difficult to do certain things. The terms used here allowed the court to determine those prospective jurors who held disqualifying and inflexible positions because their answers necessarily indicated they would not put aside their own beliefs and follow the law. Moreover, the court repeatedly emphasized that it was not focusing on one particular question but on the juror's attitude as a whole, as reflected by all of his or her answers. Accordingly, the court did not abuse its discretion in relying solely on those questionnaires to dismiss those prospective jurors it determined were substantially impaired.

c. The Trial Court Properly Determined That Each Dismissed Prospective Juror's Questionnaire Demonstrated Substantial Impairment

Thompson contends that eighteen people were wrongfully excluded from the venire because their questionnaires contained appropriate, ambiguous and/or conflicting responses and comments that should have been followed up

with oral voir dire. (AOB 71.) Thompson is wrong. As to each dismissed prospective juror, the trial court properly determined his or her questionnaire demonstrated substantial impairment.

i. Prospective Jurors Raymond H. (P), Angelina A. (P) and Richard R. (N)[18] Were Properly Dismissed For Reasons Other Than Their Views On The Death Penalty

Prospective jurors Raymond H., Angelina A. and Richard R. were excused by stipulation for reasons other than their positions on the death penalty. The removal for cause of each of these prospective jurors, by stipulation and for non-death penalty reasons, is governed by California Code of Civil Procedure sections 228 and 229. Section 228 sets forth the grounds for a challenge for cause based on general disqualifications, and includes,

> (b) the existence of any incapacity which satisfies the court that the challenged person is incapable of performing the duties

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18. (P) indicates the prospective juror was a death penalty proponent, (N) indicates the prospective juror was neutral on the death penalty, and (A) indicates the prospective juror was anti-death penalty. Thompson places prospective jurors Raymond H., Angelina A., and Richard R. in the category of "neutral" as to their position on the death penalty. (AOB 72-81.) Raymond H. and Angelina A. were not neutral. They both characterized themselves as strongly in favor of the death penalty. Raymond H. stated, "If proven guilty of murder, I would go with the death penalty." He indicated that if a person is proven to have killed a person he or she deserves the death penalty and that he would always impose the death penalty where a person was convicted of multiple murders. (1 Supp. CT 126-130.)

Angelina A. stated she would not follow the presumption of innocence, and that she was "strongly in favor" of the death penalty. (4 Supp. CT 963-964.) She said she was so strongly in favor of the death penalty that no matter what the evidence showed, she would always vote guilty as to first degree murder and find a special circumstance true in order to proceed to the penalty phase. (4 Supp. CT 967.) Accordingly, Respondent has designated Raymond H. and Angelina A. as pro-death penalty jurors.

> of a juror in the particular action without prejudice to the substantial rights of the challenging party.
>
> Section 229 states, in pertinent part:
>
> A challenge for implied bias may be taken for one or more of the following causes, and for no other: . . . (f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

The court did not abuse its discretion in determining that Raymond H. was generally disqualified and "incapable of performing the duties of a juror." (Code Civ. Proc. § 228, subd. (b).) Raymond H.'s son was facing serious criminal charges of kidnaping and robbery in the same courthouse as Thompson's trial. Raymond H. indicated in his questionnaire that his son's situation was a personal problem that might distract him during the trial. (1 Supp. CT 117, 125, 134.) Counsel stipulated and the court agreed to excuse him for cause, because of a concern that his son's situation would prevent him from giving his full attention to the case. (6 RT 721, 729-730.)

Similarly, prospective juror Angelina A. was excused for reasons other than her views on the death penalty. Angelina A. indicated in her questionnaire that she would be more likely to find the defendant guilty simply because he was charged with murder. (4 Supp. CT 961.) She said she could not set aside sympathy or prejudice, could not be fair and impartial, and would not follow an instruction which differed from her belief or opinion. (4 Supp. CT 962.) She indicated she did not believe a person's background information was relevant to the jury's consideration of penalty and that life in prison was a worse punishment than death. (4 Supp. CT 966.) She also answered "no" to the mutually exclusive questions regarding whether, in the appropriate case, she could see herself choosing life without the possibility of parole, and whether, in the appropriate case, she could see herself choosing death. (4 Supp. CT 969.)

Defense counsel and the court agreed that Angelina A. provided some "bizarre" answers on her questionnaire. Although defense counsel did not think her answers rose to the level of excusing her for cause, he nonetheless asked the court to excuse her to save time because she was never going to be selected as a juror. The court agreed and noted the prospective juror had indicated she would not follow the presumption of innocence. Angelina A. was excused by stipulation because the parties agreed her answers were bizarre and she could contaminate the rest of the panel. (6 RT 767-770, 780-781.)

Prospective juror Richard R. stated that the response of law enforcement to a case where he was a victim was "total bullshit." (6 Supp. CT 1658.) He stated his attitudes about guns would affect his ability to be fair and impartial, and that his religious or moral beliefs would make it difficult or impossible to sit in judgment of another. (6 Supp. CT 1661, 1663.) Richard R. indicated he would not apply the court's instructions regarding evaluating the testimony of all witnesses, whether they be lay witnesses or law enforcement officers. (6 Supp. CT 1664.) He said the testimony of the defendant should be judged by different standards. (6 Supp. CT 1665.) Richard R. wrote that he could not set aside sympathy, bias or prejudice; he could not be fair and impartial towards people with different lifestyles; and he would not necessarily be able to follow an instruction that was different from a belief or opinion he held. (6 Supp. CT 1666.)

The court proposed eliminating prospective juror Richard R. without oral voir dire, noting Richard R.'s questionnaire demonstrated he had an attitude problem. The court pointed out that Richard R. believed judges and lawyers are pompous and boring; indicated he was claustrophobic and could not sit through deliberations; and claimed the death penalty would not be valid until the rich and famous were put to death. (9 RT 1199-1200.) Thompson's counsel expressly acknowledged that Richard R.'s questionnaire provided a

sufficient basis for dismissing him for cause, and stipulated to his dismissal. (9 RT 1200.)

Like Raymond H., Angelina A. and Richard R. were properly excused pursuant to Code of Civil Procedure sections 228 and 229. Taken as a whole, their answers revealed a personal agenda which was likely to affect their ability and willingness to follow the law. Richard R. expressed a clear disrespect for lawyers, judges and the system. His responses were hostile and demonstrated qualities that were likely to alienate pro-death and anti-death prospective jurors alike. Angelina A. directly stated that she would not follow a law that differed from her opinions and beliefs.

Any error in excusing Raymond H., Angelina A. and Richard R. without oral voir dire is not reversible, because reversal is not required for an error in excusing a juror for reasons unrelated to the jurors' views on the death penalty. (*People v. Mickey* (1991) 54 Cal.3d 612, 683; *People v. Holt* (1997) 15 Cal.4th 619.) The general rule is that the erroneous exclusion of a juror for cause provides no basis for overturning a judgment. A defendant has a right to jurors who are competent and qualified, but does not have the right to any particular juror.[19] (*Ibid.*, citation omitted.)

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19. In any event, Raymond H. and Angelina A. were strongly in favor of the death penalty and indicated an intent to impose it, so Thompson suffered no conceivable harm from their removal from the venire.

ii. Death Penalty Opponents Patricia C. (A), Lowell S. (A), Deborah B. (A), Tina T. (A), Carolyne V. (A), Joe J. (A), Thomas S. (A), Ross S. (A), Lenora K. (A), And Nicolette S. (A)[20] Were Properly Dismissed Because Their Questionnaires Demonstrated Substantial Impairment

Thompson next challenges the dismissal of prospective jurors he claims were death penalty opponents. The trial court properly ruled that each of these prospective jurors' questionnaires demonstrated they were substantially impaired.

a) Questionnaires Of Anti-death Penalty Prospective Jurors

Prospective juror Patricia C. wrote that she could not follow the law that a single witness is sufficient to prove any fact, because she does not feel that a single witness is enough on which to base an important judgment. (1 Supp. CT 260.) She stated she does not feel "we have the right to take a life," she is strongly against the death penalty, that life in prison is sufficient punishment, and that "we don't have to kill in the name of justice." (1 Supp. CT 261.) Patricia C. stated she believed it was murder to take a life under any circumstances; she thought life in prison was a harsher punishment than death; she is so strongly against the death penalty that she would automatically vote against death no matter what other evidence in aggravation or mitigation was presented at the penalty hearing; and she would "never" vote for death under any of the special circumstances listed in Question 58. (1 Supp. CT 262-265.) In the appropriate case, Patricia C. said she could not see herself rejecting life

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20. Thompson erroneously characterized Nicolette S. as pro-death penalty. Her questionnaire clearly indicates she was anti-death penalty. (5 Supp. CT 1283-1293.)

without the possibility of parole and choosing the death penalty instead. (1 Supp. CT 266.) Defense counsel did not object to dismissing Patricia C. based solely on her questionnaire. (6 RT 742-744.)

Prospective juror Lowell S. stated that he would have a difficult time being fair and impartial. He indicated he has religious or moral beliefs which make it difficult or impossible to sit in judgment of another person, stating, "Who am I to deprive another of his life - no matter what he's done? Will that bring the victim back to life?" (2 Supp. CT 418.) Lowell S. stated the probability of the defendant's guilt was high since he had reached this stage of criminal proceedings and he was more likely to find the defendant guilty because he was charged with murder. (2 Supp. CT 420.)

Lowell S. stated he would have a difficult time following an instruction that was different from his own beliefs, noting, "It would be difficult - how else can I help change things?" (2 Supp. CT 421.) Lowell S. called the death penalty "barbaric" (2 Supp. CT 423) and said he was strongly against it, because there is always a chance a person can make a contribution to society. (2 Supp. CT 423.) Lowell S. did not know whether the death penalty was worse than life in prison, "considering how brutal and retributive the correctional system in California has become . . . ." (2 Supp. CT 425.) He stated that the defendant most likely needed rehabilitation and not punishment (2 Supp. CT 425) and that he was so strongly against the death penalty that he would refuse to vote for guilt as to murder or refuse to find a special circumstance true in order to keep the case from going into the penalty phase. Lowell S. also said he was so strongly against the death penalty that he would automatically vote against death. (2 Supp. CT 426.) For each of the special circumstances listed in Question 58, Lowell S. indicated he would never impose the death penalty. (2 Supp. CT 427.) He could never see himself rejecting life imprisonment in the appropriate case and choosing the death penalty instead.

(2 Supp. CT 428.) Defense counsel did not object to dismissing Lowell S. based solely on his questionnaire. (6 RT 744-745.)

Prospective juror Deborah B. indicated some familiarity with the case based on three newspaper articles she had read. (2 Supp. CT 499.) She stated she has religious or moral beliefs that make it difficult or impossible to sit in judgment of another. (2 CT 499.) She said the fact that the defendant was arrested and is in custody causes her to feel bias or prejudice. (2 Supp. CT 501.) She indicated confusion about the instruction which states that a single witness is enough to prove a fact. (2 Supp. CT 503.) Deborah B. stated that she is strongly against the death penalty, and that she does not want the state having the power to take a life. (2 Supp. CT 504.) Deborah B. stated she knew that defendant was on parole for murder in Texas. (2 Supp. CT 506.) She said she would automatically vote against death no matter what evidence in mitigation or aggravation was presented. (2 Supp. CT 507.) She indicated she would never impose the death penalty under any of the circumstances listed in Question 58. (2 Supp. CT 508.) Deborah B. indicated she might discuss the case at home with her life partner notwithstanding the instruction not to talk about the case, and said she could not see herself rejecting life in prison and choosing the death penalty in the appropriate case.[21/] (2 Supp. CT 509.) The parties agreed that Deborah B. was substantially impaired based solely on her questionnaire. (6 RT 751.)

Prospective juror Tina T. wrote that she had previously been robbed at gunpoint, and that the crime devastated her son who was in shock and needed therapy. (4 Supp. CT 900.) Tina T. said "I believe it's not my place to decide

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21. Deborah B.'s familiarity with the case and knowledge of Thompson's prior murder conviction played a significant role in the parties' stipulation to dismiss her, so she arguably belongs in the category of jurors who were excused for reasons other than their positions on the death penalty. (6 RT 751.)

this man's guilt or innocence," and that she had already formed an opinion about the fact that a gun was used. She indicated she has religious and moral beliefs which make it difficult or impossible for her to sit in judgment of another, and that she does not believe in deciding anyone's life. (4 Supp. CT 905.) Tina T. said she would be unable to set aside sympathy, bias or prejudice. (4 Supp. CT 908.) She placed a question mark on the answer line for the question whether she would be able to apply an instruction that was different from her own belief or opinion. (4 Supp. CT 908.) She said she does not believe a person should be killed even if they have killed (4 Supp. CT 911), that a defendant's background is not relevant to the jury's consideration of penalty (4 Supp. CT 912), that "the death penalty should never be a factor" (4 Supp. CT 912), that she was so strongly against the death penalty that no matter what the evidence showed, she would refuse to vote for guilt as to first degree murder or find true a special circumstance in order to keep the case from going to the penalty phase (4 Supp. CT 913), and that she would never impose the death penalty under any of the circumstances listed in Question 58. (4 Supp. CT 914.) She said that in the appropriate case, she could not see herself rejecting life imprisonment without the possibility of parole and choosing the death penalty. (4 Supp. CT 915.) As to her views on capital punishment, Tina T. wrote that she was strongly against the death penalty, and that "A life for a life is not the answer." (4 Supp. CT 910.) Defense counsel did not object to dismissing Tina T. based solely on her questionnaire. (6 RT 771-773.)

Carolyne V. wrote that she did not have any religious or moral beliefs that would make it difficult or impossible for her to sit in judgment of another person "as long as it does not come down to the decision of the death penalty." (5 Supp. CT 1310.) She stated she could not set aside sympathy, bias or prejudice. (5 Supp. CT 1313.) She stated that "life and death belongs to God only!" and that she was strongly against the death penalty. (5 Supp. CT 1315.)

She stated she had strong religious views against the death penalty, that she was so strongly against the death penalty that no matter what the evidence showed, she would refuse to vote for guilt for first degree murder or find true a special circumstance in order to keep the case from going to the penalty phase, and she was so strongly against the death penalty that, if the jury found a defendant guilty of first degree murder and found a special circumstance to be true, she would automatically vote against death, no matter what evidence in aggravation or mitigation was presented. (5 Supp. CT 1317-1318.) Carolyne V. wrote that she would never impose the death penalty under any of the five circumstances listed in Question 58. (5 Supp. CT 1319.) She said she could not see herself, in the appropriate case, rejecting life imprisonment and choosing the death penalty. (5 Supp. CT 1320.) Defense counsel did not object to dismissing Carolyne V. based solely on her questionnaire. (6 RT 771-773.)

Prospective juror Joe J. stated that he is strongly against the death penalty and does not believe the state or a man has the right to take a person's life. (12 Supp. CT 3404, 3407.) He said he was so strongly against the death penalty that he would refuse to vote for guilt or find a special circumstance true in order to keep the case from going to the penalty phase, and that he was so strongly against the death penalty that, if the jury found a defendant guilty of first degree murder and found true a special circumstance, he would automatically vote against death, no matter what other evidence in mitigation or aggravation was presented. (12 Supp. CT 3407.) Joe J. wrote that he would never impose the death penalty under any of the circumstances listed in Question 58 (12 Supp. CT 3408) and that he could not see himself, in the appropriate case, rejecting life in prison and choosing death. (12 Supp. CT 3409.) Defense counsel did not object to dismissing Joe J. based solely on his questionnaire. (6 RT 771-773.)

Prospective juror Thomas S. wrote that he has moral beliefs which would make it difficult or impossible for him to sit as a juror. (4 Supp. CT 1013.) He stated he would be more likely to find the defendant guilty because he is charged with murder. He did not answer the question asking whether he could set aside sympathy, bias or prejudice. (4 Supp. CT 1015-1016.) Thomas S. wrote that he does not believe in the death penalty, he is strongly against it, and he would find it very difficult to make that decision. Thomas S. stated twice that he does not believe anyone has the right to take a human life. (4 Supp. CT 1018-1020.) Thomas S. wrote that he was so strongly against the death penalty that no matter what the evidence showed, he would refuse to vote for guilt or find true a special circumstance in order to keep the case from going to the penalty phase. (4 Supp. CT 1021.) Thomas S. said he would never impose the death penalty under two of the five special circumstances listed in question 58, and gave no answer as to the other three circumstances, but explained, "I do not believe in the death penalty." (4 Supp. CT 1022.) He said that in the appropriate case, he could not see himself rejecting life imprisonment and choosing death. (4 Supp. CT 1023.) Defense counsel did not object to dismissing Thomas S. based solely on his questionnaire. (6 RT 770.)

Ross S. wrote that he could not set aside sympathy, prejudice or bias. (4 Supp. CT 1151.) Ross S. repeatedly stated, "I am not in favor of the death penalty," and "Only God has the right to take a life." (4 Supp. CT 1153, 1155, 1156.) Ross S. stated he was so strongly against the death penalty that no matter what the evidence showed, he would refuse to vote for guilt as to first degree murder or refuse to find a special circumstance true in order to keep the case from going to the penalty phase. He also stated he was so strongly against the death penalty that if the jury found a defendant guilty of murder and found a special circumstance to be true, he would automatically vote against death, no matter what other evidence in aggravation or mitigation was presented. (4

Supp. CT 1156.) Ross S. stated he would never impose the death penalty under any of the circumstances presented in Question 58. He said he could not see himself, in the appropriate case, rejecting life imprisonment and choosing the death penalty. (4 Supp. CT 1158.) Defense counsel did not object to dismissing Ross S. based solely on his questionnaire. (6 RT 768, 780.)

Prospective juror Lenora K. stated in her questionnaire that it would be difficult or impossible for her to be fair and impartial because she opposes capital punishment, and she has religious beliefs against killing. (3 Supp. CT 689.) She further stated she could not set aside sympathy, bias or prejudice. She did not answer the question regarding whether she could follow an instruction that was different from her belief or opinion. (3 Supp. CT 692.) Lenora K. checked both "moderately against" and "strongly against" the death penalty, and indicated she would not vote for the death penalty against anyone. (3 Supp. CT 694.) She stated she has strong religious beliefs against the death penalty, and stated she would never impose the death penalty under any of the circumstances listed in Question 58. (3 Supp. CT 698.) Lenora K. indicated she could not see herself, in the appropriate case, rejecting life in prison and choosing death. (3 Supp. CT 699.) Defense counsel did not object to dismissing Lenora K. based solely on her questionnaire. (6 RT 756.)

Prospective juror Nicolette S. stated she could not separate the guilt-finding process from the death penalty phase, and she does not have the right to decide who lives or dies. (5 Supp. CT 1283.) She said she has a tendency to prejudge people and the defendant looks "slimy." Her religious beliefs make it difficult or impossible for her to sit in judgment of another person. (5 Supp. CT 1283.)

Nicolette S. said she would not follow the instruction setting forth the standards for evaluating witness' testimony because she does not trust "cops" or lawyers. (5 Supp. CT 1284.) She would judge the defendant's testimony by

different standards than other witnesses, and she would be more likely to find him guilty because he is charged with having committed a murder. She stated she is biased against the defendant and she would not be able to set her feelings aside. She cannot be fair or impartial to people with different lifestyles, and she would reject the testimony of witnesses who had been involved with drugs. (5 Supp. CT 1285-1286.) To the question of whether she could apply an instruction which was different from an opinion or belief she held, Nicolette S. wrote, "Hell no! No one tells me what to believe just because they're a judge." (5 Supp. CT 1286.) Nicolette S. said she could not follow the presumption of innocence, that the defendant or his lawyer were probably hiding something, that she would require the defendant to testify and she could tell whether he was guilty by his demeanor, and that she could not follow the law that a single witness is enough to prove a fact. (5 Supp. CT 1288.)

Nicolette S. identified herself as strongly against the death penalty and said only God should decide when a person dies. (5 Supp. CT 1288.) She indicated she was so strongly against the death penalty that no matter what the evidence showed, she would refuse to vote for guilt or find a special circumstance true in order to keep the case from going to the penalty phase. She also said she was so strongly against the death penalty that she would automatically vote against death, no matter what evidence in aggravation or mitigation was presented. (5 Supp. CT 1291.) She stated she would never impose the death penalty under any of the circumstances listed in Question 58, that she could not follow the court's instruction to refrain from discussing the case, and that she could not see herself, in the appropriate case, rejecting life in prison without the possibility of parole and choosing the death penalty instead. (5 Supp. CT 1292-1293.) Defense counsel did not object to excusing Nicolette S. based solely on the answers provided in her questionnaire. (6 RT 768-773.)

b) The Court Properly Determined These Death Penalty Opponents Were Substantially Impaired Based On Their Questionnaires

In *People v. Avila, supra,* the defendant argued that the dismissal of four anti-death penalty jurors was improper without oral voir dire. The Court upheld the dismissals because the dismissed jurors indicated they would be unable to set aside their own beliefs and follow the law.

Each of the dismissed anti-death penalty prospective jurors here similarly demonstrated an inability or unwillingness to set aside their own beliefs and follow the law, and an inability to conscientiously consider all sentencing alternatives. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 983.) The final question in the section entitled "Attitudes Towards Capital Punishment" reminded the prospective jurors that there were no circumstances under which a jury is required to return a verdict of death; they always have the option of choosing life without the possibility of parole. The question asked first, whether in the appropriate case, the prospective juror could see himself/herself rejecting the death penalty and choosing life in prison, and second, whether in the appropriate case, the prospective juror could see themselves rejecting life in prison and choosing the death penalty. Every one of the dismissed prospective jurors answered the first question "yes" and the second question "no." In addition, all but Lenora K.[22/] indicated one or both of the following things: they were so strongly against the death penalty that no matter what the evidence showed, they would refuse to vote for guilt or find a special circumstance true in order to avoid going to the penalty phase, or they were so strongly against the death penalty that if the jury found the defendant guilty of intentional first degree murder and found a special circumstance true, they

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22. The parties agreed that Lenora K.'s questionnaire demonstrated that she would never impose the death penalty. (6 RT 756.)

would automatically vote against death, no matter what evidence in aggravation or mitigation was presented. Since these prospective jurors answered questions in a manner which demonstrated they would "automatically" vote in ways precluding the death penalty, they were clearly disqualified under *Witt*. (See *People v. Avila, supra*, 38 Cal.4th at p. 531.)

The anti-death penalty prospective jurors dismissed in this case gave answers that were clear, unequivocal and internally consistent demonstrating their unwillingness to impose the death penalty under any circumstances. Those prospective jurors were properly dismissed because their questionnaires, viewed as a whole, reflected an opposition to the death penalty that would prevent them from performing their duties in accordance with their oath and the instructions. (See *People v. Avila, supra*, 38 Cal. 4th at pp. 532-533.)

Assuming arguendo the trial court erroneously removed prospective anti-death penalty prospective jurors for cause based on *Witt/Witherspoon* standards, Thompson is entitled to a new penalty trial but his conviction would stand. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668 [107 S.Ct. 2045, 95 L.Ed.2d 622]; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.)

iii. Thompson's Challenge To The Questionnaire-Based Dismissals Of Pro-death Penalty Prospective Jurors Gary P. (P), Heloise M. (P), Marna R. (P), Richard H. (P) and Carol P. (P)[23] Should Be Summarily Denied; Thompson Has Waived Any Claim Regarding The Trial Court's Decision To Conduct Oral Voir Dire Of Pro-death Penalty Prospective Jurors Gwyneth G. (P), Lillias R. (P), Esther V. (P), and Michael P. (P); The Court Applied The Same "Substantial Impairment" Test To All Prospective Jurors

Regarding the trial court's handling of pro-death penalty prospective jurors during the pre-screening process, Thompson claims as to certain jurors that the trial court committed error by failing to conduct oral voir dire, and as to other jurors that the trial court committed error by conducting oral voir dire. First, he argues the trial court improperly dismissed death penalty supporters Gary P., Heloise M., Marna R., Richard H., and Carol P. based solely on the answers provided in their questionnaires. (AOB 95.) Second, he claims the trial court improperly failed to dismiss prospective jurors Gwyneth G., Lillias R., Esther V. and Michael P. during the pre-screening process, instead subjecting them to oral voir dire. Thompson has waived his first claim, and in any event has failed to explain how the exclusion of these prospective jurors caused any harm. As to his second claim, Thompson cannot challenge the court's failure to dismiss pro-death penalty prospective jurors based on their questionnaires because (1) the court's ruling simply subjected those prospective jurors to oral voir dire, as opposed to retaining or excluding any prospective jurors; (2) after questioning, the court excused one of the four prospective

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23. Thompson's failure to include pro-death penalty prospective juror Carol P. among those he claims were improperly excused (See AOB 95) appears to be an oversight, as Thompson previously included Carol P. in the list of pro-death penalty venire members who were excused. (See AOB 33.)

jurors for cause, and Thompson exercised peremptory challenges as to the other three; (3) Thompson did not exhaust all of his peremptory challenges or express dissatisfaction with the jury ultimately selected. Finally, an analysis of the questionnaires of all prospective jurors dismissed during the pre-screening process demonstrates the court applied the same "substantial impairment" test to all prospective jurors.

Thompson claims the trial court improperly excused pro-death penalty prospective jurors without oral voir dire because their questionnaires did not demonstrate substantial impairment. (AOB 95.) Thompson's claim should be summarily denied. He has failed to provide any authority for his assertion that the exclusion of pro-death penalty prospective jurors constitutes error. A brief that fails to contain supporting argument or citation of authority on the points made may be treated as waived, and passed without consideration. (*People v. Ramirez* (2006) 39 Cal.4th 398, 441, fn. 8.) In any event, Thompson cannot show he suffered any harm from the exclusion of pro-death penalty prospective jurors. While the improper exclusion of anti-death penalty prospective jurors based solely on their questionnaires constitutes reversible error without inquiry into prejudice (see *People v. Stewart, supra*, 33 Cal. 4th at p. 454, citations omitted), the improper exclusion of pro-death penalty prospective jurors does not raise the same concerns that the jury was biased in favor of the death penalty.

Nor can Thompson challenge the court's failure to dismiss several pro-death penalty prospective jurors based on their questionnaires alone. The court's ruling did not result in the retention or dismissal of any prospective jurors, it simply subjected those prospective jurors to additional questioning. Thompson has not cited any authority for the proposition that a trial court's decision to conduct oral voir dire can constitute error. Even if Thompson's claim is treated as the denial of a challenge for cause, his claim is not preserved

unless (1) he used an available peremptory challenge to remove the prospective juror in question, (2) he exhausted all his peremptory challenges or explained his failure to do so, and (3) he expressed dissatisfaction with the jury ultimately selected. (*People v. Avila, supra,* 38 Cal.4th at p. 539, citing *People v. Maury* (2003) 30 Cal.4th 342, 379.)

Thompson is precluded from raising the issue on appeal because he did not exercise all of his peremptory challenges and he did not express dissatisfaction with the jury actually selected. (*People v. Avila, supra*, 38 Cal. 4th at p. 539.) Prospective juror Gwyneth G. was excused for cause by stipulation after questioning. (7 RT 830, 887, 894.) Thompson asked the court to excuse prospective jurors Lillias R. and Esther V. based solely on their questionnaires, but he did not challenge either of those prospective jurors for cause after they were questioned, instead passing on challenges for cause and exercising peremptory challenges as to those jurors, (see 7 RT 969-970, 977, 8 RT 1057, 1074, 1171-1174) impliedly acquiescing in the court's finding that those prospective jurors were not substantially impaired. (*People v. Benavides, supra*, 35 Cal.4th at p. 88; *People v. Ervin, supra,* 22 Cal.4th at p. 73.) Thompson asked the court to excuse prospective juror Michael P. based on the answers in his questionnaire. The court denied the request. Thompson then exercised a peremptory challenge as to prospective juror Michael P. after his challenge for cause was denied. (6 RT 769-771, 780, 8 RT 1171-1174, 9 RT 1302.)

The harm to Thompson, if any, from the court's failure to excuse prospective jurors based on their questionnaires, was that those prospective jurors were subjected to follow-up questions which revealed they were qualified to serve as jurors. As a consequence, Thompson was required to use peremptory challenges to cure what he perceived as the trial court's error, thereby reducing the number of challenges available to him later in the trial.

(See *People v. Avila, supra*, 38 Cal.4th at p. 540.) But Thompson used only seven peremptory challenges (7 RT 977-981, 8 RT 1076-1080, 1175-1176, 9 RT 1299-1311) and the loss of a peremptory challenge does not violate the constitutional right to an impartial jury. (*Ibid.*)

In any event, a comparison of the questionnaires of all dismissed prospective jurors reveals that the same "substantial impairment" test was applied across the board. Viewed as a whole, the questionnaires of all dismissed jurors on both sides indicated entrenched positions and an unwillingness to follow the law. Prospective juror Gary P. stated his belief that the police and law enforcement do not arrest innocent people, and that the District Attorney does not prosecute innocent people. He stated it would be impossible for him to be fair and impartial because "he is already guilty in my mind - and no amount of alleged evidence to the contrary will change that." (1 Supp. CT 148.) Gary P. indicated he would not apply the instruction on evaluating the testimony of witnesses, because "I believe law enforcement; and I will believe in state witnesses. I do not hold anything the defense will say as valid." (1 Supp. CT 149.) Gary P. indicated he would choose to ignore the defendant's testimony, he was more likely to find the defendant guilty because he was charged with murder, he was prejudiced and biased against defendant because he had been arrested and was in custody, he could not set aside his sympathy for the victim's family and had no sympathy for the defendant, he would reject the testimony of any witness who had been involved in the use or sales of narcotics, and he would not follow the presumption of innocence. (1 Supp. CT 150-152.)

Gary P. also indicated in his questionnaire that he had no problem with the death penalty as a means of punishment, deterrence and cost savings. He said he was strongly in favor of the death penalty, and that it serves little purpose now but if executions were conducted in a timely manner, our legal

system would not be a "sham.." (1 Supp. CT 153-154.) He claimed background information about the defendant was not relevant to the penalty consideration, and that he was bothered that the death penalty was not immediate. (1 Supp. CT 155.) He further stated he was so strongly in favor of the death penalty that he would always vote guilty for murder, and find a special circumstance to be true, in order to proceed to the penalty phase, and that he would always vote for death no matter what other evidence in aggravation and mitigation was presented at the penalty hearing. (1 Supp. CT 1 56-157.) Gary P. said he would "always" impose the death penalty as to each special circumstance listed in Question 58, and explained, "defendant took the life of somebody. That person will never return. I do not need special circumstance to vote for death penalty. It (spec. circ.) should be removed from law and court proceed directly to punishment." (1 Supp. CT 157.) He could not see himself, given the appropriate case, rejecting the death penalty and choosing life imprisonment. (1 Supp. CT 158.) The parties agreed to excuse Gary P.. (7 RT 758-761.)

Prospective juror Heloise M. said she has religious or moral beliefs that would make it difficult or impossible for her to sit in judgment of another person, indicating she believes the bible states, "an eye for an eye." (2 Supp. CT 553.) She said she would judge the defendant's testimony by different standards than other witnesses, that she is more likely to find the defendant guilty because he is charged with committing a murder, that she is prejudiced against the defendant because he has been arrested and is in custody. (2 Supp. CT 555.) To the question whether she would require the defendant to testify, Heloise M. answered "no" but explained, "He wouldn't necessarily tell the truth anyway - even under oath." (2 Supp. CT 557.) She stated she is strongly in favor of the death penalty, that it should be used quickly without appeals that go on and on, and that it is a biblical principal. (2 Supp. CT 559.) She did not

feel that background information was relevant to the jury's consideration of penalty, and she indicated that life in prison was a worse punishment than death. (2 Supp. CT 560.) Heloise M. stated she was so strongly in favor of the death penalty that she would always vote guilty of first degree murder and find a special circumstance true in order to proceed to the penalty phase, she would always vote for death where a person was convicted of murder with a special circumstance, and she would always impose the death penalty under each of the circumstances set forth in Question 58. (2 Supp. CT 561-562.) The parties agreed to excuse Heloise M. (6 RT 752.)

Prospective juror Marna R. wrote that a person who takes the life of another with a gun deserves the death penalty unless the killing was done in self defense. (3 Supp. CT 797.) She stated she would judge the defendant's testimony by different standards, and "because he is the accused he therefore can't be telling the truth." (3 Supp. CT 799.) She would be more likely to find the defendant guilty simply because he is charged with murder, and feels bias and prejudice against him which she cannot set aside. (3 Supp. CT 799-800.) Her ability to follow the presumption of innocence depends on the charge. (3 Supp. CT 801.) Marna R. wrote that she is moderately in favor of the death penalty but it has not directly affected her life. (3 Supp. CT 802.) Marna R. also stated she was so strongly in favor of the death penalty that no matter what the evidence showed, she would always vote guilty as to first degree murder and find a special circumstance to be true in order to proceed to the penalty phase. (3 Supp. CT 805.) She said she would "always" impose the death penalty under the circumstances listed in Question 58, and added, "A crime of murder should be punished by death." (3 Supp. CT 806.) Marna R. wrote she could not see herself rejecting the death penalty in the appropriate case and choosing life imprisonment without the possibility of parole. (3 Supp. CT 807.) The parties agreed to excuse Marna R. (6 RT 757-758.)

Prospective juror Richard H. wrote that he does not believe in life in prison. (5 Supp. CT 1229.) He said he would be more likely to find the defendant guilty simply because he has been charged with murder, stating "He must have done it or he would not have been charged." (5 Supp. CT 1231.) He said he would be unable to set aside sympathy, bias or prejudice, and that "[i]t would be hard" to follow an instruction that was different from his own belief or opinion. (5 Supp. CT 1232.) Richard H. indicated he was strongly in favor of the death penalty, and that a person who takes a life should lose his. (5 Supp. CT 1234.) Richard H. wrote that the defendant's background information is not relevant to the jury's determination of penalty. (5 Supp. CT 1236.) Richard H. stated that he favors the death penalty; that he is so strongly in favor of the death penalty that no matter what the evidence showed, he would always vote guilty as to first degree murder and find a special circumstance to be true in order to proceed to the penalty phase; he would always vote for death, no matter what evidence in mitigation or aggravation was presented; and he would always impose the death penalty under the circumstances in Question 58. (5 Supp. CT 1237-1238.) Richard H. wrote that he could not see himself, in the appropriate case, rejecting the death penalty and choosing life in prison without the possibility of parole. (5 Supp. CT 1239.) The parties agreed to excuse Richard H. (6 RT 777.)

Prospective juror Carol P. stated that if a person takes someone's life, they should pay for it the same way. (1 Supp. CT 94.) She said she would be more likely to find a person guilty simply because he is charged with having committed a murder, "Because he took someone's life which he did it in a robbery." (1 Supp. CT 96.) She indicated she could not set aside any sympathy, bias, or prejudice she might feel towards or against any victim, witness or the defendant. (1 Supp. CT 97.) She indicated she would reject the testimony of a witness merely because the evidence showed they had been

involved in the use or sale of narcotics, and also that she could not follow the law if it was different from her own belief or opinion. (1 Supp. CT 97.) She said she would not follow the instruction presuming the defendant to be innocent, nor would she follow the instruction that the testimony of a single witness is sufficient to prove a fact, stating as her reason that, "the witness might be for the defendant." (1 Supp. CT 98.)

As to her attitudes about capital punishment, Carol P. indicated she was strongly in favor of the death penalty. (1 Supp. CT 99.) To the question, "Do you believe that background information about a defendant is something relevant to the jury's consideration of penalty?" she answered, "In this case No -." (1 Supp. CT 101.) Carol P. said she would always impose the death penalty as to each special circumstance listed in Question 58. (1 Supp. CT 103.) She said that given the appropriate case, she could not see herself rejecting the death penalty and imposing life imprisonment instead. (1 Supp. CT 104.) The parties agreed to excuse Carol P. (6 RT 729-730.)

As with the anti-death prospective jurors, each of these prospective jurors expressed unambiguous attitudes about the death penalty that demonstrated an inability or unwillingness to follow the law. The trial court focused on whether the prospective jurors indicated that they would automatically vote one way or another based on their feelings about the death penalty rather than follow the instructions and their oath. Prospective jurors Gary P., Heloise M., Marna R., and Richard H. stated they would always vote guilty in order to get to the penalty phase. Prospective jurors Gary P., Heloise M., and Richard H. indicated they would always vote for death. Prospective jurors Gary P., Marna R., Richard H., and Carol P. stated they could not see themselves imposing life in prison in the appropriate case. And all five indicated that, under any of the circumstances listed in Question 58, they would always impose the death penalty.

All but Marna R. identified themselves as strongly in favor of the death penalty. But Marna R.'s questionnaire, taken as a whole, shows that she, too, was strongly in favor of the death penalty. Although she claimed to be "moderately in favor" of the death penalty, Marna R.'s statement that she would always vote guilty and find a special circumstance true in order to proceed to the penalty phase, her statement that she would always impose the death penalty under the circumstances in question 58, and her statement that she could not see herself rejecting the death penalty in the appropriate case, taken as a whole, reflect an attitude in favor of the death penalty that would prevent her from performing her duties as a juror. (See *People v. Avila, supra,* 38 Cal.4th at pp. 532-533.) The trial court applied the same standards to all dismissed jurors.

In conclusion, the trial court committed no error, and violated none of Thompson's constitutional rights, when it dismissed 18 prospective jurors by stipulation, based on the answers provided in their questionnaires, which demonstrated substantial impairment. Thompson has waived the right to challenge the court's use of questionnaire-based dismissals because he asked the court to use the pre-screening procedure. Defense counsel was not ineffective for requesting the process because he had tactical reasons for doing so. This Court should not review the trial court's application of the substantial impairment standard to any particular prospective juror because the parties stipulated to excuse each dismissed juror. In any event, the trial court properly determined that the questionnaires of ten anti-death penalty prospective jurors demonstrated they were substantially impaired. As to five dismissed pro-death penalty prospective jurors, Thompson has not established that the trial court committed any error, or if it did, that he suffered any prejudice. Thompson cannot challenge the court's decision to conduct oral voir dire of four other pro-death penalty prospective jurors, and in any event, the trial court correctly

applied the same substantial impairment standard to pro-death penalty and anti-death penalty prospective jurors. Thompson's claim should be denied.

II.

THOMPSON'S *WHEELER*[24] MOTIONS WERE PROPERLY DENIED

Thompson contends his state and federal constitutional rights to be tried by an impartial jury were violated by the prosecutor's discriminatory use of peremptory challenges. He claims reversal is required because the trial court erroneously denied his motions for a mistrial based on the prosecutor's racially motivated exclusion of two African-American jurors. (AOB 112-134.) The trial court properly denied Thompson's *Wheeler* motions, because the prosecutor exercised his peremptory challenges for legitimate, race-neutral reasons.

The use of peremptory challenges to strike prospective jurors on the basis of bias against an identifiable group of people, distinguished on racial, religious, ethnic or similar grounds, violates the right of a criminal defendant to be tried by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution, and the right to equal protection under the United States Constitution. (*People v. Avila, supra*, 38 Cal.4th at p. 541, citing *Wheeler, supra*, 22 Cal. 3d at pp. 276-277; *People v. Griffin* (2004) 33 Cal.4th 536, 553; *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

Trial courts must follow a three step procedure when motions challenging peremptory strikes are made. First, the defendant must make a prima facie case, showing the totality of relevant facts gives rise to an inference of a discriminatory purpose. Second, once the defendant has made out a prima

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24. *People v. Wheeler, supra*, 22 Cal.3d at pp. 276-277.

facie case, the burden shifts to the state to explain adequately the challenge by offering permissible, race-neutral reasons for the strike. Finally, if a race-neutral reason is tendered, the court must decide whether the defendant has proved purposeful racial discrimination. (*Avila, supra,* 38 Cal.4th at p. 541, citing *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

The prosecutor's reasons must relate to the particular juror and to the case. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) "'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, quoting *Batson, supra,* 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation omitted], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra,* 16 Cal.4th at p. 664.)

Excluding even a single juror for impermissible reasons under *Batson* and *Wheeler* requires reversal. (*People v. Huggins* (2006) 38 Cal. 4th 175, 227, citing *People v. Silva* (2001) 25 Cal.4th 345, 386.)

After the prosecutor exercised its sixth peremptory challenge to excuse African-American prospective juror Rodell M., defense counsel argued that the prosecutor was using his peremptory challenges in a discriminatory manner, demonstrating a pattern of excluding African American people in violation of *People v. Wheeler, supra.*[25] (8 RT 1080.) Defense counsel argued that the prosecutor had previously exercised a peremptory challenge to African

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25. Although Thompson did not specifically invoke *Batson v. Kentucky, supra,* 476 U.S. 79, in his objection at trial, this Court has recognized that an objection under *Wheeler* preserves a federal constitutional objection because the legal principle that is applied is ultimately the same. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

American prospective juror Doryanna A., demonstrating an improper pattern of exclusion. (8 RT 1081.) The requested remedy was not a mistrial, but for the court to disallow the prosecutor's challenge to prospective juror Rodell M. (8 RT 1083.)

The court denied counsel's request and stated it did not find that the exclusion of two jurors out of six constituted a systematic pattern of exclusion. The court said there was a "glimmering" but that counsel had not made a prima facie showing that the prosecutor's use of peremptory challenges was improper. The court commented that there were two other African American jurors seated in the jury box, five African American jurors in the first group, and the removal of two out of five was not enough to show a systematic pattern. Prospective juror Rodell M. was excused. (8 RT 1083-1086.) Subsequently, the court reiterated its finding that Thompson had not shown a prima facie case of systematic exclusion of African Americans from the jury. The court also stated that its research had revealed that a mistrial was the only remedy for a *Wheeler* violation. (8 RT 1093-1094.)

Thompson renewed his motion after the People exercised their ninth peremptory challenge to excuse African American prospective juror Julia G. (8 RT 1176-1178.) The court stated, "It does appear there may be some good reasons for excusing them, but I think that there is at least a prima facie case for me to require the prosecutor to explain himself." The court's finding that there was a prima facie case was based on the fact that three out of the prosecutor's first nine peremptories had been used to challenge African American jurors. (8 RT 1179-1180.) The prosecutor then provided race-neutral reasons for challenging prospective jurors Doryanna A., Rodell M. and Julia G.[26/]

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26. Thompson concedes the prosecutor had legitimate, race-neutral reasons for challenging Julia G. (AOB 115, fn. 58.)

The court denied Thompson's *Wheeler* motion. (8 RT 1192-1193.) The court explained that its finding of a prima facie case of discriminatory use of peremptory challenges was based strictly on the number of African Americans who had been excused. The court said it was looking for reasons reasonably related to the case, the trial, the parties or the witnesses that would indicate to the court the juror was excused for reasons other than the color of his or her skin. (8 RT 1187.) The court found the reasons given by the prosecutor were legitimate, race-neutral reasons. (8 RT 1192-1193.)[27]

A. The Trial Court Erred In Finding A Prima Facie Case Of Discrimination And Its Ruling Should Be Set Aside

The trial court repeatedly stated its finding of a prima facie case was based solely on the numbers. The court did not find that the prosecutor's use of two out of six peremptory challenges to exclude African-American jurors was sufficient to establish a prima facie case, but did make that finding after the prosecutor used his ninth peremptory challenge to exclude a third African-American juror.

A finding that a defendant established a prima facie case of improper discrimination is reviewed for substantial evidence. (*People v. Huggins, supra,* 38 Cal.4th at p. 228.) In *Huggins*, the Attorney General argued the trial court erred in finding a prima facie case of discrimination and urged this Court to dispose of the defendant's claim on that basis. This Court declined to do so, finding that under the circumstances of that case, the use of eight out of fifteen peremptory challenges to exclude African-American jurors constituted substantial evidence in support of the trial court's ruling. Here, in contrast, the

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27. Thompson's subsequent *Wheeler* motion, challenging the prosecutor's use of a peremptory challenge to exclude African American prospective juror Sharon J., was also denied. (9 RT 1316.) Thompson does not raise any issue on appeal pertaining to the denial of that motion.

prosecutor used only three of nine challenges to excuse African-American jurors. And since the court denied Thompson's *Wheeler* motions as to prospective jurors Rodell M. and Doryanna A., it need not have even asked the prosecutor for a race-neutral explanation as to those two jurors when it subsequently granted the motion as to Julia G. (*People v. Avila, supra,* 38 Cal.4th at p. 549.) Accordingly, this Court should find an absence of substantial evidence supporting the trial court's finding that Thompson had made a prima facie case of the discriminatory use of peremptory challenges.

B. Substantial Evidence Supported The Trial Court's Ruling That There Was No Purposeful Discrimination In The Prosecutor's Exercise Of Peremptory Challenges

A reviewing court reviews a trial court's ruling on the question of purposeful discrimination for substantial evidence. (*People v. Avila, supra,* 38 Cal.4th at p. 541.) The reviewing court views the trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges with great restraint, presumes that a prosecutor used peremptory challenges in a constitutional manner, and gives great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. As long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 864; *People v. Hayes* (1999) 21 Cal.4th 1211, 1284-1285.)

The trial court made a sincere and reasoned effort to evaluate the non-discriminatory justifications offered by the prosecutor. As to both jurors, the trial court discussed the reasons offered by the prosecutor, the support for those reasons in the information provided by the prospective juror, and its perspective on the genuineness and plausibility of those reasons. This case contrasts with *People v. Silva, supra,* 25 Cal.4th at p. 385, where this Court found nothing in

the record to support the prosecutor's assertions that a prospecti ve juror would be reluctant to impose the death penalty, and nothing in the trial court's comments indicated it was aware of, or attached any significance to, the "obvious gap" between the prosecutor's claimed reasons for exercising a peremptory challenge and the facts as disclosed by the transcripts of the voir dire process.

Moreover, two African-American jurors served on Thompson's jury (See 9 RT 1313), and "[w]hile the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a Wheeler objection." (*People v. Stanley* (2006) 39 Cal.4th 913, 938, citing *People v. Turner* (1994) 8 Cal.4th 137, 168.) Substantial evidence supported the trial court's ruling that the prosecutor had bona fide, race-neutral reasons for exercising its peremptory challenges.

1. Prospective Juror Doryanna A.

The prosecutor explained that he exercised a peremptory challenge as to Doryanna A. because she was a correctional officer and it was his belief that correctional officers do not necessarily make good jurors. He said Doryanna A. worked closely with death sentenced prisoners in the prison system, and she may have developed an affinity towards the prisoners. Further, he noted that Doryanna A. felt that life without the possibility of parole (in the very institution in which she was employed) was a more serious punishment than death. The prosecutor expressed concern about the possibility that Doryanna A. might recognize some of the witnesses or the defendant because they had previously been housed at institutions where she was employed. The prosecutor also indicated he had given Doryanna A. a negative rating based on her

questionnaire before ever seeing her, because of her odd answer to a question regarding her consumption of alcoholic beverages. (8 RT 1184.)

The trial court made a sincere and reasoned effort to determine whether the prosecutor's proffered race-neutral justifications were bona fide reasons or sham excuses. The trial court ruled the prosecutor's exercise of a peremptory challenge as to Doryanna A. was based on legitimate, race-neutral concerns. (8 RT 1192-1193.) That finding was supported by substantial evidence and is entitled to great deference on appeal.

Prospective juror Doryanna A. stated in her questionnaire that she had been a correctional sergeant in southern California for nine years. Her deceased father and two brothers previously worked for the Department of Corrections, and her mother had been a warden for 33 years. (2 Supp. CT 438.) Doryanna A. wrote that she has witnessed assaults and narcotics violations during her employment at the department of corrections, and she has attended factfinding hearings relating to those matters. (2 Supp. CT 441.) Doryanna A. stated in her questionnaire that she does not consume alcohol, because, "Can't afford to; too many Earthquakes. I want to be in total awareness when the earth moves." (2 Supp. CT 444.)

During oral voir dire, Doryanna A. confirmed she was currently employed as a correctional sergeant for the Department of Corrections at Lancaster State Prison. (7 RT 851.) Doryanna A. said that staff at her institution have been the victims of tremendous assaults. (7 RT 853.) Doryanna A. said her mother was the victim of a burglary and grand theft committed by her brother. She explained that she was involved in the process and her brother was placed on probation. (7 RT 857.) Doryanna A. said that in her ten years with the Department of Corrections, she has worked with death-sentenced felons and she currently works with prisoners sentenced to life in prison without the possibility of parole. (7 RT 859.) She acknowledged that

working with people on death row can be very difficult. She gets to know the people, and she knows what they are facing. (7 RT 859.) Doryanna A. said she has special insight and personal knowledge about what it is like for a person to serve a life sentence without the possibility of parole. (7 RT 860-861.) Doryanna A.'s questionnaire responses and her oral voir dire responses provided substantial evidence in support of the prosecutor's race-neutral justifications.

Thompson claims the prosecutor's reasons were inherently implausible because he did not explore those areas in voir dire that he later claimed were his reasons for challenging her. (AOB 124.) But the prosecutor said he had given Doryanna A. a negative rating based on her questionnaire alone, before he ever knew her race. (8 RT 1184.) And Thompson is wrong to point to the prosecutor's failure to question Doryanna A. about certain subjects as evidence that he was not genuinely concerned about those issues. To the contrary, the prosecutor's failure to question Doryanna A. about her affinity towards prisoners or possible recognition of witnesses demonstrates he had concluded that his concerns were significant enough they would not be alleviated by additional questioning, even if Doryanna A. were to explain or change her answers.

Even if Doryanna A. had denied she would feel a connection to prisoners, or that she would recognize any of the witnesses, the prosecutor's concern about those possibilities was a legitimate reason for exercising a peremptory challenge. In *People v. Williams, supra*, 16 Cal.4th at p. 153, the prosecutor exercised a challenge based on the possibility a prospective juror might feel sympathy towards the defendant due to his familiarity with Blood gang members. This Court found no error in the trial court's acceptance of the prosecutor's reason, even though the juror himself said the defendant's being a Blood "wouldn't mean a thing to him." (*Id.* at p. 191.) Accordingly, the

prosecutor's concerns about Doryanna A. justified his exercise of a peremptory challenge regardless of any follow up questions.

As to the plausibility of the prosecutor's race-neutral justifications, Thompson places great weight on the fact that Doryanna A. was strongly pro-law enforcement. (AOB 125-127.) However, the lines in this case were not so clearly drawn. Doryanna A. had also witnessed "tremendous" assaults by prisoners. The People's main witness, Anthony Mercurio, was an ex-felon who had been convicted of trying to escape from the police and trying to run them down with his car. Also on the issue of plausibility, Doryanna A. acknowledged that she had special insight into the lives of prisoners sentenced to death and to life without the possibility of parole. That special knowledge created a legitimate concern on the part of the prosecutor that Doryanna A. might feel a connection to Thompson. This legitimate concern is fully supported by the record.[28/]

Thompson also claims the trial court applied the wrong standard because it failed to determine the genuineness of the prosecutor's reasons. (AOB 129-133.) Not so. Implicit in the court's determination that the reasons offered by the prosecutor were race-neutral, non-ridiculous, legitimate, and related to the case, the parties, the trial or the witnesses, was a finding that the proffered reasons were genuine. (See *Alvarez, supra,* 14 Cal.4th at pp. 197-198.) The trial court expressly found that the prosecutor had challenged Doryanna A. for legitimate, race-neutral reasons. The court found credible the prosecutor's expressed concern that Doryanna A. may have formed a bond with prisoners

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28. The fact that a prospective juror's status as a correctional officer provides a plausible reason for a prosecutor to exercise a peremptory challenge is supported by *Griffin, supra*, 33 Cal.4th at page 557, where prospective African-American juror C.F. was removed upon the prosecutor's challenge for cause after disclosing she was a warden at a prison for women sentenced to death, and that she did not want to serve as a juror because she felt it would create a personal and professional conflict of interest.

having worked with them so closely, and potentially could recognize some of the faces of witnesses who had been incarcerated at that location, even if she did not recognize their names. (8 RT 1188.)

2. Prospective Juror Rodell M.

As to prospective juror Rodell M., the prosecutor explained his concerns that Rodell M. failed to commit to anything. The prosecutor said he was unable to get a feeling at all about Rodell M.'s perspective on important issues, and that Rodell M. was even "neutral" on whether the death penalty or life in prison without the possibility of parole was a harsher punishment. The prosecutor explained that Rodell M.'s unwillingness to explain his position on important issues was disturbing because "his answers were such that he was walking this fine line, and when it got to a question where they want an answer, 'What do you think is the most serious punishment?' We still don't know from him. And we don't." (8 RT 1186.) The prosecutor told the court he did not feel that further questioning would be helpful, because his concerns were not based on a lack of information but instead, on the fact that "he was dancing on everything." (8 RT 1185.) Finally, the prosecutor explained that he was concerned that Rodell M. still seemed to have strong feelings about being wrongfully accused of missing a bed check while he was in the army 28 years earlier. (8 RT 1184-1186.)

The trial court made a sincere and reasoned effort to determine whether the prosecutor's proffered race-neutral justifications were bona fide reasons or sham excuses. The trial court ruled the prosecutor's exercise of a peremptory challenge as to Rodell M. was based on legitimate, race-neutral concerns. (8 RT 1192-1193.) That finding was supported by substantial evidence and is entitled to great deference on appeal.

Thompson claims the prosecutor's reasons were not supported by the record. (See AOB 115, 117, 120, 122.) The record belies his claim. Rodell M. stated in his questionnaire that he was wrongly accused by his first sergeant of missing a bed check in 1968 in the army. Rodell M. said "I feel well about the outcome. At that time, I was very thin. It would have been difficult to tell if I were [in] bed or not." (2 Supp. CT 631.)

Prospective juror Rodell M. did not answer questions 59 and 60, pertaining to his views on the death penalty. (2 Supp. CT 645.) As to his position on drug use, Rodell M. characterized himself as "not being biased," "very open," and "very neutral." (7 RT 966-967.) Rodell M. also indicated he could conceive of an innocent person being prosecuted, as he was prosecuted in the military and he was innocent. (7 RT 967.)

Thompson claims the prosecutor came up with "sham" reasons for challenging Rodell M. (AOB 117, 120-122.) Thompson is wrong. The gist of the prosecutor's concern was not that Rodell M. was unbiased (see AOB 117) but that Rodell M.'s expressed neutrality was insincere, and that his answers suggested an attempt to conceal his biases and give the answers he thought the parties wanted to hear. Rodell M. refused to commit to any position on issues which generally engender strong feelings in individuals, making it difficult for the prosecutor to get any sense of Rodell M.'s beliefs or positions.

A party's belief that he is unable to obtain complete and honest information from a prospective juror is a plausible and appropriate race-neutral basis for exercising a peremptory challenge. In *People v. Jones* (1998) 17 Cal.4th 279, this Court found that a prospective juror's demeanor, which was obviously troubling the prosecutor, was an appropriate, race-neutral reason to exercise a peremptory challenge. There, the prospective juror hesitated or equivocated in his answers to questions. This Court found there was evidence

to support the trial court's rulings that there was no impermissible bias. (*People v. Jones, supra*, 17 Cal.4th at p. 294.)

The prosecutor's additional justification, that Rodell M. still seemed bothered by a false accusation regarding a 28-year-old bed check violation, was also an appropriate, race-neutral basis for exercising a peremptory challenge. Thompson argues the questionnaire asked whether the jurors had ever been falsely accused of a crime, so focusing on Rodell M.'s scrupulously honest answer creates a "Catch 22." (AOB 120-121.) But Thompson's argument assumes too much. The prosecutor's expressed concern was that Rodell M. still seemed to have strong feelings about the matter. (8 RT 1184-1186.) At least in part, this concern was based on the fact that Rodell M. brought up the issue in his questionnaire. Thompson suggests that since the questionnaire asked whether the jurors had ever been wrongly accused, the prosecutor could not legitimately fault Rodell M. for bringing up the matter. However, Thompson was asked about the matter in court (see e.g., 7 RT 967) so the prosecutor's sense that Rodell M. still had strong feelings came, at least in part, from observations about his demeanor as he responded to those questions.

Thompson claims that the trial court "utterly failed to make a serious inquiry into the real reasons for the prosecutor's challenge of this African-American juror." (AOB 122.) He also claims the trial court applied the wrong standard when it stated that the prosecutor must have a reason which "an ordinarily competent prosecutor might use that is unrelated to race." (AOB 129.) Thompson is incorrect.

As to prospective juror Rodell M., the court stated she had more of a problem because he

> appeared at first blush to be 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. ¶ But I think based on the answer to question 11, that he 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 1189.)

In contrast to *People v. Silva, supra,* 25 Cal.4th at page 385, where the Court found the trial court was unconcerned with the discrepancy between the record and the prosecutor's stated reasons, the trial court here found that the reasons were supported by the record. And although the court misstated the standard as it related to an ordinarily competent prosecutor, the court's analysis demonstrates that it applied the proper standard, assessing both whether there was support for the prosecutor's reasons and whether they were sincere. For example, immediately following the court's misstatement of the applicable standard, it said, "And he is apparently still concerned about it 28 years later, it does seem to be a minor thing." This statement demonstrates the court found it to be true both that Rodell M. was still concerned about the issue despite it involving a minor thing (a missed bed check), and also that the court accepted that this was in fact the prosecutor's reason for excusing him. Moreover, the court repeatedly used the terms "legitimate," "non-ridiculous," "not ridiculous," and "reasonably related to the case, the trial, the parties, the witnesses" demonstrating it understood and applied the genuineness component. (*People v. Silva, supra,* 25 Cal.4th at p. 385.)

The prosecutor need not demonstrate that the juror was unfavorable. The point is not the sufficiency of the reasons offered by the prosecutor, but that they were race-neutral reasons which were genuine and not a pretext for racially motivated challenges. A party may exercise a peremptory challenge for any permissible reason or no reason at all (*People v. Huggins, supra,* 38 Cal.4th at p. 227, citing *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 131 L. Ed. 2d 834] and *People v. Jones, supra*, 17 Cal.4th at p. 294, although

implausible justifications may (and probably will) be found to be pretexts for purposeful discrimination. (*People v. Huggins, supra,* 38 Cal.4th at p. 227, citing *Purkett v. Elem, supra*, 514 U.S. at p. 768). Peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*People v. Wheeler, supra,* 22 Cal.3d at p. 275.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative." (*Id.* at p. 275.) "[A]dequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation omitted], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra,* 16 Cal.4th at p. 664.)

The trial court found the prosecutor's real reason for challenging prospective juror Rodell M. was that the prosecutor had concerns about the emphasis Rodell M. placed on a 28-year-old minor incident. That finding was supported by substantial evidence and is entitled to great deference on appeal.

As to prospective jurors Doryanna A. and Rodell M., the trial court made a sincere and reasoned effort to determine whether the prosecutor's use of peremptory challenges was racially motivated. Substantial evidence supported the trial court's ruling. Accordingly, Thompson's claim should be denied.

III.

POLICE LAWFULLY SEARCHED TWO BAGS FOUND IN THE TRUNK OF THOMPSON'S MOTHER'S CAR BECAUSE THEY HAD PROBABLE CAUSE TO BELIEVE THE BAGS CONTAINED EVIDENCE CONNECTING THOMPSON TO GITMED'S MURDER

Thompson contends the trial court improperly denied his motion to suppress evidence, because a police search of two bags found in the trunk of his mother's car violated his Fourth Amendment rights.[29] Specifically, Thompson claims a duffel bag and a jacket belonging to Ronald Gitmed should have been excluded because there was no probable cause to believe the items contained evidence or contraband. (AOB 135-146.) The bags were properly searched because the police had probable cause to believe the bags contained the fruits or instrumentalities of the robbery or murder, evidence which tied Thompson to the killing of Ronald Gitmed. Moreover, the bag and the jacket would have inevitably been discovered. Finally, even assuming error in admitting the jacket and the duffel bag, it was harmless.

In reviewing a denial of a motion to suppress evidence, the appellate court defers to the trial court's express or implied factual findings if supported by substantial evidence. (*People v. Weaver* (2001) 26 Cal.4th 876, 924; *People v. Woods* (1999) 21 Cal.4th 668, 673.) "[A]ll factual conflicts must be resolved in the manner most favorable to the court's disposition on the [suppression] motion." (*People v. Martin* (1973) 9 Cal.3d 687, 692.) In determining the legality of a search or seizure, the court applies its independent judgment. (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

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29. Thompson does not challenge the trial court's ruling that he did not have standing to challenge the search of his mother's car. (4 RT 429-430, AOB 137 fn. 65.)

Thompson brought a motion to suppress evidence pursuant to Penal Code section 1538.5[30] seeking the exclusion from evidence of two duffel bags and a jacket which had been found during the September 25, 1991 search of the trunk of his mother's car.[31] (2 CT 532-543.) The hearing on that motion commenced with the defense presentation of evidence.

Thompson presented the testimony of Perris Police Officer Donna Martinez (formerly Silva), who said she was assigned to investigate the homicide of Ronald Gitmed in which Thompson was a suspect. On September 25, 1991, Officer Martinez went to 11239 Rogers Street in Riverside and participated in the search of a silver Buick which was parked in the driveway. (4 RT 402-403.) The trunk was opened and searched, and two duffel bags were seized from inside the trunk. (4 RT 403, Ex. A, B.) Michelle Keathley arrived at the request of officers, and identified one of the bags, a white and blue duffel bag, as belonging to Ronald Gitmed. (4 RT 404-405, Ex. A, hereinafter "Bag A.") Officer Martinez briefly searched the contents of the duffel bags. Officer Martinez did not recall whether she opened the bags before or after Michelle arrived. (4 RT 404-405, 434-439.) Michelle did not recognize the second bag (Ex. B, hereinafter "Bag B") but identified a jacket in the second bag as belonging to Ronald Gitmed. (4 RT 434-439, 444-448.)

Thompson's mother, Jean Churder, lives at the Rogers Street address and owns the silver Buick. When she arrived home and parked the car in her

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30. Penal Code section 1538.5 states, in pertinent part, "(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: ¶ (A) The search or seizure without a warrant was unreasonable . . . ."

31. Thompson brought two suppression motions. As he explains, the second involved ammunition found during a parole search. The motion was rendered moot by the court's ruling that the ammunition was inadmissible for other reasons. (4 RT 389.)

driveway on September 25, 1991, police were at her house. Thompson was in jail on that date, but he had lived with her prior to his arrest on September 13, 1991. Churder testified that Bag A belonged to her, and Bag B belonged to Thompson.[32/] She claimed that she put the duffel bags in her trunk in August when her washing machine was broken. Churder testified that she had placed Thompson's items in one of the bags to take to her daughter Eva's house to wash. The other bag was filled with items belonging to Thompson which he had planned to take to Santa Ana in August. Churder sometimes drove Thompson around with his belongings but he did not drive her car. (4 RT 406-414.)

In response to the prosecution's objection that appellant lacked standing to challenge the search of his mother's car, defense counsel argued that Thompson had an expectation of privacy in the vehicle because his mother often used the car to drive him around, and she encouraged him to put his belongings in the car. (4 RT 422.) The court asked defense counsel to distinguish between Thompson's right to challenge the search of the bags and his right to challenge the search of the vehicle. (4 RT 423.) The court ruled Thompson did not have standing to challenge the search of the car, but had standing to challenge the search of the bags. (4 RT 421-433, 442-443.) The prosecutor presented evidence to meet its burden of justifying the search of the bags found within the car. (See 4 RT 397-400.) It was uncontested that the search was conducted without a warrant. (4 RT 397.)

Police Sergeant Betty Fitzpatrick testified that on September 11, 1991, Michelle Keathley identified the body found floating in the river on August 28, 1991 as her cousin, Ronald Gitmed. Keathley told police Thompson had been

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32. The trial court did not find Churder's statement that she owned Bag A significant to the issue of probable cause because Churder had not made that claim prior to her testimony at the hearing. (4 RT 499-500.)

with Gitmed prior to his death. On September 13, 1991, police conducted a parole search of the home where Thompson lived with his mother but did not find any evidence connected to Gitmed's murder. (4 RT 484-486.)

The next day, on September 14, 1991, Sergeant Fitzpatrick spoke to Betty Abney, who was the roommate of Thompson's sister, Eva Thompson. Abney told Fitzpatrick that she had heard about Thompson possibly being involved in a homicide or a crime, and that items belonging to Thompson had been taken from their home to Churder's home. (4 RT 485-486.) On September 17, 1991, during an interview, Tony Mercurio told Sergeant Fitzpatrick he saw Thompson shoot and kill Ronald Gitmed, and that Thompson was in possession of property belonging to Gitmed. (4 RT 486-487, 493.)

On September 25, 1991, Sergeant Fitpatrick and other officers went back to Churder's house to serve a search warrant in order to look for the items Abney had described being taken to the Rogers Street address. The items were not found in the house. Police contacted Jean Churder's daughter, Gina Churder, and asked her about two bags and a box, or two boxes and a bag, which were the subject of the search. Gina told Fitzpatrick the items were in the trunk of Jean Churder's car, and that Jean had left with Gina's sister and would be returning to the residence. (4 RT 488-489.) This information was conveyed to Officer Martinez. Jean Churder drove up to the house in the silver Buick. (4 RT 489-491.)

At the time of the search, Thompson was on parole and subject to a search condition. (4 RT 394-396, Ex. 1 and 2.)

The trial court ruled that the bags themselves were admissible because Thompson did not have standing to challenge the search of the car. The question was whether the jacket found inside the second bag was admissible. The court ruled that it was. The court found that the police had information

from Tony Mercurio on September 17, 1991, that Thompson shot and killed the victim, and that they had information from Thompson's sister's roommate that Thompson had some of the victim's belongings.[33/] The items were inside a car which was mobile on a highway, being driven by Thompson's mother. "If they got a warrant, who knows where Mrs. Churder could have driven the car with the bags and belongings in while they went and got a warrant? I think the automobile exception clicks in at that point." The court also noted that police had a warrant to search the house for the items they later learned were in the car. (4 RT 494-506.)

A. Police Had Probable Cause To Search The Two Bags Found In The Trunk Of Thompson's Mother's Car

Thompson challenges the trial court's factual findings, claiming the court mistakenly believed officers had information that Thompson was in possession of Gitmed's property, and the court mistakenly believed they had found property belonging to Gitmed in Bag A. (AOB 139-140.) Thompson also challenges the court's legal ruling that probable cause justified the search of the bags, claiming the police had no reason to believe the items in the car were connected to Gitmed's murder. (AOB 141-144.) He further contends reversal is required because the error was prejudicial. (AOB 145-146.) The trial court's factual conclusions are supported by substantial evidence. The trial court properly ruled that the search of the bags was justified by probable cause. Moreover, even assuming any error, it was harmless.

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33. The court was correct in its finding that police had been told Thompson was in possession of the victim's property, but incorrect as to the source of that information. Abney referred to the items as belonging to Thompson. (4 RT 485-486.) It was Mercurio who told police Thompson was in possession of Gitmed's property. (4 RT 493.)

Thompson challenges two of the trial court's factual conclusions. First, he claims the trial court mistakenly believed the officers who conducted the search had information that Thompson had some property belonging to Gitmed. In support of his claim, he cites the trial court's statement that the police "have information from the roommate of the defendant's sister that the defendant has some of the victim's belongings . . . ." (AOB 140, 143, citing 4 RT 505.)

The trial court's statement was incorrect only as to the source of the information. It was Tony Mercurio, and not Betty Abney, who informed Sergeant Fitzpatrick that Thompson was in possession of some of Gitmed's property. (4 RT 493.) The trial court's statement was correct to the extent it was relevant; that police had information that Thompson was in possession of Gitmed's property.

Thompson also seems to dispute the trial court's implicit factual finding that the particular officer who searched the car had personal knowledge of the claim that Thompson was in possession of Gitmed's property. (AOB 140.) Substantial evidence supported the trial court's inference that the searching officers were aware of all relevant facts. Officer Martinez and Sergeant Fitzpatrick were among several officers who went to the Rogers Street residence for the purpose of executing a search warrant for the very property they ultimately found.[34/] That fact alone supports an inference that all officers present at the scene knew what they were looking for and why.

In any event, the prosecutor need not prove that the searching officer had knowledge of every particular fact; probable cause is analyzed by evaluating the collective knowledge of the officers involved in the search. Officers may rely on information provided by other officers which establishes probable cause, but

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34. Respondent's assertion that the search warrant authorized a search for the bags ultimately found in the trunk is based on the trial court's statement to that effect (4 RT 506). The search warrant itself was not entered into evidence and is not part of the record on appeal.

"when it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness." (*Remers v. Superior Court of Alameda County* (1970) 2 Cal.3d 659, 666.) The collective knowledge of the officers involved in the search unequivocally established probable cause to search for bags and boxes. Sergeant Fitzpatrick had received information from Mercurio that Thompson was in possession of items belonging to Gitmed. (4 RT 493.) When information was gathered by Sergeant Fitzpatrick about the whereabouts of the property, that information was shared with Officer Martinez. (4 RT 489-491.) Officer Martinez was involved in the search of the Buick. (4 RT 402.) The trial court fairly inferred from this evidence that all the officers who were present at the scene were fully aware of the items they were searching for and the justification for the search.

Thompson next claims the trial court erroneously concluded that the police found something belonging to Gitmed in Bag A which justified the search of Bag B. (AOB 140, 142-143.) The trial court did, in fact, make that erroneous statement. (4 RT 479.) The evidence established that Officer Martinez did not recall which bag she opened first; that Bag A was identified by Keathley as belonging to Thompson and there was no evidence of its contents; and the item identified as belonging to Gitmed was a jacket which was found in Bag B. (4 RT 404-405, 434-439, 444-448, Exs. A and B.) However, the statement was made during a mid-hearing discussion, after which defense counsel corrected the trial court and the court responded by saying, "I think you're correct." (4 RT 480.) Further, the trial court clarified that its finding of probable cause did not stem from the initial identification of the jacket as belonging to the victim, but from the identification of one of the bags as belonging to the victim. (4 RT 481.) The trial court's subsequent statements demonstrate it understood the evidence correctly, and its initial

misunderstanding did not factor into its final ruling. Accordingly, substantial evidence supported the trial court's factual conclusions which are entitled to deference.

Thompson challenges the trial court's legal conclusion upholding the warrantless search of the bags found in the trunk of the Buick. The trial court properly ruled the search was lawful because police had probable cause to believe the bags belonged to the victim or contained items belonging to the victim, evidence which connected Thompson to Gitmed's murder.

The admissibility of the bags themselves is virtually beyond dispute. The bags were found in the trunk of the Buick, during a search Thompson concedes he did not have standing to challenge. Thus, the bags were properly admitted into evidence. The separate question of the admissibility of Gitmed's jacket, which was found inside Bag B, turns on whether there was probable cause to believe the bags contained evidence or contraband. The trial court properly ruled that there was probable cause.

"The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*California v. Acevedo* (1991) 500 U.S. 565, 579-580 [111 S.Ct. 1982, 114 L.Ed.2d 619].) The Fourth Amendment does not require police to obtain a warrant under those circumstances. (*Id.* at p. 573.)

In *Acevedo*, an individual picked up a package known to contain marijuana and took it to his apartment. The defendant arrived at the apartment and left ten minutes later, carrying a brown paper bag similar to the one known to contain the marijuana. Police stopped the defendant's vehicle, opened the trunk and the bag, and found marijuana. (*California v. Acevedo, supra*, 500 U.S. at p. 567.) The United States Supreme Court analyzed its previous jurisprudence which had "drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container

that coincidentally turns up in an automobile." (*Id.* at p. 580.) In the first case, the container could be searched without a warrant if there was probable cause to support the search. (*United States v. Ross* (1982) 456 U.S. 798 [102 S.Ct. 2157, 72 L.Ed.2d 572].) In the latter case, a warrant was required. (*United States v. Chadwick* (1977) 433 U.S.1 [97 S.Ct. 2476, 53 L.Ed.2d 538]; *Arkansas v. Sanders* (1979) 442 U.S. 753 [99 S.Ct. 2586, 61 L.Ed.2d 235].) *Acevedo* adopted the single clear-cut rule set forth in *Ross* and eliminated the warrant requirement set forth in *Sanders*. Thus, there is now one rule governing all automobile searches; "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*Acevedo, supra*, 500 U.S. at p. 580.)

The police here undoubtedly had probable cause to believe that the bags contained the fruits or instrumentalities of the robbery or murder, or that the bags belonged to Gitmed or contained property belonging to Gitmed.

As the United States Supreme Court has explained,

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer `would warrant a man of reasonable caution in the belief,' [citation], that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A `practical, nontechnical' probability is all that is required.

(*Texas v. Brown* (1983) 460 U.S. 730, 742 [103 S.Ct. 1535, 75 L.Ed.2d 502].)

At the time officers searched the car, they had information from Michelle Keathley that Thompson had been with Gitmed prior to Gitmed's murder. (4 RT 484-486.) Mercurio had been interviewed and told police that Thompson had shot and killed the victim and taken some of his property. (4 RT 486-487, 493.) A search of the Rogers Street home on September 13, 1991, where Thompson lived with his mother, failed to turn up any property belonging to the victim but the next day, police learned Thompson had stored some items at his

sister's house. They also learned that those items were taken back to Thompson's mother's house after the search of her house had been completed. (4 RT 484-487, 493.) The items were not in the house when they conducted the second search, but Gina Thompson told police the property they were looking for was in the trunk of Jean Churder's car, and that Churder would be returning to the residence. (4 RT 488-491.)

Thus, at the time the car was searched, police had a description of the murder which implicated Thompson and pointed to robbery as the motive, a statement from a witness that Thompson was in possession of the victim's property, knowledge that Thompson and his family members were moving bags and boxes from place to place in an apparent attempt to prevent their discovery, and information that those bags and boxes were currently in the trunk of Thompson's mother's car. Moreover, police were armed with the knowledge that a magistrate had determined there was probable cause to search the bags and boxes, as they had obtained a search warrant to conduct the second search for this very property. (See 4 RT 506.) When Churder in fact returned home with bags in the trunk of her car, the police had probable cause to believe those were the same bags referred to by Gina Thompson, that were the subject of the search warrant, which may have contained the fruits or instrumentalities of the murder or robbery, and may have belonged to the victim or contained property belonging to the victim. They also had information from Michelle Keathley that one of the bags belonged to Ron Gitmed.

Keathley's statement is appropriately factored into the probable cause analysis, even though Officer Martinez was uncertain about whether she opened the bags before or after Keathley's arrival. Under the inevitable discovery doctrine, the exclusionary rule does not apply if the prosecution can establish by a preponderance of the evidence that the information inevitably would have been discovered by lawful means. This is so because the exclusionary rule is

intended to ensure that the prosecution is not placed in a better position than it would have been had no illegality occurred; it does not require that they be placed in a worse position. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 62, citing *Nix v. Williams* (1984) 467 U.S. 431, 443-444 [104 S.Ct. 2501, 81 L.Ed. 2d 377].)

Gitmed's jacket would have inevitably been discovered by police had they waited the short time until Keathley arrived before opening the bags. Following the lawful discovery of the bags in the trunk, Keathley was called to the scene to see if she recognized any of the property as belonging to the murder victim. She identified one of the bags as belonging to Gitmed. Thus, even if Keathley's identification of one of the bags is considered critical to the quantum of probable cause, the jacket was properly admitted under the inevitable discovery doctrine.

Thompson argues there was no nexus between the murder and the search. (AOB 141-144.) Presumably, Thompson refers to the rule that police may not indiscriminately seize items during a lawful police search, but there must be a nexus between the item to be seized and criminal behavior. That nexus automatically exists in the case of fruits, instrumentalities or contraband, but in the case of "mere evidence" probable cause must be examined in terms of cause to believe the evidence sought will aid in a particular apprehension or conviction. (*People v. Bittaker, supra*, 48 Cal.3d at p. 1075, citing *Warden v. Hayden* (1967) 387 U.S. 294 [87 S.Ct. 1642, 18 L.Ed.2d 782], and *People v. Hill* (1974) 12 Cal.3d 731, 762, overruled on other grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889.)

Thompson was the last person known to be with Gitmed while he was still alive. A witness told police Thompson shot and killed Gitmed and took Gitmed's property. Police had information that certain items of property were being moved around by Thompson and his family in what appeared to be an

effort to avoid discovery by police. These facts gave police probable cause to believe the items being moved around contained fruits or instrumentalities of the robbery, automatically establishing a nexus between the bags and the murder.

Thompson's "nexus" argument seems to suggest that even if there was probable cause to believe Thompson possessed property belonging to the victim, there was no probable cause to believe those items were connected to Gitmed's murder. He bolsters this argument by noting that nearly thirty days had passed between the murder and the search. (AOB 141-144.) Thompson is wrong.

Thompson's possession of items belonging to the victim provided probable cause to search the bags notwithstanding the passage of several weeks between the murder and the search. Thompson argues his mere possession of the victim's property did not tie him to the murder; he could have received the property from Gitmed before the murder, or from the murderer after Gitmed was dead. However, Thompson's possession of Gitmed's property was one of many facts in the probable cause analysis. Even if that fact, standing alone, would not support a finding of probable cause, Thompson's possession of Gitmed's property was properly viewed by police in conjunction with the other information they had at that time. Mercurio had told police that Thompson was the killer and that robbery was the motive. Thompson's possession of property - at any time - which belonged to Gitmed, corroborated Mercurio's claim, giving credibility to his version of events. And police had information that the property was still in Thompson's possession on the day of his arrest, and was still being moved around by Thompson's family members on the day they arrived to conduct the second search. Accordingly, they had probable cause to believe that, at the time they conducted the search, the items in Churder's trunk

contained the fruits or instrumentalities of the murder or contained items belonging to the victim.

Even if the search was not supported by probable cause, the suppression motion was properly denied because the officers relied in good faith on a search warrant authorizing a search of the residence for the very property found in the car. The search warrant was not entered into evidence, was not relied upon by the trial court and is not part of the record. But the evidence presented at the suppression motion established that the officers believed a magistrate had determined there was probable cause to open the bags. Officer Fitzpatrick testified that the search warrant for Churder's house was issued to authorize a search for the property Abney had described as being taken from her house back to Churder's house. (4 RT 488-489.) The trial court found that the police had a warrant to search the house for the items they later learned were in the car. (4 RT 494-506.) Evidence seized in objectively reasonable reliance on a subsequently invalidated search warrant is still admissible in the prosecution's case in chief. (*United States v. Leon* (1984) 468 U.S. 897, 913, 922 [104 S.Ct. 3405, 82 L.Ed.2d 677].)

The evidence at the hearing, laid out fully above, demonstrates the officers reasonably relied upon the magistrate's determination that there was probable cause to search for and to open the bags. Thompson was the last person known to be with the victim before he was murdered. An eyewitness claimed Thompson shot and killed the victim and that Thompson was in possession of property belonging to the victim. Thompson and his family were acting suspiciously with respect to items of property that had been stored at Thompson's sister's house, returned to his mother's house after it was searched, and placed in the trunk of her car. Based on this information, officers reasonably relied upon the magistrate's determination that probable cause existed to search the items.

B. Reversal Is Not Required Because Any Error Was Harmless

Assuming arguendo the trial court erred in admitting the bags and the jacket, reversal is not required because any error was harmless. When evidence obtained pursuant to an unlawful search is erroneously admitted, reversal is not required unless the error contributed to the conviction. (*People v. Marshall* (1968) 69 Cal.2d 51, 62, citing *Chapman v. California* (1967) 386 U.S. 18, 21-24 [87 S.Ct. 824, 17 L.Ed.2d 705], *People v. Watson* (1956) 46 Cal.2d 818, 835-837, and *People v. Parham* (1963) 60 Cal.2d 378, 385.) Illegally obtained evidence may be only a relatively insignificant part of the total evidence in a trial and have no effect on the outcome. To require automatic reversal when such evidence is improperly admitted is to lose sight of the basic purpose of the exclusionary rule to deter unconstitutional methods of law enforcement. (*Id.* at p. 386.)

Thompson argues the improper admission of the bag and the jacket requires reversal because "they were the only items of the victim's property found in Thompson's possession at any time and the prosecutor argued to the jury, albeit improperly . . . that they were evidence of his guilt of robbery." (RT 1439, 2921, 2928, 2935.)" (AOB 145.) In fact, the record reveals that neither of Thompson's assertions are correct.

Gitmed's bag and the jacket were not "found in Thompson's possession." Thompson was in custody at the time these items were discovered by police. Thompson's possession of these items was presented through a chain of evidence establishing that prior to his arrest, Thompson stored bags and boxes at his sister's apartment; those bags and boxes were taken from his sister's apartment to his mother's house; those items were placed in the trunk of his mother's car, and were subsequently determined to belong to the victim. The jacket and the bag were the first items belonging to Gitmed which were connected to Thompson, and they were significant because they corroborated

Mercurio and set the course for Thompson's arrest and the additional investigation. In the context of the case, the jacket and the bag were neither valuable property that was offered as a motive for the robbery, nor were they the fruits of the robbery. Accordingly, the jacket and the bag were relatively insignificant parts of the total evidence at trial, particularly as compared to direct evidence that Thompson possessed Gitmed's car and furniture, and had access to his storage locker.

Nor did the prosecutor argue the bags or the jacket were evidence of Thompson's guilt of robbery. The bags and the jacket were helpful to the prosecution because they provided context to the progress of the investigation. They were found shortly after Mercurio accused Thompson of shooting Gitmed and taking Gitmed's property, and shortly after Thompson denied having gone anywhere with Gitmed. The manner in which the property was moved around by Thompson and his family suggested their awareness of its incriminating nature.

The prosecutor's references to the jacket and the bags encouraged the jury to use the evidence for these purposes and no others. In his opening statement, the prosecutor mentioned the items in his description of the manner in which the investigation unfolded. (11 RT 1439.) During closing argument and rebuttal, the prosecutor commented that the discovery of Gitmed's jacket and bag in Thompson's mother's trunk would be an unlikely coincidence if Thompson was not connected to Gitmed's murder, as would the family's suspicious behavior with respect to the bags. (23 RT 2921, 2935.) The prosecutor listed the bag and the jacket as some of the many items corroborating Mercurio's testimony if the jury believed Mercurio was an accomplice, thereby necessitating corroborative evidence. (23 RT 2928.) The prosecutor identified theft as the motive for the crime and listed the bags and the car as evidence of

Thompson's motive (23 RT 2398) but the prosecutor never argued that the bag and the jacket were property taken during the course of a robbery.

Thompson's connection to, and possession of, Gitmed's personal property was established through substantial additional evidence, so the evidence regarding the jacket and the bag was cumulative and did not contribute to the verdict. And since it is virtually undeniable that the bag was properly admitted, the additional admission of the jacket, even if improper, was clearly harmless.

IV.

THOMPSON'S CONVICTION AND THE TRUE FINDING ON THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED[35/]

Thompson claims reversal is required because there was insufficient evidence to support his conviction for first degree murder (AOB 147-198) and the true finding on the robbery-murder special circumstance. (AOB 227-256.) He argues there was insufficient evidence to establish that he was the direct perpetrator of a premeditated murder, and there was insufficient evidence that he committed robbery to support either a felony-murder conviction or the true finding on the robbery-murder special circumstance. (AOB 151-164, 228.) He also contends his murder conviction must be reversed because his attorneys were ineffective for failing to exclude irrelevant evidence about a wallet (AOB 173-174) and there was a failure of proof as to a nexus between the robbery and the murder (AOB 172-173); and the special circumstance must be reversed because the prosecution failed to prove the robbery was not incidental to the

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35. This argument responds to Thompson's arguments IV (AOB 147-198) and VI (AOB 227-256.)

murder. (AOB 236-243.) He further argues that reversal is required because one or more jurors believed he was an accomplice and there was insufficient evidence to establish the elements of accomplice liability required for either his murder conviction or the robbery-murder special circumstance. (AOB 164-173, 228-235.) Additionally, he claims the trial court's instructions on aiding and abetting (AOB 174-177, 243-244) and the prosecutor's misconduct in closing argument (AOB 177-194, 244-252) require reversal of both his conviction and the robbery-murder special circumstance.

Overwhelming evidence established that either Thompson or Mercurio shot Gitmed; that whomever did so acted intentionally and with premeditation and deliberation, and/or in the course of committing a robbery, and that the robbery was not merely incidental to the murder. Substantial evidence also supported the conclusion that if Mercurio was the shooter, Thompson aided and abetted him in the commission of the crimes, intended to kill Gitmed, or acted as a major participant in the robbery with reckless indifference to human life. Under any of these scenarios, Thompson was properly found guilty of first degree murder and the robbery-murder special circumstance was properly found to be true.

A. Substantial Evidence Supports Thompson's First Degree Murder Conviction And The Robbery-Murder Special Circumstance As The Direct Perpetrator Or As An Accomplice

To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) In addition, in evaluating the sufficiency of the evidence, an appellate court must presume in

support of the judgment the existence of every fact the trier of fact could reasonably have deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) The often repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it; when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. It is of no consequence that the trier of fact, believing other evidence, or drawing different inferences, might have reached a contrary conclusion. (*Id.* at pp. 576-577.) The appellate court does not reweigh evidence or redetermine issues of credibility. (*People v. Ochoa*, *supra*, at p. 1206.)

In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) If the circumstances reasonably justify the conviction, the possibility of a reasonable contrary finding does not warrant a reversal. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

The standard of substantial-evidence review mandated by the federal Constitution is the same as the state standard articulated above. That is, the critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. The reviewing court does not determine whether it believes that the evidence at trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

The same test applies with respect to special-circumstance findings, in which case the issue is whether any rational trier of fact could have found true the essential elements of the allegation beyond a reasonable doubt. (*People v. Chatman* (2006) 38 Cal.4th 344, 389; *People v. Lewis* (2001) 26 Cal.4th 334, 366; *People v. Mickey, supra*, 54 Cal.3d at p. 678.)

Thompson was tried for both premeditated murder and felony murder on the alternate theories that he was the direct perpetrator or that he was an accomplice. The jury found true the special circumstance that the murder was committed while engaged in the crime of robbery. Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) Murder in the first degree is murder perpetrated by means of a willful, deliberate and premeditated killing, or which is committed in the perpetration of certain felonies, including robbery and attempted robbery.[36] (Pen. Code, § 189.) The special circumstance of murder while engaged in the crime of robbery applies when the murder was committed while the defendant was engaged in the commission of, or attempted commission of, robbery.[37] (Pen. Code, § 190.2, subd. (a)(17)(A).)[38]

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36. The jury was instructed on the crime of first degree murder. (23 RT 2906-2910.)

37. The jury was instructed on the robbery-murder special circumstance. (23 RT 2910-2914.)

38. Formerly Penal Code section 190.2, subdivision (a)(17)(i).

1. Substantial Evidence Established That Thompson Was The Direct Perpetrator Of A Premeditated Murder

First degree murder may be found when the prosecution proves beyond a reasonable doubt that the defendant killed with malice aforethought, intent to kill, premeditation, and deliberation. (Pen. Code, §§ 187, 189.) "'Premeditated" has been defined as "considered beforehand." (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) This Court has defined "deliberate" as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Memro* (1995) 11 Cal.4th 786, 862-863; *People v. Perez*, *supra*, at p. 1123.) Premeditation and deliberation can occur in a brief interval, and the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Osband* (1996) 13 Cal.4th 622, 697, quoting *People v. Memro*, *supra*, at pp. 862-863; see also *People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

Thompson challenges the sufficiency of the evidence of premeditation. (AOB 152-154.) Where an appellate court reviews the sufficiency of the evidence to support a jury's finding of premeditation, the reviewing court need not be convinced beyond a reasonable doubt that the defendant premeditated the murder; the relevant inquiry is whether *any* rational trier of fact could have been so persuaded. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020; see also *People v. Wharton* (1991) 53 Cal.3d 522, 546.) In *People v. Anderson* (1968) 70 Cal.2d 15, this Court first set forth a tripartite test for analyzing the types of evidence which it had found sufficient to sustain a finding of premeditation and deliberation. There, the court said that such evidence falls into three basic categories: (1) defendant's planning activity prior to the homicide; (2) his motive to kill, as gleaned from his prior relationship with the victim; and (3) the manner of killing, from which it may be inferred that the defendant had a

preconceived design to kill. (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) An appellate court "sustains verdicts of first degree murder typically when there is evidence of all three types," the court noted, and it otherwise required "at least extremely strong evidence of (1) *or* evidence of (2) in conjunction with either (1) or (3)." (*Id.* at p. 27, emphasis added.)

Anderson does not require that these factors be present in any particular combination or that they be accorded any particular weight, nor is the *Anderson* list exhaustive. It simply provides a guide to an appellate court's assessment of whether the evidence supports the inference that the killing occurred as the result of preexisting reflection rather than an unconsidered or rash impulse. (*People v. Hughes* (2002) 27 Cal.4th 287, 370, citing *People v. Pride* (1992) 3 Cal.4th 195, 247.) In any event, the fact that there is at least some of each of the three types of evidence here (planning activity, motive to kill, and manner of killing) distinguishes the present case from *Anderson, supra*, where this Court noted that "the present case lacks evidence of *any* of the three types." (*People v. Anderson, supra*, 70 Cal.2d at p. 27, emphasis added.)

Substantial evidence supported the inference that Thompson may have planned to kill Gitmed as early as the time they left Michelle's house together. Thompson did not have a car and he had been trying to find transportation to Temecula to collect $6000. (See 13 RT 1597, 1603-1605.) Thompson asked Gitmed for a ride to Temecula to collect the money, and told Gitmed he would pay $1000 for the ride. Yet once Gitmed agreed to take Thompson to Temecula, Thompson's conduct and statements suggested he had different plans. Before they left Michelle's house, Thompson told Michelle and Ronada Briggs they were going to Mercurio's house. (13 RT 1616-1621, 1699, 19 RT 2402.) Once they arrived at Mercurio's house, there was no further conversation about going to Temecula. Thompson did not ask Mercurio to take him to Temecula to collect the money although Mercurio was his friend and

Mercurio had access to a truck. Instead, Mercurio, Gitmed and Thompson drove in Mercurio's truck to a remote portion of Canyon Lake and Thompson brought a gun. (15 RT 1886-1891, 1957-1958.) A jury could reasonably infer from this evidence that Thompson went to Mercurio's house with a plan to kill Gitmed and the hope of obtaining Mercurio's assistance in committing the murder.

Thompson's planning activities continued after his arrival at Canyon Lake. Even if the murder was not planned weeks and months in advance, premeditation and deliberation can occur in a brief interval, and the test is not time, but reflection, as "'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Osband*, *supra*, 13 Cal.4th at p. 697, quoting *People v. Memro*, *supra*, 11 Cal.4th at pp. 862-863; see also *People v. Bloyd*, *supra*, 43 Cal.3d at p. 348.) In other words, the absence of protracted and elaborate planning activity is not fatal to finding sufficient evidence of premeditation. (See *People v. Millwee* (1998) 18 Cal.4th 96, 134.)

Gitmed was taken to a remote, unpopulated part of Canyon Lake, and after Mercurio parked the truck on a peninsula approximately 30 to 40 feet from the water's edge, Thompson walked with Gitmed to the front of the truck. (15 RT 1891-1892.) This, combined with the fact that Thompson brought a gun, supports the inference that Thompson intended to go to a secluded area as part of a planned encounter. (See *People v. Marks* (2003) 31 Cal.4th 197, 230.) An argument started although Gitmed had just been enjoying the area and there had been no hostility between them. (15 RT 1882-1883, 1892-1893, 1899, 1947-1951.) Thompson told Gitmed to take off his clothes and pointed a gun at Gitmed's chest or waist from a distance of three or four feet away. (15 RT 1893-1894, 1959.) Thus, the evidence established Thompson pulled a gun and demanded Gitmed's property in an abrupt and unexpected departure from the

pleasant, relaxed mood that had characterized their interaction up until that point. A jury could reasonably infer from this evidence that Thompson intentionally lulled Gitmed into a false sense of comradery and security in order to catch him off guard and facilitate the killing. It weighs against a theory that the killing occurred in an unplanned attack or in a moment of rage.

While motive is *not* required to support a conviction for first degree murder (*People v. Orozco* (1993) 20 Cal.App.4th 1554, 1567) and "'[a] senseless, random, but premeditated, killing supports a verdict of first degree murder'" (*Ibid.*, quoting *People v. Thomas* (1992) 2 Cal.4th 489, 519), there was substantial evidence of motive here. Thompson traveled by bike. He did not have a car. (Exhibit Z-3.) He wanted to go to Temecula to collect $6000 that was owed to him but he was unable to get a ride. (See 13 RT 1603-1605.) Gitmed agreed to give Thompson a ride in exchange for $1000. (13 RT 1616-1617, 1621.) Gitmed was found without car keys, a wallet or drugs, evidence which supported the conclusion that Thompson's motive to kill Gitmed was to take his car and other property, and to avoid paying him the money he had agreed to pay for a ride. (See *People v. Marks, supra*, 31 Cal.4th at p. 230.)

Thompson argues the evidence that Thompson had access to $6000 undermines the theory that he had a motive to rob Gitmed. (AOB 157.) Not so. If Thompson was owed $6000, he did not have the means to obtain it. Thompson clearly had a motive to steal Gitmed's car to travel to Temecula to collect his money without having to pay Gitmed $1000 for the ride. Thompson also had reason to believe the car keys were in Gitmed's pocket.

The manner of killing provides substantial evidence of premeditation. Gitmed was taken to a secluded, unpopulated area of Canyon Lake. (15 RT 1891.) The car was parked at a peninsula, right at the water's edge. (15 RT 1891.) Gitmed was enjoying the area and talking about how he had never been there before when Thompson pointed a gun at his waist or his chest and

demanded his clothing. (15 RT 1892-1894, 1959.) Gitmed took off his shirt or jacket. Thompson shot him three times from a distance of three to four feet away. (15 RT 1959.)

Gitmed sustained three gunshot wounds; one to the upper right chest, one on the left lower back, and one on the forearm. One of the wounds was immediately fatal. (12 RT 1533-1537.) This close-range shooting without any provocation supports an inference of premeditation and deliberation. (See *People v. Marks, supra,* 31 Cal.4th at p. 230 [defendant discussed baseball game with victim before shooting him.])

Evidence of planning activity, motive and the manner of killing supported the inference that the murder was calculated and not the product of an unconsidered, rash act. Substantial evidence supported Thompson's conviction on the theory that he was the direct perpetrator of a premeditated murder.

2. Substantial Evidence Supports Thompson'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

When a defendant unlawfully kills a human being during the commission of a robbery or an attempted robbery, he is guilty of first degree murder under the felony murder doctrine. (*People v. Young* (2005) 34 Cal.4th 1149, 1175, Pen. Code, § 189.) A defendant commits robbery when: 1) he or she takes the personal property in the victim's possession, 2) from the victim's person, or from the victim's immediate presence, 3) against the victim's will, and 4) by means of force or fear. (Pen. Code, § 211; *People v. Bonner* (2000) 80 Cal.App.4th 759, 764.) "Immediate presence" means that property must be within the victim's reach or control, so that he could, if not overcome by

violence or prevented by fear, retain his possession of it. (*People v. Harris* (1994) 9 Cal.4th 407, 415.)

A defendant who is guilty of first degree murder is also guilty of the felony-murder special circumstance when the murder was committed while he was engaged in, or was an accomplice in, the commission of, attempted commission of, or immediate flight after committing or attempting to commit a robbery. (Pen. Code, § 190.2, subd. (a)(17)(A).) To prove a felony-murder special circumstance, the defendant must have "intended to commit the felony at the time he killed the victim and . . . the killing and the felony were part of one continuous transaction. [Citations.]" (*People v. Coffman, supra*, 34 Cal.4th at p. 88.) In other words, the underlying felony may not be "merely incidental to murder[.]" (*People v. Green* (1980) 27 Cal.3d 1, 61, overruled on other grounds as stated in *People v. Dominguez* (2006) 39 Cal.4th 1141, 1155; see *People v. Turner* (1990) 50 Cal.3d 668, 688 ["the elements of a robbery-murder special circumstance are not present if theft of the victim's property was merely 'incidental' to a murder"].) Concurrent intents to kill and to commit an independent felony will support a felony-murder special circumstance. (*People v. Clark* (1990) 50 Cal.3d 583, 608-609; see *People v. Zapien* (1993) 4 Cal.4th 929, 984-985 [where the evidence suggested a pre-existing intent to kill and then rob the victim, the robbery-murder special circumstance finding was proper because the robbery was not merely incidental to the murder].)

Thompson argues the evidence was insufficient to establish that he robbed Gitmed, because there was no substantial evidence that Gitmed was in possession of any property at the scene of the crime and there was no substantial evidence that Thompson took any property from Gitmed when he was killed. (AOB 154-164.) Substantial evidence supported the inference that Thompson took Gitmed's car keys, wallet, and clothing, and may have taken drugs from his person immediately before the shooting.

Thompson's case is similar to *People v. Marks, supra,* 31 Cal. 4th at page 197. In *Marks*, this Court found sufficient evidence to support a felony murder conviction based on the facts that the defendant was found with several $1 bills and change, it was the victim's habit to carry $1 bills to make change, and no money was found on the victim's person or in his car. Also, the defendant was able to buy groceries even though he had no money when he encountered the victim. This Court rejected the defendant's claim that the evidence of robbery was insufficient because no witness saw money being taken from the victim. The Court held a first degree robbery-murder finding was properly based on circumstantial evidence. (*People v. Marks, supra,* 31 Cal.4th at pp. 230-231.)

Similarly, substantial circumstantial evidence in this case established Gitmed was in possession of property which may have included clothing, car keys, a wallet and drugs, Thompson knew or believed Gitmed had these items in his pocket when he held him at gunpoint, and Thompson took some or all of these items from Gitmed before killing him. The evidence clearly established Thompson took Gitmed's clothing. Thompson pointed a gun at Gitmed's chest or waist and demanded he remove his clothing. (15 RT 1893-1894, 1959, 20 RT 2534-2539.) When Gitmed initially refused to get undressed, Thompson got in his face and yelled at him, demanding that Gitmed take off his clothes. (15 RT 1955-1956.) Gitmed took off his shirt or his jacket. (15 RT 1894.) Although Gitmed was self-conscious about his body, and normally wore big bulky clothes and did not like to take off his shirt, his body was found clothed only in pants and socks, with a watch on the wrist. (12 RT 1514-1517, 20 RT 2669-2670.)

Circumstantial evidence also supported the inference that Thompson took Gitmed's car keys from his person. Thompson needed a car. Thompson knew Gitmed was likely to have the keys to his Toyota in his pocket, since he

had driven Thompson to the Triplett's home in that car earlier in the evening. (13 RT 1621.) When Thompson held Gitmed at gunpoint, Gitmed gave him small items from his pockets. (20 RT 2537.) Gitmed's car keys were not found in his pockets, at the murder scene or at the Triplett's residence. After returning to the Triplett's house, Thompson drove away in Gitmed's car. (15 RT 1900.)

There was also evidentiary support for the conclusion that Thompson took Gitmed's wallet and his drugs. Mercurio testified before the grand jury that the items Gitmed took from his pockets and gave to Thompson may have included a wallet or some change. (20 RT 2537.) A wallet with no identification was among several items of Gitmed's property Thompson took to his sister's house before his mother's house was searched, and Gitmed's wallet was not found. (16 RT 2143-2148, 19 RT 2394-2396.) Thompson also knew that Gitmed had been carrying drugs earlier in the evening.[39] (13 RT 1619.)

Based on this evidence, a reasonable jury could conclude Thompson believed Gitmed was holding property of value on his person; he intended to take the property from Gitmed; he accomplished the taking by holding Gitmed at gunpoint; and he actually took property which included clothing, keys, a wallet, some change and possibly drugs. Thompson placed the items on the hood of his truck, walked a few steps towards Gitmed to shoot and kill him, then took the items from the hood of the truck and left the scene with Gitmed's property. (15 RT 1894-1896, 1961, 1969.) Mercurio testified before the grand jury that Gitmed had taken items out of his pockets and handed them to Thompson while Thompson had the gun pointed at him. (20 RT 2537.) At trial, Mercurio testified he did not remember whether Gitmed took anything out

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39. Although Gitmed, Thompson and Mercurio used Gitmed's drugs at Mercurio's house (15 RT 1885), there was no evidence as to whether they used all of the drugs or whether Gitmed retained possession of some of the drugs.

of his pockets and he did not recall Thompson asking Gitmed to empty his pockets, but he testified that Thompson took some of Gitmed's small personal items off the hood of the truck and had some of Gitmed's personal items when he got back into the truck, which may have included a wallet or some change. (15 RT 1894-1896, 1961, 1969.) The grand jury testimony was admitted for its truth and was not contradicted by Mercurio's more vague account at trial. Since the standard of review requires this Court to draw all reasonable factual inference in favor of the judgment, the evidence supports the conclusion that Gitmed took items from his pockets and handed them to Thompson while Thompson stood pointing a gun and yelling at him.

Thompson's reliance on *People v. Morris* (1988) 46 Cal.3d 1 (overruled on another ground as stated in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5), and *People v. Marshall, supra,* 15 Cal.4th 1, is misplaced. (See AOB 154, 159.) In *Morris*, this Court reversed a robbery conviction and robbery-murder special circumstance where the victim was found naked, shot to death, in a bathhouse, and there was no evidence that the victim had any personal property in his possession at the time of the murder. The *Morris* Court found that evidence the defendant used a credit card previously in the victim's possession was consistent with the defendant having surreptitiously stolen the card from the victim's clothing, or the victim having offered the card to the defendant in exchange for sexual services. (*People v. Morris*, 46 Cal.3d at pp. 20-22.) In *Marshall*, this Court found insufficient evidence of robbery where the only property taken from the victim was a letter of no clear value to the defendant. (*People v. Marshall*, 15 Cal.4th at pp. 34-35.) In contrast, as described above, there was ample evidence that Thompson took Gitmed's property which could have included clothing, car keys, some change, a wallet and possibly drugs.

Thompson's conviction and special circumstance should be affirmed even if this Court finds the evidence was insufficient to establish that

Thompson actually took property from Gitmed's person. A felony murder conviction can be based on an attempted robbery. (Pen. Code, § 189.) Similarly, an attempted robbery can support a robbery-murder special circumstance. (Pen. Code, § 190.2, subd. (a)(17)(A).)

> "An attempt to commit a crime consists of a specific intent to commit the crime, and a direct but ineffectual act done towards its commission. [Citation.] Commission of an element of the underlying crime other than formation of intent to do it is not necessary. [Citation.] Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]"

(*People v. Jones* (1999) 75 Cal.App.4th 616, 627.)

The evidence set forth in the previous section unequivocally demonstrates that Thompson believed Gitmed was in possession of personal property when he pointed a gun at him and angrily demanded his property. Accordingly, Thompson stands properly convicted of first degree murder and the robbery-murder special circumstance even in the absence of any evidence that Gitmed actually possessed any property or that Thompson actually took it. (See *People v. Marks, supra,* 31 Cal.4th at p. 231 [even if the defendant had been found without any money on his person, the jury could rationally have concluded he shot the victim in an attempt to obtain money.])

Thompson claims his conviction must be reversed because there was no nexus between the robbery and the murder (AOB 172-173) and the felony-murder special circumstance must be reversed because the evidence was insufficient to establish the robbery was not incidental to the murder. (AOB 236-243.) In *People v. Green, supra,* 27 Cal.3d at page 16, this Court held that the felony-murder special circumstance requires that the defendant commit the act resulting in death "in order to advance an independent felonious purpose."

That means that he must not perpetrate the underlying felony as "merely incidental to the murder." (*People v. Green, supra,* 27 Cal.3d at p. 16; see also *People v. Thompson* (1980) 27 Cal.3d 303, 322.) The *Green* rule has been summarized in the following terms: "[W]here the defendant's intent is to kill, and the related offense is only incidental to the murder, the murder cannot be said to have been committed in the commission of the related offense." (*People v. Williams* (1988) 44 Cal.3d 883, 927.)

This Court repeatedly has observed that "when one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Hughes, supra*, 27 Cal.4th at p. 357; *People v. Turner, supra*, 50 Cal.3d at p. 688; accord, *People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Kipp, supra*, 26 Cal.4th at p. 1128.) "If a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money." (*People v. Hughes, supra,* 27 Cal.4th at 357, citing *People v. Marshall, supra,* 15 Cal.4th at p. 35.)

In *People v. Navarette* (2003) 30 Cal.4th 458, this Court found sufficient evidence that the defendant formed an intent to rob the victims prior to killing them.

> The evidence showed that defendant was seeking money during the day prior to the murders, that he took [one victim's] property after murdering her, and that he struggled with [another victim], creating an audible disturbance. The jury was entitled to infer from this evidence that he entered the victims' apartment with an intent to steal, that he murdered his victims in order to take their property, and that he fled [the] apartment without taking her property, because his struggle with her became noisy.

(*Id.* at p. 499.) Similarly here, Thompson's primary purpose in killing Gitmed was to facilitate the robbery and his escape. Thompson was seeking

transportation to Temecula to collect money during the week prior to the murder. He knew Gitmed had a car and had reason to believe the keys were in Gitmed's pocket. He took small items from Gitmed before shooting him and later drove away from the Triplett's home in Gitmed's car. The jury was entitled to infer from this evidence that Thompson killed Gitmed for the primary purpose of taking his car keys and other property.

In *People v. Bolden*, this Court found sufficient evidence of intent to rob where the defendant "killed [the victim] and at the time of the killing took [the victim's] binoculars, wallet, bracelet, cuff links, camera, coins, and wristwatch. This evidence supports an inference that defendant robbed [the victim], and it constitutes substantial evidence supporting the robbery verdict." (*People v. Bolden, supra*, 29 Cal.4th at p. 553; accord *People v. Kipp, supra*, 26 Cal.4th at p. 1128 [sufficient evidence of intent to rob where defendant killed victim and then took her stereo, selling it to a second-hand dealer].)

In contrast, in *People v. Green, supra,* the court concluded there was insufficient evidence to establish the felony-murder special circumstance. The prosecutor there conceded that the defendant's primary crime was the murder, and the motive for taking property from her was to remove items that would aid in her identification. Accordingly, the robbery was merely incidental to the murder.

Overwhelming evidence established that there was a nexus between the robbery and the murder. Robbery was Thompson's primary goal; it was not an afterthought, or otherwise incidental to the murder. Thompson and Gitmed met each other on the day the crimes were committed. They had no history from which could have developed some other motive to kill Gitmed. On the day of the murder, and up until the time Thompson pulled out a gun, the two were friendly with no apparent hostility between them. And then Thompson pointed a gun at Gitmed, told him to take off his clothes, and angrily demanded his

property. After obtaining Gitmed's property, Thompson shot and killed Gitmed and later drove off in his car. Substantial evidence clearly supported the reasonable inference that the killing was done to facilitate the robbery and escape and to avoid detection.

Thompson claims "the theory that [Mercurio] killed Gitmed so that he and Thompson could rob him defies common sense."[40/] (AOB 239.) This is so, he says, because it was two against one - Mercurio and Thompson against Gitmed, who was timid and nervous and appeared to be retarded. (AOB 239.) He claims there is no evidence in the record that anything occurred at any point which would have made it necessary to kill Gitmed to accomplish the robbery. "They could have merely robbed him in the ordinary manner, for example by threatening him with the gun, or assaulting him. . . ." (AOB 239.)

But they didn't. They killed him. And the fact that they could have robbed him without killing him does not transform the robbery into a crime that was incidental to the killing. Nor does it make the point, as Thompson suggests, that they killed Gitmed for no reason at all. Rather, it demonstrates they shot Gitmed to death to increase their chances of getting away with his wallet, his car keys, his clothing, his change and his drugs, even though they may well have managed to get away with those things without killing him. The jury was not compelled to conclude that Thompson was willing to take such a chance. Substantial evidence supported the robbery-murder special circumstance.

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40. This portion of Thompson's argument assumes some or all of the jurors concluded Mercurio was the shooter. As explained below, that assumption is not supported by the evidence or the verdicts in this case.

3. Substantial Evidence Supports Thompson's Conviction On The Theory That He Aided And Abetted Mercurio In The Commission Of A Premeditated Murder Or A Felony Murder With The Intent To Kill Or As A Major Participant With Reckless Indifference To Life

In addition to the theory that Thompson was the actual shooter, the jury was instructed on the law of aiding and abetting and the prosecutor argued that theory as an alternative. Thompson claims there was insufficient evidence to convict him on that theory, so his conviction must be reversed. (AOB 167-173.) He further claims the evidence was insufficient to establish the required mental state for the special circumstance if Thompson acted as an accomplice; that Thompson aided and abetted Mercurio with the intent to kill, or as a major participant with reckless indifference to human life. (AOB 232-235.) Substantial evidence supported the prosecutor's alternate theory that Thompson aided and abetted Mercurio in the commission of a premeditated murder or a felony-murder during the commission of a robbery or attempted robbery, that he acted with the intent to kill, or that he acted as a major participant with reckless indifference to human life.

Thompson's argument that there was insufficient evidence supporting the theory that he was an accomplice relies heavily upon two erroneous assumptions. First, he repeatedly assumes that one or more jurors necessarily concluded Mercurio was the shooter. Second, he excises the entirety of Mercurio's statements from the calculus of the sufficiency of the evidence, based on the faulty premise that the jury did, or this Court must, reject all of Mercurio's statements because the jury necessarily rejected Mercurio's claim that Thompson was the shooter. Neither assumption is appropriate.

The "not true" finding on the gun use enhancement does not indicate that one or more jurors necessarily concluded Mercurio was the shooter. It means they concluded Thompson was the actual shooter or an aider and abettor.

In *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919, the defendant was charged with murder, a robbery-murder special circumstance, and an additional allegation that he personally used a knife in the commission of the crime within the meaning of Penal Code section 12022.2, subdivision (b). The main witness was a companion who had been charged and convicted with being an accessory to the murder. The jury convicted the defendant of robbery, found true the robbery-murder special circumstance, but found not true the allegation that the defendant personally used a knife in the commission of the crime. (*Id.* at pp. 908-909.) The defendant's murder conviction was reversed when the Court of Appeal found an 11-day continuance during deliberations constituted prejudicial error. (*Id.* at p. 909.) The issue presented was whether the doctrine of collateral estoppel prevented retrial on the theory that the defendant was the direct perpetrator, since the jury expressly acquitted him of personally using a weapon. (*Id.* at p. 910.) The court noted that "The jury may merely have believed, and most likely did believe, that defendant was guilty of murder as either a personal knife user or an aider and abettor, but *it may have been uncertain exactly which role defendant played.* That, too, would fully explain, and necessitate, the split verdict." (*Id.* at p. 919.) As in *Santamaria*, the verdicts may indicate the jury was uncertain as to Thompson's exact role, but concluded Thompson was guilty of murder either as a direct perpetrator or an accomplice. The verdicts do not indicate that any of the jurors concluded Mercurio was the shooter.

Thompson argues the "not true" finding is an affirmative indication under *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129, that the jury relied upon the theory that Thompson was an accomplice. (AOB 165-166.) In substance, Thompson's argument is that the "not true" finding is inconsistent with the theory that he was the direct perpetrator, so one or more of the jurors

must have concluded he was an accomplice.[41] But both the United States Supreme Court and this Court have expressly declined to reach such conclusions from inconsistent verdicts. The United States Supreme Court has explained:

> [A] criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient.

(*United States v. Powell* (1984) 469 U.S. 57, 67 [105 S.Ct. 471, 83 L.Ed.2d 461].)

An inherently inconsistent verdict is allowed to stand. If an acquittal on one count is factually irreconcilable with a conviction on another count, or if a not true finding of an enhancement is inconsistent with a conviction on the substantive offense, effect is given to both. The jury may have been convinced of guilt but arrived at an acquittal or not true finding from mistake, compromise or lenity. The benefit of the acquittal goes to the defendant so it is not irrational or illogical to require the defendant to accept the burden of conviction. (*People v. Santamaria, supra,* 8 Cal.4th at p. 911.) Accordingly, there is no legal support for Thompson's conclusion that one or more jurors necessarily concluded Mercurio was the shooter. (See *People v. Santamaria, supra*, 8 Cal. 4th at p. 919, finding the pertinent issues decided by the express conviction, on the one hand, and the express acquittal, on the other hand, were "quite different.") And since substantial evidence established Thompson was the

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41. So, the argument goes, his conviction must be reversed, because allegedly there was insufficient evidence supporting this theory upon which the jury apparently relied.

direct perpetrator, reversal is not required even if the "not true" finding is inconsistent with that verdict.

The second faulty assumption that pervades Thompson's argument is that Mercurio's entire testimony must be removed from the calculus of sufficiency of the evidence. He seems to presume, based on the jury's "not true" finding on the personal use enhancement, that the jury rejected, or should have rejected, or this Court must reject, everything Mercurio said, since one or more of the jurors apparently rejected Mercurio's claim that Thompson was the shooter. (See, e.g., "There was no evidence presented at trial, apart from Mercurio's rejected testimony, that Thompson did or said anything to assist or encourage Mercurio in shooting Gitmed." (AOB 168-169); "On this record, if Thompson was present at all when Gitmed was shot . . . his role might have been to object to the robbery, object to the shooting, plead for Gitmed's life, or otherwise try to prevent or interfere with the commission of the crimes. It is impossible even to know whether Thompson witnessed what happened, let alone what he may have done or intended." (AOB 171); "[T]hose jurors who rejected Mercurio's testimony that Thompson shot Gitmed had no information about Thompson's conduct at the scene of the crime." (AOB 232); "It was simply impossible on this record for those jurors who were not convinced that Thompson used the gun, to rationally conclude anything about Thompson's role in the robbery, if any." (AOB 233.)

Even if the jury had a reasonable doubt as to Mercurio's truthfulness on the issue of his own level of participation in the crimes, they properly relied on other aspects of his testimony. In the first place, as explained above, there is no basis for Thompson's presumption that the verdicts indicate the jurors rejected Mercurio's claim that Thompson was the shooter. In any event, even if they did, Thompson's presumption that they rejected (or that this Court must reject) Mercurio's entire account of the crime, is inconsistent with the standard of

review. Viewing the evidence in the light most favorable to the judgment, the jury was entitled to and apparently did believe Mercurio's statements and testimony as to the events surrounding the robbery and murder of Ron Gitmed, even if they doubted Mercurio's denial of personal involvement. And they had a rational basis for doing so.

Contrary to Thompson's assertion, the inconsistencies between Mercurio's trial testimony and his grand jury testimony were minor, particularly when compared to his consistent account of the chronology of events and the manner of killing. Mercurio never wavered from his position that Thompson was the shooter, and that the shooting came after Thompson unexpectedly yelled at Gitmed and placed items of Gitmed's property on the hood of the truck.[42/]

Additionally, Mercurio's own self-interest gave him an obvious incentive to understate his personal involvement in the robbery and murder. (See *People v. Santamaria, supra*, 8 Cal.4th at p. 918 ["At trial, there was much evidence defendant was involved in the murder, including the evidence that he helped pawn the victim's jewelry. The only eyewitness to the killing was Nubla, an admitted accessory. His testimony minimized his own role. The jury may well have doubted that he was quite so innocent in the killing as he claimed . . . "].) The jury was informed that Mercurio had not been granted immunity. (23 RT 2888.) But the physical and testimonial evidence was consistent with Mercurio's account of the time, place and manner of the robbery and murder of Ronald Gitmed, including Thompson's involvement in the crimes. (See Argument V.) The jury was fully informed of the factors affecting Mercurio's credibility, and fully instructed on the concerns involved

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42. The inconsistency in this area was that at the grand jury, Mercurio testified Thompson told Gitmed to give him the contents of his pockets and Gitmed did so, whereas at trial Mercurio did not recall those events. (15 RT 1894-1896, 1961, 1969, 20 RT 2537.)

in relying on accomplice testimony. Accordingly, Mercurio's testimony is properly considered among the evidence supporting the judgment. Moreover, there was substantial additional evidence even aside from Mercurio's statements and testimony supporting the conviction and true finding, and refuting the speculative inferences he posits here. (See Argument V.)

Thompson claims the evidence was insufficient to support his murder conviction or the special circumstance because the elements of accomplice liability for premeditated murder were not present (AOB 168-169), and the elements of accomplice liability for felony murder were not established because there was no evidence of Thompson's conduct or intent as an aider and abettor to Mercurio, and the evidence showed no logical nexus between the murder and the robbery. (AOB 169-173.) As to the special circumstance, he claims the evidence was insufficient to show Thompson acted as an aider and abettor with the intent to kill, or as a major partipant with reckless indifference to human life. (AOB 232-235.) Thompson is wrong. Substantial evidence supported Thompson's conviction and the true finding on the robbery-murder special circumstance on the theory that Thompson was an accomplice. Even if the jury did not resolve the identity of the actual shooter beyond a reasonable doubt, substantial evidence supported the conclusion that it was either Thompson or Mercurio who shot Gitmed; that whomever did so acted with premeditation and deliberation; that the murder was committed during the commission or attempted commission of a robbery; that if Mercurio was the shooter, Thompson aided and abetted him; and that if Thompson aided and abetted him, he did so with the intent to kill or as a major participant with reckless indifference to human life.

With respect to aiding and abetting, Penal Code section 31 provides in pertinent part as follows:

> All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit

> the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed.

(Pen. Code, § 31; see *People v. McCoy* (2004) 25 Cal.4th 1111, 1116-1117.)

> [P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus - - a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea - - knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus - - conduct by the aider and abettor that in fact assists the achievement of the crime.

(*People v. Perez, supra*, 35 Cal.4th at p. 1225.)

The aider and abettor's liability extends to the natural consequences of the acts he knowingly and intentionally aids. (*People v. Croy* (1985) 41 Cal.3d 1, 12.) An aider and abettor "is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets." (*Id.* at p. 12, fn. 5.)

Although an aider and abettor must know the perpetrator's criminal purpose and he must intend to facilitate the offense (*People v. Beeman* (1984) 35 Cal.3d 547, 560), he need not be prepared to commit the offense by his own act. If a defendant's liability is predicated on a theory of aiding and abetting the perpetrator, the defendant's intent to encourage or facilitate the perpetrator must be formed before or during the commission of the offense. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039; *People v. Cooper* (1991) 53 Cal.3d 1158, 1164; *People v. Beeman, supra*, 35 Cal.3d at pp. 556-558.)

Based on the foregoing principles, Thompson aided and abetted Mercurio in committing a premeditated murder if he knew of Mercurio's intent to commit a premeditated murder, he had the intent or purpose of committing, encouraging or facilitating the premeditated murder, and he promoted, encouraged or instigated the premeditated murder. Similarly, Thompson aided and abetted Mercurio in committing a felony murder if he knew of Mercurio's

intent to commit a robbery, he had the intent or purpose of committing, encouraging or facilitating the robbery, and he promoted, encouraged or instigated the commission of the robbery. As an accomplice, Thompson was also liable for the robbery-murder special circumstance if he acted with either an intent to kill, or as a major participant with reckless disregard for human life.

Substantial evidence supported any of those theories. The jury need not have unanimously agreed upon whether Mercurio or Thompson fired the shots. When multiple theories of first degree murder are supported by the evidence, the jury need not unanimously agree on which theory of first degree murder applies. (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) "More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator." (*People v. Majors* (1998) 18 Cal.4th 385, 408, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 92; *People v. Forbes* (1985) 175 Cal.App.3d 807, 816-817.) In *Majors*, this Court rejected a defendant's claim that the trial court erred by not instructing the jury that they had to unanimously agree that the defendant committed the same acts for purposes of proving first degree murder and the felony murder special circumstance. (*People v. Majors, supra,* 18 Cal.4th at pp. 407-408.) "Sometimes . . . the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." (*People v. Santamaria, supra,* 8 Cal.4th at pp. 918-919.) The federal constitution is not violated by state law rules that do not require juror unanimity on these matters. (*People v. Majors, supra,* 18 Cal.4th at p. 408, citing *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555]; *People v. Santamaria, supra,* 8 Cal.4th at pp. 918-919.)

Thompson's liability as an aider and abettor to a premeditated or felony-murder, as well as his intent to kill and his involvement as a major participant with reckless disregard for human life, was established by much of the same evidence supporting the theory that he was the actual shooter. As laid out in great detail in the foregoing sections, the evidence shows that the week prior to the murder, Thompson was looking for a ride to Temecula and said he planned to bring a gun. Thompson convinced Gitmed to give him a ride to Temecula but instead, they went to Tony Mercurio's house. Thompson had met Mercurio in prison earlier that month. Thompson went with Gitmed and Mercurio to a remote area of Canyon Lake in an apparently stolen truck. Thompson brought a gun.[43/] Thompson held Gitmed at gunpoint and ordered him to take off his clothes, took small personal items from Gitmed, stole his car, spent the next day cleaning the gun and destroying items from inside the car, sold Gitmed's stereo, concealed Gitmed's jacket and bags, took furniture from Gitmed's storage unit and gave it to Mercurio, and burned Gitmed's car.

Thompson's statements and conduct after the shooting provided further evidence that if he was an aider and abettor, he either intended to kill Gitmed or acted as a major participant with reckless disregard for human life. Thompson's evasiveness and conflicting statements upon returning to Michelle's house shortly after the murder were highly suspicious and demonstrate a consciousness of guilt. Thompson returned to Michelle's house to get his bike at approximately 3:30 a.m. When Michelle asked Thompson

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43. Even if one or more jurors believed Mercurio may have been the shooter, substantial evidence established that Thompson supplied the gun, notwithstanding Thompson's bare assertion that the "jurors could only rationally have concluded that Mercurio was the one who took the gun along." (AOB 170.) Approximately a week before the shooting, Thompson told Eric Arias he would bring a gun when he went to Temecula to collect his money. (13 RT 1604.) The day after the shooting, Charlene Triplett saw Thompson cleaning a gun. (16 RT 2202-2203.)

where Gitmed was, Thompson initially said Gitmed was down the street and would be there in a couple of minutes. (13 RT 1622.) When she asked again, Thompson said, "Well, there was a little bit of a scuffle; he got a little scared." (13 RT 1622.) She continued to ask about Gitmed and Thompson said Gitmed might have gone home. (13 RT 1623.)

To police, Thompson denied ever having left Michelle's house with Gitmed. (Ex. 22.) A false denial is relevant evidence of a consciousness of guilt. (*People v. Hughes, supra*, 27 Cal.4th at p. 335.) A lack of intent to kill or major participation in the crimes was belied by Thompson bragging about the crime to Danny Dalton and Barbara Triplett, describing a person left floating in a lake who would not be making decisions for himself anymore. (15 RT 2043-2044, 2048, 2091, 17 RT 2282-2283.) And the day after the murder, Thompson told Mercurio to get his girlfriend and her family to go along with whatever they told her to go along with. (16 RT 2197, 2224.) The fact that Thompson ordered Mercurio to get his girlfriend to go along with their story is highly indicative of Thompson's consciousness of guilt (because he needed Charlene to cover for him) and that he felt that he was in a position of power with respect to Mercurio (because he felt comfortable bossing him around). Both of these factors weigh against Thompson's theory that Thompson was an innocent bystander, just along for the ride, and provide substantial support for the theory that Thompson was a major participant who acted with reckless disregard for human life.

Substantial evidence established Thompson knew of Mercurio's intent to commit a robbery or a murder, that he had the intent or purpose of committing, encouraging or facilitating those crimes, that he promoted, encouraged or instigated the commission of those crimes, and that he did so with the intent to kill or as a major participant with reckless disregard for human life. Accordingly, substantial evidence supported the alternate theory

that Thompson was guilty of murder as an aider and abettor, and that he was guilty of the special circumstance of robbery-murder.

B. The Trial Court Properly Instructed The Jury On Aiding And Abetting

Thompson contends the trial court improperly instructed the jury on aiding and abetting. (AOB 174-177.) He claims the aiding and abetting instruction was intended to apply to Mercurio as an accomplice, but was used by the prosecutor to claim that Thompson may have been an aider and abettor and that theory was unsupported by the evidence. (AOB 174-175.) Thompson's failure to request a modification of the standard instruction in the trial court waives the claim on appeal. There was no error because the evidence fully supported the theory that Thompson aided and abetted Mercurio in the commission of a premeditated or felony murder with the intent to kill or with reckless disregard for human life.

A trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311; *People v. Sedeno* (1974) 10 Cal.3d 703, 715, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) A trial court also has the duty "'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.)

The trial court gave the following standard instructions on aiding and abetting:

> The persons concerned in the commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof include: ¶ Those who directly and actively commit the act constituting the crime, or ¶ Those who aid and abet the commission of the crime. ¶ An accomplice is a person who is subject to prosecution for the identical offense charged in Count 1 against the defendant on trial by reason of aiding and abetting. ¶ A person aids and abets the commission of a crime when he or she: ¶ With knowledge of the unlawful purpose of the perpetrator and ¶ With the intent or purpose of committing, encouraging or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime. ¶ A person who aids and abets the commission of a crime need not be personally present at the scene of the crime. ¶ Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. ¶ Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. . . .

(23 RT 2901-2904.)

A trial court has a sua sponte obligation to give instructions concerning accomplice testimony whenever there is testimony sufficient to warrant the jury concluding that a witness implicating a defendant was an accomplice. (*People v. Zapien, supra*, 4 Cal.4th at p. 982.) Thompson requested accomplice instructions in the trial court, claiming the evidence supported a conclusion that Mercurio was an accomplice. (See 4 CT 1009-1014.) Thompson now claims the instruction should have been modified or explained by the trial court to refer only to Mercurio, since the prosecutor's theory was that Thompson was the direct perpetrator. Since Thompson did not request amplification or explanation in the trial court, error cannot now be predicated on the trial court's failure to modify or explain the instruction. (*People v. Anderson, supra*, 64 Cal.2d at p. 640.) Defendant expressly agreed to the instruction so he is barred from challenging it on appeal under the invited error doctrine. (*People v. Davis* (2005) 36 Cal.4th 510.)

In any event, the trial court has a duty to instruct the jury on *issues raised by the evidence*, not just on the prosecution's theory of the case. The trial court correctly concluded that the evidence could support a finding that Thompson aided and abetted Mercurio in the crimes, without finding beyond a reasonable doubt that either Mercurio or Thompson personally fired the fatal shots at Gitmed. Accordingly, the jury instructions regarding aiding and abetting were properly applied to him.

Thompson's argument on this point again assumes that if the jury disbelieved Mercurio as to the identity of the actual shooter, they were required to dismiss his entire testimony. (AOB 175-176.) Yet the jury was free to believe all the evidence about Thompson's involvement in the shooting and yet be uncertain as to who actually pulled the trigger. Mercurio's testimony and other evidence supported the conclusion that even if Thompson did not pull the trigger, he was an aider and abettor. Substantial evidence, outlined above, demonstrated that Thompson and Mercurio went together in a stolen truck to take Gitmed to a remote area, that Thompson had a motive to rob Gitmed, that Thompson supplied the gun, that Thompson demanded Gitmed's property, that Thompson took items of Gitmed's property from the scene, that Thompson took Gitmed's car, that Thompson and Mercurio disposed of the car together, that Thompson was at Mercurio's house the next day cleaning the gun and disposing of the contents of the car, that Mercurio helped him burn the items in the car, that Thompson and Mercurio went together to Gitmed's storage facility and both were in possession of Gitmed's property after the murder, that Thompson bragged about leaving a man floating in a lake, and that Thompson told Mercurio to make sure his girlfriend got their story straight. The jury was properly instructed on the law of aiding and abetting, and the instructions were properly applied to Thompson.

C. Trial Counsel Was Not Ineffective For Failing To Object To Evidence Of A Wallet

In his argument challenging the sufficiency of evidence of murder, Thompson also contends his lawyer was ineffective for failing to move to exclude irrelevant evidence about a wallet. (AOB 173-174.) Thompson is wrong.

A successful claim of ineffective assistance of counsel has two components. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington, supra*, 466 U.S. at p. 688.) In evaluating counsel's performance the court must be highly deferential, avoiding the "distorting effects of hindsight" and "indulg[ing] in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." (*Id.* at p. 689.) Second, the defendant must show that counsel's deficient performance deprived him of a fair trial; i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

Thompson cannot show deficient performance from his trial lawyer's failure to move to exclude evidence regarding a wallet. Counsel is not ineffective for failing to make frivolous or futile motions. (*People v. Memro, supra,* 11 Cal. 4th at p. 834.) A motion to exclude evidence of a wallet would have been denied, because the evidence was relevant.

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive. (*People v. Scheid* (1997) 16

Cal.4th 1, 13, citing *People v. Garceau* (1993) 6 Cal.4th 140, 177.) Evidence leading only to speculative inferences is irrelevant. (*People v. Kraft, supra*, 23 Cal.4th at p. 1035, citing *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244.)

Evidence of a wallet was presented through the testimony of several witnesses. Viewed as a whole, the testimony tended to establish that Thompson was in possession of Gitmed's wallet. This, in turn, corroborated Mercurio's testimony that Thompson had taken Gitmed's wallet during the robbery.

Mercurio testified that after the shooting, Thompson took some small items which belonged to Gitmed and may have included a wallet or some change. (15 RT 1896, 1969.) On September 25, 1991, during a search of Thompson's mother's house, police found a wallet in a bedroom previously occupied by Thompson, in a nightstand where Thompson had left some personal items. The wallet was old and tattered and contained business cards but no identification. (14 RT 1807-1812, 1818-1819.) Marc Bendlin, Eva Thompson's son, testified a wallet containing business cards but no identification was among the items Thompson left at Eva Thompson's house which he moved to Jean Churder's house, which included Gitmed's bag and jacket. (16 RT 2145, 19 RT 2394-2396.)

Thompson argues that the evidence was irrelevant since there was no evidence directly connecting the wallet to Gitmed or the robbery. But the evidence taken as a whole had a tendency in reason to prove that it was connected to Gitmed. Significantly, even if the evidence directly connecting the wallet to Gitmed was lacking, the discovery of the wallet was relevant to prevent the jury from inferring that no wallet had been taken during the robbery based on the erroneous assumption that no wallet had ever been found.

In any event, there was no prejudice. The nature of the evidence was such that the jury either drew the above inferences or did not. It was not subject

to any improper interpretation. (Contrast *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862 [evidence of defendant's parents' possession of a knife set of same brand as knife found at murder scene irrelevant and prejudicial where prosecutor emphasized in argument that it was an unlikely coincidence, notwithstanding the widespread distribution of that particular brand of knives].) If the jury found the chain of evidence concerning the wallet too tenuous to conclude that the wallet belonged to Gitmed or corroborated Mercurio's testimony, it was meaningless. The prosecutor did not argue that the wallet found at Churder's home was Gitmed's wallet. Thompson was not deprived of the effective assistance of counsel.

D. Thompson's Claim Of Prosecutorial Misconduct Is Waived And Lacks Merit

Thompson also includes, in his challenge to the sufficiency of the evidence, a claim that the prosecutor committed misconduct by misstating the law and misrepresenting the evidence during his closing argument, requiring reversal. (AOB 177-194, 244-252.) The claim is waived. In any event, the prosecutor did not commit misconduct and reversal is not required.

1. Thompson's Claim Is Waived

In general, a defendant may not raise an issue of prosecutorial misconduct on appeal unless a timely objection was raised on the same ground in the trial court and a request for a curative admonition was made. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Exceptions to this rule exist where an objection or request for admonition would be futile, where an admonition would not cure the misconduct, and where the court immediately overrules an objection and does not give counsel an opportunity to seek an admonition. (*People v. Hill, supra*, 17 Cal.4th at pp. 820-821.)

In the trial court, Thompson did not object to the prosecutor's closing argument on the basis of prosecutorial misconduct. Had he done so, the trial court would have had an opportunity to admonish the jury and any harm would have been cured by such an admonition.

As to his claim that the prosecutor misstated the law, Thompson argues the prosecutor's use of the term "involved" "set a lower bar for culpability" on the requirements for accomplice liability. (AOB 181.) Had Thompson objected on these grounds, the court could have reread the instructions setting forth the elements of accomplice liability. (See 23 RT 2901-2902.) Thompson also claims the prosecutor misstated the law by failing to distinguish the crime of felony-murder from the felony-murder special circumstance. (AOB 248-251.) Again, had Thompson objected, the trial court could have clarified the law by rereading the separate instructions defining the crime and the special circumstance. (See 23 RT 2908, 2909-2912.) Thompson further claims the prosecutor misrepresented the evidence by representing to the jury that there was evidence that Thompson had been found in possession of property taken during a robbery. (AOB 182-184, 251-252.) Had Thompson objected, the court could have reread the instructions which informed the jury that they were responsible for finding the facts, that the statements of attorneys are not evidence, and that the crime of robbery requires property to be taken from the person or immediate presence of the victim. (See 23 RT 2889-2890, 2911-2912.) Any harm from the prosecutor's statements could have been cured with an objection and a simple reminder to the jury of the applicable law. Thompson's claim is therefore waived. (*People v. Davis, supra*, 36 Cal.4th at p. 550 [claim of misconduct forfeited for failure to object to prosecutor's misstatement about accomplice's presence at the murder scene.])

Thompson claims his attorney was ineffective for failing to object to the prosecutor's argument. (AOB 188-192.) His claim of ineffective assistance

fails because, as explained below, there was no prosecutorial misconduct, and no prejudice from the prosecutor's statements. (See *Strickland v. Washington, supra,* 466 U.S. at p. 688.)

2. There Was No Misconduct

Even if the claim is not waived, it fails. Under state law, prosecutorial misconduct only occurs when the prosecutor engages in "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, quoting *People v. Strickland* (1974) 11 Cal.3d 946, 955; see also *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) A prosecutor's statements are misconduct only if there is a "reasonable likelihood" the jury will improperly misconstrue or misapply the statements. (*People v. Frye* (1998) 18 Cal.4th 894, 970; *People v. Sanders* (1995) 11 Cal.4th 475, 526.) Federal due process is not violated unless the offending remarks are so egregious as to "infect" the entire trial with unfairness. (*People v. Frye*, *supra*, 18 Cal.4th at p. 969.) Argument is "traditionally vigorous and therefore accorded wide latitude." (*People v. Fierro* (1991) 1 Cal.4th 173, 212.)

a. Alleged Misstatements Of Law

Thompson claims the prosecutor misstated the law by telling the jury it could convict Thompson as an accomplice if it found that the murder was committed during the course of a robbery and that Thompson was merely "involved" in the robbery. (AOB 178-182.) Thompson also claims the prosecutor misstated the law by confusing the jury on the distinction between first degree murder and special circumstance felony-murder (AOB 248-251.)

The prosecutor did not misstate the law. A prosecutor's statements are misconduct only if there is a "reasonable likelihood" the jury will improperly misconstrue or misapply the statements. (*People v. Frye, supra,* 18 Cal.4th at p. 970; *People v. Sanders, supra,* 11 Cal.4th at p. 526.) The prosecutor's theory was that Thompson committed a deliberate and premeditated murder. The concepts of accomplice liability and felony murder were discussed only as alternatives to the prosecutor's primary theory. The challenged statements were made after the jury was fully instructed on the applicable law. Viewed in context, the challenged statements did not purport to define accomplice liability, felony-murder or the robbery-murder special circumstance, and there is no reasonable likelihood the jury improperly misapplied the statements in that manner. The clear point of the prosecutor's argument was that under any view of the evidence, Thompson was guilty of first degree murder because at a minimum, the evidence supported a conviction on the alternative theory of liability which he summarized, but did not emphasize, define or rely upon.

The prosecutor argued,

> Judge Sherman just read you different definitions. There's various types of murder. *There's premeditated first degree murder.* Judge Sherman has read you a definition of that. That's when someone goes out and decides to kill somebody and kills them. And, ladies and gentlemen, *I submit to you that in this particular case that's what happened.* ¶ It is very clear from the testimony of Tony Mercurio that the defendant, James Alvin "Tex" Thompson, was out there with a gun and for no reason, even after apparently Ron Gitmed gave up his personal property, he shot and killed him, he shot and killed him. ¶ *Now, ladies and gentlemen, the Court also spoke to you about a different type of first degree murder that's called felony murder.* ¶ *Now, it may apply in this case, and I'll discuss it in more detail later on.* But let me give you one example of how it may apply in this case. ¶ Let's say you're really unsure of precisely what happened out there by the lake on that August night in 1991. Let's say you're not sure precisely what happened. Well, did the robbery take place first? Did the murder? Was the murder the

> thing that was primary in Mr. Thompson's mind? ¶ Well, ladies and gentlemen, under the felony murder theory, you don't have to prove this premeditation. All that needs to be proven is that the defendant was involved in a robbery and that someone was killed in the course of that robbery. ¶ And, ladies and gentlemen, and *I'll talk about this again some more later on,* even if you were to conclude under some extreme evaluation of the evidence that Tony Mercurio shot and killed Ronald Gitmed, but if you conclude that the defendant was still involved in that robbery, the defendant is still responsible. *Now, I don't believe the evidence shows that, but that will give you an idea what a felony murder is all about.* ¶ So, ladies and gentlemen, I'm not going to spend much more time talking about the definition of murder. Just that, however you look at this, if you conclude that the defendant was out there that night and he was involved in either the death or the robbery of Ronald Gitmed, you can't but come to the conclusion that he is guilty of first degree murder.

(23 RT 2918-2920, emphasis added.)

To the extent the prosecutor referred to the concepts of felony-murder and accomplice liability, his references were factual and would not have been taken by the jury as statements of law. The prosecutor twice stated that he would discuss those legal concepts in greater detail later on, signaling to the jury that his comments at this point were not intended to fully define those principles. After explaining his primary theory that Thompson committed a first degree, premeditated murder, the prosecutor addressed the alternative factual conclusions the jury might draw (i.e., that Tony Mercurio shot and killed Gitmed; that the defendant was involved in either the death or the robbery) and reminded the jury that they could rely upon an alternative theory of liability if they could not determine whether the murder was premeditated or if they could not resolve exactly what happened out at Canyon Lake.

There is no risk the jury misconstrued the prosecutor's statement to mean Thompson could be convicted if he was involved but not an accomplice. There was simply no evidentiary basis for them to draw such a distinction in this case. If the jury did not believe Thompson was a direct perpetrator or an accomplice,

they had no basis for believing he was involved at all. There was no evidence from which they could conclude he was involved but had some lesser role.

Similarly, the prosecutor did not confuse the concepts of felony-murder and special circumstance felony-murder. Thompson takes issue with the prosecutor's statement that if the jury believed that Thompson "robbed Ron Gitmed and shot and killed him, the special circumstance is very straightforward." (AOB 247.) He claims this serious misstatement undermined the requirement that the special circumstance requires proof that the purpose of the murder was to advance, facilitate or escape from the robbery. (AOB 247-248.)

The prosecutor did not misstate the law. Viewed in context, his statement was an introduction to the additional element of the felony-murder special circumstance requiring the jury to find Thompson was a major participant who acted with reckless indifference to human life. After reminding the jury that the evidence established Thompson committed a deliberate, premeditated murder, the prosecutor explained that the jury could find Thompson guilty even if they could not conclude who the shooter was. In that case, he explained, the special circumstance "becomes a little trickier," because then, "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.)

Again, Thompson mischaracterizes the prosecutor's argument. The challenged statement did not purport to set forth the elements of the felony-murder special circumstance. Rather, it told the jury how to apply the facts to the law. It was well within the scope of appropriate argument for the prosecutor to attempt to persuade the jury that the special circumstance was satisfied if they reached that particular factual conclusion.

Nor did the prosecutor misstate the law when he said that if they believed Mercurio was an accomplice, "[t]his is where felony murder comes back into play. Because if Tony Mercurio's an accomplice and he's just as involved as the defendant, under the felony murder rule the defendant is still guilty of murder, if you find that the defendant aided and abetted in the commission of the robbery . . . ." (AOB 248, emphasis in AOB, citing 23 RT 2929.) Thompson claims these statements omitted the requirement of intent to kill, or reckless indifference to human life, which were required for a true finding on the felony-murder special circumstance. (AOB 248.) But the prosecutor was not discussing the felony murder special circumstance at that point, and nothing in his argument would have misled the jury into believing otherwise. Again, the prosecutor's comments reminded the jury that they had an alternative theory of liability even if they were uncertain as to Mercurio's level of involvement in the crimes. In fact, the prosecutor correctly stated the felony murder rule by reminding the jury that Thompson was guilty of the murder "if you find the defendant aided and abetted in the commission of the robbery." (23 RT 2929.)

The prosecutor followed that argument by stating, "[n]o matter how you approach Tony Mercurio or how you approach the evidence, the only way that you can find that the defendant is not guilty of murder is that if you conclude that he had absolutely nothing to do with it and his name was picked out of the air by Michelle Keathley and Tony Mercurio and Charlene Triplett and Danny Dalton and Barbara Triplett." (23 RT 2929.) Thompson claims this argument confused the felony-murder rule with the robbery-murder special circumstance, and the statement was "flatly not true, and the prosecutor knew it. If the jury "approached" the evidence by not believing Mercurio's story that Thompson held a gun to Gitmed, then it was duty-bound on the state of this record to find him not guilty of murder - even if it thought Thompson had "something to do

with it," for example by doing drugs with Mercurio and Gitmed, riding around in the truck with them, even simply being present when Gitmed was killed, and later helping to burn Gitmed's car." (AOB 249.)

Thompson is wrong. The prosecutor clearly distinguished between the felony-murder rule and the robbery-murder special circumstance. After describing the two types of first degree murder, the prosecutor explained there was a special circumstance charged and that "You can't even get to the special circumstance until you conclude that the defendant is guilty of first degree murder." (23 RT 2920.) Further, the above argument was not a misstatement of law, it was not a statement of law at all. It was a comment on the evidence in furtherance of the prosecutor's theme that either Thompson was guilty, or he was the innocent victim of some random, inexplicable coincidence in which all the prosecution witnesses lied about Thompson's activities, and all the evidence pointed to his guilt.

b. Alleged Misrepresentations Of Evidence

Thompson's claim that the prosecutor misrepresented the evidence should also be rejected. It is misconduct for a prosecutor to argue facts not admitted into evidence (*People v. Cunningham, supra,* 25 Cal.4th at p. 1026). However, the argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill* (1998) 17 Cal.4th 800, 819, internal quotation marks omitted.)

Thompson contends the prosecutor led the jury to believe his possession of Gitmed's property a month after Gitmed was killed was evidence of robbery, and that the prosecutor deliberately confused the concepts of motive and purpose although he conceded there was no reason for the murder and therefore no basis for the special circumstance finding. (AOB 182-184, 251-252.) As

to the first point, the prosecutor's references to Gitmed's jacket, bag and car did not state or imply that they were fruits of the robbery. In each case, it was clear the prosecutor was making an entirely different point. For example, the prosecutor commented that the discovery of Gitmed's jacket and bag in Thompson's mother's trunk would be an unlikely coincidence if Thompson was not connected to Gitmed's murder, as would the family's suspicious behavior with respect to the bags. (23 RT 2921, 2935.) The prosecutor listed the bag and the jacket as some of the many items corroborating Mercurio's testimony if the jury believed Mercurio was an accomplice. (23 RT 2928.) The prosecutor identified theft as the motive for the crime and listed the car and other items as evidence of Thompson's motive to steal (23 RT 2398) and noted that the bag was significant because Mercurio had implicated Thompson in the shooting but Thompson had denied going anywhere with Gitmed. (23 RT 3010-3011.) The prosecutor never argued or suggested that any of those items constituted the fruits of the robbery.

The jury was instructed that the crime of robbery required that property be taken from the victim's person or immediate presence, and the prosecutor did not undermine that element of the crime. Evidence of Thompson's possession of the car, the jacket and the bag were discussed as circumstantial evidence of Thompson's motive for the crime and his intent when he took items from the victim's person.

As to Thompson's claim that the prosecutor deliberately confused motive and purpose, the prosecutor's argument should be viewed in context. The argument did not gloss over the fact that the purpose of the murder was robbery; the taking of items from Gitmed's person. It just also acknowledged Thompson's plan to steal from Gitmed went beyond the items he was carrying. For example, on the subject of circumstantial evidence, the prosecutor argued, "Anybody who has a gun and there's an argument and then winds up with

Ronald Gitmed's property, what do you think was going through his mind? He wanted to rob him . . . ." and

> What do the circumstances show? It shows that the defendant was out there with a gun, wound up with the property of Ronald Gitmed and shot and killed him. ¶ Ladies and gentlemen, I submit to you that the circumstances there show that the defendant was committing a robbery. And the reason I talk about this, ladies and gentlemen, is because it gets down to the different types of murder. However you look at it, felony murder or deliberate, premeditated murder, the defendant still committed first degree murder.

(23 RT 2922.)

The prosecutor explained that everything was in the jury's hands, and they could conclude

> that the defendant is no more involved in this than possessing stolen property. If you conclude he had nothing to do with the death or robbery of Ronald Gitmed, that by just some trick or quirk of fate he wound up with Ron Gitmed's bag and jacket, I guess you could conclude that all he did was possess stolen property. ¶ But, ladies and gentlemen, I submit to you that is not what the evidence shows.

(23 RT 2920-2921.)

Thompson argues the prosecutor virtually conceded the lack of evidence that the murder was committed for the purpose of robbery to support the special circumstance because he told the jury there was no reason for the murder. He claims one who commits a murder for "no reason" is not subject to the death penalty. (AOB 252.) Thompson focuses on the prosecutor's statement about the reasons for the murder, without reference to the context in which those statements were made. The prosecutor never conceded that robbery was not the primary - if not sole - reason for the murder.

The prosecutor stated:

> The Court read to you a jury instruction about motive. ¶ The presence of motive can be helpful, the lack of motive may be a reason why you think the defendant didn't do it. ¶ Motive here

> is robbery, but you may be thinking of a bigger motive. Okay. Robbery. But why did he shoot him? Why did he shoot him? Why did he have to do that? ¶ Well, ladies and gentlemen, there's a difference between motive and reason. Motive tries to explain what happened. Maybe he didn't – you know, it tries to explain what happened. ¶ A reason is trying to put some sense into what occurred, to try to come up with a basis to understand why this happened. That's the difference between motive and reason. ¶ A robbery occurs, property is taken and someone is killed. The motive? They wanted the property. But you keep asking why it happened, why it happened. ¶ Why did the defendant go out there with Ron Gitmed and murder him? ¶ And, ladies and gentlemen, I tell you. There is no reason. It is senseless. You can't understand something like this. Yes, there's a motive, the car, the bag, but that doesn't mean that there's a reason for this.

(23 RT 2947-2948.)

The prosecutor never conceded there was a lack of evidence that Thompson killed Gitmed for the purpose of facilitating the commission of, avoiding detection of, or escaping from a robbery. Rather, his comments addressed the larger, looming, reality of this case which was presented by the evidence and undeniably on the minds of every juror; for a wallet, some change, a car, some clothing and possibly some drugs, Thompson brutally took the life of a completely harmless and innocent person. This, he appropriately characterized as senseless.

c. Any Misconduct Was Harmless

Even assuming arguendo there was misconduct, it was harmless. Reversal is warranted only if, "on the whole record the harm resulted in a miscarriage of justice[.]" (*People v. Bell* (1989) 49 Cal.3d 502, 535; see also *People v. Bolton* (1979) 23 Cal.3d 208, 214.) Even where prosecutorial misconduct has been committed, reversal is not required unless the misconduct subjects the defendant to prejudice. (*People v. Warren* (1988) 45 Cal.3d 471,

480.) Prosecutorial misconduct is cause for a reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the comment attacked by the defendant. (*People v. Milner* (1988) 45 Cal.3d 227, 245.) Whether there exists a reasonable probability of prejudice is determined by a review of the prejudicial nature of the misconduct and the weight of the evidence adduced at trial. (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1171.)

The jury was fully instructed on the applicable law, including the definitions of felony-murder, accomplice liability and the robbery-murder special circumstance. They were told that the statements of the lawyers are not evidence. The issues pertaining to Mercurio's credibility were exhaustively addressed during examination and argument. The evidence clearly pointed to robbery as the motive for the murder, and escape from detection as the reason for the killing, since Thompson and Mercurio took Gitmed, a new acquaintance, to a secluded spot, pointed a gun at him, demanded his clothing and property, shot him to death, left him in the water, burned his car, sold his stereo and used his furniture. In addition, the challenged statements were made following the conclusion of a lengthy trial in which much evidence was introduced, and there is little likelihood the jurors were affected by the prosecutor's relatively brief and insignificant remarks in an otherwise lengthy argument. When viewed in context, the statements at issue were hardly so inflammatory as to distract the jurors from a thorough and reasoned evaluation of the evidence. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 61.) Moreover, overwhelming evidence was introduced as to Thompson's guilt. Any possible misconduct was, therefore, harmless.

E. If This Court Finds The Evidence Is Insufficient To Support The Robbery-Murder Special Circumstance, Thompson's Death Judgment Should Still Be Affirmed

A determination of an invalid special circumstance is not prejudicial per se, but subject to harmless-error analysis. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 745-750 [110 S.Ct. 1441, 108 L.Ed.2d 725]; *Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [103 S.Ct. 2733, 77 L.Ed.2d 235] [fact that one aggravating factor may be found invalid does not mean a death penalty may not stand where there are other valid aggravating factors]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 512 [invalid conviction for kidnaping for robbery, felony-murder theory, and felony-murder special circumstance did not require reversal of penalty]; *People v. Roberts* (1992) 2 Cal.4th 271, 327 [appellate court examines whether there is a reasonable possibility that the jury would have recommended a sentence of life without the possibility of parole]; *People v. Mickey, supra,* 54 Cal.3d at p. 703 [subject to harmless-error analysis].)

Assuming arguendo the evidence was insufficient to support the robbery-murder special circumstance, there is still no reasonable probability that the jury would have recommended a sentence of life without the possibility of parole. The fact that the murder was committed for the *purpose* of robbery was a minor factor in the jury's choice to impose the death penalty. The absence of such a finding does not alter the fact that the jury concluded Thompson was the direct perpetrator or an accomplice to a premeditated murder or a murder committed in the course of a robbery. It does not change the facts of the case; that Thompson and Mercurio took Gitmed, an emotionally disabled, trusting person, to a remote area where they shot and killed him and stole his wallet, his car and his furniture. This, a month after Thompson had been released from prison for the murder of Floyd Fox. The facts of this case and the true finding on the prior murder special circumstance were clearly the most significant factors in the imposition of the death penalty. Accordingly, the death judgment

should be affirmed even if the robbery-murder special circumstance is invalidated.

V.

THOMPSON'S CONVICTION SHOULD BE AFFIRMED BECAUSE MERCURIO WAS NOT AN ACCOMPLICE AND IN ANY EVENT, HIS TESTIMONY WAS SUBSTANTIALLY CORROBORATED

Thompson contends his conviction should be reversed because it was based primarily on the testimony of accomplice Tony Mercurio. (AOB 199-226.) He claims Mercurio's testimony was inherently incredible (AOB 202-206), there was no corroboration connecting Thompson to the robbery or the murder (AOB 206-214) and there was no corroboration that Thompson was with Mercurio and Gitmed on the date of the murder. (AOB 215-221.) He argues the record reveals insufficient corroboration as compared to other cases involving accomplice testimony. (AOB 221.)

Thompson's claim lacks merit. Mercurio was not an accomplice and therefore his testimony did not require corroboration. In any event, Mercurio's account of the crimes, including Thompson's involvement, was consistent with, and corroborated by, the physical evidence and the testimony of other witnesses. The jury was fully aware of all the factors that might affect Mercurio's believability and they were fully instructed on the risks involved in relying on accomplice testimony.

Penal Code 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.

Section 1111, by its terms, only applies to "testimony." This Court has defined "testimony" to include "'all out-of-court statements of accomplices .... used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police.'" (*People v. Williams, supra*, 16 Cal.4th at p. 245, internal citation omitted; *People v. Belton* (1979) 23 Cal.3d 516, 524-526.)

Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. (*People v. Brown* (2003) 31 Cal.4th 518, 556; *People v. Hayes, supra*, 21 Cal.4th at p. 1271.) The evidence is sufficient if it *tends* to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Brown, supra,* at p. 556.)

In addition to physical evidence, an accomplice's statements may be corroborated by evidence of the "relationship, conduct and activities" of the defendant and the accomplice. (See *People v. Cooks* (1983) 141 Cal.App.3d 224, 313; *People v. Ross* (1941) 46 Cal.App.2d 385, 395.) Eyewitness corroboration is unnecessary. (*People v. Miranda, supra*, 44 Cal.3d at p. 100.)

A. Tony Mercurio Was Not An Accomplice So His Testimony Did Not Require Corroboration

Section 1111 defines an accomplice 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." In order to be chargeable with the identical offense, the witness must be considered a principal under section

31. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113; *People v. Fauber* (1992) 2 Cal.4th 792, 833.) Section 31 defines principals to include "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission. . . ." (*People v. Horton, supra,* at pp. 1113-1114; *People v. Fauber, supra,* at p. 833.) To be liable as an aider and abettor, the person must act both with knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. (*People v. Hayes, supra*, 21 Cal.4th at p. 1271, fn. 19.)

The burden is on the defendant to establish, by a preponderance of the evidence, a witness's status as an accomplice. (*People v. Frye, supra*, 18 Cal.4th at pp. 967-969.) The trial court here ruled that Mercurio was not an accomplice as a matter of law, but that the issue was ultimately one for the jury's determination. Where the facts are in dispute as to the knowledge and intent of the person claimed to be an accomplice, the witness's liability for prosecution is a question for the jury. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) The court commented that there was not a shred of evidence showing that Mercurio pulled the trigger. (21 RT 2707-2710). The prosecutor argued the evidence showed Mercurio was only an accessory after the fact, and the trial court acknowledged there was no evidence that Mercurio was the shooter, only that he had Gitmed's property after the murder, and participated in burning Gitmed's car. (21 RT 2702.) Still, at Thompson's request, the court instructed the jury on the law pertaining to accomplices, informing the jury that the testimony of an accomplice should be viewed with distrust and requires corroboration. (4 CT 1009-1014.)

Since Mercurio was not an accomplice, no corroboration was required. "Criminal liability as a principal attaches to those who aid in the commission of a crime only if they also share in the criminal intent." (*People v. Tewksbury*

(1976) 15 Cal.3d 953, 960.) The fact that an individual may have been at the scene of the crime or been somehow involved is not sufficient. The defense must make a showing, based upon the evidence presented at trial, that the witness in question was an accomplice. Although the standard is lower (i.e., preponderance of the evidence rather than beyond a reasonable doubt) the test on appeal is still the familiar sufficiency of the evidence test. (*People v. $497,590 United States Currency* (1997) 58 Cal.App.4th 145, 151-152.) Thus, there must be substantial evidence to support the ruling, and such evidence must be reasonable in nature, credible, and of solid value. (*People v. Johnson, supra*, 26 Cal.3d at pp. 576-578.)

There was no evidence whatsoever that Mercurio was an accomplice to the robbery or the murder. Mercurio was not "liable to the prosecution for the identical offense charged against the defendant." Mercurio was charged with, and pled guilty to, being an accessory after the fact. And that is all that was supported by the evidence. As the trial court noted, there was not a shred of evidence connecting Mercurio to the crimes. Mercurio consistently denied any knowledge that Thompson had a gun when they went to Canyon Lake. He claimed they went to the area to go four-wheeling when Thompson unexpectedly demanded Gitmed's property and then shot him. There was absolutely no evidence contradicting his account. Outside of Mercurio's testimony denying any knowledge or responsibility for the crimes, the only evidence that connected him to Gitmed at all was the fact that they were seen leaving the Triplett's house together, that he was in possession of some of Gitmed's property after the murder, and that he helped Thompson destroy Gitmed's car. On this evidence, Mercurio was liable only as an accessory to the murder.

An accessory is not an accomplice. An accomplice must have guilty knowledge and intent with regard to the commission of the crime. (*People v.*

Boyer (2006) 38 Cal.4th 412, 467.) An accessory, on the other hand, is defined as "[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment. . . ." (Pen. Code, § 32.) The evidence here supported the theory that Mercurio was an accessory, but there was no evidence that he had guilty knowledge or intent as to the murder or the robbery.

B. If Mercurio Was An Accomplice, His Testimony Was Sufficiently Corroborated

A reviewing court gives deference to a jury's determination that an accomplice's testimony was sufficiently corroborated.

> Unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal.

(*People v. Perry* (1972) 7 Cal.3d 756, 774, emphasis original, footnote omitted; see *People v. McDermott* (2002) 28 Cal.4th 946, 986.)

In making this determination, because "an appellate court must view the evidence in a light most favorable to the verdict [citation]," the reviewing court "must uphold the trial court's disposition if, on the basis of the evidence presented, the jury's determination is reasonable." (*People v. Perry, supra,* 7 Cal.3d at p. 774.)

There was far more than the required "slight" evidence corroborating Mercurio's testimony. Compelling circumstantial evidence connected Thompson to the crimes and bolstered Mercurio's version of events.

Corroboration of Thompson's motive to commit the crime was provided by Eric Arias, who testified that he met Thompson at Keathley's house in

August 1991. Thompson asked him for a ride to Temecula to collect $6000 and said he would have a gun, but Arias did not give Thompson a ride to Temecula. (13 RT 1597-1605.)

There was corroboration of Mercurio's testimony that Thompson ordered Gitmed to take off his clothes. Mutka testified Gitmed's body was wearing only socks, pants and a watch. (12 RT 1514-1517.) Naomi Dekens testified Gitmed was very self-conscious about his body, wore big bulky clothes and did not like to take off his shirt. (20 RT 2669-2670.)

Thompson's commission of the murder and robbery was corroborated by the physical evidence and testimony establishing he was in possession of the victim's property, including property which had been with Gitmed shortly before he was murdered, and that Thompson and his family were acting suspiciously with respect to the property. Don Fortney testified the blue and white bag (Ex. 11) was in Gitmed's apartment the day he helped Gitmed to move, which was August 26, 1991. (13 RT 1584-1585.) Jean Churder and Investigator Donna Silva testified that on September 25, 1991, Gitmed's bag was in the trunk of Thompson's mother's car along with another bag that contained a jacket belonging to Gitmed. (14 RT 1800-1801, 1815-1816, 1820.) Gitmed's mother Naomi Dekens testified she saw Gitmed with the jacket on August 26, 1991. (12 RT 1485-1486.) Eva Thompson testified that Thompson brought a suitcase, boxes and clothes to her house in September 1991 and asked if he could keep them in her closet because he did not know where he would be staying. (19 RT 2394.) The blue and white bag was among the items. (19 RT 2394.)

Marc Bendlin, Jean Churder and Eva Thompson testified that after Thompson's arrest, Bendlin brought items to Jean Churder's house that Thompson had stored at Eva Thompson's house. Bendlin testified the items left by Thompson at Eva Thompson's house included a wallet with business

cards but no identification. (14 RT 1805, 15 RT 2143-2148, 19 RT 2395-2396.) Gina Churder testified that a wallet containing business cards and no identification was left behind by Thompson in a nightstand in the bedroom he had occupied in Jean Churder's house. (14 RT 1810-1811.) Gitmed's wallet was never found.

Other corroboration was provided in the form of testimony establishing Thompson and Mercurio were the last people to be seen with Gitmed while he was still alive. There was also evidence that Mercurio's only connection to Gitmed was through Thompson. Michelle Keathley testified she met Thompson in August 1991 at a pool hall. Thompson rode a bike but did not have a car. (13 RT 1613-1614.) A week or two after Michelle first met Thompson, Thompson met Gitmed, who was Keathley's cousin, at her house and asked him for a ride to Temecula to collect his money. (13 RT 1616-1617.) Gitmed agreed and they left together in his Toyota Tercel. (13 RT 1621-1622.) Ronada Briggs French testified that Thompson and Gitmed left Keathley's house together one night in August 1991. Gitmed had a small car. Thompson said he needed a ride and were going over to a friend's house. (19 RT 2400-2402.) Thompson admitted meeting Gitmed at Michelle's house, but told police he did not leave Keathley's house with Gitmed. (Ex. 22A.) A false denial is relevant evidence of a consciousness of guilt. (*People v. Hughes, supra*, 27 Cal.4th at p. 335.)

Mercurio's account of the robbery was corroborated by evidence that Gitmed drove Thompson in his Toyota Tercel to the Triplett's house, Gitmed's keys were never found, and Thompson drove up to the Triplett's house in Gitmed's car the day after they were together.

Thompson's conduct and statements provided further corroboration. Michelle testified that Thompson returned without Gitmed at 3:30 a.m., and when she asked where Gitmed was, Thompson told her he was down the street

and would be there in a couple of minutes. (13 RT 1622.) When she asked again, Thompson said, "Well, there was a little bit of a scuffle; he got a little scared." And then, Thompson told Michelle that Gitmed might have gone home. (13 RT 1622.)

Charlene Triplett's testimony, standing alone, provided substantial corroboration. Charlene testified that Thompson, Mercurio and Gitmed left the Triplett's house together in the red truck. (15 RT 2180.) Charlene testified that Gitmed's car was gone when she woke up the next morning, and Thompson drove up to the Triplett's house in Gitmed's car the same day (the day after Thompson, Mercurio and Gitmed had left together). (15 RT 2237.) Charlene testified that the day Thompson returned to her house in Gitmed's car, he was burning papers by the trash dumpster and cleaning a gun with lighter fluid. That day or the next day, Thompson gave items of furniture to Charlene and Tony claiming he was emptying his storage unit. (15 RT 2202-2203, 2238-2239, 2183.) Charlene testified she overheard Thompson tell Mercurio that he needed to get Charlene and her family to say whatever they needed to say to make it look like they had never met Thompson. (15 RT 2204-2205, 2197, 2224.)

Barbara Triplett testified Thompson told her about a person floating in Canyon Lake who could not make decisions for himself anymore. (15 RT 2282-2283.) Danny Dalton testified that Thompson told him Thompson was bragging about leaving someone floating in a lake. (15 RT 2044, 2048, 2091.) Danny Dalton testified that he went with Mercurio and Thompson to burn Gitmed's car, (15 RT 2044-2045) and that Thompson asked him to sell a stereo for him and he did. (15 RT 2045-2046, 2122-2124.) Dalton testified that defendant offered him items of furniture in exchange for a car. (15 RT 2120-2122.)

Other portions of Mercurio's testimony were also corroborated. Officer Martinez testified that Mercurio directed police to the very spot where Gitmed's body was found. (22 RT 2805-2806.) Gitmed's car was found burned. (Exs. H and I, 13 RT 1739, 20 RT 2542-2545.) Furniture belonging to Gitmed was found on the Santa Rosa Mine property. (14 RT 1830-1834.)

Thompson places great weight on the fact that there was conflicting evidence as to whether the events at Michelle's house took place on August 26 or August 27, 1991. (AOB 212.) He contends this is significant because, he claims, the murder clearly occurred on August 27, 1991. (AOB 215-221.) Thompson argues,

> [t]he fact that Thompson left the Triplett compound with Mercurio and Gitmed in the red truck does not establish that he went with them to Canyon Lake the evening of August 27. That may have occurred on August 26, 1991. And if Thompson drove off with Mercurio and Gitmed on the evening of August 26, then there is no independent evidence that he was with them, or with either of them, on August 27, which was the night Gitmed was killed.

(AOB 212.) He also contends that "[o]n this record, it is completely possible that Mercurio drove the truck someplace-again, whichever night it was-and dropped Thompson off somewhere and drove away with Gitmed." (AOB 212.) Even if the evidence is subject to the speculative inferences Thompson offers, accepting those inferences is contrary to the standard of review and ignores the relevant timing considerations.

Mercurio did not testify that the events occurred on any particular date, recalling only that he took Charlene to the hospital on August 25, 1991, and then saying the events may have occurred on a Monday, Tuesday or Wednesday, later saying they may have occurred the following Friday or Saturday. (15 RT 1975.) So on the issue of corroboration, Thompson must be claiming that inconsistencies pertaining to the dates undermine Mercurio's

testimony entirely. But the quality of the corroborating evidence is not dependent on the actual date of the murder. Evidence outside of Mercurio's testimony corroborated the relevant considerations; Michelle testified that Thompson returned to her house and said there had been a scuffle and Gitmed had become scared at 3:30 *the morning after* he had left with Gitmed; Charlene testified that Thompson drove Gitmed's car and cleaned a gun *the day after* he left the Triplett's residence with Mercurio and Gitmed. So whether Thompson left with Gitmed on the 26th or the 27th, he returned without Gitmed, drove Gitmed's car and cleaned a gun the following day.

Thompson also claims the physical evidence is inconsistent with Mercurio's testimony. He claims the shots could not have been fired in the manner described by Mercurio because the fatal bullet entered Gitmed's body at a downward angle, meaning the shooter would have to be ten feet tall if both people were standing up. But Dr. Joseph Choi testified that there were three gunshot wounds (12 RT 1533) and there was no way to determine the position of the body when it was shot or the order in which the shots occurred. (12 RT 1543, 1547.) Common sense dictates that Gitmed's body position would have changed after being hit by the first bullet, and Mercurio's testimony does not state otherwise. The physical evidence was consistent with Thompson standing facing Gitmed as Mercurio described when Thompson started firing, and firing the fatal shot as Gitmed's body changed position in response.

Thompson also claims Mercurio said he did not see Gitmed's body in the water and Thompson did not put Gitmed in the water. But Mercurio's grand jury testimony stated that Gitmed fell down right at the water's edge. (19 RT 2543-2539.) And Mercurio testified at trial that they drove to a spot 30 to 40 feet from the water's edge and then Thompson and Gitmed walked out onto the peninsula. (15 RT 1891.) Officer Martinez testified Mercurio directed police to the very spot where Gitmed's body was found, and Kamron Collins testified

that he found Gitmed's body in the water on the shoreline area of Canyon Lake. (12 RT 1502-1503.) Thompson himself described a person left floating in a lake. (15 RT 2044, 2048, 2091, 2282-2283.)

Thompson explains that Dalton did not see Gitmed and Thompson together at the Santa Rosa Mine property. But Charlene did. He also claims that Mercurio said the gun used was a semiautomatic, while Charlene testified that the next day, Thompson was cleaning an automatic firearm. Minor inconsistencies in the testimony do not undermine the corroborating value of the fact that Thompson was cleaning a gun the day after the shooting occurred.

In *People v. Fauber, supra*, 2 Cal.4th at p. 835, the Court held that independent evidence of the defendant's possession of the victim's property after the murder was sufficient corroboration. Although corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense (*People v. Brown, supra,* 31 Cal.4th at p. 556; *People v. Hayes, supra,* 21 Cal.4th at p. 1271), far more was presented here.[44/]

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44. Indeed, defense counsel acknowledged and summarized the corroborating evidence in this case during a pretrial argument on the admissibility of other crimes.

> Is Mr. Ruddy trying to convince this Court that in this case there is no evidence to corroborate Tony Mercurio's testimony? Let's look at some of the corroborating evidence, not necessarily in this order. ¶ Miss Keathley sees Mr. Thompson and Mr. Gitmed leave together. Mr. Arias has testified about collecting of the debt. Mr. Mercurio's testimony is corroborated even to the point of eating a hamburger for dinner. Dr. Choi testified there was hamburger, pickle and potato type substance found in the victim. Mr. Mercurio is corroborated by the Biotox Laboratory results that in fact they ingested speed before going out to Canyon Lake. ¶ Tony Mercurio is corroborated by Charlene Triplett, by Barbara Triplett, by Danny Dalton, by September 25, 1991, when the police went to the defendant's

Finally, there is no merit to Thompson's assertion that Mercurio's testimony was inherently incredible. The jury was fully informed as to all the factors that might affect Mercurio's credibility. Mercurio testified extensively about his criminal history, including the fact that he had been released from prison a week or two before the murder occurred. Evidence was presented that Mercurio had been to prison for shooting at an inhabited dwelling and possession of a stolen vehicle, all of which occurred while he was already on parole. Evidence established that Mercurio never reported Thompson to the police, instead he took Thompson away from the scene and helped Thompson destroy Gitmed's car. (15 RT 1907-1908.)

Additional evidence was presented establishing that Mercurio was arrested in 1992 for a high speed pursuit in a vehicle, assaulting a police officer and possession of a rifle. (15 RT 1911.) He was placed in custody and signed

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> residence and found Mr. Gitmed's belongings in the trunk of his mother's car. Why aren't we talking about that corroboration? That's corroboration. ¶ The only thing that's not corroborated is how Mr. Gitmed's body got in the water. That's the only thing that's not corroborated. Mr. Thompson is seen repeatedly with Mr. Gitmed's car. There's evidence of him being at the locker because he returns with the furniture. Before he returns to the Triplett residence with the furniture, he's offering the furniture to them as a wedding gift. ¶ The corroboration that's lacking is an eye witness. And if Justice Arabian meant by his concurring opinion that you can introduce a defendant's prior history whenever there's no other eyewitness, then he should have said it. He didn't say that. ¶ This case is not a case where the prosecution case rests entirely on Tony Mercurio, where the entire prosecution case is we have to have an eye witness because we don't have anything else. That's what you have in a rape case. He abducted me on the street, he threw me in the bushes and he raped me, and the defendant said I met her at a bar. I don't have any witnesses, but it was consensual sex. ¶ I see an enormous difference. I don't even think the two are close.

(RT 2349-2350.)

an agreement whereby the charges would be dropped in exchange for his cooperation in the case against Thompson. Mercurio entered a guilty plea to the charges of accessory to murder and being an ex-felon in possession of a gun. He served a year in custody. (15 RT 1911-1913.)

The jury was informed that Mercurio had not received immunity for the robbery and murder. (23 RT 2888.) The jury was instructed extensively on the law pertaining to the testimony of accomplices. They were given the definition of an accomplice and told that a defendant could not be convicted on the testimony of an accomplice unless it was corroborated. They were instructed that in determining whether corroboration existed, they should consider the case as if the accomplice's testimony had been removed and then determine whether the remaining evidence tended to connect the defendant with the commission of the crime. They were told that the testimony of an accomplice should be viewed with distrust. (23 RT 2901-2904.) The jury was also instructed according to defendant's special instruction as follows:

> The testimony of a witness who provides evidence against a defendant in return for leniency from punishment, whether actual or expected, should be viewed with closer scrutiny and greater caution than that of other witnesses. If you find that any witness has received or has expected to receive such leniency, you should consider the extent to which the testimony of such witness has been influenced or affected by the receipt or expectation of any benefits from the party calling that witness, and his or her motive in testifying against the defendant.
>
> This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled after examining it in light of all of the evidence presented.

(23 RT 2903-2904.)

Mercurio was not an accomplice, so his testimony did not require corroboration. In any event, it was sufficiently corroborated so Thompson's conviction should be affirmed.

VI.

SUBSTANTIAL EVIDENCE SUPPORTED THE TRUE FINDING ON THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

In Argument VI, Thompson contends the robbery-murder special circumstance is not supported by sufficient evidence. (AOB 227-256.) The discussion in Argument IV is incorporated herein by reference.

VII.

THOMPSON HAS WAIVED ANY CLAIM THAT BARBARA TRIPLETT'S TESTIMONY WAS IRRELEVANT; THE TRIAL COURT'S RULINGS REGARDING THE TESTIMONY OF DANNY DALTON AND BARBARA TRIPLETT WERE PROPER

Thompson challenges the allegedly erroneous admission, and the allegedly erroneous exclusion, of various statements made to, and by, witnesses Barbara Triplett and Danny Dalton. Specifically, Thompson argues the statements he made to Triplett and Dalton about a person floating in a lake should have been excluded as irrelevant. He further contends that Dalton's opinion that Thompson killed Gitmed should have been stricken. He also claims the trial court improperly excluded a prior statement made by Dalton indicating he was going to pin the crime on Mercurio. He claims the trial court's erroneous evidentiary rulings deprived him of his constitutional right to due process.[45] (AOB 257-289.)

Thompson has waived any claim that his statement to Triplett should have been excluded because he failed to object in the trial court. In any event, Thompson's statements to Dalton and Triplett about a person floating in a lake

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45. The trial court granted Thompson's pretrial motion to presume that all of his objections included any federal constitutional grounds that would apply. (1 RT 96-98.)

were highly relevant and properly admitted. As to Dalton's opinion that Thompson killed Gitmed, any error was waived and any potential for harm was cured by the court's instruction to the jury on the law governing lay witness opinion. Dalton's prior statement, that he would pin the crime on Mercurio if he was called to testify, was properly excluded as hearsay and irrelevant.

A trial court has wide discretion in determining relevance. (*People v. Chatman, supra*, 38 Cal.4th at p. 371.) The abuse of discretion standard of review applies to any ruling by a trial court regarding the admissibility of evidence. The standard is particularly appropriate in cases where the determination of admissibility involves questions of hearsay, relevance and undue prejudice. "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115, citing *People v. Rowland* (1992) 4 Cal.4th 238, 264, and *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Danny Dalton testified that "this fool kept trying to tell me some shit, and I said, Leave me alone. I don't want to hear shit." Dalton testified that he told Thompson to shut up because he did not want to know about it. He did not want anything to do with it. Dalton said Thompson said he had told Charlene and Barbara. Dalton was angry that Thompson had told them and he told Thompson he had to leave. Thompson kept trying to tell Dalton things and every time, Dalton told him to shut up. Thompson told him about leaving someone floating. (15 RT 2043-2044.)

The prosecutor asked Dalton how he knew Thompson was talking about something bad that had happened, since Dalton did not let Thompson speak much. The following colloquy took place:

> [Dalton]: Well, he never came right out and said that he did this, but little parts of everything he said, you could tell what

[Dalton]: Well, he never came right out and said that he did this, but little parts of everything he said, you could tell what somebody's talking about by what they're saying. ¶ I can't remember exact words or nothing. It was a long time ago, but I knew then what he was talking about.

[Prosecutor]: And what was he talking about?

[Dalton]: Sounds like he took somebody out and blew them away and left them floating in a lake, to tell you the truth. But that ain't what he told me. That's what I put together on my own. That's when I told him I didn't want to hear nothing and I didn't want him up at our house.

[Prosecutor]: Specifically all you remember is him floating in a lake, making statements to that effect?

[Dalton]: Yup. That's the only thing I can remember that he did state.

(15 RT 2048.)

Barbara Triplett testified that some time before September 17, 1991, Thompson told her something about a person floating in Canyon Lake who couldn't make decisions for himself anymore. (RT 2282-2283.)

A. Thompson Has Waived Any Claim That Barbara Triplett's Testimony Was Irrelevant

Evidence Code section 353 states, in pertinent part,

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . .

Thompson did not object to Barbara Triplett's testimony that Thompson told her about a person floating in a lake who could not make decisions for himself anymore. Accordingly, that claim is waived on appeal. Thompson argues an objection was unnecessary and would have been futile, because "the trial court had already signaled its assessment of the admissibility of this evidence by its attitude towards, and ruling on, the very similar evidence that it had earlier allowed into evidence through Dalton . . . ." (AOB 265.) Creative, but wrong. Barbara Triplett was a different witness, and her testimony pertained to a different statement. Pursuant to Evidence Code section 353, this Court has consistently held that the defendant's failure to make a specific and timely objection in the trial court on the grounds asserted on appeal makes the ground not cognizable. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21, citing *People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

B. Thompson's Statements To Danny Dalton And Barbara Triplett About A Person Floating In A Lake Were Properly Admitted

Thompson contends his statements to Danny Dalton and Barbara Triplett about a person floating in a lake were irrelevant. Not so.

"Relevant" evidence is that evidence, "including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Only relevant evidence is admissible. (Evid. Code, § 350.) A trial court has discretion to exclude even relevant evidence if the probative value of the evidence "is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Thompson's statements about a person floating in a lake were highly relevant, as they had a tendency in reason to prove that Thompson was familiar with, and possibly involved in, Gitmed's murder. The statements were also relevant to corroborate Mercurio's testimony.

Gitmed's body was found on the shoreline in an unpopulated area of Canyon Lake. Mercurio testified Thompson shot Gitmed at Canyon Lake and left his body at the water's edge. Thompson's statements to Dalton and Triplett about a person floating in a lake (Canyon Lake specifically, according to Triplett) had a tendency to prove Thompson was familiar with, and possibly involved in, the killing.

The relevance of Thompson's statements to Dalton and Triplett is not undermined by the fact that a newspaper article, presumably published before the statements were made, described a body found at Canyon Lake. The fact that Thompson's source of information may have been a newspaper rather than personal involvement does not make the statements unreliable or inadmissible. (See *People v. Guerra, supra*, 37 Cal.4th at p. 1115 [rape victim's statements that the defendant was in her house were not unreliable even though she might have dreamt the defendant was in her house or spoken falsely about the incident].) In any event, even if the fact asserted by Thompson was one of common knowledge, the relevance was in his particular interest in the fact and the context in which his statements were made. Thompson made the comment twice to two different people and told Barbara Triplett the person would not be making decisions for himself anymore. The manner in which Thompson made the statement to Dalton suggested to Dalton that something bad had happened. Dalton did not want to hear about it, and he was mad that Thompson had told Barbara and Charlene. Neither Dalton nor Triplett testified that Thompson claimed to be discussing a newspaper article.

In *People v. Jablonski* (2006) 37 Cal.4th 774, 825, the Court found relevant and not unduly prejudicial a sexually suggestive letter the defendant wrote to his mother-in-law nine years before he raped and murdered her. In *People v. Chatman, supra*, 38 Cal.4th at p. 371, this Court upheld the admission of testimony that a child had nightmares and woke up screaming following a stabbing. The Court held that although the very brief testimony was not the lynchpin of the case, it did have a tendency in reason to prove a disputed fact of consequence to the determination of the action. The child was a witness at trial and the nightmare evidence was germane to the jury's evaluation of his testimony. Similarly, here, Thompson's statements had a tendency in reason to establish that he was connected to Gitmed's murder.

Thompson's reliance on *Piaskowski v. Bett* (7th Cir. 2001) 256 F.3d 687, misses the point. In *Piaskowski*, the defendant was one of several employees of a paper mill convicted of murdering the victim by throwing his beaten body into a paper vat. The court reversed the defendant's conviction, finding the evidence was insufficient to support the prosecution's theory that the defendant was involved in a conspiracy to murder the victim. The court explained the defendant's statement about "shit going down" was not tied to other evidence which would indicate the "shit" referred to was a murder or that the defendant participated. Accordingly, the "scant evidence" fell short of meeting the People's burden of proof beyond a reasonable doubt. (*Ibid.*) Whether a statement is sufficient to support a conviction beyond a reasonable doubt is a far different question than whether a statement has a tendency in reason to prove or disprove a fact that is of consequence to the action. There was no suggestion in *Piaskowski* that the defendant's statement, even though subject to many interpretations, was irrelevant or should have been excluded. The same is true here.

C. Thompson's Claim Is Waived As To Danny Dalton's Testimony That He Believed Thompson Killed Gitmed; The Court's Instruction To The Jury Cured Any Potential Harm

Thompson claims the trial court improperly denied Thompson's motion to strike Dalton's testimony because it was a lay opinion based on speculation. He further argues the trial court's admonition was misleading and prejudicial. (AOB 264-271.) There was no harm.

The only objectionable portion of Dalton's testimony was his statement which speculated, "Sounds like he took somebody out and blew them away . . . ." (15 RT 2048.) Immediately after making that statement, Dalton made it clear "But that ain't what he told me. That's what I put together on my own." (15 RT 2048.) The jury was made aware immediately that Thompson did not make that statement, and that Dalton's testimony related to his impressions about what Thompson was trying to say.

Thompson objected to Dalton's statement and moved to strike his testimony as speculative. The trial court agreed the foundation for his statement was "skimpy" and agreed to admonish the jury. The court offered a specific admonition tailored to Dalton's testimony, but both parties objected to the admonition. Thompson asked for the testimony to be stricken or, in the alternative, for the jury to be instructed not to give any weight to the opinion of a lay witness or an inference drawn by a lay witness and to disregard those opinions and inferences. The prosecutor agreed with the recommended admonition. The court stated the parties could look at the transcript and decide whether they wanted the admonition more narrowly tailored. (15 RT 2084.) Before the prosecutor began his cross-examination of Dalton, the trial court instructed as follows:

> And, ladies and gentlemen, before we proceed, I'm going to give you a cautionary instruction with respect to the opinions expressed by lay witnesses, and this is particularly, although it goes to all witnesses, particularly with respect to the direct

> testimony of Danny Dalton that you heard yesterday. ¶ You are to give no weight to the opinion of lay witnesses nor to draw inferences from the expression of those opinions unless you find that the opinions are clearly based on facts to which the witness has testified.

(15 RT 2085.)

In the first place, Thompson has waived any claim that the remedy was inadequate. Although he requested the testimony be stricken, and only alternatively that the jury be admonished, he did not object until the day after Dalton's testimony and did not identify a particular statement he requested to be stricken. Accordingly, both the prosecutor and the court suggested obtaining the transcript to narrowly tailor the testimony that would be stricken. In the meantime, the court proposed an admonition, the parties discussed it, and the trial court agreed to the instruction proposed by defense counsel. The court reminded the parties they could look at the transcript to decide whether they wanted the admonition more narrowly tailored. (15 RT 2084.) Neither party made such a request. Accordingly, the claim is waived.

In any event, the admonition clearly cured any potential harm. Error in admitting opinion testimony is harmless if it is not reasonably probable the defendant would have achieved a more favorable result absent the error. (See *People v. Melton* (1988) 44 Cal.3d 713, 745.) In *Melton*, this Court found that any error was harmless when the opinion testimony was brief and there was otherwise strong evidence of the defendant's guilt. (*Ibid.*) Most of Dalton's testimony was entirely appropriate and admissible to describe the context of Thompson's statements. All witnesses, with the exception of expert witnesses, are limited to testifying about matters within their personal knowledge. (Evid. Code, § 702.) A lay witness can testify to an opinion that is rationally based on his or her perception and helpful to a clear understanding of his or her testimony. (Evid. Code, § 800.)

A far cry from being a detached discussion about a newspaper article, Dalton explained that although he could not remember exact words, and these events happened a long time ago, he repeatedly characterized Thompson as "bragging" and said he knew what Thompson was talking about based on "little parts of everything he said, you could tell what somebody's talking about by what they're saying." (15 RT 2043-2044, 2048.) Dalton's testimony made it clear that he recalled that Thompson was talking about something bad that had happened that Thompson was involved in. Even if he could not remember the exact words, he remembered that Thompson kept trying to tell him things he did not want to hear, and that he was mad that Thompson had told Charlene and Barbara about those things. (15 RT 2048.)

The admonition specifically directed the jury's attention to Danny Dalton, and informed them they were not to give any weight to, or draw any inferences from, the opinion of lay witnesses unless the opinions were clearly based on facts to which the witness had testified. Dalton expressly stated that his opinion that Thompson took somebody out and blew them away was not based on what appellant expressly said to him, but rather his own speculation. The jury was effectively instructed to disregard that statement.

D. Danny Dalton's Prior Statement, That He Would Pin The Crime On Mercurio If He Was Required To Come To Court, Was Irrelevant, Misleading, Hearsay, And Not Admissible As A Prior Inconsistent Statement

During Dalton's testimony, the prosecutor requested a recess and informed the court he had just learned of a prior statement allegedly made by Dalton to defense investigator Tom Crompton wherein Dalton supposedly told Crompton that Tony Mercurio said he committed the murder. The prosecutor

requested a foundational hearing outside the presence of the jury[46] to determine whether Dalton was going to admit or deny making the statement, and whether Crompton was available as a witness. (16 RT 2096.)

Defense counsel made an offer of proof that Dalton told Crompton that Mercurio said he shot the person, threw the body in the water and burned the car. According to the offer of proof, Dalton also told Crompton that Mercurio was the one who gave Dalton the stereo from the blue car. Based on this offer of proof, and the fact that Crompton was available to be a witness, the court determined this evidence was admissible. (16 RT 2097.)

The prosecutor argued the evidence was highly prejudicial under Evidence Code section 352[47] and had not previously been disclosed. The prosecutor requested the court to first hear the evidence outside the jury's presence, claiming that if Dalton denied making the statement, Crompton's statement was inherently unreliable. Defense counsel made an offer of proof that if Dalton denied talking to Crompton, full discovery would be provided and Crompton would be called to impeach Dalton. (16 RT 2098.)

The court ruled the evidence was admissible but agreed to hear it first outside the presence of the jury, so that if Dalton denied making the statement, Crompton could be brought in to testify. (16 RT 2104-2106.) Dalton testified that the interview with Crompton took place in the yard and was not tape recorded. Dalton told Crompton he did not know anything. Crompton asked questions about the car and the furniture. Dalton told Crompton he did not want to come to court, and if he had to come to court he would "pin it all on

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46. Evidence Code section 402.

47. Evidence Code section 352 states, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Tony," meaning the shooting, the body, the furniture, the car stereo and everything. (16 RT 2107-2108.) Dalton then testified as follows:

> [Defense counsel]: Did you tell Mr. Crompton that Tony Mercurio told you that Tony was the one who shot this guy at Canyon Lake?
>
> [Dalton]: No. What was said is I didn't want to come in all this court bullshit and don't even be wanting - - don't even try making me because I'll pin it all off on Tony is what I said.

(16 RT 2107.)

> [Defense counsel]: What did you mean when you made that statement?
>
> [Dalton]: What I meant is because I didn't want to have to come up here.
>
> [Defense counsel]: So you told Mr. Crompton that you were going to pin it all on Tony if you had to come in here?
>
> [Dalton]: That's what I told him.
>
> [Defense counsel]: And by 'pin it all on Tony, ' you were referring to the shooting in part?
>
> [Dalton]: Everything.

(16 RT 2107.)

On cross-examination, Dalton specifically testified that Tony Mercurio never told him that he was the one who shot the guy and put him in the lake. Defense counsel said that as he had hoped and expected, Dalton's testimony was consistent with Crompton's report so he was not going to call Investigator Crompton. (16 RT 2109.)

The prosecutor argued the evidence should be excluded under Evidence Code section 352. The court noted that the witness's statement was not that Mercurio told Dalton he was the one who shot Gitmed and put him in the lake, but he did not want to get involved, so he threatened to pin it all on Mercurio

if he had to come to court. (16 RT 2110-2111.) Defense counsel argued the evidence was relevant because it showed the witness was willing to lie. The court disagreed, stating, "Mr. Aquilina, I think you're doing some great fancy foot work, and I'm full of admiration." (16 RT 2112.)

The court ruled:

> I think under 352 this is substantially more prejudicial than probative. It appears to be a reluctant witness making statements that he was going to pin this offense on somebody else without any foundation in fact for those assertions because he was angry about possibly having to come to court. ¶ The original offer of proof that I received from the defense was that if questioned Mr. Dalton, if he told the truth, based on investigator Crompton's interview, would say that he had information that Tony Mercurio had committed this crime, that Tony Mercurio had told him he committed this crime. When the witness testified that was not what we heard. And you indicated you were not going to call Investigator Crompton because the witness testified in conformance with whatever report you have from Investigator Crompton. ¶ So based on what the witness in fact said and the fact that you are not going to call investigator Crompton to contradict this, I do find that it's far more prejudicial than probative because this simply seems to me to be the assertion of an angry witness who did not want to come to court. He indicated that he did not have this information from Tony Mercurio or from any other source. ¶ So at this point I'm not going to permit you to make this inquiry in front of the jury.

(16 RT 2115-2116.)

Subsequently, defense counsel asked the court to include Crompton's report in the record[48], and asked for permission to call Investigator Crompton to testify about Dalton's prior inconsistent statement. (18 RT 2370-2373.) The court read the report and ruled Dalton's statement as reported suffered from the

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48. Crompton's report is at 4 CT 950-952.

same problem as his testimony; namely, that there was no factual basis for pinning the crime on Mercurio.[49] (18 RT 2381.)

The trial court properly ruled this evidence was inadmissible. In the first place, the evidence was irrelevant. Dalton's statement to Investigator Crompton that he would pin everything on Mercurio if he was required to come to court did not have any tendency to prove or disprove any disputed fact that was of consequence to the determination of the action. (Evid. Code, § 210.) It simply had a tendency in reason to prove that Dalton did not want to testify, and the lengths he was willing to go to in order to avoid coming to court.

If the purported relevance was Dalton's willingness to lie, then the statement was hearsay. Hearsay is defined as evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Dalton's willingness to lie could only be established by his out-of-court statement if it was offered for its truth; to show that he was willing to pin the crime on Mercurio in order to avoid coming to court. And, contrary to Thompson's assertion, it did not fall under any exception to the hearsay rule.

Evidence Code section 1235 provides as follows:

> Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . .

Dalton's statement of his intent to pin the crime on Mercurio was not inconsistent with any statement made during his testimony. Dalton testified about his acquaintance with Thompson, his conduct relative to the victim's property, and statements Thompson made to him. He did not testify about his

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49. This was correct. The report says Dalton told Crompton that Tony Mercurio did not tell him where the murder occurred but talked to Barbara Triplett about the murder. (4 CT 951.)

intent with regard to testifying truthfully, so his statement of intent to fabricate a story, if required to testify, was not inconsistent with any testimony at trial.

Moreover, the trial court properly excluded the evidence under Evidence Code section 352. The evidence carried great potential for confusing the issues and misleading the jury as it could have lead to the highly prejudicial but erroneous conclusion that Mercurio confessed to the crime.[50/]

Thompson claims the prosecutor's argument that Dalton's statement to Crompton was just "blowing a lot of smoke" because Dalton "was obviously mad at Mr. Crompton" was completely illogical. He claims "[i]t makes no sense that Dalton would "pin it all" on Mercurio if he was "mad" at Crompton, who was the investigator for Thompson. Surely, if he wanted to be uncooperative with Crompton, he would have threatened to pin the murder on Thompson, not Mercurio." (AOB 276.) Thompson's argument assumes Dalton knew Crompton was working for Thompson and not for Mercurio. Although Crompton's report states that he advised Dalton that he was working on behalf of James Thompson (4 CT 950-952), Dalton very well may have assumed Crompton was working for Mercurio.[51/] Dalton would not likely have expected an investigator working for Thompson to approach him with the expectation that he would be helpful, considering Dalton's attitude towards Thompson in the past. In contrast, Dalton and Mercurio were more closely connected, having lived together for some time at the Santa Rosa Mine

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50. The likelihood of such confusion is demonstrated by the fact that defense counsel initially made an offer of proof that Dalton told Crompton that Mercurio said he shot the person, threw the body in the water and burned the car (16 RT 2097), and after hearing Dalton's testimony stated that Dalton testified exactly as he had expected and consistent with his statement to Investigator Crompton. (16 RT 2109.)

51. Crompton's report was entered into evidence but Crompton did not testify. There was no sworn testimony that Crompton identified himself as working for Thompson.

property. Dalton most likely assumed Crompton was there on Mercurio's behalf. This is further evidenced by Dalton's statement to Crompton that "they do not want me for a witness because I will tell what that lame did." (4 CT 950.)

E. Any Error Was Harmless

If there was error in the exclusion or admission of any of the challenged statements, it was clearly harmless. Thompson's statements to Dalton and Triplett about a person floating in a river were minor as compared to the substantial evidence that he committed first degree murder in the course of a robbery. (See Argument IV.) Dalton's statement that he would pin the crime on Mercurio if required to come to court would not have affected the jury's assessment of Thompson's guilt.

Finally, defendant claims the trial court's erroneous ruling also violated his right to due process. His constitutional claims lack merit because, for the reasons stated, the admission of Thompson's statements to Barbara Triplett and Danny Dalton, and the exclusion of Danny Dalton's statement to Investigator Crompton, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

VIII.

THERE WAS NO CUMULATIVE ERROR

Appellant contends the cumulative effect of the alleged errors which occurred in this case undermined the fundamental fairness of appellant's trial and warrants the reversal of the judgment of conviction and sentence of death. (AOB 290-293.) As previously discussed at length throughout this brief, no error occurred; therefore, there cannot be any cumulative error.

Assuming for the sake of argument that those claims of error appellant ascribes to the guilt and penalty phases of his trial were in fact error, each would be harmless under the applicable standard of review. (*People v. Cunningham, supra*, 25 Cal.4th at pp. 1009, 1038; *People v. McDermott, supra*, 28 Cal.4th at p. 1005 [no individual error, so rejecting claim of cumulative error]; accord *People v. Slaughter* (2002) 27 Cal.4th 1187, 1223 [taken individually or cumulatively, errors harmless].) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) Because the issues claimed as error by appellant either were all not error, have been waived, were invited, or were harmless, there could be no prejudice to appellant, and therefore no cumulative effect. (*People v. Kipp, supra*, 26 Cal.4th at p. 1141.)

Accordingly, assuming arguendo there had been any error at all, viewed cumulatively such errors would not have significantly influenced the fairness of appellant's trial or detrimentally affected the jury's determination of the appropriate penalty. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1038.) Therefore, the entire judgment must be affirmed.

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE LAW GOVERNING THE PROCESS OF CHOOSING THOMPSON'S SENTENCE

Thompson claims his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the trial court's failure to instruct the jury that they were required to make unanimous findings before returning a death judgment, and that those findings had to be established beyond a reasonable doubt. Thompson further claims the court was required to instruct the jury that certain factors could only be

considered in mitigation of his sentence. He claims these instructional errors require reversal. (AOB 294-302.)

This Court has previously and repeatedly rejected all of Thompson's contentions. Because Thompson fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected by case citation, without additional legal analysis. (*People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

Thompson asserts his constitutional rights were violated because the jury was not instructed that the findings made in support of the death judgment had to be established beyond a reasonable doubt, and that the findings required unanimous agreement. No such instructions were required.

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not factual, and thus not susceptible to *any* burden-of-proof qualification. (*People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Burgener, supra*, 29 Cal.4th at pp. 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch, supra*, 20 Cal.4th at p. 767; *People v. Sanchez* (1995) 12 Cal.4th 1, 81.) This Court has repeatedly rejected claims identical to Thompson's regarding a burden of proof at the penalty phase (*People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Welch, supra*, at pp. 767-768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt, supra*, 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]), and, because Thompson does not offer any valid reason to vary from those past decisions, the Court should do so again here. Moreover, California death penalty law does not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating

factor. Neither the federal nor the state Constitutions require the jury to agree unanimously as to aggravating factors. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; *People v. Osband, supra*, 13 Cal.4th at p. 710.)

In *People v. Farnam* (2002) 28 Cal.4th 107, 192, this Court stated the following regarding CALJIC No. 8.88:

> The capital sentencing scheme is not unconstitutional insofar as it does not require the jury to render a statement of reasons or to make unanimous written findings on the aggravating factors supporting its verdict. There is no constitutional requirement that the jury, in order to return a verdict of death, must unanimously find that aggravating factors outweigh the mitigating factors beyond a reasonable doubt or that death is the appropriate remedy beyond a reasonable doubt. Defendant's arguments fail to convince us to revisit any of these holdings.

Thompson argues, however, that this Court's decisions are invalid in light of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. This Court has considered and rejected Thompson's argument by finding that neither *Blakely*, *Ring*, nor *Apprendi* have altered or undermined this Court's conclusions regarding the burden of proof in the penalty phase, and do not otherwise affect California's death penalty law. (*People v. Stitely, supra*, 35 Cal.4th at p. 573 [*Blakely*, *Ring*, and *Apprendi* "do not require reconsideration or modification of our long-standing conclusions in this regard"]; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272.)

Thompson also argues that he was entitled to an instruction that certain factors listed in Penal Code section 190.3 could only be considered in mitigation of his sentence. Specifically, he cites factors (d), (e), (f), (g), (h) and (j), and claims the prosecutor's emphasis on the absence of these factors may have weighed in favor of the death sentence. (AOB 298-299.) But this Court

has held the trial court is not constitutionally required to instruct the jury that certain sentencing factors are relevant only to mitigation (*People v. Panah, supra,* 35 Cal.4th at pp. 500-501; *People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079.)

In *People v. Farnam, supra,* 28 Cal.4th at pages 191- 192, the court stated:

> Contrary to defendant's assertions, the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating circumstances.

Thompson acknowledges this Court's previous decisions have rejected his contentions, but asks that those decisions be reconsidered and overruled. (AOB 302.) As it has in the past, this Court should decline to do so. (*People v. Welch*, *supra*, 20 Cal.4th at pp. 771-772.)

X.

THE TRIAL COURT PROPERLY DISCHARGED A JUROR DURING PENALTY PHASE DELIBERATIONS AND PROVIDED APPROPRIATE SUPPLEMENTAL INSTRUCTIONS AFTER SEATING AN ALTERNATE JUROR

Thompson contends his rights to a unanimous verdict and due process under the state constitution (Cal. Const. Art. I, §§ 15 and 16) and due process and a reliable sentence under the federal constitution (U.S. Const., 14th Amend., 8th Amend.) were violated by the erroneous discharge of a juror during penalty deliberations, and by the court's inadequate supplemental instructions upon seating an alternate juror. Specifically, he claims the trial court failed to conduct an adequate investigation into the possibility of juror misconduct; erred in discharging a juror; gave inadequate instructions after seating the alternate juror; and erred in denying Thompson's motion for a new

trial. This, he claims, resulted in an impermissible directed verdict of death. (AOB 303-345.)

Thompson did not request additional investigation in the trial court, so his claim is forfeited. In any event, the trial court conducted a full and adequate inquiry. Juror Lucille R. was properly discharged. After an alternate juror was seated, the trial court properly instructed the jury. Thompson's claim should be rejected.

During penalty phase deliberations, the trial court received a note indicating jurors Lucille R. and Debra P. wished to speak to the court privately. (27 RT 3327-3328.) The court asked the jurors to leave the courtroom with the exception of juror Lucille R. (27 RT 3329.) The following discussion took place:

> [Juror Lucille R.]: I was having thoughts when we first had to go in the deliberating room and - - I'm very nervous right now.
>
> [The Court]: That's all right; just relax. It's just us.
>
> [Juror Lucille R.]: And I was pressured at the end into going with something - - going with a decision I was not 100 percent sure of. And the more I thought about it, I went over your rules and how we were supposed to weigh things, and I felt for myself that there was a lot of doubt. And I was pressured by other jurors. ¶ And frankly, the last day and a half was horrible. It was horrible for me. I was told things that I felt I was on trial. And I was reminded of things, of what I was doing, I was being pointed out - - and frankly, I was the last one with the decision that I had, and every - - it was awful. ¶ The second point, with the weapon, frankly, everybody agreed because I said I would not go the other way with, if yea, the weapon, or - - I can't even remember what exactly it said. And they basically agreed because they knew I would be there to argue that point, and I told them I would not change my mind. ¶ Now we're going on this third phase, and I can't do it, because I don't feel - - I felt pressured. I felt a lot of pressure. ¶ There was a lot of doubt in my mind. I tried pointing that out, and like I said, frankly, I was

told - - I don't even want to go out in that room over there because of the way some of the people treated me, so - -

[The Court]: Well, we've got a lot of issues here, Ms. [Lucille R.] ¶ First of all, are you telling me you're not comfortable with your original verdict in the guilt phase, or are you telling me you're not comfortable with your verdict as to Mr. Thompson's prior?

[Juror Lucille R.]: No, the guilt phase.

[The Court]: Conviction of murder, the guilt phase?

[Juror Lucille R.]: Yes, starting from - - yes. And I know I was wrong, and I don't know what can happen to me, but I can't go on with the following phases with this problem.

[The Court]: Well, are you telling me that you have a reasonable doubt in your mind as to the guilt of Mr. Thompson with respect to the guilt phase?

[Juror Lucille R.]: Yes, the first phase, yes.

[The Court]: In other words, you're telling me now you want to retract your verdict?

[Juror Lucille R.]: Yes. . . .
(27 RT 3329-3331.)[52/]

Juror Lucille R. left the courtroom. The trial court and counsel discussed the implications of Lucille R.'s statement. The prosecutor said the first issue to be resolved was whether Lucille R. could continue to deliberate through the penalty phase of the trial. The next issue was what effect, if any, the pressure in the jury room had on her verdict, which was an issue that should

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52. Following this exchange, Thompson's request to reappoint counsel, who had been placed on standby following his previous request to represent himself, was granted. (27 RT 3331-3339.)

be handled in a new trial motion governed by Evidence Code section 1150.[53] The trial court agreed. Defense counsel asked the court to bring in juror Debra P., and determine how to proceed with the penalty phase, but not to make any findings yet regarding a motion for a new trial. (27 RT 3341.) Defense counsel said juror Lucille R. had formed an opinion about penalty based on the fact that she did the wrong thing in the guilt phase, and she was entitled to her opinion. He said there was nothing to indicate she could not continue to deliberate. (27 RT 3342.) The court brought juror Lucille R. back into the courtroom and the following exchange took place:

> [The Court]: Ms. [Lucille R.], I want to address at this point in time your ability to continue as a juror in the penalty phase. ¶ We've gone through Phase 1 and Phase 2. Basically we are at Phase 3 now. ¶ What I need to know from you is whether you feel that you are capable of reaching a decision one way or the other.
>
> [Juror Lucille R.]: No; no.
>
> [The Court]: And what is the - - well, okay. ¶ Is the reason for this the fact that you have a fundamental disagreement with the other jurors? Without talking about the nature of the fundamental disagreement. ¶ My problem is that neither the attorneys nor I are permitted to go into the mental processes of what goes on in the jury room.

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53. Evidence Code section 1150 provides,

> (a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. ¶ (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

[Juror Lucille R.]: Just the differences, and - - I just can't - - I just can't do it.

[The Court] Do you know if you're capable of functioning as a juror any longer?

[Juror Lucille R.]: No.

The court asked if that was a sufficient inquiry, and the prosecutor responded affirmatively. (27 RT 3344.) Juror Lucille R. left the courtroom, and juror Debra P. was brought in.

[The Court]: [Debra P.], you indicated that you wanted to speak with me?

[Juror Debra P.]: Yes. ¶ That I don't feel comfortable being on the jury, that with this second phase that we're in deliberation of, I just can't do it. ¶ I feel that I was rushed on the first phase, and like this past weekend, I was sick the whole weekend, even went to my hairdresser. I'm losing my hair. I've got - - I'm having migraines. ¶ I can't do it. I can't make a decision on this second phase, since I don't feel comfortable with what was done on the first phase.

[The Court]: All right; you're telling me that you feel physically and mentally incapable of continuing as a juror?

[Juror Debra P.]: Yes.

[The Court]: You don't feel capable of deliberating with the other jurors at this point in time?

[Juror Debra P.]: No.

[The Court]: And you're asking to be discharged from the jury?

[Juror Debra P.]: Yeah, because I am - - I just don't feel - - especially when we first went in for deliberation, everybody in that room had already made up their minds, even before paperwork had got in there, instructions, evidence. And we were - -

[The Court]: Well, I don't want to go behind the processes of deliberation, Ms. [Debra P.]. ¶ What I'm asking you now is whether you feel that whatever is troubling you has rendered you incapable of continuing as a juror in the final phase of this case.

[Juror Debra P.]: Yes.

[The Court]: Do you feel that you cannot deliberate with the other jurors under any circumstances?

[Juror Debra P.]: No.
(27 RT 3344-3345.)

Defense counsel indicated he had some questions. The court said she would discuss them with counsel first. (27 RT 3345.) Defense counsel said he did not want the two jurors to be excused, because their statements, taken in light of the fact that Thompson did not present any evidence at the penalty phase, indicated they were not going to agree to the death penalty because they continued to have some doubt about Thompson's guilt, which was an appropriate consideration at the penalty phase. (27 RT 3347-3348.) The trial court agreed with defense counsel that the jurors could not be removed for having a lingering doubt about Thompson's guilt, but said they had to be removed if they were incapable of deliberating further, because that would be a failure to follow their oath as jurors to continue deliberating. The court also said the jurors were free to continue deliberating, to vote for life without possibility of parole, and issues of a coerced verdict could be brought up in a new trial motion. (27 RT 3349.)

After additional discussion, juror Lucille R. was brought back into the courtroom.

[The Court]: [Lucille R.], you made your feelings pretty clear, but, for many reasons, we need to tie this down and be completely clear. ¶ Do you feel capable at this point in time of continuing to deliberate with your fellow jurors?

[Juror Lucille R.]: No.

[The Court]: Okay. If I leave you on the jury, will you continue to deliberate?

[Juror Lucille R.]: No. I'm - - No, I don't want to.

[The Court]: All right. So your position right now is - -

[Juror Lucille R.]: If I have to, I will get a doctor's excuse. I have not been able to sleep from the first time we were in the deliberating room. ¶ I have not - - you give strict instructions not to think about it when you go home. Well, it's next to impossible for me not to think about it.

[The Court]: I know.

[Juror Lucille R.]: And frankly, right now I'm ready to run out that door. I do not want to be here any longer. I don't want to talk to any other jurors. I don't want to - - I don't even want to be in here right now.

[The Court]: All right. So you feel unable to continue deliberating?

[Juror Lucille R.]: Right.

[The Court]: All right. I'm going to excuse you at this time - -

[Defense Counsel]: Your Honor - -

[Juror Lucille R.]: And I don't want to go out and use that elevator either, if everyone else is standing there.

. . . .

[Defense Counsel]: Your Honor, we would ask leave to inquire briefly, before the Court - -

[The Court]: That will be denied at this point in time.
(27 RT 3352-3354.)

After Lucille R. left the courtroom, the trial court made the following factual findings:

> [Lucille R.] was clearly and obviously in very great distress. She could hardly maintain her seat. All she wanted to do was get out of here. ¶ She was up and down in her seat at least half a dozen times while I was talking to her. It would have been a cruel imposition to leave her in this situation on the jury, regardless of what else happens. ¶ And those were some of the reasons behind my decision to excuse her, quite apart from the fact that she says she's incapable of continuing to deliberate. I think that, judged on her demeanor and her physical behavior in the courtroom, she was both physically and mentally incapable of continuing with deliberations as a trial juror, regardless of the reasons behind that.

(27 RT 3356.)

Debra P. was then asked to return to the courtroom.

> [The Court]: I'm going to ask you one more question, Ms. [Debra P.]: ¶ Do you feel capable at this point in time of reaching a decision in the penalty phase of this case as to what the appropriate penalty should be?
>
> [Juror Debra P.]: My own decision, or a decision with everybody else?
>
> [The Court]: Your own decision.
>
> [Juror Debra P.]: Oh, I feel comfortable with my decision.
>
> [The Court]: All right. So you do feel capable of reaching a decision if left on this jury with the other jurors as to whether the penalty should be death or life without possibility of parole. Is that correct?
>
> [Juror Debra P.]: Yes.
>
> [The Court]: Okay.
>
> . . . .

[The Court]: So it is not that you're incapable of deliberating at this point? Previously you told me that you weren't capable of deliberating or reaching a decision.

[Juror Debra P.]: Okay. I reached my own, but it's not with everyone else.

[The Court]: That's fine.

[Juror Debra P.]: Okay.

[The Court]: That's no problem. ¶ You are entitled to your own decision, providing that you also have engaged in the deliberative process with the other jurors.

[Juror Debra P.]: Okay.

[The Court]: So if you've reached a decision, that's just fine. ¶ My understanding of what you said previously was that you weren't capable of deliberating with the other jurors and you weren't capable of reaching a decision, but what you're telling me now is a little bit different.

[Juror Debra P.]: Maybe I didn't - - I'm capable of reaching a decision, it's just that it's - - if I - - Well, if I have to go back in the jury - - back in there with everyone else, we're not going to have an answer, we're not going to all agree.

[The Court]: So be it. ¶ But I'm - - I do not want to relieve you of your position on this jury if you feel that you're capable of deliberating and capable of reaching a decision, and that's all we're asking.

[Juror Debra P.]: Okay. . . .
(27 RT 3357-3359.)

After juror Debra P. left the courtroom, the trial court noted that Debra P. seemed a lot calmer and more comfortable than Lucille R. had, and Lucille R. "was in very dire straits." (27 RT 3360.) Defense counsel advised against questioning Debra P. further, and asked that she be told that she was entitled to

hold an honestly held belief. (27 RT 3361.) Juror Debra P. was brought in one last time:

> [The Court]: Ms. [Debra P.], you've indicated to me that you have strongly held - - a strongly held position, but you are capable of reaching a decision. ¶ You indicated earlier that you did not feel you were capable of deliberating with the other jurors. You do understand that it's your job to participate in discussion with the other jurors?
>
> [Juror Debra P.]: Yes.
>
> [The Court]: You feel capable of continuing to do that?
>
> [Juror Debra P.]: Yes.
>
> [The Court]: All right. It's perfectly acceptable for you to have formed conclusions and opinions; that's your job as a juror. But it's also your duty to discuss with the other jurors. ¶ Are you comfortable with that?
>
> [Juror Debra P.]: Yes.
>
> [The Court]: Are you comfortable with staying on the jury?
>
> [Juror Debra P.]: Yes.
>
> [The Court]: As comfortable as anyone can be in your position?
>
> [Juror Debra P.]: Yes. . . .

(27 RT 3362-3363.)

At this point, defense counsel moved for a mistrial on the basis that juror Lucille R. was improperly excused, and the jury was deadlocked. Defense counsel also said the questioning of juror Lucille R. was inadequate. (27 RT 3364.) The mistrial motion was denied. (27 RT 3365.) The court stated,

> [Lucille R.] was about to - - put in the vernacular - - "flip out" in the jury box, there's no question in my mind. She indicated she could not deliberate any further, that she could not reach a

> decision. That was the clear import of everything she said. ¶ She indicated she felt perhaps she'd made a wrong decision in the guilt phase, and that was the basis of her problem as well as the fact she felt pressure from the other jurors. ¶ She was obviously not going to continue to deliberate. We may reach a mistrial stage on the penalty phase. I don't think we have reached that stage yet. . . .

(27 RT 3365.)

The court informed the parties it intended to seat an alternate and to tell the jury nothing, except the standard instructions that one of their number had been replaced and they must begin deliberations anew. (27 RT 3367.) There was no objection, and defense counsel did not request any additional instructions.

The following day, before the jury came in, defense counsel argued the court did not conduct a sufficient hearing regarding juror Lucille R., and that she had been improperly dismissed. Defense counsel agreed Lucille R. was "noticeably upset," but believed it was because she was being coerced by the rest of the jurors. (27 RT 3370-3371.) Defense counsel argued the court's actions were coercive, by removing a minority juror who disagreed with the others about penalty because she believes she was incorrect in the guilt phase. (27 RT 3371-3372.) Defense counsel requested that the court excuse all the jurors because they were apparently deadlocked after what he called a day and a half of deliberations. He also asked they be excused because there was a great deal of pressure on the two jurors from the other ten. (27 RT 3372-3373.) Defense counsel requested a mistrial or, alternatively, that the jurors be questioned to determine whether they were deadlocked. (27 RT 3373-3375.)

The court disagreed, and clarified that the jury had only been out for one and a half hours, not one and a half days. (27 RT 3377.) The court stated it intended to read CALJIC Nos. 17.40 and 17.41, and defense counsel had no objection. (27 RT 3374.) The court reiterated her finding that one of the jurors

held strong beliefs that "would technically fall in the category of lingering doubt", but she was in significant, severe distress, and she was unable to continue to deliberate. (27 RT 3375.)

The prosecutor pointed out that there was no basis for defense counsel's belief that the count was 10 to 2. Rather, the information they had was that Lucille R. was unable to deliberate, and Debra P. was able to continue deliberating. (27 RT 3377-3378.) The court said she could have had all the jurors in and asked them whether there had been weapons held to anybody's throat, but no one volunteered that. The court stated, "I have no evidence that there was anything more than heated debate and deliberation, which is entirely proper. And it would be improper for me to inquire into its nature at this particular stage." (27 RT 3379.)

A. Thompson Has Waived Any Claim That The Trial Court Failed To Conduct A More Thorough Investigation; The Trial Court Conducted An Adequate Inquiry Into The Possibility Of Juror Misconduct

Thompson claims the trial court failed to conduct an adequate investigation into the possibility of juror misconduct. He claims the information received by jurors Debra P. and Lucille R. placed a duty on the court to determine whether their refusal to deliberate was a product of misconduct on the part of other jurors, who may have improperly led Lucille R. and Debra P. to believe their lingering doubt about Thompson's guilt was not an appropriate consideration at the penalty phase. To the extent Thompson claims the trial court should have questioned jurors other than Lucille R. and Debra P., he has forfeited this claim. In any event, the trial court conducted a detailed inquiry and the record amply supports its decision to dismiss juror Lucille R..

In *Ramirez*, the defendant argued the trial court had failed to conduct an adequate inquiry into the effect of the murder of a fellow juror (which was unrelated to the case) on the remaining jurors and their ability to deliberate. He also claimed the trial court failed to inquire about whether the jurors had been exposed to media coverage about the juror's death. This Court held the defendant had forfeited the claims by failing to request additional inquiry in the trial court. (*People v. Ramirez, supra*, 39 Cal.4th at pp. 460-461.)

The same is true here. Thompson claims, "Given the nature of the allegations by two jurors, the rest of the jury, or at least the foreman, should have been questioned with regard to whether anyone on the jury had failed to deliberate, i.e. whether anyone had refused or been unable, to listen to others or to share his or her own views." (AOB 318.) But defense counsel did not ask the trial court to inquire of the foreman or any of the other jurors about any juror's refusal to deliberate. As to those jurors, Thompson asked only for the court to inquire as to whether they were deadlocked. (27 RT 3374, 3381-3382.) Accordingly, to the extent he now claims the foreman or other jurors should have been questioned, his claim is waived.[54/]

Even if it is not waived, his claim fails on the merits. The trial court conducted a sufficient investigation by conducting a detailed inquiry of the two jurors who had indicated they were experiencing distress.

> The decision whether to investigate the possibility of juror bias, incompetence, or misconduct - - like the ultimate decision to retain or discharge a juror - - rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. ¶ As our cases make clear, a hearing is required only where the court possesses

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54. Thompson did ask for an opportunity to question juror Rodriguez and his request was denied. The court indicated the juror was in no physical or mental state to talk to anyone, and defense counsel agreed. (27 RT 3354, See 28 RT 3401, 3403.)

information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citations.]"

(*People v. Ray* (1996) 13 Cal.4th 313, 343-344.)

In *Ramirez, supra,* 39 Cal.4th at page 461, this Court held the trial court did not abuse its discretion in failing to conduct further inquiry, noting,

> "California courts have recognized the need to protect the sanctity of jury deliberations. [citations.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 475 [106 Cal.Rptr. 2d 313, 21 P.3d 1225].) One reason "is to 'assure[] the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.' [Citation.]" [Citation.]"

(*Ibid.*)

> Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations.

(*People v. Ramirez, supra,* 39 Cal.4th at p. 476.)

In *People v. Davis* (1995) 10 Cal.4th 463, during the defense case at the penalty trial, a juror had a chance contact with the murder victim's grandmother. The court separately asked the juror and the grandmother about the conversation and learned that the juror had expressed sympathy to the grandmother and asked how her daughter was doing, and that the grandmother had said the crime had been hard on her daughter. The juror informed the court there had been no discussion among the jurors about the matter, but that at least two other jurors were sitting on a bench "across the way" when the conversation occurred. The juror was excused upon defendant's request. On appeal, the defendant claimed the court conducted an inadequate inquiry before dismissing the juror. The Court rejected his claim. (*Id.* at p. 535.)

> [O]nce a court is put on notice of the possibility that improper or external influences are being brought to bear on a juror, it is the court's duty to make whatever inquiry is reasonably necessary to

> determine if the juror should be discharged and whether the impartiality of other jurors has been affected.

(*People v. Davis, supra*, 10 Cal.4th at p. 535, citing *People v. Ramirez* (1990) 50 Cal.3d 1158, 1175.) The trial court has discretion in this area because it is in the best position to observe the jury. (*Ramirez, supra,* 39 Cal.4th at p. 461, citing *People v. Ray, supra,* 13 Cal.4th at p. 343.) In *Davis,* the Court held the trial court had conducted a sufficient inquiry by questioning the juror and the grandmother. The Court said no further inquiry was necessary based on the defendant's speculation that some other juror might have been tainted by overhearing the conversation. Even though other jurors were across the way, there was no evidence they were seated within hearing distance and the juror indicated she had not discussed the matter with anyone else. (*Ramirez, supra,* 39 Cal.4th at p. 461; see also *People v. Beeler* (1995) 9 Cal.4th 953 [no duty to conduct a more detailed inquiry of jurors about perceived time pressure to reach a verdict].)

Here, the trial court extensively examined jurors Lucille R. and Debra P. about their ability to continue deliberating. The court noted for the record that juror Lucille R. was extremely distraught, and that she was about to "flip out" in the jury box. (27 RT 3365.) The trial court noted that Lucille R. was in "very dire straits." (27 RT 3360.) She was up and down in her seat half a dozen times, she was clearly and obviously in great distress, she was incapable of continuing to deliberate, and forcing her to do so would have been a cruel imposition. Based on those observations, the court concluded, "I think that, judged on her demeanor and her physical behavior in the courtroom, she was both physically and mentally incapable of continuing with deliberations as a trial juror, regardless of the reasons behind that." (27 RT 3356.) Defense counsel agreed with the court's assessment of Lucille R.'s state of mind. (27 RT 3354; see 28 RT 3401, 3403.) The trial court's inquiry and observations of

juror Lucille R. provided a sufficient basis for exercising her discretion to discharge Lucille R.. The court's decision not to investigate further was not an abuse of discretion.

B. The Trial Court Did Not Abuse Its Discretion In Discharging Juror Lucille R.

Nor did the trial court abuse its discretion when it dismissed juror Lucille R.. Penal Code section 1089 authorizes a trial court to dismiss a juror "at any time," whether before or after the final submission of the cause to the jury, if the juror dies or becomes ill or is found unable to perform his or her duty. A trial court's decision to discharge a juror will be upheld if there is substantial evidence supporting it. A juror's inability to perform as a juror must appear in the record as a "demonstrable reality." (*People v. Boyette* (2002) 29 Cal.4th 381, 462-463.)

In *Boyette*, a juror asked to be excused following the prosecutor's closing argument, during which the prosecutor reminded the jury that they had all agreed they could vote for death, and telling the jurors they could be replaced by alternates if they found the task was too much and they were unable to deliberate. The juror gave conflicting reasons for his request to be discharged, first stating he had already made up his mind, then claiming he could not make up his mind on either side. He also said, "I haven't made up my mind that either choice to me is not acceptable," and then said, "I can see at some level that logically I should be able to [weigh the mitigating and aggravating evidence], but the choices available to me at this point, I'm having [a] problem with, because I'm not - - I'm not clear either choice is appropriate." He said he would continue to deliberate if the judge wished him to, but expressed that it would be unfair for him to continue if "my fellow jurors seem bent on one way and I'm bent on another and then there would be no

conclusion because I already made up my mind, maybe?" The juror also said that he had reached a subjective sense of the defendant's past based on the evidence presented over the past several days, he had tied it to his own experiences, and he would have a difficult time being objective. The juror was dismissed without objection. (*People v. Boyette, supra*, 29 Cal.4th at pp. 461-462.)

This Court found no abuse of discretion. Noting a trial court's determination to discharge a juror will be upheld if there is substantial evidence supporting it, and that a juror's inability to perform as a juror must appear in the record as a "demonstrable reality," the court held that the juror had made it clear he could no longer be objective, and that the record showed to a demonstrable reality that the juror could not follow the trial court's instructions to keep an open mind. He was therefore properly discharged. (*People v. Boyette, supra*, 29 Cal.4th at pp. 462-463.)

Similarly, here, substantial evidence supported the trial court's determination that juror Lucille R. was unable to continue performing as a trial juror. The record showed a "demonstrable reality" that juror Lucille R.'s physical and mental state made it impossible for her to continue to deliberate. Juror Lucille R. said she was unable to make a decision either way and that she would get a doctor's note if the judge required her to continue deliberating. She was unable to stay in her seat and unwilling to ride the elevator with the other jurors. Her discomfort was so severe the court found it would be "cruel" to force her back into the jury room. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 298, upholding the trial court's denial of a motion to discharge a juror based on observations of the juror's demeanor.)

Thompson takes issue with the court's statement,

> Given the fact, quite frankly, that this jury has heard no evidence in mitigation, and really the only evidence in mitigation that's before them is the sympathy factor plus lingering doubt, which

> was not addressed by anyone due to the unusual nature of the penalty phase, I do have questions in my mind as to whether the two jurors in question were following either the court's instructions or whether they were totally honest with you in voir dire. But that is a side issue.

(27 RT 3375.) Thompson claims the statement indicates (1) the court believed the penalty jury did not understand that lingering doubt was a valid consideration, and (2) the court concluded that since Lucille R. did not know she could consider lingering doubt, the fact that she was considering lingering doubt indicated she had been dishonest during voir dire. (AOB 320.)

Thompson misconstrues the court's statement. The trial court's comments were based on the fact that Thompson had sat moot throughout the penalty phase, and in an act of silent protest did not present any evidence or argument. Thus, no mitigating evidence had been presented, and the concept of lingering doubt had not been argued to the jury or emphasized in any way. The court's comments indicate that under those circumstances, the court had questions whether the jurors' expressed concerns were *actually* based on a lingering doubt about Thompson's guilt, or whether they were based on an anti-death penalty bias that had not been revealed during voir dire.

Thompson's reliance on *Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, is misplaced. In *Sanders*, the trial court discharged a juror after learning the juror was the lone holdout for guilt. Reports of the other jurors indicated the holdout juror believed everything the defendant said, did not trust the police and believed the police had been badgering a key witness. The juror at issue said she felt deeply that she was fair and objective, that the other jurors had pressured her, and that she attempted to go through the witnesses one by one to point out areas of doubt. All parties agreed that the juror was not biased or prejudiced or refusing to follow instructions, and should not be removed on that basis. The juror was removed, however, when the trial court discovered she

had failed to disclose during voir dire that she lived in a neighborhood with gang activity and that her sons claimed gang affiliation. (*Id.* at pp. 946-947.)

The defendant's federal habeas petition was granted. The Ninth Circuit held the District Court properly concluded the petitioner's constitutional right to a unanimous jury was violated when the trial court dismissed the lone holdout juror after learning the juror was unpersuaded by the government's case. Specifically, the court concluded the record did not demonstrate the juror intentionally or unintentionally withheld information during voir dire, and the juror did not harbor bias or impermissible prejudice during the deliberation process. (*Sanders v. Lamarque, supra*, 357 F.3d at pp. 948-949.) The court distinguished *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, in which the trial judge's decision to excuse a lone holdout juror for cause was upheld.

In *Perez*, after making clear that she had a reasonable doubt about the defendant's guilt and the other jurors had voted guilty, the lone dissenting juror said she did not want to continue deliberating. She said it was very stressful and the other jurors were yelling at her. The juror cried and said she was emotionally unable to continue with deliberations. The trial court noted she was an "emotional wreck." The Ninth Circuit denied the habeas petition. The court found that the judge's knowledge that the juror was the lone holdout for acquittal did not invalidate the court's decision to remove her from the panel. (*Perez v. Marshall, supra*, 119 F.3d at p. 1427.)

Sanders explained that in *Perez*, the court was forced to act due to the juror's emotional instability, and inability to continue performing the essential function of deliberation. Also in *Perez*, the trial court's decision to remove the juror was not based on the desire for a unanimous verdict. (*Sanders, supra*, 357 F.3d at p. 945.)

This case is much more like *Perez* than like *Sanders*. The trial court made factual findings, undisputed by defense counsel at trial, that juror Lucille

R.'s emotional state made it impossible for her to continue as a juror. Thus, her dismissal was proper.[55/]

C. Thompson Has Waived Any Claim That The Supplemental Instructions To The Jury, After The Alternate Was Seated, Were Inadequate; In Any Event, The Trial Court Properly Instructed The Jury

Thompson further claims the supplemental instructions given to the jury were inadequate because they failed to inform the jury that the concept of lingering doubt was an appropriate consideration at the penalty phase. While acknowledging the general rule that no instruction on lingering doubt is required, Thompson contends that in this case, the instruction was required once the trial court had notice from two jurors that they mistakenly believed their lingering doubt was not an appropriate factor to consider in their penalty decision. (AOB 331-342.) Thompson has waived this claim. In any event, no lingering doubt instruction was required; the instructions given sufficiently addressed the concept of lingering doubt; and any error was harmless.

Thompson has waived his claim of instructional error because he never asked the court for more specific or clarifying instructions on the propriety of considering lingering doubt at the penalty phase. Prior to the penalty phase, the trial court, the prosecutor and Thompson discussed the instructions the court intended to give at the penalty phase. There was no objection. (24 RT 3190.) When the court proposed seating an alternate, defense counsel asked the court to instruct the jury according to CALJIC No. 17.40, and did not object to the court's stated intent to instruct the jury according to CALJIC No. 17.41. (27

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55. Thompson's discussion, at AOB 326-327, of *People v. Bowers* (2001) 87 Cal.App.4th 722, and *People v. Cleveland, supra*, 25 Cal.4th at p. 484, which is intended to support his claim that juror Lucille R. was improperly discharged, better makes the point that the remaining jurors did not engage in misconduct or refuse to deliberate.

RT 3374.) As described below, the instructions given to the jury, both before deliberations began and after the alternate was seated, encompassed the concept of lingering doubt, and defense counsel did not request any additional instructions, or ask the court to elaborate on the instructions given. (27 RT 3374.) Accordingly, his claim is waived. (*People v. Lewis, supra*, 26 Cal.4th at p. 380.)

In any event, as Thompson acknowledges, he had no right to an instruction on lingering doubt. "[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown, supra*, 31 Cal.4th at p. 567, citing *People v. Slaughter, supra*, 27 Cal.4th at p. 1219.) The rule is the same under the state and federal Constitutions. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Lawley* (2002) 27 Cal.4th 102, 166.) Thus, the proposed instruction was unnecessary. (*Id.* at p. 166; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1187 ["Defendant clearly has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt."].)

Thompson claims that notwithstanding this general rule, the statements of jurors Debra P. and Lucille R. placed a duty on the court to specifically instruct the newly constituted jury on the concept of lingering doubt. Thompson is wrong. The concept of lingering doubt was sufficiently addressed by the instructions given to the jury.

Prior to the commencement of deliberations, the jury was instructed as follows:

> You are to be guided by the previous instructions given in the first phase of this case which are applicable and pertinent to the determination of penalty. However, you are to completely disregard any instructions given in the first phase having prohibited you from considering pity or sympathy for the defendant. ¶ In determining penalty, the jury shall take into

consideration pity and sympathy for the defendant. ¶ You must determine what the facts are from the evidence received during the entire trial, unless you are instructed otherwise. You must accept and follow the law that I shall state to you. ¶ . . . .

In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if they are applicable:

A, the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;

B, the presence or absence of criminal activity by the defendant other than the crime for which the defendant has been tried in the presnet proceedings, which involve the use or attempted use of force or violence, or the express or implied threat to use force or violence;

C, the presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings;

D, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

E, whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

F, whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

G, whether or not the defendant acted under extreme duress or under the substantial domination of another person;

H, whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to

conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

I, the age of the defendant at the time of the crime;

J, whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

K, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. . . .

(Emphasis added.)

This instruction sufficiently informed the jury of the appropriateness of considering lingering doubt in the penalty phased. In *People v. Hines* (1997) 15 Cal.4th 997, this Court held that a lingering doubt instruction was unnecessary, because the concept of lingering doubt was sufficiently encompassed in Penal Code section 190.3, factors (a) and (k). The trial court was under no duty to give a more specific instruction. Similarly, factors (a) and (k), as given here, provided sufficient instruction on the concept of lingering doubt, as defense counsel conceded in the trial court. (27 RT 3381.)

Additionally, after the alternate juror was seated, the court instructed the newly constituted jury as follows:

One of your number has been excused for cause and replaced by an alternate juror. ¶ The alternate juror was present during the presentation of all of the evidence, arguments of counsel, and reading of instructions during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point. ¶ For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial. ¶ Your function now is to determine, along with the other jurors, in the

> light of the prior verdict or verdicts, and findings, and the evidence and the law, what penalty should be imposed. ¶ Each of you who now compose the jury must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial. ¶ The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. ¶ Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts. ¶ The People and the defendant are entitled to the individual opinion of each juror. ¶ Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and the instructions with the other jurors. ¶ Do not hesitate to change an opinion if you're convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision. ¶ Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination.

(27 RT 3383-3385, emphasis added.)

In *People v. Cain* (1995) 10 Cal.4th 1, 66-67, the Court held there was no requirement that the penalty jury re-litigate the defendant's guilt, and thus no error in the instruction requiring the jury to accept the guilt verdicts. In reaching this decision, the Court noted that the challenged instruction did not purport to limit the jury's consideration of lingering doubt. The Court found that the concept of lingering doubt was implicit in other instructions. For example, the jury was instructed that the alternate juror was to participate fully in the deliberations, "including such review as may be necessary of the evidence presented in the guilt phase of the trial." This instruction, the Court found, made it clear the alternate juror was to play an equal role in assessing the evidence from the guilt phase for purposes of penalty. (*Id.* at p. 66.)

Here, too, the newly formed jury was told "Each of you who now compose the jury must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial." The concept of lingering doubt was implicit in the instructions given to the jury after the alternate was seated. There was no error.

Even if a lingering doubt instruction should have been given, Thompson suffered no prejudice from the lack of the instruction. As previously stated, CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) Juror Debra P. was specifically informed that it was "just fine" for her to have reached her own decision, and that if the jurors could not all agree, then "so be it." (27 RT 3358-3359.) Juror Debra P., who like Lucille R. had expressed feelings of lingering doubt, was not excused but returned to continue with deliberations, so that the jury was not led to believe, based on Lucille R.'s dismissal, that lingering doubt was an inappropriate consideration. Thompson's claim should be rejected.

XI.

THE TRIAL COURT PROPERLY DENIED THOMPSON'S MOTION FOR A NEW TRIAL

Thompson contends the trial court improperly denied his motion for a new trial based on juror misconduct and insufficient evidence. (AOB 346-356.) The motion was properly denied.

On October 11, 1996, Thompson filed a motion for a new trial pursuant to Penal Code section 1181, subdivisions (3), (4) and (7)[56], the Due Process

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56. Penal Code section 1181 states, in pertinent part,
When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . . (3) When the jury has separated

Clause of the United States Constitution, Fourteenth Amendment, and article 1, section 7 of the California Constitution. The motion included affidavits of jurors Lucille R. and Debra P., and claimed a new trial was warranted for the following reasons: (1) the jury was guilty of misconduct affecting and preventing their fair and due consideration of the case; (2) the verdict was decided by means other than a fair expression of opinion on the part of all the jurors; (3) the verdict was contrary to the law and the evidence presented; (4) the evidence was insufficient to sustain the verdict. (5 CT 1230-1255.) On appeal, Thompson challenges the court's denial of that motion on the basis of juror misconduct and insufficient evidence.

The determination of a new trial motion rests within the trial court's discretion, and the court must perform a three-step analysis in ruling on a motion for new trial based on allegations of juror misconduct. First, the trial court must determine whether the evidence submitted is admissible. Second, the trial court must determine whether the admissible evidence establishes misconduct. Third, the trial court must determine whether the misconduct is prejudicial. (*People v. Hord* (1993) 15 Cal.App.4th 711, 724; *People v. Perez* (1992) 4 Cal.App.4th 893, 906.) The first two prongs of that analysis are reviewed for abuse of discretion; where the trial court denies the new trial

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without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; (4) When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors . . . . (7) When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed . . . ."

motion after finding misconduct but no prejudice, the no-prejudice finding, as a mixed question of law and fact, is reviewed de novo by this Court. (*People v. Nesler* (1997) 16 Cal.4th 561, 581-582 & fn. 5; *People v. Ault* (2004) 33 Cal.4th 1250, 1255.)

When a verdict has been rendered, the defendant may also move for a new trial on the ground that the verdict is contrary to the law or evidence. (Pen. Code, § 1181, subd. (7).) When a trial court rules on a new trial motion after a jury verdict, it independently assesses the evidence supporting the verdict. (*People v. Lewis, supra*, 26 Cal.4th at p. 364; *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038.) A court may grant a new trial motion only if the defendant demonstrates the existence of reversible error. (*People v. Clair* (1992) 2 Cal.4th 629, 667.) A ruling on a motion for new trial rests so completely within the trial court's discretion that this Court will not disturb it on appeal absent "a manifest and unmistakable abuse of discretion." (*People v. Lewis, supra*, 26 Cal.4th at p. 364; *People v. Hayes* (1999) 21 Cal.4th 1211, 1260-1261.) In determining whether there has been an appropriate exercise of discretion, each case must be judged on its own factual background. (*People v. Turner, supra*, 8 Cal.4th at p. 212.)

> In passing upon a motion for a new trial the judge has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with a decision granting or denying such a motion unless there is a clear showing of an abuse of discretion.

(*People v. Robarge* (1953) 41 Cal.2d 628, 633.)

Thompson contends the record does not support the trial court's findings. Specifically, he claims the dismissal of juror Lucille R. was an abuse of discretion requiring reversal of the penalty judgment, the jurors' declarations demonstrated that other jurors had predetermined Thompson's guilt and failed to deliberate, the trial court ignored the objective evidence that juror Debra P. had been coerced, and the trial court abused its discretion in determining the

evidence was insufficient to support the verdict. (AOB 348-356.) The trial court's findings were amply supported by the record.

As to Thompson's claim that the discharge of juror Lucille R. was an abuse of discretion requiring reversal of the penalty judgment, the trial court initially ruled that pursuant to Evidence Code section 1150, the court would consider the statements and conduct of other jurors, as described in the affidavits of jurors Debra P. and Lucille R., to determine whether they objectively rose to the level of harassment, but that the questions of whether juror Lucille R. felt pressured, and whether that stress resulted in her decision to vote for guilt, were not proper considerations on the issue of misconduct. (28 RT 3466.) The trial court ruled that it was not an abuse of discretion to discharge juror Lucille R.; rather, it would have been an abuse of discretion and an abuse of juror Lucille R. to force her to continue with deliberations. The court ruled that juror Lucille R. had to be excused for good cause under Penal Code section 1089 because she was unable to perform her functions as a juror and continue to deliberate, and this was so even if her inability to function was the result of pressure from other jurors. The trial court ruled that Lucille R.'s dismissal was based on the fact that she was emotionally distraught, had not been able to sleep, and refused to deliberate further. (28 RT 3466.) As discussed extensively in Argument X, and incorporated by reference herein, those findings were supported by substantial evidence in the record.

Regarding the allegation that jurors other than Debra P. and Lucille R. had predetermined Thompson's guilt and failed to deliberate, the trial court found the statements to that effect in the affidavits of jurors Debra P. and Lucille R. were conclusory, were not supported by specific examples, and were refuted by other facts provided in the affidavits. Juror Lucille R.'s declaration stated that she was constantly asked to justify her position and she was asked to view a photograph. Juror Lucille R.'s declaration also indicated she

persuaded the jury to review the evidence and deliberate, and the deliberations ultimately lasted several days. Based on the declarations, the court concluded the evidence established there were extensive deliberations and no misconduct had occurred. The court stated that although the comments to juror Lucille R. may have been made in a heated and impolite fashion, they were not refusals to deliberate but invitations to juror Lucille R. to justify her position in a free and open exchange which is necessary during the deliberation process. The court stated that jurors are expected to be ready, willing and able to participate and defend their positions and engage in debate, and the system does not require a particular level of politeness in the debate. To find otherwise would cause a significant chilling effect on deliberations. The court ruled the comments did not amount to undue pressure or misconduct. (28 RT 3469.)

Substantial evidence in the record supported those findings. Both jurors' declarations did state that several jurors determined Thompson was guilty prior to deliberations, and refused to engage in any meaningful deliberation. (5 CT 1232, 1237.) However, their declarations also set forth facts demonstrating the jurors did deliberate, by repeatedly asking Lucille R. to justify and defend her position, and stating such things as, "His guilt is plain as day," "We need to leave," and "We're not going to keep coming back to go over the same things again." The declarations stated that Lucille R. was confronted with questions about how she could do what she was doing; how she could vote not guilty and still face the victim's mother in the courtroom; how she could know he was a killer and let him go free. She was also shown a photograph by the jury foreman who asked, "what makes you think he's not dead?" (5 CT 1233, 1237.) The trial court properly concluded this evidence demonstrated that the jurors who allegedly "pressured" Lucille R. actually were engaged in debate and deliberation and encouraged her to defend her views.

The trial court properly ruled that the statements and conduct of the other jurors, as described in the affidavits of jurors Lucille R. and Debra P., did not amount to a refusal to deliberate or consider the evidence, and did not constitute misconduct. In *People v. Bowers, supra*, 87 Cal.App.4th at page 722, a jury foreman reported to the trial court that one of the jurors – number 4 – was refusing to deliberate. The court questioned the jurors individually and was told by many that number 4 had "made his mind up from the beginning, refused to participate at certain times by staring out the window, and had not fully engaged in discussions nor responded to questions." The court dismissed number 4 for failing to "enter into meaningful deliberations."

The court of appeal reversed:

> It is not uncommon for a juror (or jurors) in a trial to come to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors. ¶ . . . Individuals acquire different methods of processing information and decisionmaking based on their background and experiences. It is unrealistic to expect each person or each jury to deliberate and come to a conclusion in the same fashion.
>
> It cannot be said a juror has refused to deliberate so long as a juror is willing and able to listen to the evidence presented in court, to consider the evidence and the judge's instructions, and to finally come to a conclusion and vote, which is precisely what Juror No. 4 did.

(*Id.* at pp. 734-735.)

Pursuant to *Bowers,* the conduct of the other jurors, as described by jurors Debra P. and Lucille R., cannot be considered a failure to deliberate. This Court has explained that "jurors can be expected to disagree, even vehemently, and attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255; see also *People v. Keenan* (1988) 46 Cal.3d 478, 451 [a juror's " particularly harsh and inappropriate" outburst against a holdout juror was simply "an

expression of frustration, temper, and strong conviction against the contrary views of another panelist"]; *People v. Orchard* (1971) 17 Cal.App.3d 568, 574 ["[j]urors may be expected to disagree during deliberations, even at times in heated fashion"].)

As to the claim that the trial court ignored the objective evidence that juror Debra P. had been coerced, the trial court found there was no objective evidence that the jury failed to consider the evidence or placed undue pressure on Debra P. to change her vote. The court stated that although juror Debra P. indicated that her health had suffered due to the stress of being a trial juror, she also told the court she could continue to deliberate. Debra P. made it clear to the court that she was a holdout juror, and the court reassured Debra P. that her position was legitimate. (28 RT 3474.)

The court's findings are supported by the record. Juror Debra P.'s affidavit indicated she agreed to continue to deliberate after she felt the judge would not excuse her. (5 RT 1239.) The record indicates that juror Debra P. informed the court she was able to make her own decision and was comfortable with it, and the trial court told her, "That's no problem. ¶ You are entitled to your own decision, providing that you also have engaged in the deliberative process with the other jurors." (27 RT 3358.) The court told Debra P., "So if you've reached a decision, that's just fine." (27 RT 3358.) When juror Debra P. told the court that if she had to go back in the jury room, they would not all agree, the court said, "So be it." (27 RT 3359.) Juror Debra P. said she was comfortable with her own decision. (27 RT 3358.)

The admissibility of evidence in this context is governed by Evidence Code section 1150, which states:

> (a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to

> show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. ¶ (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict.

The trial court acknowledged and followed the three step process for a motion for a new trial based on jury misconduct. (28 RT 3464.) As to the first prong, determining whether the evidence submitted is admissible, the trial court indicated that many of the statements contained in the affidavits were inadmissible under Evidence Code section 1150, or because they were hearsay or irrelevant. (28 RT 3464-3467.) The trial court referred in its ruling to the portions of the affidavits it determined were admissible, and ordered the remainder of the affidavits stricken. (28 RT 3467, 3474-3475.)

Debra P. also stated she was the only dissenting juror and she was afraid to continue to express her opinions with the other jurors so she agreed to render a verdict of death in order to end deliberations and be excused from further jury service. (28 RT 1240.) The trial court properly struck this portion of the affidavit as the very type of inquiry prohibited by Evidence Code section 1150. Evidence Code section 1150 permits evidence from jurors regarding "'overt acts' – that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration' [but jurors] may not testify to `the subjective reasoning processes of the individual juror . . . .' [Citation.]" (*In re Stankewitz, supra*, 40 Cal.3d at p. 398.)

Although not referenced by the trial court in its ruling, the instructions given to the newly constituted jury provide other objective evidence that there was no misconduct or coercion. After the alternate was seated, the jury was reminded:

> Each of you who now compose the jury must participate fully in the deliberations, including any review as may be necessary of

> the evidence presented in the guilt phase of the trial. ¶ The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. ¶ Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts. ¶ The People and the defendant are entitled to the individual opinion of each juror. ¶ Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and the instructions with the other jurors. ¶ Do not hesitate to change an opinion if you're convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision. ¶ Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination.

(27 RT 3383-3385.)

Finally, the trial court properly denied Thompson's motion for a new trial based on insufficient evidence to support the verdict. The trial courts findings relating to this issue were made simultaneously with its denial of Thompson's automatic motion to modify the verdict, and are discussed in Argument XII, which is incorporated herein by reference.

XII.

THE TRIAL COURT PROPERLY DENIED THOMPSON'S AUTOMATIC MOTION TO MODIFY THE SENTENCE

Thompson contends the trial court improperly denied his automatic motion to modify his sentence, in violation of his federal constitutional right to due process and a reliable sentence in a capital case. (AOB 357-374.) The motion was properly denied.

Penal Code section 190.4, subdivision (e), provides that in every case in which a jury returns a verdict of death, the defendant is deemed to apply for a modification of such verdict. The judge shall

> review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3[57], and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.

In *People v. Steele, supra,* 27 Cal.4th at page 1230, this Court explained the trial court's duty as follows:

> Section 190.4 provides for an automatic motion to modify the death verdict. In ruling on the motion, the trial court must independently reweigh the evidence of aggravating and

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57. Penal Code section 190.3 sets forth the aggravating and mitigating circumstances as follows: " . . . In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: ¶ (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1. ¶ (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. ¶ (c) The presence or absence of any prior felony conviction. ¶ (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. ¶ (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. ¶ (f) Whether or not the offense was committed under circumstance which the defendant reasonably believed to be a moral justification or extenuation for his conduct. ¶ (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person. ¶ (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication. ¶ (i) The age of the defendant at the time of the crime. ¶ (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. ¶ Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

> mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict. The court must state the reasons for its ruling on the record. On appeal, we independently review the trial court's ruling after reviewing the record, but we do not determine the penalty de novo.

(*People v. Steele, supra,* 27 Cal.4th at p. 1267.)

The trial court's ruling reveals that it relied upon the following factors in aggravation: factor (a), the circumstances of the crime and the existence of any special circumstances; factor (b), the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, and factor (c), the presence or absence of a prior felony conviction. The trial court considered and rejected the following factors in mitigation: factor (h), whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of the affects of intoxication, and (j), whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. The trial court relied on factor (k), any other circumstance which extenuates the gravity of the crime even though it is not an excuse for the crime.

Substantial evidence in the record supported each of the aggravating factors relied upon by the trial court. The evidence also supported the trial court's ultimate conclusion that the aggravating circumstances were so substantial in comparison with the mitigating circumstances that death was the appropriate punishment.

The trial court relied on three factors in aggravation; factors (a), (b) and (c).

Penal Code section 190.3, subdivision (a) provides that the circumstances of the crime, and the existence of any special circumstances, may

be considered as factors in aggravation or mitigation. As to this factor, the court found:

> With respect to the nature and circumstances of the offense, I do find that the first degree murder of Ronald Gitmed was intentional and it was committed in the course of a robbery, within the meaning of Penal Code section 211, in a remote area of Canyon Lake on or about August 27, 1991.
>
> I do further find that Ronald Gitmed was cold-bloodedly shot in the heart for the purpose of taking his belongings from his person at the time of the killing, and for the purpose of acquiring his remaining belongings, which the defendant knew to be in storage, as well as for the purpose of acquiring his vehicle following the shooting. The defendant was in fact a major beneficiary of the victim's murder since he acquired some of his property and his vehicle.
>
> I do find the defendant was present at the scene of the murder and that he was a major participant. He had recently been released from prison where he met his co-participant, Tony Mercurio. He apparently initiated the sequence of events, which led to the remote area of the lake where the killing occurred, by taking the victim from his cousin's house to Tony Mercurio's residence and then proceeding to the lake with Tony Mercurio and the victim, as well as possibly other people.
>
> Although, as I've indicated, the jury did find there was a reasonable doubt that the defendant personally fired the fatal shot, there is more than sufficient evidence to so believe that if he did not, both the defendant and Tony Mercurio were present at the scene and aided and abetted each other, possibly others, in killing the victim for purposes of acquiring all his worldly goods.
>
> In taking the victim to this remote location to accomplish this purpose, the defendant did demonstrate, it appears to the Court, a willful, deliberate and premeditated intent to kill Ronald Gitmed for his belongings, many of which were subsequently found in the possession of the defendant's relatives as well as of Tony Mercurio and his friends.

> The defendant showed no remorse; he burned the victim's car to avoid detection afterwards, and he made statements concerning a quote, "floater," unqote, who would not be making decisions for himself anymore. The victim, I found, was particularly vulnerable, being somewhat simple. He was unarmed and he was outnumbered . . .
>
> . . . .
>
> The impact of this offense on Ronald Gitmed's family was magnified because he was a simple young man with a nervous disorder arising to the level of a disability which the evidence showed qualified him for Social Security benefits. He was close to his family and somewhat more dependent on them than other young men of a similar age.

(28 RT 3491-3495.)

Substantial evidence supported the trial court's conclusion that Thompson acted as either the direct perpetrator, or an aider and abettor, to an intentional, cold-blooded killing for the purpose of committing a robbery and acquiring the victim's vehicle and other worldly possessions. The evidence supporting this factor in aggravation is set forth in detail in Argument IV. To summarize it here, Thompson convinced the victim to give him a ride to Temecula by offering to give him $1000, but instead took the victim to the home of Tony Mercurio, a recent parolee. (13 RT 1616-1621, 1699, 19 RT 2402.) Thompson and Mercurio took Gitmed to a remote portion of Canyon Lake, and Thompson brought a gun. (15 RT 1886-1891, 1957-1958.) Thompson held Gitmed at gunpoint and ordered him to take off his clothes and to empty his pockets. (15 RT 1893-1894, 1959.) Thompson took small personal items from Gitmed at the scene, which may have included a wallet or some change. (20 RT 2537.) Either Thompson or Mercurio shot Gitmed three times, and both left him to die at the water's edge. (12 RT 1533-1537.) Thompson stole Gitmed's car (15 RT 1900), spent the next day cleaning a gun and destroying items from inside the car (16 RT 2202-2203), arranged to sell

Gitmed's stereo (15 RT 2045-2046), concealed Gitmed's jacket and bags (14 RT 1800-1801), took furniture from Gitmed's storage unit and gave it to Mercurio (15 RT 1903-1904), burned Gitmed's car (15 RT 2044-2045), told Barbara Triplett and Danny Dalton about a person left floating in a lake (15 RT 2044, 17 RT 2282-2283), and told Tony Mercurio to get his girlfriend to say whatever she needed to say to make it look like she had never met Thompson (16 RT 2197.)[58]

Thompson argues the evidence did not support the trial court's statements that he was a major beneficiary of the crime, and that he knew before Gitmed was killed that Gitmed's belongings were in storage. (AOB 360-362.) In addition to the property Thompson took from Gitmed at the scene, Thompson took Gitmed's car, his car stereo, items of furniture from Gitmed's storage unit and Gitmed's jacket and bag. This evidence supports the conclusion that he was a major beneficiary of the crime even if he ultimately destroyed the car, and gifted items of value to Tony Mercurio. Moreover, the evidence reasonably supports the inference that Thompson learned that Gitmed had property in storage before killing Gitmed. Somehow, Thompson learned the location of the storage facility, the particular storage unit assigned to Gitmed, and Gitmed's personal access code. It was reasonable for the jury to conclude Thompson learned this information from Gitmed before he was killed. In any event, irrespective of when Thompson learned about the storage unit,

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58. Here again, Thompson mistakenly presumes that Mercurio's testimony and statements were, or should have been, entirely discounted because the jury did not conclude beyond a reasonable doubt that Thompson was the shooter. (AOB 365.) As discussed in Arguments IV and V, even if the jury disbelieved Mercurio's denial of his own involvement in the crimes, his statements and testimony nonetheless provided substantial evidence of Thompson's involvement in the crimes, especially when considered along with the other corroborating evidence.

Thompson was still a major beneficiary of the crime in part because he acquired Gitmed's belongings from his storage facility.

Thompson argues there was no evidentiary support for the trial court's conclusion that Thompson initiated the sequence of events which led to the remote area of the lake where the killing occurred, and that the trial court improperly relied upon that fact in concluding Thompson was a major participant in the crime. (AOB 362-364.) But the evidence established that Thompson convinced Gitmed to leave Michelle's house with him by promising Gitmed $1000 in exchange for a ride to Temecula. Once they left Michelle's house, however, Thompson instead took Gitmed to the home of his parolee friend Tony Mercurio, and from there the two took Gitmed to a secluded place where they ultimately killed him. Accordingly, substantial evidence supported the fact that Thompson initiated a sequence of events which led to the killing.

Thompson places too much weight on the trial court's comments that there were possibly other people present at the scene or involved in the crimes. First, there is some evidentiary support for those statements, as Marvin Avery was at Canyon Lake that night and heard shots and saw several people in the area. Second, to the extent the evidence is lacking as to the presence or involvement of other people, the trial court clearly did not make any factual finding on that issue, referring only to the possibility that other people were present or involved, a factor which was not pertinent to the court's assessment of Thompson's individual culpability for the crimes.

Thompson also claims the trial court's reliance on his lack of remorse as an aggravating factor violated his rights under the Eighth and Fourteenth Amendments of the federal constitution, as well as under state law, although he acknowledges that the trial court could have pointed out the lack of evidence of the mitigating factor of remorse. (AOB 367-369.) Substantial evidence was presented which affirmatively demonstrated Thompson's lack of remorse,

including the lengths he went to in order to destroy Gitmed's car and identifying property, the comments he made about a person floating in a lake, and his order to Tony Mercurio to get his girlfriend to go along with whatever they told her to go along with. This evidence was properly considered in the balance of aggravating and mitigating factors.

Thompson unpersuasively claims the trial court made a factual finding contrary to the jury's determination that Thompson was not the shooter, and that this finding was unconstitutional. (AOB 371-372.) The trial court did comment that she felt the jury's reasonable doubt as to whether Thompson was the actual shooter was contrary to the great weight of the evidence. (RT 3494.) Yet the trial court repeatedly made it clear the court's evaluation of the aggravating and mitigating factors was based on her consideration of Thompson's role as an aider and abettor to Mercurio. (28 RT 3491-3495.)

Penal Code section 190.3, subdivision (b), provides that the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence may be considered as a factor in aggravation or mitigation. As to factor (b), the court stated,

> With respect to past criminal activity following – excuse me, involving the use of force or violence, I do note, and this was extensively litigated at trial, that in 1977 in a remote area in Texas under somewhat similar circumstances the defendant killed Floyd Fox, who was an inebriated man, who had befriended the defendant and given him transportation on his way across the country. The defendant knifed Mr. Fox in the heart for purposes of acquiring his worldly possessions and his vehicle.

(28 RT 3491-3495.)

Substantial evidence established that Thompson killed Floyd Fox, whose body was found on September 22, 1976. Some time earlier that month, Fox had packed his Chevy truck with his belongings and moved to Texas. (26 RT 3274-3277.) Fox picked up Thompson, who was hitchhiking, and an argument

ensued over Fox's missing wallet. Thompson stabbed Fox to death, went through the victim's pockets, and then left Fox's body on the side of Interstate 10 and drove off in Fox's car. Thompson traveled through several states, using the victim's car and credit cards. (25 RT 3235-3250.)

Penal Code section 190.3, subdivision (c) provides that the presence or absence of any prior felony conviction may be considered as a factor in aggravation or mitigation. With respect to factor (c), the court found "[Thompson has] previously been convicted of Penal Code Section 12021, ex-felon with a gun, and of the prior murder in Texas." Substantial evidence supported those findings. (25 RT 3211-3212, 26 RT 3271.)

The court explained that although Thompson elected not to present any evidence in mitigation, she had considered every possible mitigating factor, and all possible mitigating evidence of which she was aware. The trial court considered and rejected factors (h) and (j) as potential factors in mitigation, and relied on factor (k) as a factor in mitigation. (28 RT 3491-3495.)

Factor (h) permits consideration of the possibility of intoxication as a factor in aggravation or mitigation. The trial court considered and rejected Thompson's possible intoxication as a mitigating factor. Although there was evidence Thompson may have used a line of methamphetamine at the Triplett's home before departing for Canyon Lake, the trial court noted there was no evidence that Thompson was intoxicated or that his judgment was impaired by the use of narcotics at the time of the crimes. (28 RT 3491-3495.)

Factor (j) permits consideration of whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. The trial court acknowledged that the jury's not true finding on the personal use enhancement indicated it had not found, beyond a reasonable doubt, that Thompson was the shooter. The trial court also acknowledged that based on its own consideration of the evidence, it could see

why there was a reasonable doubt as to the identity of the actual shooter, and further that "[i]n any event, we will probably never know who actually shot Mr. Gitmed." As to factor (j), the court stated, "Although I do feel the great weight of the evidence was to the contrary, I have considered the fact that the jury had a reasonable doubt that the defendant was the shooter, and I have evaluated and reviewed and considered the evidence in this light." (28 RT 3491-3495.)

Yet the court still found that there was more than sufficient evidence to conclude that even if Thompson did not fire the fatal shot, he and Tony Mercurio aided and abetted each other in killing the victim for the purpose of acquiring his worldly goods. The court concluded, "[I] cannot find at this point that [Thompson's] participation in the commission of this offense was minor in any way, and I do find that he did have a reckless disregard for human life in the commission of this offense." The court expressly found that Thompson was a major participant. (28 RT 3491-3495.) Those findings were supported by substantial evidence, as set forth extensively in Argument IV, and summarized in the analysis of the evidence supporting factor (a), above.

Factor (k) permits consideration of any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime. Pursuant to this factor, the trial court took into account that:

> Mr. Thompson has been a model defendant in my court, he has exhibited good behavior, he's exhibited great patience, given the length of time that this case has taken. He's behaved most of the time with dignity and decorum, and he has expressed thoughtfulness from time to time for the family of the victim during the trial.

(28 RT 3491-3495.)

Substantial evidence in the record supported the aggravating circumstances relied upon by the trial court, as well as the court's ultimate conclusion that death was the appropriate penalty. The trial court properly denied Thompson's automatic motion to modify the death judgment.

XIII.

THE DEATH PENALTY WAS PROPERLY IMPOSED AS IT IS NOT GROSSLY DISPROPORTIONATE TO THOMPSON'S CULPABILITY FOR THE MURDER OF RONALD GITMED

Thompson contends that under the Eighth Amendment to the United States Constitution, the death penalty is grossly disproportionate to his individual culpability for the death of Ronald Gitmed. (AOB 375-378.) Thompson is wrong.

Thompson provides the following reasons in support of his claim that the punishment of death is grossly disproportionate to his role in the crime: given the jury's finding that he was not the shooter, there is no way to know what his role was, if any, in Gitmed's death (AOB 375); the forensic evidence contradicted Mercurio's description of events (AOB 376); Mercurio's testimony was uncorroborated (AOB 376); there was no evidence, apart from Mercurio's testimony, that Thompson did or said anything to assist Mercurio in committing a robbery or a murder (AOB 376); there was no evidence of Thompson's mental state (AOB 376-377); a juror was improperly removed from the jury based on lingering doubt (AOB 377); and the jury that sentenced Thompson did not believe it could consider lingering doubt (AOB 377). Respondent has previously addressed each of these claims. They should all be rejected.

The Eighth Amendment does not require strict proportionality between crime and sentence. It forbids only sentences that are "grossly disproportionate" to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [111 S.Ct. 2680, 115 L.Ed.2d 836].) Thompson acted either as the direct perpetrator of a premeditated or felony murder, or aided and abetted Mercurio in the commission of a premeditated or felony murder. If it was the latter, he acted with an intent to kill or as a major participant with reckless indifference

to human life. The jury found this to be true and the evidence supported the jury's findings. The death penalty is not grossly disproportionate to Thompson's personal culpability for the death of Ronald Gitmed.

Even assuming arguendo Thompson was not the actual shooter, he was properly sentenced to die for his role as an accomplice. In *Enmund v. Florida* (1982) 458 U.S. 782, 797-801 [102 S.Ct. 3368, 73 L.Ed.2d 1140], the United States Supreme Court found the defendant's death sentence violated the Eighth Amendment where he had been convicted of felony murder but did not actually kill, attempt to kill or intend to kill. There, the only evidence of the defendant's individual participation was that he was in a car by the side of the road where the robberies occurred, possibly waiting to help the robbers get away. (*Enmund v. Florida, supra*, 458 U.S. at p. 786.) The Court stated, "It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." (*Ibid.*) In *Tison v. Arizona* (1987) 481 U.S. 137, 150-157 [107 S.Ct. 1676, 95 L.Ed.2d 127], the United States Supreme Court clarified that a person who did not actually kill, attempt to kill or intend to kill could only be sentenced to death upon a showing of major participation in the underlying felony along with a reckless indifference to human life.

In the instant case, Thompson's jury specifically found he committed murder, and found true the robbery-murder special circumstance. They were instructed that if Thompson's conviction relied upon the theory that he was an aider and abettor, the special circumstance required proof that Thompson intended to kill the victim or acted as a major participant with reckless disregard for human life. Accordingly, the jury necessarily found the *Enmund* factors were present if they convicted Thompson on the theory that he was an accomplice. As described in Argument IV, substantial evidence supported that

theory. Accordingly, the death penalty was not grossly disproportionate to Thompson's personal culpability in the murder of Ronald Gitmed.

XIV.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THOMPSON

Thompson claims the California capital sentencing scheme violates the Sixth, Eighth and Fourteenth Amendments of the United States Constitution because it does not require a jury to render written findings as to the aggravating circumstances it has relied upon, nor does it require any reasons for the choice of sentence; the death penalty statute is allegedly overbroad and encompasses nearly every type of first degree murder; the statute prohibits proportionality review; the statute places limitations on the jury's consideration of factors (d) and (g); and the death penalty itself allegedly constitutes cruel and unusual punishment. (AOB 379-384.) This Court has repeatedly considered and rejected each of these claims. It should do so again here.

A. The United States Constitution Does Not Require Written Findings Regarding The Aggravating Factors Relied Upon By The Jury, Nor Does It Require The Jury To State Reasons For Its Sentencing Choice

This Court has held, and should continue to hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Young, supra*, 34 Cal.4th at p. 1233; *People v. Maury, supra,* 30 Cal.4th at p. 440; *People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Welch, supra*, 20 Cal.4th at p. 772; *People v. Ochoa, supra*, 19 Cal.4th at p. 479; *People v. Frye, supra*, 18 Cal.4th at p. 1029.) The above decisions are consistent with the United States Supreme Court's pronouncement that the

federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi, supra*, 494 U.S. at pp. 746, 750, citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].)

Thompson argues that since state law requires the sentencer in a non-capital case to state reasons for the sentence choice on the record (Pen. Code, § 1170, subd. (c)), the failure to so require in a capital case violates the Fourteenth Amendment. (AOB 379.) Thompson's argument fails. The California death penalty scheme expressly requires the sentencing court, in any case where a jury has returned a judgment of death, to reweigh the evidence and evaluate the aggravating and mitigating facts to determine whether the sentence is properly set at death or should be reduced to life without the possibility of parole. (Pen. Code, § 190.4, subd. (e).) Thompson's claim must be rejected.

B. California's Special Circumstances Are Not Overbroad; And Preclusion Of Intercase Proportionality Review Does Not Violate The United States Constitution

Thompson contends that virtually any defendant accused of murder may be prosecuted under the California death penalty statute, because the special circumstances are so broadly defined. This, he claims, invites arbitrary and capricious imposition of the ultimate punishment in violation of the Eighth and Fourteenth Amendments. (AOB 380-381.) Not so. This Court has repeatedly rejected the claim that the sentencing factors in Penal Code section 190.3 fail to adequately channel or limit the sentencer's discretion in choosing to impose death over life without the possibility of parole. (*People v. Stanley, supra*, 39 Cal.4th at p. 913; *People v. Hawkins* (1995) 10 Cal.4th 920, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82.)

Thompson further claims the preclusion of intercase proportionality review violates the principle that the state's death penalty scheme must comport

with evolving standards of decency. (AOB 381.) Thompson's argument is not well taken, as this Court has repeatedly rejected identical contentions based on United States Supreme Court precedent.

Intercase proportionality review is not constitutionally required in California (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it. (*People v. Morrison, supra*, 34 Cal.4th at p. 730; *People v. Welch, supra*, 20 Cal.4th at p. 772; *People v. Majors, supra*, 18 Cal.4th at p. 432; *People v. Millwee, supra*, 18 Cal.4th at p. 168; *People v. Mayfield* (1997) 14 Cal.4th 668, 812.)

C. The Adjectives "Extreme" And "Substantial" In Factors (D) And (G) Do Not Place Unconstitutional Limitations On The Jury's Ability To Consider Mitigating Evidence

Thompson claims the terms "extreme" and "substantial" in factors (d) and (g) placed an impermissible barrier to the sentencer's consideration of all mitigating evidence, in violation of his rights under the United States constitution. (AOB 381-383.) Thompson is wrong. This Court has previously determined those words are neither unconstitutionally vague, nor do they improperly limit consideration of mitigating evidence.

Factor (d) provides the penalty jury must consider "[w]hether or not the offense was committed while the defendant was under the influence of **extreme** mental or emotional disturbance." (Pen. Code, § 190.3, subd (d), emphasis added.) Factor (g) then provides the jury must consider "[w]hether or not the defendant acted under **extreme** duress or under **substantial** domination of another person." (Pen. Code, § 190.3, subd. (g), emphasis added.)

It is well established that use of the adjectives "extreme" and "substantial" to describe potential mitigating circumstances in factors (d) and (g) is constitutional and does not create an impermissible barrier to the jury's

consideration of mitigating evidence. (E.g., *People v. Weaver, supra,* 26 Cal.4th at p. 992; *People v. Ochoa* (2001) 26 Cal.4th 398, 462; *People v. Lewis, supra,* 26 Cal.4th at p. 395; *People v. Riel* (2000) 22 Cal.4th 1153, 1225; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054-1055; *People v. Davenport* (1995) 11 Cal.4th 1171, 1230; see also, *People v. Visciotti* (1992) 2 Cal.4th 1, 73-75 [instruction that speaks to "extreme" duress is not constitutionally vague].

This is especially so because "Catchall" factor (k), which allows for consideration of other mitigating evidence, then provides the means whereby mitigating evidence such as non-extreme mental or emotional conditions may be considered. (*People v. Welch, supra,* 20 Cal.4th at pp. 768-769; *People v. Davenport, supra,* 11 Cal.4th at p. 1230.)

In the present case, Thompson once again provides no reason for reconsidering this issue and his contention of error should be summarily denied.[59/]

D. The Death Penalty Is Not Cruel And Unusual Punishment

For the reasons explained throughout Respondent's Brief, death is the appropriate punishment for Thompson's role in the killing of Ronald Gitmed. (See *Enmund v. Florida, supra,* 458 U.S. at pp. 797-801; Argument XIII.)

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59. Respondent disputes Thompson's contention that there was any factual support whatsoever for the theory that he was under the influence of (less than extreme) mental or emotional disturbance by virtue of the fact that he was arguing with Gitmed and his voice was getting louder just before he fired the shots. (AOB 382.) The undisputed evidence established the "argument" involved Thompson's unprovoked demand for Gitmed's clothing and other property, and Gitmed's initial refusal. Nor was there any evidence whatsoever that Thompson acted under (less than extreme) duress or (less than substantial) domination of Mercurio. (AOB 382.) Again, however, if the jury did believe there was factual support for either of those mitigating factors, it was instructed to consider them under factor (k).

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 25, 2006.

Respectfully submitted,

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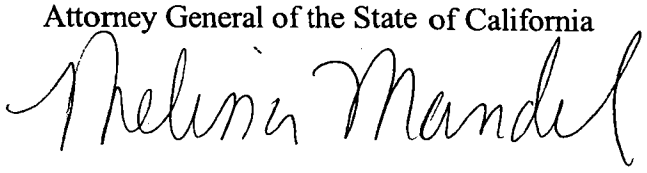
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 70,268 words.

Dated: October 25, 2006.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. James Alvin Thompson** No.: **S056891**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 110 West "A" Street, Suite 1100, San Diego, California 92101.

On October 27, 2006, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 27, 2006, at San Diego, California.

R. Tolentino
Declarant

R Tolentino
Signature