IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **KENNETH RAY BIVERT,** Defendant and Appellant.

CAPITAL CASE

Monterey County Superior Court No. SS991410
The Honorable Wendy Clark Duffy, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

GLENN R. PRUDEN
Supervising Deputy Attorney General

ALICE B. LUSTRE
Deputy Attorney General
State Bar No. 241994

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1167
Fax: (415) 703-1234
Email: Alice.Lustre@doj.ca.gov

Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF APPEALABILITY	1
INTRODUCTION	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
A. Assault on Rick Dixon	3
B. Murder Of Leonard Swartz	5
C. Penalty Phase	11
ARGUMENT	14
I. APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHERE THE TRIAL COURT DENIED HIS MOTION TO HAVE SEPARATE JURIES FOR THE GUILT AND PENALTY PHASES OF THE TRIAL	14
II. THE TRIAL COURT CORRECTLY GRANTED THE STATE'S CHALLENGE FOR CAUSE AS TO PROSPECTIVE JUROR NO. 3, WHERE HER ANSWERS REFLECTED AN INABILITY TO FOLLOW THE LAW	16
III. THE TRIAL COURT DID NOT ERR IN DENYING A CHALLENGE FOR CAUSE AGAINST JUROR NO. 8 WHERE HE REPEATEDLY AND CLEARLY STATED THAT, DESPITE HIS PERSONAL FEELINGS IN FAVOR OF THE DEATH PENALTY, HE WOULD SET THOSE ASIDE AND FOLLOW THE LAW	20

TABLE OF CONTENTS (continued)

		Page
IV.	**LIMITED EVIDENCE OF THESE BELIEFS TO BE ADMITTED APPELLANT'S WHITE SUPREMACIST BELIEFS WERE RELEVANT TO ESTABLISHING HIS MOTIVE IN THE MURDER, THEREFORE THE TRIAL COURT DID NOT ERR IN ALLOWING**	27
V.	**THE TRIAL COURT'S INSTRUCTION REGARDING IN-CUSTODY INFORMANTS (CALJIC NO. 3.20) WAS A CORRECT STATEMENT OF THE LAW AS DEFINED IN PENAL CODE SECTION 1127(A)**	30
VI.	**THE SUPREME COURT'S HOLDING IN *ROPER V. SIMMONS* (2005) 543 U.S. 551 [125 S.CT. 1183, 161 L.ED.2D 1], DOES NOT PROHIBIT THE USE OF PRIOR MURDER CONVICTIONS, COMMITTED WHEN APPELLANT WAS A JUVENILE, AS AN AGGRAVATING CIRCUMSTANCE TO RENDER APPELLANT DEATH ELIGIBLE FOR A MURDER COMMITTED WHILE HE WAS AN ADULT**	33
VII.	**CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL**	37
	A. Penal Code Section 190.2 Is Not Impermissibly Broad	37
	B. Penal Code Section 190.3(a) Does Not Allow For The Arbitrary And Capricious Imposition Of The Death Penalty	38
	C. California's Death Penalty Provides Appropriate Safeguards To Avoid Arbitrary And Capricious Sentencing	38

TABLE OF CONTENTS (continued)

	Page
D. California's Death Penalty Statute Does Not Violate The Equal Protection Clause	38
E. California's Use Of The Death Penalty Does Not Violate The Eighth Amendment	39
F. Cumulative Error	39
CONCLUSION	40

TABLE OF AUTHORITIES

Page

Cases

Dawson v. Delaware
(1992) 503 U.S. 159 — 28, 29

England v. State
(Fla. 2006) 940 So.2d 389 — 35

Gryger v. Burke
(1948) 334 U.S. 728 — 34

Melton v. State
(Fla. 2006) 949 So.2d 994 — 35

People v. Demetrulias
(2006) 39 Cal.4th 1 — 37-39

People v. Bradford
(1997) 15 Cal.4th 1229 — 14

People v. Castillo
(1997) 16 Cal.4th 1009 — 31

People v. Catlin
(2001) 26 Cal.4th 81 — 15

People v. Cleveland
(2004) 32 Cal.4th 704 — 16

People v. Coleman
(1988) 96 Cal.3d 749 — 20

People v. Cox
(1991) 53 Cal.3d 618 — 26

People v. DePriest
(2007) 42 Cal.4th 1 — 16

TABLE OF AUTHORITIES (continued)

	Page
People v. Earp (1999) 20 Cal.4th 826	14
People v. Griffin (2004) 33 Cal.4th 536	16
People v. Harris (2005) 37 Cal.4th 310	38, 39
People v. Helm (1907) 152 Cal. 532	27
People v. Hillhouse (2002) 27 Cal.4th 469	25, 27
People v. Kraft (2000) 23 Cal.4th 978	14
People v. Ledesma (2006) 39 Cal.4th 641	16
People v. Lucas (1995) 12 Cal.4th 415	14
People v. Mendoza (1998) 18 Cal.4th 1114	31
People v. Mendoza (2000) 24 Cal.4th 130	14
People v. Mickey (1992) 54 Cal.3d 612	26
People v. Nicolaus (1991) 54 Cal.3d 551	14, 15
People v. Prince (2007) 40 Cal.4th 1179	14

TABLE OF AUTHORITIES

	Page
Cases	
Dawson v. Delaware (1992) 503 U.S. 159	28, 29
England v. State (Fla. 2006) 940 So.2d 389	35
Gryger v. Burke (1948) 334 U.S. 728	34
Melton v. State (Fla. 2006) 949 So.2d 994	35
People v. Demetrulias (2006) 39 Cal.4th 1	37-39
People v. Bradford (1997) 15 Cal.4th 1229	14
People v. Castillo (1997) 16 Cal.4th 1009	31
People v. Catlin (2001) 26 Cal.4th 81	15
People v. Cleveland (2004) 32 Cal.4th 704	16
People v. Coleman (1988) 96 Cal.3d 749	20
People v. Cox (1991) 53 Cal.3d 618	26
People v. DePriest (2007) 42 Cal.4th 1	16

TABLE OF AUTHORITIES (continued)

	Page
Constitutional Provisions	
California Constitution	
Article I, § 28(g)	34
Statutes	
Penal Code	
§ 190.2	37
§ 190.2, subd. (a)(2)	2
§ 190.2, subd. (a)(15)	2
§ 190.3, subd. (a)	38
§ 190.4	15
§ 667, subd. (d)(3)(b)	34
§ 1127, subd. (a)	31, 32
§ 1249, subd. (a)	1
§ 4500	3
§ 12022, subd. (b)	2
§ 12022.7, subd. (a)	3
Tennessee Code Annotated	
§ 34-13-204(i)(2)	36
§ 37-1-134(a)(1)	36
Other Authorities	
California Jury Instructions	
No. 3.20	30, 31

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **KENNETH RAY BIVERT,** Defendant and Appellant.	**CAPITAL CASE** S099414

STATEMENT OF APPEALABILITY

This appeal is an automatic appeal following a judgment of death pursuant to Penal Code section 1249, subdivision (a).

INTRODUCTION

Appellant, Kenneth Ray Bivert,[1/] was convicted in 1988 of three murders which took place in two separate instances, in Yolo County, California. Appellant, who was a juvenile when these murders were committed, was sentenced to a term of 52 years 8 months to life in the state prison.

In November 1996, appellant was incarcerated at Salinas Valley State Prison in Monterey, California. While there, he and fellow inmate, Steve Petty, attacked a third inmate, Rick Dixon, stabbing him multiple times in the chest. Dixon survived the attack, and appellant was sent to administrative segregation.

In February 1997, following his return to the general population, appellant attacked Leonard Swartz, an inmate convicted of child molestation. Using a homemade shank, appellant cut Swartz's throat. Swartz ultimately died as a result of the wounds.

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1. For purposes of this brief, appellant will be referred to either as "appellant" or "Bivert."

Appellant proceeded to trial for both the November 1996 and February 1997 incidents. Following convictions for first degree murder and assault with a deadly weapon, the jury returned verdicts of guilty as to the special circumstances of lying in wait and prior conviction for first degree murder. (Pen. Code, § 190.2, subd. (a)(2) and (15)). The jury also found that appellant personally used a shank as a deadly weapon in the commission of the murder and that he was serving time as a life prisoner when he attacked Dixon. The jury failed to find that appellant personally inflicted serious bodily injury on Dixon. During the penalty phase, the prosecution introduced evidence of the facts underlying appellant's three prior murder convictions along with evidence of some additional misconduct that occurred while appellant was in prison. Appellant instructed his counsel to present no evidence in mitigation. The jury returned a verdict of death for the murder of Leonard Swartz.

STATEMENT OF THE CASE

Appellant was indicted on June 30, 1999, for the deliberate and premeditated murder of Leonard Swartz. (1 CT 194-195.) The indictment alleged the special circumstance that the murder was committed while appellant was lying in wait (Pen. Code, § 190.2, subd. (a)(15), and three special circumstances of murder with a prior conviction for murder.[2/] (Pen. Code, § 190.2, subd. (a)(2). The indictment also alleged that, in the commission of the murder, appellant personally used a shank as a deadly weapon (Pen. Code, § 12022, subd. (b).

Count two of the indictment alleged that appellant, who was a life prisoner, while acting with malice aforethought, assaulted Rick Dixon with a deadly weapon and by means of force likely to produce great bodily injury. (Pen.

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2. This was later reduced to one special circumstance of prior murder. (2 CT 524-525, 563.)

Code, § 4500.) The indictment also alleged that, in commission of the assault, appellant personally inflicted great bodily harm on Dixon. (Pen. Code, § 12022.7, subd. (a).) (1 CT 195-196.)

The trial court granted appellant's motion to bifurcate the trial on the issue of whether appellant was a life prisoner at the time of the assault on Rick Dixon. (3 CT 741.) Following the presentation of evidence at the guilt phase, the jury returned verdicts of guilty as to the first degree murder of Leonard Swartz and assault with a deadly weapon on Rick Dixon. The jury also found as true the allegations that appellant committed the murder while lying in wait and that he personally used a deadly weapon. (3 CT 843, 845.) The jury failed to reach a verdict on the allegation that appellant personally inflicted great bodily injury on Dixon, and that count was dismissed. (3 CT 843, 846.)

Following further presentation of evidence, the jury found the special circumstance that appellant had previously been convicted of first degree murder. They also found that appellant was a life prisoner at the time of the assault on Dixon. (3 CT 899-900.)

STATEMENT OF FACTS

A. Assault on Rick Dixon

Inmate Rick Dixon, was incarcerated at Salinas Valley State Prison. Both Dixon and appellant were housed in Building B2. In November 1996, appellant approached Dixon to "deal with," or stab, another inmate in order for Dixon to show that he was a part of the group of "woods," or White inmates at the facility. (47 RT 9221-9227, 9254.) The inmate in question was a purported child molester. (47 RT 9227.) Due to his pending parole release date, Dixon declined, despite appellant's threat that something would happen to him, Dixon, if he did not participate. (47 RT 9227, 9254-9255.)

On November 23, 1996, Dixon returned to his building from a period in the yard. At the same time, Officers Gonzales and Griewank went outside the building to conduct contraband searches of inmates returning from other areas of the building. (47 RT 9030, 9032, 9235.) Dixon went to a urinal in the day room and, as he was walking away, he was grabbed from behind by Steve Petty who placed a shoestring around his neck, using it to pull him backwards.[3/] Appellant then approached Dixon stabbing him several times in the chest with a prison-made shank. (47 RT 9117, 9235-9237, 9264-9265.) Dixon suffered seven stab wounds to his chest and sides, although he was able to walk out of the building following the attack. (47 RT 9211, 9214-9215, 9237.)

As Dixon left the building, Officers Gonzales and Griewank saw that he was bleeding from the chest. (47 RT 9031,-9032, 9239.) Griewank sounded an alarm, and the officers then entered the building ordering the inmates inside to assume a prone position on the ground. A search of the inmates turned up no one in possession of a weapon, but a shank was found inside the first tier section C shower. (47 RT 9031-9032, 9052-9053.) Appellant and Petty were identified as the two inmates closest to the shower at the time. (47 RT 9068-9069, 9104-9106, 9206.) Appellant was observed to have red lines and indentations on the back and side areas of his hands. (47 RT 9107.) Dixon identified appellant and Petty from a line-up as the inmates who attacked him. (47 RT 9245-9246, 9288-9289; 54 RT 10,618-10,619.) At that time Dixon asserted that the motive for the stabbing was due to his former cell mate's failure to pay a drug debt owed to inmates of other races, a matter that Dixon had apparently failed to "deal with" prior to his cell mate leaving the yard. (47 TR 9247-9250.) Dixon did not relate the information regarding the demand to

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3. There was some conflict in the testimony regarding whether it was Petty or appellant who grabbed Dixon from behind. Dixon testified that it was Petty, while Inmate D testified that it was appellant, and that Petty did the stabbing. (47 RT 9281-9282, 9285; 50 RT 9854-9855.).

stab another inmate who was a child molester until December 1998. (47 RT 9251-9252, 9271-9272.)

B. Murder Of Leonard Swartz

Following the assault on Dixon, appellant was transferred to the administrative segregation unit for a period of time. (50 RT 9839-9840.) In February 1997, however, he was returned to B complex. (50 RT 9840.) When approached by Inmate D[4] about his early return, appellant told him that he would not be around long because he was going to kill a child molester in building B1. Appellant said that this was something he had to do as the inmate needed to be "gutted." (50 RT 9841, 9854.)

Inmates at Salinas Valley State Prison maintained segregated living areas and did not generally mix with inmates outside those areas. Appellant, who appeared to be in charge of the white inmates at Salinas, would tell young white inmates "what the White race is all about and what they should do." He complained that the White race had "gotten soft" over the years as evidenced by the failure to deal with people like Swartz, who would have been "dealt with" in the past. He also stated that one of his missions was to clean up all the "trash" and "scum" that white people "let slide." (50 RT 9866-9867, 9870; 51 RT 10,019.)

On February 5, 1997, appellant told Inmate C that Leonard Swartz was a child molester who did not belong on the face of the earth. Appellant also stated that it was the responsibility of the White race to take care of such people, and that one of his personal missions was to take care of "scum" like Swartz. (50 RT 9863-9868.) Appellant told Inmate C that he intended to deal with Swartz that day. Despite these statements, Inmate C did not warn Swartz

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4. For security purposes, several inmate witnesses were referred to by designated letters -- A, B, C, D. . ., etc.. The jurors were provided with a sealed exhibit during deliberations identifying those inmates by name.

or alert any corrections officers, saying that he did not believe appellant truly intended to attack Swartz. (50 RT 9865, 9869, 9874.)

Shortly before the murder, Inmate C left the building. As he left, he saw appellant sweeping in the day room. This was not appellant's assigned duty. (50 RT 9872-9874.) After Inmate C left, two Black inmates approached Officer Carbajal, one of the floor officers on duty, asking for some paperwork. Officer Carbajal went to a nearby office to obtain the paperwork. Officer Morgan, the other floor officer stepped out of the building to speak with Sergeant Mitchell. (47 RT 9293-9294; 48 RT 9460.) Officer Brockett was in the upstairs control room. At about the same time that Officer Carbajal was in the office, her attention was drawn to a Black inmate in an upper tier who was signaling her to open his cell. (47 RT 9315-9317; 48 RT 9423.)

Inmate F, who was in the day room talking to another inmate, heard sounds of punching and slapping. He turned and saw appellant slapping or hitting[5/] another inmate. Although Inmate F did not observe a weapon being used, he saw the other inmate walking toward the officers' podium bleeding and holding his neck. Inmate F also testified that he saw appellant walk off and throw "something." (50 RT 9901-9906, 9923.)

Inmate G also witnessed the fight. Inmate G was on his way to the shower in Section A when he saw two inmates fighting. He observed one of the inmates, with blood coming from his neck, run toward the officers' podium. He also stated that he heard thumps and when he looked at the inmates he saw appellant make two stabbing motions. (51 RT 10,023.) Inmate G stated that, although he saw appellant with something in his hand, he could not identify what it was. Later Inmate G saw a weapon on the floor. (51 RT 10,024,

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5. There was a slight variance between Inmate F's testimony at trial where he described only "slapping," and his grand jury testimony that described "slapping" with one hand and "hitting" with the other. (51 RT 10,005.)

10,034, 10,04-10,042.) While lying on the floor following the stabbing, Inmate G saw a blue shirt with blood on it lying next to him. He also noted that appellant was wearing a blue shirt that was too small for him. Inmate G did not recall whether appellant was wearing a shirt during the fight. (51 RT 10,025-10,027, 10,038-10,039.)

Inmate A, who was a friend of Swartz, testified that, at around 11:20 a.m., he was playing dominoes with Swartz when a call for a custody count occurred. Swartz left the table. Shortly thereafter, Inmate A heard a noise and saw appellant behind Swartz with his hands around Swartz's throat. When appellant released him, Swartz was bleeding from the throat. Inmate A then saw appellant walk toward a stairwell. He also believed that appellant dropped a weapon. (51 RT 10,055-10,059, 10,065.) Inmate A saw appellant remove his shirt, although he did not see what appellant did with it. Appellant then walked to some tables in section A. He was shaking a bit. (51 RT 10,058-10,061, 10,068, 10,071-10,072.)

When Officer Carbajal returned to the day room, she saw Leonard Swartz coming toward her. Swartz was bleeding and holding his hands around his throat. Carbajal triggered the alarm, ordered all inmates to the floor, helped Swartz down to the floor, and called for medical help. (47 RT 9297-9299.) Officer Morgan and Sergeant Mitchell reentered the building, saw Swartz bleeding on the floor, and ordered the inmates to a prone position. The investigation was turned over to officers with the Investigative Services Unit who arrived on the scene shortly thereafter. (48 RT 9438-9441, 9461-9462.)

Swartz was placed on a Stokes litter for transport to the medical facilities. He was taken to the prison infirmary and then to the prison's emergency room. Swartz was subsequently transferred to the emergency room at Natividad Medical Center. (47 RT 9299-9300; 48 RT 9486-9487; 49 RT 9705-9708.) On examination by medical personnel, it was determined that Swartz's carotid

artery had been partially severed and the muscles in his neck had been cut. Swartz lost a large amount of blood which resulted in a series of strokes. As a result of his injuries, Swartz died two weeks later, on February 22, 1997. (50 RT 9820, 9838.)

The investigation revealed that appellant was among those inmates on the A side of the day room at the time of the stabbing. A shank was found on the floor of the day room by Officer Holland. (48 RT 9529-9530.) The shank was tested for fingerprints, but none were found. (49 RT 9643-9644.) Random inmates were selected and subjected to a Hemastix presumptive test for the presence of blood. Appellant was included in the random sample. His test strip was positive for blood. (49 RT 5634-5638; 53 RT 10,431.) Officer Cariaga, who performed the test, noted that appellant's hands were shaking, his chest was quivering, and he was sweating. Appellant claimed that he was shaking due to being cold, but had no answer when asked why he was sweating. The temperature in the day room was normal at the time and no other inmates appeared to be shaking. (49 RT 9639-9637, 9700-9701.)

Appellant's blue jeans, belt, and shoes were seized for testing, along with a blue, prison-issued shirt that was found on a stairwell handrail. (49 RT 9445-9447, 9664-9665, 9670-9671.) It was determined that appellant's shoes did not match footprints found at the scene. (49 RT 9647.) Blood found on the shank blade, handle, and the rear of appellant's pants did match the blood of the victim, Leonard Swartz. (53 RT 10,408-10,410, 10413-10,419; 54 RT 10,703-10,704.) DNA obtained from the front of appellant's pants was found to have a mixture of appellant's and Swartz's DNA. (54 RT 10,705-10,710; 55 RT 10,883-10,887.)

Following the stabbing, prison authorities began reviewing appellant's mail. As a part of that process, they intercepted a letter from appellant to Christian

Banscombe, another inmate.[6] (53 RT 10,470-10,472.) In that letter, appellant asked, "How can a man call himself a peckerwood and still live on the yard with scrap?" Peckerwood was later explained by a prison officer to be a term identifying a White supremacist in the prison system. (53 RT 10,478, 10,481.) Appellant also told Branscombe that investigators had taken blood samples from him but denied that he was the one who had stabbed Swartz. (53 RT 10,476.)

In the period following the attack on Swartz, appellant made several statements to other inmates. In May, 1997, while sharing a cell with Inmate J, appellant told J that he and Steve Petty had attacked another inmate in November 1996. Appellant stated that Petty put a garotte around the inmate's neck, while appellant stabbed the inmate six to eight times. (52 RT 10,207-10,209, 10,220.) According to Inmate J, appellant stated that he wanted to kill the inmate because of rumors that the victim had previously shared a cell with a black inmate. Appellant also told J that, while in "the hole" for that stabbing, he had created a mental list of inmates to target and that the top of his list was an inmate in building B1 who was a child molester. Appellant said that he made a knife to kill the inmate by sharpening a flat piece of metal. (52 RT 10,210-10,214.) According to appellant, he had waited in the day room with the knife in his pocket until the inmate walked by when he struck the inmate in the neck. Appellant stated that he knew cutting the carotid artery would decrease the chances of survival. (52 RT 10,214-10,215, 10,244, 10,342-10,344.)

Appellant acknowledged that he had attempted to clean his hands following the attack, but that the investigating officers found blood on them. As for blood

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6. The letter was sent in another envelope addressed to Mary Ellen Mercer, Branscombe's grandmother, to circumvent the prison restrictions against inmates communicating with one another. (53 RT 10,471-10,472, 10481-10,482.)

on his shoes, appellant told Inmate J that he could simply claim that the victim bumped into him. (52 RT 10,216.) According to Inmate J, appellant stated that his goal was to end up at Pelican Bay State Prison with bragging rights and to be with "the brothers." (52 Rt 10,218-10,219.)

While incarcerated at Pelican Bay, appellant was in the same yard with Inmate R for several months. (52 RT 10,260-10,261.) During the period when appellant was indicted, he spoke to Inmate R. Appellant told R that he had stabbed one inmate who survived the attack and that he was upset that the victim survived. Appellant claimed to have gotten away with that attack. (52 RT 10,262.) Inmate R said that appellant believed the first inmate to be a sex offender. Appellant told Inmate R that the second victim was a child molester. (52 RT 10,262, 10,269.) According to Inmate R, it was not unusual for inmates to brag about themselves in order to look like "a big man." (52 RT 10,262-10,263.)

Inmate P, who was also housed with appellant at Pelican Bay, related appellant's statements that he had stabbed a victim while another inmate held him. According to appellant, that victim survived. (52 RT 10,277.) Inmate P did not recall the reason for the stabbing, other than that the victim was on a "hit list" and that appellant wanted to kill someone in order to be sent to Pelican Bay. Appellant also told Inmate P that he knew human anatomy and knew where to stab someone in order to kill him. (52 RT 10,278, 10,302.) Appellant told Inmate P that he was targeting "child molesters, blacks, and 'rats,'" and that he believed the gene pool should be cleansed of defective persons. (52 RT 10,279-10,280, 10,285.)

Appellant told Inmate P about a second stabbing he committed in which the victim was a child molester. Although appellant could not recall whether he stabbed that inmate in the neck, he told Inmate P that the victim had staggered to the officers' podium and bled to death. Appellant also stated that he

removed his shirt, which had gotten blood on it, and put on a shirt belonging to another inmate. He also admitted getting blood on his hands that had been detected with some type of test. (52 RT 10,280-10,282, 10,303.) According to appellant, he planned to tell authorities that the blood got on him when the victim bumped into him and appellant pushed the victim off. (52 RT 10,281.)

C. Penalty Phase

During the penalty phase, the prosecution introduced evidence regarding appellant's three prior murder convictions. On September 5, 1987, appellant and Inmate T, a friend, planned to spend the night at Portugese Bend, an area on the river near Woodland and Knights Landing in Yolo County. The two were dropped off by Adam Hennessy, who was to return the next day to pick them up. (64 RT 12,625-12,626, 12,634-12,637.) While there, appellant and Inmate T ran into David Garske and some friends. Appellant showed Garske a shotgun that he had. (64 RT 12,629-12,630.) The shotgun was inoperable due to sand inside it. Garske cleaned the gun, loaded it, and was then able to fire a round. (64 RT 12,630.) Inmate T had a .22-caliber weapon with him. (64 RT 12,633.)

A man, later identified as Steve Patton, was fishing nearby. Appellant stated that he was going to take Patton's truck and use it to rob a bank. He stated further that, if Patton would not give him the truck, appellant would shoot him. (64 RT 12,630, 12,664.) Following these statements, Garske and his friends left. As they were leaving, Garske observed appellant and Inmate T walking toward Patton. (64 RT 12,630-12,632.)

Appellant and Inmate T approached Patton and began speaking with him, even sharing a beer. (64 RT 12,632, 12,650-12,651.) While they were talking, appellant shot Patton in the back of the head, killing him. Inmate T and appellant then threw Patton's body and belongings in the river. (64 RT 12,651-12,652; 65 RT 12,821-12,822.) The two then drove around in Patton's truck

until they ran it into a ditch, at which point they drove the truck into the slough to get rid of it. (64 RT 12,652-12,654.)

The next day, when Hennessy returned to pick up appellant and Inmate T, appellant told him that the two of them had shot a fisherman in the head, killing him. (64 RT 12,637-12,639.) Appellant stated that he shot the fisherman while the man was talking to Inmate T. According to appellant, the shotgun did not discharge the first time, so he pulled the trigger a second time. (64 RT 12,641-12,642.) He also told Hennessy about dumping the body and the truck, even taking him to a gate on the levee where appellant and Inmate T had rammed the truck before driving it into the water. (64 RT 12,638-12,640.)

A few days later, appellant and Inmate T met at a school bus stop. Appellant had two guns with him, a .38-caliber handgun and a .44-caliber Magnum. The two planned to skip school to go target shooting. Appellant spoke of robbing a bank and, when Inmate T stated that he was leaving, appellant threatened to kill him. (64 RT 12,657-12,658.)

The two went to a nearby slough where they saw Raymond and Dawn Rogers fishing. Appellant told Inmate T that he wanted to take the couple's car for use in a bank robbery and threatened T if T did not participate in shooting Mr. and Mrs. Rogers. (64 RT 12,658-12,659; 65 RT 12,816-12,818.)

Appellant and Inmate T approached the couple and began speaking to them. Appellant then pulled his gun, shooting Dawn Rogers in the back three times. Both men then began shooting toward Mr. Rogers, striking him in the head and killing him. Dawn Rogers was still alive and screaming. Appellant shot her in the head, blowing off the entire top portion of her head. Appellant and Inmate T then pushed the bodies and their belongings into the slough. (64 RT 12,660-12,665; 65 RT 12,816-12,819.)

Appellant was convicted of the three murders and sentenced to 52 years eight months to life. In September 1995, while serving his sentence, appellant

was involved in a fight in the administrative segregation yard. The fight began when two inmates attacked to other inmates on the yard. The yard gun officer ordered all inmates to lie face down on the ground. Despite this order, other inmates, including appellant, joined in the fight. Appellant did not stop until the officer fired a third rubber bullet from his weapon. (64 RT 12,612-12,614, 12,626-12,627.) In January 1997,[7] while in the administrative segregation yard at Salinas Valley State Prison, appellant assaulted another inmate with his fists. Despite orders to cease and the firing of rubber bullets, appellant did not immediately stop the assault but was instead joined by Steve Petty. It was not until a second round was fired that the fight stopped. (64 RT 12,620-12,624.)

Although appellant's counsel conducted cross-examination of the prosecution witnesses, appellant chose to present no affirmative case in mitigation. (62 RT 12,236-12,243.)

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7. This incident occurred while appellant was on administrative segregation following the attack on Dixon.

ARGUMENT

I.

APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED WHERE THE TRIAL COURT DENIED HIS MOTION TO HAVE SEPARATE JURIES FOR THE GUILT AND PENALTY PHASES OF THE TRIAL

Prior to trial, appellant sought leave of the court to empanel separate juries for the guilt and penalty phases of his trial. (3CT 612-616; 29 RT 5626-5633; 64 RT 1260.) Relying on this Court's holding in *People v. Nicolaus* (1991) 54 Cal.3d 551, the trial court denied the motion. (31 RT 6003-6004.) A trial court's decision to deny a defense request to impanel a separate jury for the penalty phase is reviewed for an abuse of discretion. (*People v. Kraft* (2000) 23 Cal.4th 978, 1069; *People v. Lucas* (1995) 12 Cal.4th 415, 482-483.)

This Court has repeatedly held that Penal Code section 190.4 expresses a long-standing legislative preference for a single jury in the absence of circumstances constituting good cause. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1281; *People v. Yeoman* (2003) 31 Cal.4th 93; *People v. Mendoza* (2000) 24 Cal.4th 130; *People v. Earp* (1999) 20 Cal.4th 826; *People v. Rowland* (1992) 4 Cal.4th 238.) Good cause "must be based on facts that appear "'in the record as a demonstrable reality,'" showing the jury's "'inability to perform'" its function." (*Prince, supra,* 40 Cal.4th at p. 1281 (quoting *People v. Earp, supra,* 20 Cal.4th at p. 891; *People v. Bradford* (1997) 15 Cal.4th 1229, 1354 [and cases cited therein].)

In this case, appellant's sole justification in support of separate juries is that he was "prevented" from fully exploring the possible impact his prior murder convictions might have upon jurors if a penalty phase was held, while the prosecution was free to voir dire on the impact that the victim's status as a child molester might have. This desire to avoid tainting the jury with knowledge of prior misconduct is the exact reasoning rejected by this Court in *Nicolaus*,

noting that there were neutral ways in which to phrase questions to get at possible bias resulting from prior murders, and that such tactical decisions are a routine part of defense strategy. (*Nicolaus*, *supra*, 54 Cal.3d, at pp. 571-574. See also *Yeoman, supra,* 31 Cal.4th at pp. 119-120; *People v. Catlin,* (2001) 26 Cal.4th 81, 114-115; *Rowland, supra,* 4 Cal.4th at p. 268.

As this Court suggested in *Nicolaus*, appellant did, in fact, inquire of prospective jurors regarding the potential impact a prior murder conviction might have upon their decision to impose a particular sentence. Counsel routinely advised individual and small groups of prospective jurors of the existence of various special circumstances, including murder for financial gain, racially motivated crimes, and prior murder convictions, and inquired whether the mere existence of such a circumstance would cause them to automatically vote for the death penalty. (36 RT 7072, 7139-7140, 7146-7147; 37 RT 7251, 7273-7274; 38 RT 7492; 39 RT 7681; 40 RT 7898; 41 RT 8079; 43 RT 8480; 44 RT 8676.) The trial court did nothing to restrict counsels' questions in this regard.

Although counsel was required to make a strategic decision regarding the nature and extent of their voir dire, as set forth above, this is *de rigueur* for defense counsel in any case, particularly where their client has a prior criminal history. Moreover, counsel did avail themselves of the course suggested in *Nicolaus* by conducting a more general inquiry into the area. While it is true that nothing in Penal Code section 190.4 or the cases decided by this Court would prohibit the impanelment of a second jury if the parties so agreed, on the record in this case, and in light of this Court's well-settled precedent, the decision of the trial court to deny appellant's motion cannot be considered an abuse of discretion. This claim is without merit.

II.

THE TRIAL COURT CORRECTLY GRANTED THE STATE'S CHALLENGE FOR CAUSE AS TO PROSPECTIVE JUROR NO. 3, WHERE HER ANSWERS REFLECTED AN INABILITY TO FOLLOW THE LAW

The trial court excused Juror No. 3 for cause, finding that, "because of her views as she stated that she would be prevented or substantially impaired from being neutral." (36 RT 7090.) Appellant challenges this finding claiming that, although some of Juror No. 3's answers to questions were equivocal, her responses did not show that she would not consider all relevant evidence and possible sentences. (Brief, p. 73.)

As an initial matter, respondent notes, and appellant concedes, that he failed to object to the trial court's ruling at the time it was made. Appellant asserts that his refusal to stipulate to the state's challenge prior to questioning constitutes a sufficient objection. Although this Court has held that a failure to object will not constitute a waiver of review, such a failure, even when it includes a refusal to stipulate, "does suggest counsel concurred in the assessment that the juror was excusable." (*People v. Schmeck* (2005) 37 Cal.4th 240, 262 [quoting *People v. Cleveland* (2004) 32 Cal.4th 704, 734].) In any event, even if counsel had lodged a contemporaneous objection, this claim is without merit.

A trial court's determination that a juror's views on capital punishment would substantially impair his or her ability to serve is entitled to substantial deference on appeal. (*People v. DePriest* (2007) 42 Cal.4th 1, 20-21; *People v. Ledesma* (2006) 39 Cal.4th 641, 675; *People v. Griffin* (2004) 33 Cal.4th 536, 558-59.) "Indeed, where answers given on voir dire are equivocal or conflicting, the trial court's assessment of the person's state of mind is generally binding on appeal." (*Ibid.*, see also *Uttecht v. Brown* (2007) __ U.S. __ [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014] [noting critical importance of trial court's

ability to assess demeanor, tone, and credibility firsthand].)

Beginning with her responses to the written juror questionnaire, Juror No. 3 gave inconsistent responses regarding her attitudes toward the death penalty. For example, although she indicated in question 69 that she supported the death penalty, as part of that response she indicated that it "could be a little scary" for her. (4 CT 1085.) To question 75, which asked in parts A and B whether she could, in the appropriate case, impose either life without parole or death, she responded in the negative to both options. (4 CT 1086-1087.) She responded that she would hold the prosecution to a higher burden of proof and that she felt that the death penalty was used too often. (4 CT 1087.) She also stated that she agreed with the statement: "If the murder victim was a child molester, that fact alone would prevent me from voting for the death penalty." (4 CT 1089.)

During voir dire, Juror No. 3 gave the following responses to various questions:

BY THE COURT

Q: What category would you put yourself in as to your views on the death penalty?

A: Uh, three.

Q: Category number three?

A: Yes.

Q: What you mean by that is, tell me if I've got this right or not, you accept the notion or the theory of the death penalty, but you feel that you personally could not ever vote to impose the death penalty in any case?

A: Right. I wouldn't want to feel guilty.

(36 RT 7049.)

BY THE COURT

Q: Let's assume, just for the purposes of argument, that you were convinced beyond a reasonable doubt that the murder had been proved.

A: Um-mm.

Q: However, you knew also that the victim had a conviction for child molestation.

Would that fact that he was – he, the victim – was a child molester, do you think affect your ability to vote for a verdict of guilty if the case had been proved to you?

A: I don't know. I don't know. I'll be honest with you, I don't know.

Q: You think it might be a problem?

A: Might be, yeah. Big problem.

Q: Then the same question would be posed if the case were to reach a penalty phase.

Again, assuming that the defendant were convicted of first degree murder with special circumstances, then you would be in a position of weighing that aggravating evidence and that mitigating evidence and choosing the appropriate penalty. And how do you feel the status of the victim might come into play then?

A: Uh.

Q: In other words, would it be your feeling that the death penalty would not be appropriate for someone who had taken the life of a child molester?

A: Probably. Probably.

Q: All right.

(36 RT 7088-89.) At that point, the court asked counsel if they wished to stipulate to Juror No. 3 being excused. Counsel for appellant simply submitted the matter to the court, but counsel for the state asked the following questions:

BY MR. BRANNON

Q: Ma'am, on question 79 of the questionnaire, the question reads: "If the murder victim was a child molester, that fact alone would prevent me from voting for the death penalty." You checked "agree."

Was that an accurate answer?

A: You know, I'm kind of -- maybe a not sure would have been good there. I really can't answer that question. Honestly, I can't.

Q: A minute ago I think you used the word "probably"?

A: You know, kind of between. You know, I'm running that line there. I don't know.

Q: We want you to be honest, and there's no right or wrong answer. Doesn't mean you're saying something that isn't right here.

A: Right.

Q: Different people are suited to sit on different trials.

A: Correct.

Q: You checked "agree" and you said "child molesters are monsters in many ways"?

A: Yes. Yes.

Q: Do you think that?

A: I think about it and I stand behind what I said and what I wrote, period.

(36 RT 7089-90.) Following these questions, the court and counsel determined that Juror No. 3 had identified herself as a Category 3 person – one who personally could not ever vote to impose the death penalty – and the court excused her for cause, finding that her views would substantially impair her in her role as a juror. (36 RT 7090.)

Based upon the above answers, and granting the trial court the appropriate deference based upon its ability to observe the juror in question, the record amply supports the court's decision to dismiss Juror No. 3 for cause. In light of the record, and considering appellant's failure to object, this claim is without merit.

III.

THE TRIAL COURT DID NOT ERR IN DENYING A CHALLENGE FOR CAUSE AGAINST JUROR NO. 8 WHERE HE REPEATEDLY AND CLEARLY STATED THAT, DESPITE HIS PERSONAL FEELINGS IN FAVOR OF THE DEATH PENALTY, HE WOULD SET THOSE ASIDE AND FOLLOW THE LAW

During voir dire appellant moved to excuse Juror No. 8 for cause based upon his strong, personal support for the death penalty. (36 RT 7012-7014, 7164.) In denying that motion the court held:

> Although I acknowledge that -- no, I won't use the word equivocal. It's very clear that juror number 8 personally strongly supports the death penalty, but he also was very clear in stating that despite his personal opinion, he would follow the law in the case and he placed himself in category four. He never placed himself in category two. In other words, he never said that he would vote for the death penalty in all circumstances. There was a concern as to the prior murder and his statement regarding person's [sic] convicted of murder. However, that was asked of him and he stated that he would follow the law. Essentially, no matter what the special circumstance was, he would follow the law. So I am going to deny the motion as to juror number 8.

(36 RT 7164.)

As noted in Section II, *supra*, great deference is accorded to a trial court's findings regarding a juror's ability to set aside personal beliefs and follow the law. Moreover, the record amply supports the court's findings regarding Juror No. 8's position. While it is certainly clear, as appellant points out and as the trial court acknowledged, that Juror No. 8 had strong personal opinions regarding the death penalty, such beliefs alone did not render him incapable of sitting as a juror,[8/] nor would they *per se* deny appellant a fair trial. *People v. Coleman* (1988) 96 Cal.3d 749, 765 (applying *Witt* test to defense challenges for cause).

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8. In fact, Juror No. 8, was excused by appellant through the use of a peremptory challenge. The impact of that action will be discussed *infra*.

During voir dire, Juror No. 8 was questioned extensively, by both the court and counsel for appellant, regarding his ability to follow the law in light of his strong feelings favoring the death penalty. As set forth below, Juror No. 8 consistently maintained that he would not allow his personal feelings to interfere in his deliberations:

BY THE COURT

Q: Sir, I just wanted to go back to your views on the death penalty because in one place it looked as if it was your feeling that you would always impose the death penalty because you had indicated that murderers should never have the opportunity to kill again. But then in another place -- you've indicated that you're a category four. In another place, you said you would not automatically vote for either life sentence or death sentence. That you would weigh the evidence and consider all of the evidence before you made that choice. So just getting down to that last answer, if I could. Assuming that the defendant were found guilty of murder, then would you be able to consider which penalty to impose or would you always impose the death penalty?

BY PROSPECTIVE JUROR 8:

A: I think I can clarify that by telling you that I understand the legal concept and how the death penalty should be imposed. It just -- I just don't happen to personally agree with the way it works. But if I were on this case and I'm sitting in judgment here, I will follow the directions of the Court on how to impose a penalty as determined by law.

Q: All right.

THE COURT: Counsel, did either of you want to ask the juror any follow-up questions?

MR. BRANNON: No.

THE COURT: You didn't want to ask questions?

MR. WEST: Yes.

BY MR. WEST:

Q: Let me ask you this, juror number 8.

You realize the Court has told you about there are special circumstances. That's what makes this case a potential death penalty case. You understand that?

BY PROSPECTIVE JUROR 8:

A: Yes, sir, I do.

Q: There are several kinds of special circumstances. She told you about one of them. Lying in wait. There are several others. One of those being killing someone, murdering someone for financial gain. There is another one that's for like poisoning someone to murder them. There is another one -- and the reason I'm asking you about this one is because of your statement "murderers should never have another opportunity to kill again." There is a special circumstance that says essentially that they previously have been convicted of a murder. Would that, by itself, just that by itself?

A: Would you rephrase that last part of it, please?

Q: Yes. In other words, there are several categories I just told you about?

A: That's right. The last one you said?

Q: The last one was the one where it says, if the defendant had been convicted previously of a murder in the first or second degree, okay?

A: Okay.

Q: Based on your statement and in your questionnaire, if that were true, would you automatically just say that's it, that's the death penalty?

A: No, I wouldn't. But my -- I would wonder why that person had the opportunity. Again, it's my personal belief, but I'm not going to let my personal judgment interfere with me following the letter of the law. Okay?

Q: I see.

A: I will follow the directions given me by the Court, even if I don't personally agree with them.

Q: And your personal belief, though, as you stated is true?

A: Yes. I was stating my personal opinion on this.

Q: Right. Okay. If the judge were to tell you that you have to consider everything before you make that decision, you'd do that?

A: Yes, sir, I would. I would follow the judge's directions.

Q: Despite your own personal belief otherwise?

A: Correct.

(36 RT 7091-7094.) Then again, Juror No. 8 responded as follows:

BY MR. WEST

Q: Juror number 8, have you disagreed or agreed with anything I said so far?

BY PROSPECTIVE JUROR 8:

A: It sounds like you were phrasing your question a little bit differently in their situation than previously. I think you understood what I would do under the similar circumstances based upon our previous private session, and I haven't changed my opinion at all. So my answer remains the same.

Q: You would still listen to all the evidence?

A: I would follow the directions given to me by the Court. And even if I had a personal disagreement with the policy, I would put that aside and weigh the evidence and follow the instructions I was given.

Q: Okay. Now, I certainly respect that. As the judge might and Mr. Brannon has said and I believe, no case is in a vacuum. You can't just say what you'd do. I appreciate that because no person can say, as I believe another juror has said, I can't tell you how I'm going to react to that tomorrow or two days or two weeks down the road. It's obviously going to depend on what I hear. That's not really what we're asking you. We're asking you if those personal views would interfere with you to the extent that you don't think that Mr. Bivert would be able to get a fair trial from a person such as yourself, juror number 8?

A: From myself, no. For myself, it would not interfere with my ability to give him a fair and impartial judgment.

(36 RT 7147-7148.) These statements unequivocally demonstrate Juror No. 8's conviction that he could, and would, set aside his personal feelings and follow the law.

Appellant places some emphasis on Juror No. 8's statement that he would not be comfortable with someone like himself on the jury if he were appellant. While it is true that Juror No. 8 made this statement, he went on, under additional voir dire, to explain the statement, making it clear that he would still apply the law regardless of his personal feelings:

BY MR. WEST

Q: If you were Mr. Bivert, would you feel comfortable having a juror like yourself being on the jury?

A: No, I wouldn't.

Q: So you wouldn't be comfortable with yourself?

A: No. No. I wouldn't want -- If I were a person like Mr. Bivert and if he is found guilty --

Q: Um-mm.

A: -- of this crime beyond all reasonable doubt and all the evidence is such that the instructions are that this is a death penalty case and I would be responsible for making a decision in that matter, if all the evidence points to him, he knows I'm going to vote for the death penalty. Or at least he should based upon what he heard me say in this court today.

Q: One of the things I want to make sure -- the other jurors I think hit upon it -- is that in fairness, they don't have to prove, as I think juror number 4 had said, absolute or beyond all doubt or anything like that. The standard is beyond a reasonable doubt. But when you say when all the evidence points to Mr. Bivert, what do you mean?

A: I mean just basically what I've been told. The case has to be weighed. He has to be found guilty beyond any reasonable doubt in the, what is it, the trial phase.

THE COURT: Let me stop you for a minute. I think it may be difficult for you to -- maybe it's being unfair to ask you to lay it all out. Let me lay it out.

PROSPECTIVE JUROR 8: Okay.

THE COURT: Let's assume, for purposes of this questioning, that after the guilt phase evidence is over, that the jury reaches the verdict of guilty as to first degree murder. And that further, the jury finds that special circumstance to be true. That would then propel the jury into the next phase. The penalty phase. It's at that phase that the jury would be required to balance the aggravating factors and the evidence of aggravating factors, bad information, and the mitigating factors, or good information, about the defendant. To go through a weighing process and balancing process and consider the circumstances of the offense, and to, after considering all of those factors, make a decision as to what the penalty should be.

So the question really comes down to, if you reach that point, just getting to the penalty phase, you would have already made a finding of guilty beyond a reasonable doubt. You already would have made a finding of special circumstances. The question of the penalty would then be, when you reach that phase, are you saying then that you would automatically --

PROSPECTIVE JUROR 8: No. I guess I misunderstood counsel's question. I thought he was telling me I got to a point where everything was set in motion. That there was two options there, but and I could -- I and another 11 jurors have the option to determine whether or not he gets either the death penalty or life without the possibility of parole, life in prison without possibility of parole. Since he already knows that I am strongly in favor of the death penalty, doesn't mean I would automatic go for it. But since he knows that, he wouldn't want to take a chance on me being on this jury. At least I hope he wouldn't.

THE COURT: Now I understand your answer. Thank you. That's a very difficult question to ask someone to put themselves in the minds of another person, which is close to impossible. I appreciate your explanation, sir. Thank you.

(36 RT 7149-7151.) Considering the follow-up questions, Juror No. 8's statements indicate only that, all other things being equal, he would not choose someone who favored the death penalty as a juror were he sitting at the defense table. While this might be a perfectly sound choice, and a good basis for a peremptory challenge, it is very different from requiring a finding that the juror is ineligible to sit. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 488 [upholding trial court's denial of challenge for cause to juror who stated that he

had preconceived determination of guilt based on pretrial publicity, but stated further that he could be fairly impartial based upon the evidence and instructions].) As this Court has stated:

> Indeed, a juror like this one, who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so.

(*Ibid.*)

When reviewing a decision to grant or deny a challenge for cause, this Court must consider the voir dire as a whole, rather than as individual and isolated answers to specific questions. (*People v. Cox* (1991) 53 Cal.3d 618, 647-48 [noting that defendant based his objections "on excerpted portions of the voir dire, isolating particular answers out of context, or fail[ed] to accord due deference to the court's fact-finding role."].)

As set forth above, Juror No. 8 repeatedly stated that, despite his personal feelings and regardless of his disagreement with particular policies, he would listen to the evidence presented and follow the law as given by the court. To the extent that the specific answers identified by appellant render Juror No. 8's responses equivocal, then, as noted previously, the trial court's findings are binding on the appellate court. (*Id.* at p. 647.)

Finally, even if this Court were to find that the trial court erred in denying appellant's challenge, the claim must fail as Juror No. 8 did not, in fact, sit on appellant's jury. Appellant exercised a peremptory challenge to remove Juror No. 8. (45 RT 8845.) Where a challenge for cause is erroneously denied, but that juror does not actually sit on the case, there will generally be no error as he cannot have influenced the process or result of the trial. (*People v. Mickey* (1992) 54 Cal.3d 612, 683.) Any error in the denial of the challenge for cause will be deemed harmless unless appellant can establish that he "was obliged afterward to accept an objectionable juror, without power to use a peremptory

challenge upon him. . . ." (*Id.* at p. 683 [quoting *People v. Helm* (1907) 152 Cal. 532, 535]; *Hillhouse, supra,* 27 Cal.4th at p. 487 [same].) Here, although appellant did utilize all of his available peremptory challenges, he did not object to the jury as seated, nor does the record reflect any basis for a finding that any of the jurors who actually heard appellant's case were objectionable. In the absence of any proof establishing that the jury that actually convicted appellant was somehow biased, any error in failing the grant the challenge for cause as to Juror No. 8 is harmless. This claim is without merit.

IV.

LIMITED EVIDENCE OF THESE BELIEFS TO BE ADMITTED APPELLANT'S WHITE SUPREMACIST BELIEFS WERE RELEVANT TO ESTABLISHING HIS MOTIVE IN THE MURDER, THEREFORE THE TRIAL COURT DID NOT ERR IN ALLOWING

During the investigation into the murder of Leonard Swartz, evidence was obtained showing that appellant was in charge of the "woods," or white inmates, at Salinas (47 RT 9229); that appellant felt it was his mission to "take care" of those members of the White race who were child molesters, claiming that the race had gotten "soft" over the years; that he was targeting child molesters, blacks and "rats"; and that he needed to cleanse the gene pool. (50 RT 9865-9868.) As the prosecution argued, these statements were indicative of the motive underlying appellant's attack on Swartz, who was serving time for child molestation.

Prior to trial, appellant moved to exclude any references to White supremacist philosophy or materials found in his possession, asserting that they were irrelevant and unduly prejudicial. (3 CT 763-765.) This motion was subsequently expanded to include specific statements made by appellant, including those set forth above. (30 RT 5818.) In response, the prosecution noted that, as demonstrated by the comments made by appellant, the murder,

although not a "hate" crime in the usual sense, was racially motivated as it came about due to appellant's desire to cleanse the White gene pool, a matter to which whites had, in his opinion, been lax in attending. (3 CT 645-651; 45 RT 8820-8821.) As the prosecution stated:

> Any attempt to understand the defendant's motivation to kill others for child molestation or for failing to take care of White business in the building, without reference to defendant's view of race, is flawed as both incomplete and unconvincing. The undertaking is analogous to claiming an understanding of why Hitler wished to eradicate Jews without considering Hitler's views on the Aryan race.

(3 CT 645-646.) Thus, the statements and underlying tenets of the philosophy were relevant to an understanding of appellant's motives.

The trial court reviewed the information appellant sought to exclude and found that general evidence regarding David Lane[9/] and his philosophy would be inflammatory, unduly consume time, and lacked great probative value. (45 RT 8822.) The court also excluded generalized testimony that stabbing child molesters in prison was primarily an activity of White inmates. (45 RT 8830.) As to the statements made by appellant, however, the court found that, other than those addressing appellant's intent to commit future crimes, they would be admissible. (45 RT 8822-8824.) The court also allowed one very broad question on the juror questionnaire regarding familiarity with "Aryan Racialist philosophy." (4 CT 1083.) Appellant asserts that the limited evidence allowed by the trial court violated his constitutional rights as it was irrelevant and unduly prejudicial.

Appellant relies on *Dawson v. Delaware* (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309], where the Supreme Court determined that the admission of a stipulation regarding the defendant's membership in the Aryan

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9. David Lane is a well-known White Supremacist, currently incarcerated for the hate-based assassination of radio talk show host Alan Berg. He is featured in Focus Fourteen, an Aryan Racialist newletter. (3 CT 650.)

Brotherhood constituted error as it "proved nothing more than Dawson's abstract beliefs," and was, therefore, irrelevant to the case. (*Ibid.* at p. 167.) In that case, however, the decision turned on the fact that the stipulation offered by the government was so vague and generalized that it had been rendered devoid of any possible relevance. (*Ibid.* at p. 165.)

The stipulation in *Dawson* was offered during sentencing as rebuttal to the defense's mitigation case and stated only that:

> The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

(*Dawson, supra*, 503 U.S. at p. 162.) The prosecution then introduced evidence that Dawson had the words "Aryan Brotherhood" tattooed on his hand. (*Ibid.*) The murder for which Dawson was convicted involved the killing of Madeline Kisner (white) during the theft of her car while Dawson was on escape. (*Id.* at p. 161.) No evidence was presented showing that the crime was racial in nature or that Mrs. Kisner was targeted based on her race. In contrast, the Court noted that, where the beliefs espoused by the organization or individual can be tied to the crime, then such evidence may be relevant. For example, in *Dawson,* the Court opined that the proposed evidence originally proffered by the prosecution – "that the Aryan Brotherhood is a white racist prison gang that is associated with drugs and violent escape attempts" – might have supported a different ruling given the facts of the case. (*Ibid.*) Similarly, the Court noted that evidence that the Aryan Brotherhood had committed or endorsed unlawful or violent acts might have been relevant associational evidence to establish that the defendant represented a future danger to society. (*Id.* at p. 167.)

In this case, evidence was admitted showing that appellant was a leader among the White inmate population. He made specific statements indicating his belief that the White race had failed to properly police itself. The

generalized statement of philosophy that was admitted – "Non-existence of the unfit has and will be the law of nature" – demonstrates the concept of "cleansing" and further supports appellant's view that Swartz's murder was a part of his "mission." Unlike *Dawson*, appellant's belief system was directly tied to his motive for the murder of Leonard Swartz. Further, the trial court reviewed the proposed evidence and limited scope of the evidence that would be allowed, holding that the more generalized statements of philosophy and intent to commit future crimes would serve to confuse or unduly prejudice appellant and were thus inadmissible. Given the relevance of the specific evidence admitted, the trial court did not abuse its discretion and appellant's constitutional rights were not violated. This claim is without merit.

V.

THE TRIAL COURT'S INSTRUCTION REGARDING IN-CUSTODY INFORMANTS (CALJIC NO. 3.20) WAS A CORRECT STATEMENT OF THE LAW AS DEFINED IN PENAL CODE SECTION 1127(A)

At the close of proof, the trial court gave the jury various instructions, including CALJIC No. 3.20, as follows:

> The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating this testimony, you should consider the extent to which it may have been influenced by the receipt of or expectation of any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard this testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in the case.
>
> * * *
>
> In-custody informant means a person other than a co-defendant, percipient witness, accomplice or co-conspirator whose testimony is based on statements made by a defendant while both the defendant and the informant are held within the correctional institution.
>
> Inmate D, C, J, R, and P are in-custody informants.
>
> Salinas Valley State Prison, Corcoran Prison and Pelican Bay Prison

are correctional institutions.

(58 RT 11457-11458.) Prior to giving this instruction, appellant requested the trial court include Inmates A, F, and G as in-custody informants. (56 11015-11016.) He argued then, as he does here, that by deleting them from the instruction the jury might somehow be misled as to their status. (56 11016.) In denying this motion, the trial court stated:

> The instruction goes to the situation of an in-custody person relating statements made by a defendant, and if you can cite any authority, Mr. West, that the testimony of a percipient witness who is an in custody – was a person in custody at the time a crime is observed, if the jury -- if there's any authority that the jury should be instructed that, because of that person's status as an inmate, their testimony should be viewed with caution and close scrutiny, then I would certainly consider it, but there's a distinction here in my mind. The factors to be used in assessing the credibility of witnesses will be stated and, of course, will include felony convictions, and certainly you'll be free to argue that.

(56 RT 11016-11017.) The court cited Penal Code section 1127(a), which specifically exempts percipient witnesses from the definition of "in-custody informants." (56 RT 11018.)

As in the trial court, appellant has failed to provide any authority in support of his proposition that the statutory definition of "in-custody informant" should be ignored. Instead, he relies upon dicta from a concurring opinion in *People v. Castillo* (1997) 16 Cal.4th 1009, 1020, wherein Justice Brown opined that a failure to define premeditation and deliberation as "mental states" might have caused confusion to jurors asked to apply a voluntary intoxication instruction which referred to the impact upon a defendant's mental state.

As appellant notes, where a trial court chooses to give an instruction that is not otherwise required, it must give a correct instruction. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134.) In this case, the trial court's instruction comported with the statutory definition. As noted by the court, CALJIC 3.20 specifically addresses testimony pertaining to statements made by a defendant

to another inmate. (56 RT 11016-11017.) It was this distinction that led the trial court, in an abundance of caution, to include Inmate D within those listed, because, although he was a percipient witness to some matters, his testimony also included statements made to him by appellant, and that testimony would come within the ambit of Penal Code section 1127(a). (56 RT 11014-11015.) In contrast, the three inmates at issue here testified only to matters that they observed. Their testimony did not relate to statements made to them by appellant.

To allow appellant to prevail on this claim would be to contravene Penal Code section 1127(a), which, by definition, excludes the witnesses who are the subject of this claim. Moreover, to the extent that appellant argues that the jurors might have been misled, the jury was given the general instructions regarding witness testimony, including the ability to consider inconsistent statements, a witness' ability to perceive events, possible bias or interest, and discrepancies between witnesses or between a witness and other evidence. (58 RT 11454-11457.) Further, appellant has failed to demonstrate, nor does the record show, any bar to his ability to cross-examine Inmates A, F, and G, or to argue their status as inmates in terms of possible impact on their credibility. In fact, as set forth above, the trial court specifically noted that counsel were free to argue such things.

The trial court properly instructed the jury as to those in-custody informants who met the statutory definition, therefore there was no error. In any event, where the jury was further instructed as to the various considerations relating to witness credibility, and there was no limitation placed upon cross-examination or argument as to these areas, appellant can demonstrate no prejudice even if such an instruction should have been given. This claim is without merit.

VI.

THE SUPREME COURT'S HOLDING IN *ROPER V. SIMMONS* (2005) 543 U.S. 551 [125 S.CT. 1183, 161 L.ED.2D 1], DOES NOT PROHIBIT THE USE OF PRIOR MURDER CONVICTIONS, COMMITTED WHEN APPELLANT WAS A JUVENILE, AS AN AGGRAVATING CIRCUMSTANCE TO RENDER APPELLANT DEATH ELIGIBLE FOR A MURDER COMMITTED WHILE HE WAS AN ADULT

Appellant was convicted of the first degree murder of Leonard Swartz which was committed when appellant was 27 years old. (60 RT 11806.) He was also found guilty of the special circumstance of lying in wait (60 RT 11806) and that he had previously been convicted of first degree murder. (61 RT 12039-12040.) The prior murders were committed in 1987, when appellant was 17 years old. Appellant, by his choice, presented no independent mitigating evidence, although his counsel cross-examined various witnesses during sentencing. Based upon the evidence presented, the jury returned a verdict of death for the murder of Leonard Swartz. Appellant now claims that his death sentence violates the Eighth Amendment because it was imposed "primarily due to the murders he committed when he was a juvenile." (Brief, pg. 105.)

In *Roper v. Simmons*, the United States Supreme Court determined that sentencing someone to death for a crime committed when that person was a juvenile violated the Eighth Amendment. (*Roper v. Simmons* (2005) 543 U.S. 551, 578 [125 S.CT. 1183, 161 L.ED.2D 1].) Appellant now asks this Court to expand *Roper* and, in essence, prevent a jury from giving any weight to crimes committed as a juvenile when determining whether the death penalty is appropriate for a later murder committed as an adult. Such a rule is not mandated by *Roper,* nor does it comport with well-established sentencing considerations, which legitimately allow the sentencer to consider the effects of recidivism. Further, it ignores the distinction between double sentencing for a

prior crime versus taking the fact of a defendant's criminal history into account when determining the appropriate sentence for continued criminal behavior.

The Supreme Court discussed this distinction in *Witte v. United States* (1995) 515 U.S. 389 [115 S.Ct. 2199, 132 L.Ed.2d 351]. In denying relief on a claim that enhanced punishment based upon a prior offense violated double jeopardy, the Court held:

> In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

(*Id.* at 400 [quoting *Gryger v. Burke* (1948) 334 U.S. 728, 732 [68 S.Ct. 1256, 92 L.Ed.2d 1683]].) The Court went on to state:

> These decisions reinforce our conclusion that consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.

(*Witte, supra,* 515 U.S. at p. 401. See also *Moore v. Missouri* (1895)159 U.S. 673, 677 [16 S.Ct. 179, 40 L.Ed. 301] [under a recidivist statute, "the accused is not again punished for the first offence" because "' the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself'"].) Here, appellant was sentenced to death for the murder of Leonard Swartz in part because this murder was a continuation of prior murderous conduct, "a situation into which [he] had previously brought himself." Such a finding comports not only with Supreme Court precedent, but with the principles established in the California Constitution and legislation. (See Cal. Const., art. I, § 28(g) [allowing use of any prior felony conviction, whether adult or juvenile, to enhance a sentence]; Pen. Code, § 667(d)(3)(b) [setting the criteria for the use of juvenile adjudications for purposes of the habitual offender enhancement].)

As appellant notes, to the limited extent that his argument has been pursued since *Roper* was decided in 2005, it has been unanimously rejected by the courts considering it. The Florida Supreme Court has expressly rejected this argument in the context of capital cases, finding:

> In *Roper*, the United States Supreme Court held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." Roper, 543 U.S. at 578, 125 S.Ct. 1183. The Court provided a bright line rule for the imposition of the death penalty itself, but nowhere did the Supreme Court extend this rule to prohibit the use of prior felonies committed when the defendant was a minor as an aggravating circumstance during the penalty phase.

(*England v. State* (Fla. 2006) 940 So.2d 389, 407. See also *Melton v. State* (Fla. 2006) 949 So.2d 994, 1020 [same].) Other jurisdictions, addressing the issue outside the capital context, have likewise dismissed claims that *Roper* somehow provides a defendant with a clean slate for juvenile offenses. (*State v. Rideout* (Vt. 2007) 933 A.2d 706, 719 ["The mere fact that his sentence for crimes committed as an adult has been affected by adult convictions obtained while he was a minor does not by itself bring his sentence within *Roper's* narrow protective ambit. A defendant sentenced as a recidivist or habitual criminal is not punished again for his prior crimes, but rather receives an enhanced sentence for the present offense."]; *United States v. Wilks* (11th Cir. 2006) 464 F.3d 1240, 1243 ["*Roper* does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday."].)

Tennessee has also addressed this issue in the capital context, although it was done pre-*Roper* and on the basis of state law prohibiting execution as a penalty for murders committed by juveniles. In *State v. Davis* (Tenn. 2004) 141 S.W.3d 600, the defendant argued that the trial court erred in allowing the state to rely on a prior murder, committed when he was juvenile, as an aggravating factor rendering him eligible for the death penalty in the later case, as he could not have received the death sentence for the prior murder. In denying relief on

this claim, the Tennessee Supreme Court noted that nowhere in the definition of prior violent felony was there a requirement that the crime be committed when the defendant was 18 or older. (See Tenn. Code Ann. § 34-13-204(i)(2).) The court also noted that the language of the statute prohibiting capital punishment was contained in the juvenile transfer statutes and was directed specifically to the offense for which the juvenile was transferred. (See Tenn. Code Ann. § 37-1-134(a)(1).) The court then analyzed the claim in light of general sentencing considerations, holding:

> We also believe that the plain meaning of the above statutes is consistent with the overall capital sentencing structure in Tennessee. A capital sentencing scheme must allow for an individualized sentencing determination based on "the character of the individual and the circumstances of the crime." *State v. Middlebrooks*, 840 S.W.2d 317, 343 (Tenn.1991). A defendant is entitled to present relevant evidence in mitigation of sentence, *see Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and the prosecution is entitled to present relevant evidence in aggravation, "as long as it is relevant to the sentencing decision and promotes the reliability of that determination," *Middlebrooks*, 840 S.W.2d at 343. In addition, we have explained:
>
> As a constitutionally necessary first step under the Eighth Amendment, the Supreme Court has required the states to narrow the sentencers' consideration of the death penalty to a smaller, more culpable class of homicide defendants.... A proper narrowing device ... provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not ..., and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed.... As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers-those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate.
>
> *Id.* (citations omitted.)
>
> In our view, the "prior violent felony" aggravating circumstance in this case achieved the required "narrowing" purpose. Indeed, Davis's conviction for a prior first degree murder, for which he was tried as an

> adult, provided a principled, rational way in which to differentiate this case from other cases and was properly weighed by the jury in analyzing the evidence of aggravating and mitigating circumstances and in determining the appropriate punishment. In short, there was no constitutional or statutory restriction against the use of Davis's prior conviction for first degree murder in this case.

(*Davis, supra,* 141 S.W.3d at pp. 617-618. See also *State v. Cole* (Tenn. 2005) 155 S.W.3d 885, 905 [noting *Davis* and denying similar claim].)

Nothing in *Roper* mandates an extension of its holding to sentencing for murders committed as an adult. Rather, appellant's argument would operate as a free ride for juvenile offenders who go on to continue their criminal careers as adults, and would frustrate efforts to conduct individualized sentencing by hampering a jury's ability to determine whether a particular defendant is "the worst of the worst," as it potentially places someone such as appellant, who has now committed four murders, on an equal footing with a defendant who commits his first murder as an adult. This claim is without merit.

VII.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant asserts a number of challenges to California's death penalty statute, although he acknowledges that they have previously been decided adversely to his position. The specific claims are addressed briefly below.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code Section 190.2 is constitutionally defective as it fails to properly narrow the class of death-eligible defendants. This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 958 [and cases cited therein]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [and cases cited therein].)

B. Penal Code Section 190.3(a) Does Not Allow For The Arbitrary And Capricious Imposition Of The Death Penalty

Appellant asserts that Penal Code Section 190.3(a) fails to adequately guide the jury's deliberations, thereby resulting in arbitrary and capricious imposition of the death penalty. This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *Stanley, supra,* 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris* (2005) 37 Cal.4th 310, 365 [and cases cited therein].)

C. California's Death Penalty Provides Appropriate Safeguards To Avoid Arbitrary And Capricious Sentencing

In addition to the above two provisions, appellant asserts that other aspects of California's death penalty statute deprive him of necessary safeguards to avoid arbitrary and capricious sentencing. These include: lack of written findings or unanimity regarding aggravating circumstances; no requirement that aggravating circumstances be proved beyond a reasonable doubt; no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate punishment; no instruction as to burden of proof except for other criminal activity and prior convictions; and no inter-case proportionality review. All of these claims have been previously rejected by this Court, and appellant offers nothing specific to his case that would justify a departure from those holdings. (See, e.g., *Demetrulias, supra,* 39 Cal.4th at pp. 39-45 [and cases cited therein]; *Harris, supra,* 37 Cal.4th at p. 365 [and cases cited therein].)

D. California's Death Penalty Statute Does Not Violate The Equal Protection Clause

Appellant asserts that the California death penalty statute violates the Equal Protection Clause of the Constitution due to its failure to require a specific burden of proof or unanimous findings for aggravating circumstances. This

claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *Harris, supra,* 37 Cal.4th at p. 365 [and cases cited therein].)

E. California's Use Of The Death Penalty Does Not Violate The Eighth Amendment

Appellant asserts that California's use of the death penalty violates international norms and thus violates the Eighth and Fourteenth Amendments. This Court has repeatedly rejected such claims and appellant offers nothing specific to his case that would warrant a reversal of that position. (See, e.g., *Demetrulias, supra,* 39 Cal.4th at p. 43 [and cases cited therein]; *Harris, supra,* 37 Cal.4th at p. 365 [and cases cited therein].)

F. Cumulative Error

Appellant also asserts that, when considered cumulatively, the California death penalty statute is so devoid of safeguards as to violate his constitutional rights. As set forth above, however, appellant has failed to establish the existence of any errors which could be considered cumulatively. Moreover, this Court has specifically held that "[t]he claimed flaws in our state's death penalty statute. . .whether considered individually or together, do not make it unconstitutional." (*Demetrulias, supra,* 39 Cal.4th at p. 45.) This claim is without merit

CONCLUSION

For the reasons set forth above, the convictions and sentences should be affirmed.

Dated: January 11, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

GLENN R. PRUDEN
Supervising Deputy Attorney General

ALICE B. LUSTRE
Deputy Attorney General

Attorneys for Plaintiff and Respondent

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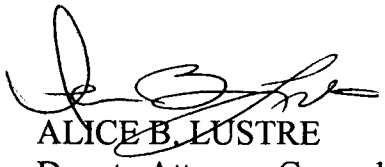
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 12,250 words.

Dated: January 11, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



ALICE B. LUSTRE
Deputy Attorney General

Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Kenneth Ray Bivert*** No.: **S099414**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. On December 11, 2008, I served the attached: **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Warren P. Robinson
Attorney at Law
15412 Caldas De Reyes
San Diego, CA 92128-4456 (2 copies)

Kenneth Ray Bivert
D-85672
P. O. Box D-85672
San Quentin, CA 94974

Richard Landreth
Attorney at Law
137 Central Avenue, Suite 3
Salinas, CA 93901-2656

Richard H. West, Esq.
Law Office of Richard H. West
137 Central Avenue, Suite 3
Salinas, CA 93901

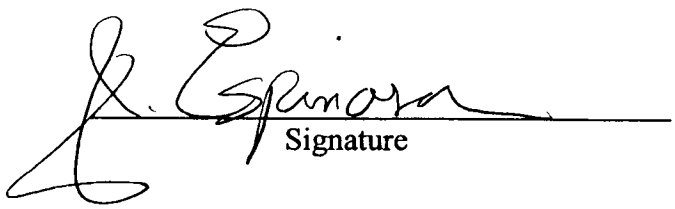
Governor's Office
Attn: Legal Affairs Secretary
State Capital, First Floor
Sacramento, CA 95814

The Honorable Dean D. Flippo
Monterey District Attorney's Office
P O. Box 1131
Salinas, CA 93902

Monterey County Superior Court
1200 Aguajito Road
Monterey, CA 93940

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 11, 2008, at San Francisco, California.

J. Espinosa
Declarant



Signature

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