SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL LEE WHALEN, Defendant and Appellant.	CAPITAL CASE Case No. S054569

Stanislaus County Superior Court Case No. 25297
The Honorable John G. Whiteside, Judge

RESPONDENT'S REDACTED BRIEF

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TABLE OF CONTENTS

Page

Statement of the Case 1

Statement of Facts 2

- A. Guilt phase 2
- B. Defense 13
- C. Penalty phase 14
- D. Defense 15

Argument 17

- I. Appellant waived any claim of error during voir dire by agreeing to the final jury before exhausting his peremptory challenges 17
  - A. Prospective jurors J.O., Y.C., J.M., R.Z., S.W., F.G., M.A., C.P. and M.S. 20
  - B. Prospective jurors I.W., D.O., E.S. and G.T. 21
  - C. Prospective jurors L.G., C.P., L.H., M.C. and C.H. 22
  - D. Prospective juror J.E. 22
  - E. Prospective juror M.E. 30
  - F. Prospective juror J.J. 37
  - G. Prospective juror R.L. 42
  - H. Prospective juror L.V. 51
- II. Appellant received a fair trial before an unbiased jury 53
- III. The court properly excused prospective jurors M.F. and B.H. for cause 55
  - A. The facts 55
  - B. Discussion 58
- IV. The court properly denied appellant's motion for a directed verdict since there was sufficient non-accomplice corroborating evidence 60
  - A. The facts 60

TABLE OF CONTENTS
(continued)

				Page
	B.	Discussion		62
V.	The court properly instructed the jury on accomplice testimony			68
	A.	The facts		69
	B.	Discussion		69
VI.	Appellant had a fair trial and the prosecutor did not engage in misconduct			71
	A.	Conduct during voir dire		72
		1.	The Facts	72
		2.	Discussion	74
	B.	Examination of John Richie		74
		1.	The Facts	75
		2.	Discussion	75
	C.	Discovery of criminalist miller's handwritten notes and photographs		76
		1.	The Facts	76
		2.	Discussion	82
	D.	Melissa Fader's testimony		83
		1.	The Facts	83
		2.	Discussion	84
	E.	Appellant's lack of remorse		85
	F.	The prosecutor's listing of aggravating factors		87
	G.	Cumulative error		90
VII.	The trial court properly instructed that in determining penalty, the jury could consider the circumstances of the crime and the existence of any special circumstances found true			90
VIII.	The penalty instructions were proper			92

TABLE OF CONTENTS
(continued)

Page

IX. The court was not required to define "aggravating" and "mitigating" for the jury 93

X. The death selection process was constitutional 93

- A. Section 190.3, factor (a) 94
- B. Section 190.3, factor (b) 95
- C. Section 190.3, factors (d), (g) and (h) 96
- D. Labeling factors as aggravating or mitigating 97
- E. Various other contentions 100

XI. The court had no duty to instruct on the lesser included offense of theft 102

XII. The court properly denied appellant's motions at the penalty phase 105

- A. The facts 105
- B. Discussion 106

XIII. The court properly instructed the jury on proof beyond a reasonable doubt 108

XIV. The court's instructions on motive were proper 114

XV. California's death penalty statute is constitutional 116

XVI. Appellant's death sentence does not violate international law 120

XVII. There were no errors in either the guilt phase or the penalty phase that had a cumulative prejudicial effect 120

Conclusion 121

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey
(2000) 530 U.S. 466 .... 117, 118

Brady v. Maryland
(1963) 373 U.S. 83 82

Buell v. Mitchell
(6th Cir. 2001) 274 F.3d 337 119

Chapman v. California
(1967) 386 U.S. 18 .... 21, 22

Covarrubias v. Superior Court
(1998) 60 Cal.App.4th 1168 18

Cupp v. Naughten
(1973) 414 U.S. 141 114

Estelle v. McGuire
(1991) 502 U.S. 62 109

In re Winship
(1970) 397 U.S. 358 .... 108, 109, 113

Jackson v. Superior Court
(1937) 10 Cal.2d 350 37

Johnson v. Texas
(1993) 509 U.S. 350 91

Morgan v. Illinois
(1992) 504 U.S. 719 18

Mu'Min v. Virginia
(1991) 500 U.S. 415 .... 18, 19, 54

People v. Alvarez
(1996) 49 Cal.App.4th 679 83

People v. Arias
(1996) 13 Cal.4th 92 .... 92, 101

People v. Bacigalupo
(1993) 6 Cal.4th 457 91

People v. Balderas
(1985) 41 Cal.3d 144 54

People v. Barnett
(1998) 17 Cal.4th 1044 89

People v. Barton
(1995) 12 Cal.4th 186 .... 102, 103

People v. Benson
(1990) 52 Cal.3d 754 95

People v. Berryman
(1993) 6 Cal.4th 1048 .... 94, 101

People v. Bohannon
(2000) 82 Cal.App.4th 798 .... 82, 83

People v. Box
(2000) 23 Cal.4th 1153 .... 18, 117, 121

People v. Boyette
(2002) 29 Cal.4th 381 120

People v. Bradford
(1997) 15 Cal. 4th 1229 119

People v. Breverman
(1998) 19 Cal.4th 142 .... 102, 103, 104

People v. Brown
(2004) 33 Cal.4th 382 .... 116, 120

People v. Cain
(1995) 10 Cal.4th 1 96

People v. Carpenter
(1997) 15 Cal.4th 312 117

People v. Carter
(2003) 30 Cal.4th 1166 100

People v. Chapman
(1993) 15 Cal.App.4th 136 18

People v. Clay
(1984) 153 Cal.App.3d 433 112

People v. Clevland
(2004) 32 Cal.4th 704 .... 18, 115, 116

People v. Cole
(2004) 33 Cal.4th 1158 .... 62, 120

People v. Coleman
(1988) 46 Cal.3d 749 .... 21, 22

People v. Cox
(1991) 53 Cal.3d 618 99

People v. Cox
(2003) 30 Cal.4th 916 119

People v. Crittenden
(1994) 9 Cal.4th 83 .... 58, 101, 111

People v. Croy
(1985) 41 Cal.3d 1 70

People v. Cunningham
(2001) 25 Cal.4th 926 58

People v. Daniels
(1991) 52 Cal.3d 815 .... 17, 107

People v. Danielson
(1992) 3 Cal.4th 691 22

People v. Daya
(1994) 29 Cal.App.4th 697 91

People v. Dennis
(1998) 17 Cal.4th 468 17

People v. Earp
(1999) 20 Cal.4th 826 .... 92, 99

People v. Eilers
(1991) 231 Cal.App.3d 288 103

People v. Espinoza
(1992) 3 Cal.4th 806 101

People v. Estep
(1996) 42 Cal.App.4th 733 113

People v. Fairbank
(1997) 16 Cal.4th 1223 120

People v. Farnam
(2002) 28 Cal.4th 107 .... 17, 72, 76, 100

People v. Fauber
(1992) 2 Cal.4th 792 .... 62, 68, 71

People v. Frierson
(1979) 25 Cal.3d 142 101

People v. Frye
(1998) 18 Cal.4th 894 .... 62, 99, 111, 116

People v. Garrison
(1989) 47 Cal.3d 746 69

People v. Gordon
(1990) 50 Cal.3d 1223 101

People v. Guiuan
(1998) 18 Cal.4th 558 70

People v. Hart
(1999) 20 Cal.4th 546 .... 106, 118

People v. Hawkins
(1995) 10 Cal.4th 920 101

People v. Hayes
(1999) 21 Cal.4th 1211 69

People v. Heard
(2003) 31 Cal.4th 946 58

People v. Heishman
(1988) 45 Cal.3d 147 62

People v. Hill
(1998) 17 Cal.4th 800 94

People v. Hillhouse
(2002) 27 Cal.4th 469 120

People v. Holt
(1997) 15 Cal.4th 619 .... 59, 119

People v. Horton
(1995) 11 Cal.4th 1068 70

People v. Howard
(1988) 44 Cal.3d 375 107

People v. Hughes
(2002) 27 Cal.4th 287 .... 97, 111

People v. Jackson
(1980) 28 Cal.3d 264 99

People v. Jackson
(1996) 13 Cal.4th 1164 .... 93, 101

People v. Jacobs
(1987) 195 Cal.App.3d 1636 29

People v. Jenkins
(2000) 22 Cal.4th 900 .... 58, 117

People v. Jennings
(1988) 46 Cal.3d 963 107

People v. Jennings
(1991) 53 Cal.3d 334 111

People v. Johnson
(1992) 3 Cal.4th 1183 119

People v. Johnson
(1993) 6 Cal.4th 1 90

People v. Keenan
(1988) 46 Cal.3d 478 101

People v. Kipp
(2001) 26 Cal.4th 1100 96

People v. Kirkpatrick
(1994) 7 Cal.4th 988 .... 93, 101

People v. Lewis
(2001) 25 Cal.4th 610 .... 37, 42, 51, 53

People v. Maury
(2003) 30 Cal.4th 342 .... 92, 111, 117, 118

People v. McPeters
(1992) 2 Cal.4th 1148 119

People v. Medina
(1995) 11 Cal.4th 694 101

People v. Mendoza
(2000) 24 Cal.4th 130 102

People v. Miranda
(1987) 44 Cal.3d 57 .... 106, 107

People v. Montiel
(1993) 5 Cal.4th 877 89

People v. Morales
(2001) 25 Cal.4th 34 71

People v. Morris
(1988) 46 Cal.3d 1 82

People v. Nakahara
(2003) 30 Cal.4th 705 .... 112, 113

People v. Navarette
(2003) 30 Cal.4th 458 72

People v. Noguera
(1992) 4 Cal.4th 599 111

People v. Obie
(1974) 41 Cal.App.3d 744 29

People v. Ochoa
(1998) 19 Cal.4th 353 37

People v. Ochoa
(2001) 26 Cal.4th 398 .... 86, 119

People v. Ortega
(1998) 19 Cal.4th 686 .... 102, 103

People v. Osband
(1996) 13 Cal.4th 622 .... 94, 100, 111

People v. Pollock
(2004) 32 Cal.4th 1153 96

People v. Pride
(1992) 3 Cal.4th 195 .... 106, 107

People v. Prieto
(2003) 30 Cal.4th 226 .... 99, 116, 118

People v. Proctor
(1992) 4 Cal.4th 499 91

People v. Raley
(1992) 2 Cal.4th 870 22

People v. Ramos
(1997) 15 Cal.4th 1133,1164 86

People v. Ray
(1996) 13 Cal.4th 313 111

People v. Riel
(2000) 22 Cal.4th 1153 111

People v. Rodrigues
(1994) 8 Cal.4th 1060 91

People v. Rollo
(1977) 20 Cal.3d 109 29

People v. Salas
(1975) 51 Cal.App.3d 151 112

People v. Samayoa
(1997) 15 Cal.4th 795 120

People v. Sanchez
(1995) 12 Cal.4th 1 .... 89, 101

People v. Sanders
(1995) 11 Cal.4th 475 17

People v. Seaton
(2001) 26 Cal.4th 598 121

People v. Smith
(2003) 30 Cal.4th 581 118

People v. Snow
(2003) 30 Cal.4th 43 .... *passim*

People v. Stankewitz
(1990) 51 Cal.3d 72 .... 70, 71, 94

People v. Stanley
(1995) 10 Cal.4th 764 116

People v. Stewart
(2004) 33 Cal.4th 425 .... 42, 59

People v. Sully
(1991) 53 Cal.3d 1195 86

People v. Thomas
(1992) 2 Cal.4th 489 95

People v. Turner
(1994) 8 Cal.4th 137 101

People v. Turner
(2004) 34 Cal.4th 406 120

People v. Visciotti
(1992) 2 Cal.4th 1 106

People v. Wade
(1995) 39 Cal.App.4th 1487 .... 109, 110, 111

People v. Wader
(1993) 5 Cal.4th 610 101

People v. Wash
(1993) 6 Cal.4th 215 101

People v. Watson
(1956) 46 Cal.2d 818 85

People v. Weaver
(2001) 26 Cal.4th 876 53

People v. Webb
(1993) 6 Cal.4th 494 101

People v. Williams
(1997) 16 Cal.4th 153 .... 93, 119

People v. Williams
(1997) 16 Cal.4th 635 17

People v. Yoder
(1979) 100 Cal.App.3d 333 109

People v. Young
(2005) 34 Cal.4th 1149 71

People v. Zapien
(1993) 4 Cal.4th 929 70

Pulley v. Harris
(1984) 465 U.S. 371 101

Ring v. Arizona
(2002) 536 U.S. 584 .... 117, 118

Ross v. Oklahoma
(1988) 487 U.S. 81 37

Simmons v. South Carolina
(1994) 512 U.S. 154 92

Tuilaepa v. California
(1994) 512 U.S. 967 .... 94, 95, 101

Victor v. Nebraska
(1994) 511 U.S. 1 .... 108, 109

Wainwright v. Witt
(1985) 469 U.S. 412 .... 29, 30, 58, 59

Witherspoon v. Illinois
(1968) 391 U.S.510 54

STATUTES

Code of Civil Procedure
§ 223 18
§ 231 37

Penal Code
§ 31 70
§ 187 1

§ 190.2, subd. (a)(17) 1
§ 190.3 .... *passim*
§ 190.3, factor (a) .... *passim*
§ 190.3, factor (b) 95
§ 190.3, factor (g) 96
§ 190.3.factor (h) 96
§ 190.3, subdivision (a) 116, 117
§ 211 103
§ 212.5 1
§ 484 103
§ 484, subd. (a) 103
§ 487 103
§ 488 103
§ 667.5, subd. (b) 1, 2
§ 667, subd. (d) 1
§ 1054.1, subd. (e) 82
§ 1111 62
§ 1118.1 .... 60, 62, 63
§ 12022.5 1
§ 12022, subd. (a) 1
§ 12022, subd. (a)(1) 2

CONSTITUTIONAL PROVISIONS

California Constitution
Article VI 18

United States Constitution
Eighth Amendment 95, 120
Fourteenth Amendment 108

COURT RULES

Cal. Rules of Court,
rule 34 2

OTHER AUTHORITIES

CALJIC
No. 1.00 .... 108, 109, 110
No. 1.01 112

No. 2.01 .... 108, 111
No. 2.21 113
No. 2.21.1 .... 108, 112
No. 2.21.2 .... 108, 112
No. 2.22 .... 108, 111, 112
No. 2.27 108
No. 2.51 .... *passim*
No. 2.90 .... 108, 110, 112, 113
No. 3.31 115
No. 8.10 115
No. 8.83 108
No. 8.83.1 108
No. 8.85 .... 94, 97, 100

STATEMENT OF THE CASE

On July 21, 1994, the district attorney filed information number 25297 in the Stanislaus County Superior Court, charging appellant Daniel Lee Whalen and co-defendant Michelle Joe with, in count 1, murder (Pen. Code, § 187),[1] with the special circumstance that the murder was committed during the course of a robbery (§ 190.2, subd. (a)(17)), and in count 2, robbery (§ 212.5). As to both offenses, the information alleged that appellant personally used a firearm (§ 12022.5) and co-defendant Joe was armed with a firearm (§ 12022, subd. (a)). (CT 412-422.) The information further alleged that appellant had suffered three prior serious felony convictions (§ 667, subd. (d)), and four prior prison terms (§ 667.5, subd. (b)). (*Ibid.*)

Prior to appellant's trial, co-defendant Joe entered into a plea bargain in which she agreed to testify in appellant's case and plead guilty to second degree murder and residential robbery, with the use of a firearm, in exchange for a sentence of 16 years to life in prison.[2] (RT 1821-1822.)

Following a jury trial, on June 13, 1996, the jury found appellant guilty of murder and robbery, and found the enhancements and special circumstance allegation to be true. (RT 2340.)

On June 18, 1996, the court conducted a penalty phase. Following testimony, the jury reached its verdict that appellant should be sentenced to death for murder, with the special circumstance that the murder was committed during the course of a robbery. (RT 2525.) Appellant requested that he be sentenced immediately, waiving a referral to probation over

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[1] Hereafter, all statutory references are to the Penal Code, unless otherwise indicated.

[2] Melissa Fader was included as a co-defendant in the original complaint (see CT 71), but she also entered into a plea bargain prior to appellant's trial.

defense counsel's objection. (RT 2528-2529.) Defense counsel made an oral motion for a new trial based on the trial court's refusal to give certain jury instructions, and the court denied the motion. (RT 2534-2535.) Defense counsel also made a motion to modify the sentence from death to life, and the court denied that motion. (*Ibid.*)

On count 2, the court sentenced appellant to 25 years to life for robbery, plus five years for use of a firearm (§ 12022, subd. (a)(1)), plus one year for a violation of probation. The court stayed this sentence pending punishment on the other count.

Appeal is automatic. (Cal. Rules of Court, rule 34.)

STATEMENT OF FACTS

A. Guilt Phase

On March 23, 1994, Shirley Robbins entered the residence at 519 Nebraska Street ("the Nebraska house") in Modesto and found her husband's elderly uncle, Sherman Robbins, lying dead on the living room couch. (RT 1280-1281.) He had a gunshot wound to his face, and his hands were tied behind his back with a necktie. (RT 1281-1282.) Shirley immediately noticed that a microwave and a small television were missing, and the guns were not in the gun cabinet. (RT 1283.)

That month Sherman had been taking care of the Nebraska house while his brother Bill, who owned the house, vacationed in Ireland. (RT 1269-1270.) Shirley would periodically visit Sherman and take him for blood tests. (RT 1269, 1271.) She also helped him rent a dumpster so the family could surprise Bill by cleaning up his yard while he was away. (RT 1271.)

From Thursday, March 18th through the weekend, Shirley and various family members helped Sherman clean up the property. (RT 1271, 1287.) During this time, Shirley first noticed Johnny Long and Michelle Joe. (RT

1271-1272.) Sherman introduced Long to Shirley as his cousin. Long drove a green 1967 Mustang. He drove up to the Nebraska house with Joe and her children in the car. (RT 1272-1273.) Shirley noticed Long help Sherman move a basketball pole. (RT 1273.) Meanwhile, Joe sat in the car with her children. (RT 1274.) Shirley offered them something to drink, and Joe later went in the house to take one of her children to the bathroom. (*Ibid.*)

That Sunday, Shirley talked to Sherman on the phone a couple of times regarding his doctor's appointment the next day. (RT 1275.) On Monday morning, Shirley's daughter, Krista, picked up Sherman for his appointment. Krista alerted Shirley that when she had picked up Sherman, Joe was at the Nebraska house going through the dumpster.[3] (RT 1277.) Shirley directed Krista to return to the house and make sure it was locked. (*Ibid.*)

Shirley telephoned Sherman on Monday night between 7:00 and 9:00 p.m. (RT 1275-1276.) They discussed his insulin supply, and Sherman assured Shirley that he had enough insulin. (RT 1276.) Shirley repeatedly telephoned Sherman on Tuesday, but he did not answer the phone. (RT 1276, 1278.)

On Wednesday morning, Shirley dropped her son off for school, then she drove to the Nebraska house. (RT 1279.) When she parked in the driveway, she noticed two newspapers outside. (Ibid.) The sliding glass

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[3] Krista Robbins confirmed that she picked up Sherman at 8:00 or 9:00 a.m. (RT 1419). At that time, she saw Michelle Joe going through the dumpster in the front yard, while Joe's children ran around in the back. (RT 1419-1420.) When Krista and Sherman left, Joe was still there. By 10:00 a.m., when Krista returned to make sure Sherman's doors were locked, Joe had left. (RT 1421-1423.) However, as Krista drove away from Sherman's house, she saw Joe and Johnny Long driving back towards Sherman's house. (RT 1457.)

door and wood front door to the house were both open. (RT 1280.) As soon as Shirley noticed Sherman lying dead on the couch, she immediately dialed 911. (RT 1281.)

Twenty-three year old Melissa Fader testified under a grant of immunity resulting from the following plea bargain. She agreed to plead guilty to robbery and being armed with a firearm in exchange for receiving a seven-year prison sentence and giving truthful testimony in this case. (RT 1529, 1627, 1638.) On March 21, 1994, Fader was living in a trailer at 2536 Parkdale behind Nellie Thompson. (RT 1530.) That morning, Fader saw Michelle Joe and Johnny Long when they drove by in a green Mustang. (RT 1531.) They left and Joe returned at about 1:00 p.m. in the Mustang with her young daughter Crystal. (RT 1533.) Fader and Joe cruised around for a while. They tried to get some crank from a friend of Joe's, but they were unsuccessful. (RT 1535-1537.) Joe later dropped Fader back off at her trailer. (RT 1538.)

Later that night, Fader and her boyfriend, Gerald Blitch or "J.R." were fighting. (*Ibid.*) Fader wanted to go to sleep because she had been up for a few days on crank, but Blitch kept on insisting that she "score" some more crank for him. (RT 1539.) J.R. had locked Fader in the trailer, then he had crawled out the window. The two were fist fighting inside the trailer when Joe arrived, and Fader was crying. (RT 1540.) Fader crawled out the window and left with Joe in an effort to get away from J.R. (RT 1541.)

Fader climbed into the back seat of the Mustang. Appellant was sitting in the front passenger seat. (RT 1545.) Joe drove to the Nebraska house. (RT 1545-1546.) She informed Fader that they were going to commit a robbery. Fader asked if anyone was going to be home. Joe informed her that no one would be there, and they would just take items and leave. (RT 1546.)

When they arrived at the Nebraska house, Joe walked up to the door and determined that there was someone sleeping inside. (RT 1548.) They unsuccessfully drove around to try to locate a back road entrance. When they could not find one, Joe parked the car at the end of the driveway near a large brush pile.[4] (RT 1550.)

Joe came up with a plan to wake up the old man named Sherman, claim that her car was broken, and ask if she and Fader could spend the night. (RT 1553.) Joe walked to the house and returned five minutes later. She instructed Fader to accompany her inside the house, while appellant waited outside. (RT 1557-1558.)

When Fader and Joe entered the house, Joe pretended to telephone someone, and Sherman offered Fader a beer. (RT 1559.) Fader and Sherman sat down on the sofa and talked. (RT 1560-1561.) Fader and Joe then looked inside the bedroom where Sherman told them they could sleep. Fader took a bath and made a sandwich. (RT 1564-1566.) She again sat by Sherman on the couch, and the two fell asleep. (RT 1567-1568.)

At 3:30 a.m., Fader woke up to find appellant pointing a gun at Sherman. (RT 1568.) Appellant was yelling for Sherman to tell him where his wallet was located. (RT 1570.) Sherman replied that it was in the bedroom in a box. (*Ibid.*) Appellant ordered Fader to tie up Sherman. When Fader resisted, appellant pointed the gun at her and commanded, "You're gonna do it." (RT 1570-1571.) He then handed her a necktie and directed her to tie Sherman's hands behind his back. (RT 1573.) When she tried to tie Sherman up loosely, appellant ordered her to tie him up tighter. (RT 1574.)

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[4] Neighbor Damon Podesto, whose house is approximately 300 yards south of the Nebraska house, saw a green Mustang make a u-turn in his yard on the night of March 21, 1994. (RT 1754-1756.)

Fader complained to appellant that she wanted to get out of there, and she did not want to be involved. Appellant responded, "You ain't going nowhere." He directed her to take a microwave and a typewriter out to the car. (*Ibid.*) During this time, Joe was also putting various items into the car. (RT 1577.)

Fader went back into the house. She saw Sherman lying on his stomach on the couch. Joe was in one of the bedrooms going through Sherman's wallet. (RT 1578-1579.) When Fader mentioned that she wanted to get out of there, Joe told her to climb out the window, which Fader did. (RT 1580.) Fader also took a bag filled with items from the house, including a jar full of pennies and a stereo. (RT 1581.)

Fader and Joe met at the car. Joe got into the driver's seat, and Fader climbed into the back. A few minutes later, they heard a gunshot. (RT 1585-1586.) Appellant exited the house carrying a shotgun. (RT 1589.) He placed it in the trunk and announced, "Let's get out of here." Joe then alerted him that there was another gun inside the gun cabinet. (*Ibid.*) Appellant retrieved it and also placed it in the trunk. (RT 1591.)

The three got gas, then drove to Prescott Estates, where appellant unsuccessfully attempted to find someone to buy the stolen items. (RT 1595.) The three eventually ended up at John Richie's apartment at 620 Paradise. (RT 1598.) Joe had urinated in her pants, and she needed to change. (RT 1601.) The three took some of the stolen items into the apartment, where Fader saw Joe's children asleep and a woman named Kathy sitting in the front room. (RT 1603, 1608.)

Fader and Joe went into the bathroom and ingested crank. (RT 1603-1604.) Fader then counted pennies from the jar she had taken in the bedroom. (RT 1604.) Two men showed up at the apartment. One of the men gave Joe and appellant an eight ball of crank for all of the stolen items. Joe and appellant divided the dope between themselves and Fader. (RT

1606-1607.) Fader then went into the bathroom a second time with appellant to ingest more crank. (RT 1609.) Afterwards, appellant followed Fader into the bathroom and raped her. (RT 1610-1611.) Eventually, Joe took Fader home in the Mustang. (RT 1612.) Joe warned Fader not to say anything to anyone about what had happened. (RT 1616.)

Fader ended up with a gram of crank, some rolls of pennies, and a meat grinder. (RT 1613.) As soon as Fader arrived at her trailer, she tried to sell Nellie Thompson the meat grinder for five dollars.[5] (RT 1615.) A week later, Fader confided to Thompson that she had been raped. (*Ibid.*) Approximately two weeks following the murder, Fader was arrested. (RT 1617.) On cross examination, Fader acknowledged that she had been up for approximately ten days on methamphetamine at the time of the crime. (RT 1635.)

Michelle Joe testified consistently with Fader's testimony (RT 1821-1869), with the following exceptions and additions. Joe came up with the idea to burglarize the Nebraska house. She persuaded appellant to assist her. (RT 1860.) Both appellant and Joe obtained gloves from Kathy Sisk to wear during the burglary.[6] (RT 1865-1866.) Earlier in the day, Joe obtained methamphetamine from Rick Sasso, and she got high. (RT 1849.) She also ingested methamphetamine that morning with a guy named Juan. (RT 1850, 1852.)

When Joe, Fader and appellant first arrived at the Nebraska house, they parked on a dirt road near a pile of branches. Joe advised appellant that there were some things in the back yard. He retrieved a chain saw

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[5] Nellie Thompson confirmed Fader's testimony on this point. (RT 1515.)

[6] On cross-examination, Joe indicated that she got the gloves from John Richie. (RT 2006.)

from behind the house, which he put in the back of the Mustang. (RT 1869-1871.)

Later that night, after Sherman and Fader had fallen asleep on the couch, Joe signaled appellant to enter the house. (RT 1888.) She unlocked a window in the bedroom, and appellant climbed through the window. (1889.) Joe and appellant went through drawers in the bedroom. They took a television and a large boom-box type CD player from the bedroom. (RT 1891.)

Joe then heard appellant enter the family room. She could hear the noise of something opening and slamming. When she joined him, he was carrying a large shotgun. (RT 1894-1895.) Joe walked into the other bedroom, where she found another boom box. (RT 1897.) Fader came into the room and explained to Joe that appellant wanted her to find something to tie up Sherman with. Fader found a tie, and she returned to the living room. (*Ibid.*)

Joe next walked into the dining room. Appellant was pointing the gun at Sherman and demanding that he disclose the location of his wallet. (RT 1898.) Joe found the wallet in a green box in the first bedroom. She handed the wallet to Fader, who gave it to appellant. (RT 1899.) Appellant directed Joe to get the car. (RT 1900.) Joe moved the car back near the house. She then got out of the car and opened the trunk. (RT 1901.) When she went back into the house, Sherman was still lying tied-up on the couch, and appellant was pointing a gun at him. (RT 1902.)

Joe and Fader were in one of the bedrooms, when appellant came in and directed them to move the stuff they had collected into the car. (RT 1904.) He appeared to be angry at both women. (RT 1905.) Fader walked out the door with a typewriter. Joe advised appellant that she was scared, and she did not want to go through with it anymore. (RT 1907.) Appellant told her to just get the stuff in the car. (*Ibid.*) Joe walked out to the car and

back into the house. She asked appellant if he was going to kill Sherman, and appellant said no. (RT 1909.) Joe denied suggesting that they smother Sherman, rather than shooting him. (*Ibid.*)

Appellant was acting very upset, and Joe was worried about what he might do. (RT 1910.) Joe placed another item in the trunk of the car. She and Fader both walked to the driver's side of the car, and they heard a shot from inside the house. (RT 1911.) The two got into the car, and appellant came out carrying the gun. (RT 1912.) Appellant put the gun into the car, then went into the house and brought out another gun, which he placed with the first gun in the front of the car. (RT 1913.)

Appellant directed Joe to drive to his friend's house at Prescott Estates. (RT 1914.) Joe asked appellant if he killed Sherman, and appellant denied it. (RT 1915.) Appellant was unsuccessful at off-loading the stolen property at Prescott Estates. (RT 1916.) The three eventually ended up at John Richie's apartment. (RT 1920.) When they arrived, Richie, Kathy Sisk and their children and Joe's daughter were asleep. (*Ibid.*) Joe took a shower because she had urinated in her pants. Appellant and Richie brought the stolen property into the house. (RT 1921.)

When Joe came out after taking a shower, the stolen property was on the kitchen table. Rick Sasso provided appellant with methamphetamine, which was also on the table. (RT 1924-1926.) Joe went back into the bedroom and ingested some of the methamphetamine. (RT 1927.) Joe returned to the kitchen and advised Sasso that appellant might have killed somebody. Sasso kissed her then left. (RT 1928.) Joe saw appellant follow Fader into the bedroom. When Fader came out, she asked Joe to give her a ride home, which Joe did. (RT 1929.)

John Richie testified pursuant to a grant of immunity in which the prosecution agreed not to prosecute him for any crimes associated with his testimony, in exchange for his truthful testimony in this case. (RT 1349.)

He is currently serving time in prison for possession of a firearm by a felon and burglary. (RT 1334-1335.) Richie was also previously convicted of arson and misdemeanor receiving stolen property. (RT 1335.)

Richie met appellant at a place called Butler's Camp approximately five years earlier when Richie was living there. (RT 1332-1333.) Richie explained that Sherman Robbins is his aunt's brother. (RT 1336.) Richie was briefly acquainted with Michelle Joe. While Richie was living at 1620 Paradise, appellant protected Joe a few times from her boyfriend who had been beating her. (RT 1337.)

Also during this time, Richie saw appellant in a park, and he invited appellant to come live with him. (RT 1338.) Appellant lived with Richie, Kathy Sisk and their three daughters at an apartment at 620 Paradise for a month or two before appellant was arrested. (RT 1339-1340, 1343.)

On the morning of March 21, 1994, Michelle Joe came to the apartment looking for appellant. (RT 1341.) Richie overheard Joe ask appellant to help her commit a burglary. (RT 1342.) Richie advised appellant not to get involved. Appellant agreed, and assured Richie that he would not do it. (RT 1343.) Shortly before dark that evening, Joe asked Richie to babysit one of her children. (RT 1344.) Richie agreed. (RT 1344-1345.) Richie next remembered returning to his apartment and seeing a small tv, a microwave, a stereo, a typewriter, a .22 rifle and a .410 shotgun. (RT 1344-1346.) The shotgun smelled like gunpowder. (RT 1346-1347.) Richie's girlfriend, Sisk, was sitting with a woman named Melissa, counting out pennies from a jar. (*Ibid.*)

Richie noticed that Joe had urinated in her pants. She used the shower, and Sisk loaned her some clothes. (RT 1348.) Richie subsequently spoke with his friend Rick Sasso. He gave Sasso a description of the items in the apartment. (RT 1349.) Sasso loaded the

items in his car in exchange for giving appellant, Joe and Fader an eight ball, or three and three quarter grams of methamphetamine. (RT 1350.)

Appellant shared his methamphetamine with Richie. Joe and Fader ingested some methamphetamine and saved the rest. (RT 1351.) When Richie later went to jail, Fader wrote him a letter in which she apologized about what had happened to Sherman Robbins. (*Ibid.*)

In the days after the incident, Richie noticed that appellant was watching the newspaper closely, and he was acting very nervous. (RT 1352.) Appellant admitted to Richie that he had killed a man. He described that he had tied up the man and told him to "get right with God." Appellant left for a minute, and when he returned, he shot the man. (RT 1353-1354.) Appellant explained that he and Joe had argued about how the man should die. Joe preferred that the man be smothered because there would not be a sound of a gunshot. (RT 1354.) Appellant explained that wrestling with the man would have been more of a torture than shooting him. (RT 1355.) Appellant had shot the man in the forehead after tying him up. (RT 1395, 1415.) When Richie asked appellant how he could have done this, appellant indicated that "it was nothing" and "you couldn't get emotionally involved." (RT 1356.)

Richie received a letter from appellant while appellant was in jail. Appellant complained that Joe and Fader were both "telling on" him. (RT 1764.) Appellant did not deny that what Joe and Fader were saying was true. (*Ibid.*)

On cross examination, Richie acknowledged that he had written Joe a letter in which he told her that he cared for her a lot and would do anything for her. (RT 1401.) In another letter, Richie admitted to Joe that he did not tell a detective the truth about everything, but rather he "took it as the perfect chance to tell him that the crime was only supposed to be a burglary and not a murder." (RT 1404.) In the letter, Richie mentioned how he

would love to see Joe "walk" because she had suffered enough and did not deserve any more time. (RT 1405.)

Ricky Sasso testified under a grant of immunity in which the prosecution agreed not to prosecute him for any crimes associated with his testimony, in exchange for his truthful testimony in this case. (RT 1427-1428.) Sasso was acquainted with appellant and John Richie through selling and using drugs. (RT 1428.) At one point, Sasso went to Richie's apartment and obtained possession of a shotgun and a .22 rifle. (*Ibid.*) Sasso indicated that Richie's wife and children, Michelle Joe and another woman were in the apartment at the time. (RT 1432.) Joe was acting scared. (RT 1433.) Appellant came out of the bedroom about an hour later. (RT 1434.) Sasso eventually "cheated" appellant by giving him a gram and two quarters of methamphetamine for the guns. (RT 1436.) Sasso subsequently sold the guns to a guy named Rudy Martinez in exchange for more drugs after Richie told Sasso that appellant had used the guns to shoot somebody. (RT 1437, 1439.)

Stanislaus County Identification Officer Daniel Cron matched a latent palm print (People's Exh. 52) from the bedroom window on the south side of the Nebraska house to Fader's right palm. (RT 1462-1464, 1465.)

On March 23, 1994, forensic pathologist Thomas Beaver conducted an autopsy on Sherman Robbins. (RT 1472.) He determined that Robbins died from a shotgun wound to the right temporal area of the head. The wound was from a close range shotgun that had been only inches away from the victim when it was fired. (*Ibid.*)

On March 23, 1994, Department of Justice Criminalist John Miller helped recover a 20–gauge shotgun casing and shotgun pellets from the crime scene at 519 Nebraska. (RT 1522.) He noted that the shotgun pellets were scattered all over the room. (*Ibid.*) From the location of the shotgun casing compared with the position of the victim's body, Miller was able to

determine that the shotgun was fired at a 30 degree angle to the floor. (RT 1523.) Miller concluded that the victim was lying on the couch in the same position he was found at the time he was shot. (RT 1526.)

At 5:30 p.m. on April 7, 1994, Stanislaus County Sheriff's Detective Giles New arrested appellant. (RT 1497.) Upon being arrested, appellant spontaneously remarked, "I was expecting to get picked up sooner or later. Sometimes the best place to hide is right under your noses." (RT 2080.)

B. Defense

Nellie Thompson assisted Melissa Fader in obtaining disability payments. Part of the reason that Fader was able to claim a disability was a result of her drug addiction and her mental status, which was about that of a 12-year-old. (RT 2141.) Fader admitted to Thompson that in October of 1993, Fader, Michelle Joe, and a man named Shane Bingle had gone to a vacant house in the country to burglarize it. Fader reported to Thompson that she thought someone had shot a barking dog that was there. Fader had cut her leg as she was jumping into the window of the get-away car. (RT 2142-2143, 2149.) When Fader saw in the paper that a man had been killed in a house in the country, she exclaimed, "Oh, my God. I thought they shot the dog." (RT 2145.)

Licensed private investigator Alan V. Peacock interviewed Thompson on August 3, 1994. Thompson never told him that Melissa Fader had reported being raped by appellant. (RT 2151.)

The parties entered into the following stipulations. Michelle Joe never described to law enforcement that she urinated on herself the night of March 21. (RT 2120.)

Melissa Fader explained to Detective New that Joe did all of the negotiating for the exchange of stolen property for drugs. When they came back to Richie's house, the property was gone and Joe had an "eight-ball."

Appellant, Joe and Fader then split the drugs three ways. (RT 2130.) In a statement to a prosecutor, Fader indicated that Joe wanted her to take the "rap" for the crime. Fader protested, and maintained that appellant should take the rap because he was "the one with the guns and stuff." (RT 2131.)

John Richie told Detective Viohl that following the crime, appellant notified Richie that he needed to leave because he was endangering Richie's family. (RT 2133.) Appellant described that there was a drunkard at the house where they obtained the possessions. This was the last time appellant talked to Richie about the crime. (*Ibid.*) Richie believed appellant was a pretty good guy who helped take care of and cook for Richie's children. (RT 2135-2136.)

Rick Sasso advised Detective Valdez that he and John Richie traded the guns Sasso had received at Richie's apartment for more dope. (RT 2138-2139.)

C. Penalty Phase

On May 26, 1988, Sharon Kennedy was working as a Bank of America teller, when appellant attempted to rob the bank. (RT 2375-2377.) He came up to the window of another teller named Francis Passalaqua and handed her a note that said, "This is a robbery." (RT 2377.) When Kennedy saw the note, she immediately pressed a panic button. Appellant turned and ran out the door. On his way out, he knocked over a customer who was also leaving. (RT 2378.)

Francis Passalaqua testified consistently with Kennedy's testimony, with the exception that she was unable to identify appellant in court. (RT 2383.)

The parties stipulated that on April 15, 1971, appellant was convicted of robbery and assault with a deadly weapon on a police officer. He was

sentenced to state prison and released on June 5, 1975. (RT 2416-2417.) On March 17, 1976, appellant was convicted of robbery. He was sentenced to state prison and released on May 16, 1979. (RT 2417.) On January 16, 1980, appellant was convicted of possession of a firearm by a felon. He was sentenced to state prison and released on November 8, 1985. (RT 2418.) On March 29, 1989, appellant was convicted of attempted robbery. He was sentenced to state prison and released on November 23, 1993. (*Ibid.*)

D. Defense

Private investigator Alan Peacock indicated that appellant's father and sister have both died, and appellant never knew his natural mother. (RT 2388.) According to Peacock, appellant has one close friend and a daughter, but appellant did not want either involved in this case. (*Ibid.*) The defense introduced into evidence a photograph of appellant's daughter. (RT 2389.)

Peacock advised that appellant had been either in custody or on probation or parole from the time he was 14 years old until the present. (RT 2391.) Appellant has a history of abusing alcohol, methamphetamine, heroin and marijuana. (RT 2392.)

Retired California Department of Corrections Officer James Parks interviewed appellant prior to testifying. Appellant expressed his desire to have the death penalty imposed in his case. (RT 2430.) However, Parks opined that after appellant adjusted to being back in prison, he believed appellant would return to being a useful prisoner. (RT 2432.) Parks noted that appellant had been a lead man in the prison in many of the areas that he worked. He got along well with most of the prison staff and inmates in general. (RT 2433.) Parks explained that appellant refused to work on a

couple of occasions because either he did not like the work or the supervisor. (*Ibid.*)

In reviewing appellant's prison record, Parks pointed out that in appellant's early years in prison, he received a laudatory commendation for helping two officers who were confronted by an inmate with a razor blade. (RT 2434.) He was also helpful in training other prisoners. (*Ibid.*) Parks noted that appellant had performed warehouse work, vocational machine shop work and painting while he was in prison, and he did well in those jobs. (RT 2437.) There were instances where appellant had not done well on certain prison jobs. Parks suspected that this was a result of him not getting along with a supervisor. (*Ibid.*)

Parks indicated that once appellant had been using a knife in connection with his work in prison. After the job ended, the supervisor forgot to pick up the knife from appellant. To his credit, appellant turned the knife in, when he could have sold it or kept it. (RT 2439-2440.) On another occasion, appellant volunteered to work while other inmates were on strike. (RT 2440.)

Appellant had been in trouble a few times in prison for drinking homemade wine, or "pruno." (RT 2438.) He had once attempted to commit suicide while housed in Vacaville. (RT 2438.) Four times appellant had failed to report to work while in prison. (*Ibid.*) Once he was directed to remove a towel from a window in his cell, and he refused to do so. On that occasion, he cursed and made threatening moves at the correctional officer on duty. (*Ibid.*)

ARGUMENT

I. APPELLANT WAIVED ANY CLAIM OF ERROR DURING VOIR DIRE BY AGREEING TO THE FINAL JURY BEFORE EXHAUSTING HIS PEREMPTORY CHALLENGES

In Argument I, appellant contends that the trial court erred in repeatedly "rehabilitating" death-prone jurors by asking leading and suggestive questions on voir dire[7] which stacked the jury in favor of a death sentence, thereby depriving him of a fair and impartial jury. (AOB 45-174.) In Argument II, he contends that the court erred in denying challenges for cause to many prospective jurors who had disqualifying opinions. (AOB 175-180.)

However,

> [t]o preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so.

(*People v. Farnam* (2002) 28 Cal.4th 107, 132, quoting *People v. Williams* (1997) 16 Cal.4th 635, 667; see also *People v. Daniels* (1991) 52 Cal.3d 815, 853-854 [in reviewing a motion for change of venue after voir dire, the fact defense counsel did not exhaust peremptory challenges was decisive in determining the jury actually selected was fair]; *People v. Sanders* (1995) 11 Cal.4th 475, 507; *People v. Dennis* (1998) 17 Cal.4th 468, 524.) Here, appellant waived the voir dire claims he has raised in Arguments I and II by agreeing to the jury before exhausting his peremptory challenges. Moreover, his failure to exhaust peremptory challenges suggests that he was satisfied with the jury when it was sworn.

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[7] Defense counsel objected on this basis during voir dire. (RT 564.)

In any event, a review of the court's voir dire of prospective jurors in question discloses no error. Code of Civil Procedure section 223 grants the trial court broad discretion to conduct voir dire of prospective jurors.[8] (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1184.) United States Supreme Court decisions have made clear that "the conduct of voir dire is an art, not a science," so "'[t]here is no single way to voir dire a juror.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 736-737, quoting *Mu'Min v. Virginia* (1991) 500 U.S. 415, 451 (dis. opn. of Kennedy, J.).) In *Morgan v. Illinois* (1992) 504 U.S. 719, at page 729, the court noted that "[t]he Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury."

To be an abuse of discretion, the trial court's conduct of voir dire "must render the defendant's trial fundamentally unfair." (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 737; *Mu'Min v. Virginia*, *supra*, 500 U.S. at pp. 425-426.) "Such discretion is abused 'if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1179, quoting *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.) Moreover, the United States Supreme Court has

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[8] Code of Civil Procedure section 223 provides:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deeems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. [¶] Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. [¶] The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

never found a constitutional entitlement to a particular manner of voir dire. (See *Mu'Min v. Virginia*, *supra*, 500 U.S. at p. 424.) Contrary to appellant's claims, he has no entitlement to a particular manner of voir dire, but only to a fair and impartial jury.

An examination of the voir dire conducted by the trial court in this case shows that it did not abuse its discretion. As will be discussed below, in several cases, the prospective jurors' answers to the questionnaire indicated that they did not understand the difference between the guilt and penalty phases in a capital trial, and the requirement that they consider aggravating and mitigating factors when determining punishment. The trial court educated these jurors about the two phases of a capital trial individually and outside the presence of the other prospective jurors. (See, i.e., RT 784-786, 877-879.) After ensuring that a juror understood the process, the court then asked follow-up questions directly related to the juror's questionnaire answers. In several cases, the juror's responses to the court's follow-up questions were different than his or her answers to the questionnaire. Indeed, it was clear in several cases that a juror had not understood the question posed in the questionnaire. After the court gave a clarifying explanation regarding a specific legal term or phase of a capital trial, often the juror would give an entirely different answer than the juror had written in the questionnaire.

For example, when the court individually educated various jurors that they would be required to follow the trial court's instructions in arriving at a penalty, many of the jurors listed by appellant in Arguments I and II indicated that they could do this. (See RT 689-690, 692-693, 883.) They also confirmed that they could weigh the aggravating and mitigating factors presented in order to arrive at a penalty determination. (See RT 593-595, 596-597, 786-787.) Contrary to appellant's claim (AOB 46-47), the court's questioning was not unduly leading and suggestive, and there was nothing

improper about the procedure employed by the court to determine whether the prospective jurors could be fair and impartial. The court did not "stack" the jury pool with pro-death jurors, but it asked similar questions of all the jurors questioned individually during voir dire to determine if they could be fair.

In Argument I, appellant lists 24 prospective jurors that he claims were subjected to "improper rehabilitation" during voir dire by the trial court. (AOB 45-167.) In Argument II, appellant contends that with respect to 15 of these 24 prospective jurors, the court improperly denied challenges for cause. (AOB 175-180.) As set forth below, however, of the 24 jurors appellant lists, nine were never called to the final round of jury selection. Four of the 24 were excused by the prosecutor. Five of the 24 jurors were ultimately selected to serve on appellant's jury. Appellant declined to exercise a peremptory challenge to these jurors, despite the fact that he had four remaining peremptory challenges. (See RT 1181-1193.) Accordingly, as to 18 of the 24 jurors listed by appellant, he can show no prejudice resulting from any alleged error by the trial court during voir dire. With respect to the remaining six jurors that appellant lists, the following analysis demonstrates that trial court properly conducted voir dire of these jurors and denied defense challenges for cause based on their oral responses.

A. Prospective Jurors J.O., Y.C., J.M., R.Z., S.W., F.G., M.A., C.P. and M.S.

Appellant contends that the questionnaire answers of prospective jurors J.O., Y.C., J.M., R.Z., S.W., F.G., M.A., C.P. and M.S. indicated that each would each be subject to a challenge for cause by the defense as a result of their views in favor of the death penalty. He argues that the trial court subsequently improperly rehabilitated each of these jurors during voir

dire by asking leading questions that resulted in oral answers that were far different than the views expressed by the prospective jurors in their questionnaires. (AOB 65-71, 78-85, 119-122, 123-127, 135-153, and 160-164.)

As to these nine jurors, however, appellant cannot show prejudice resulting from any alleged errors made by the court during voir dire or in denying defense challenges for cause. The trial court conducted voir dire of each of these jurors individually and outside the presence of the other prospective jurors. Thus, their opinions on the death penalty were kept private from all of the other jurors. None of the nine were called as prospective jurors during the final phase of jury selection. Therefore, appellant never had to use a peremptory challenge to excuse any of them. On this record, appellant cannot show any prejudice whatsoever resulting from the court's questioning of these jurors during voir dire or the denials of challenges for cause as to these jurors. (See *People v. Coleman* (1988) 46 Cal.3d 749, 768 [an erroneous ruling on a challenge for cause which results in the inclusion of a prospective juror is subject to a harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 23] .)

B. Prospective Jurors I.W., D.O., E.S. and G.T.

Appellant claims that the court improperly rehabilitated prospective jurors I.W., D.O., E.S., and G.T., by asking leading questions after these jurors gave disqualifying answers in their juror questionnaires. He also contends that the court improperly denied defense challenges for cause to these jurors. (AOB 71-77, 157-159, 167-168.) Similar to the above analysis, appellant can show no prejudice from any alleged error committed by the trial court.

The court questioned each of these persons individually and outside the presence of the other prospective jurors. The prosecutor subsequently

exercised peremptory challenges to excuse these four jurors. (RT 1188-1189, 1183, 1191.) On this record, appellant was not prejudiced by any alleged error committed during voir dire by the trial court. (*People v. Coleman*, *supra*, 46 Cal.3d at p. 768; *Chapman v. California*, *supra*, 386 U.S. at p. 23.)

C. Prospective Jurors L.G., C.P., L.H., M.C. and C.H.

Appellant claims that the court improperly rehabilitated prospective jurors L.G., C.P., L.H., M.C., and C.H., by asking leading questions after these jurors gave disqualifying answers in their juror questionnaires. (AOB 98-118, 154-156.) However, during the final round of voir dire, appellant chose not to exercise a peremptory challenge as to any of these jurors, even though the defense had not exhausted its peremptory challenges. The court had previously conducted voir dire of each of these jurors individually and outside the presence of the other prospective jurors.

Since appellant chose not to exercise a peremptory challenge to remove any of these five jurors who ultimately sat on the jury, any alleged error appellant claims that the trial court made during voir dire was harmless. Appellant can show no prejudice. (*People v. Danielson* (1992) 3 Cal.4th 691, 714; *People v. Raley* (1992) 2 Cal.4th 870, 904-905; *Chapman v. California*, *supra*, 386 U.S. at p. 23.)

D. Prospective Juror J.E.

Appellant claims that the court improperly rehabilitated prospective juror J.E. during voir dire. He argues that the answers in her questionnaire should have given the court notice that she was subject to a challenge for cause by the defense. (AOB 59-65.) To the contrary, defense counsel made an initial challenge for cause, but did not renew this challenge once J.E. was thoroughly questioned during voir dire. (RT 430.) The trial court

asked appropriate questions during voir dire. J.E.,'s answers demonstrated that she was not unfairly biased in favor of the death penalty, but would consider the aggravating and mitigating circumstances before deciding on the appropriate punishment.

In J.E.'s questionnaire, she advised that she could serve fairly on the instant jury, and she had not heard anything about the case (questions 1 and 2). (CT 1469.) She indicated that she "strongly" supported the death penalty (question 9). (CT 1470.) She expressed her view that "If you intentionally take someone's life you should pay with your own" (question 10). (CT 1471.) She also indicated, however, that she was "not sure" whether everyone convicted of a murder committed during a robbery should receive the death penalty (question 12). (*Ibid.*) She agreed that she would listen open-mindedly to any evidence submitted about the penalty and base her decision solely on the evidence and the court's instructions (question 13). (*Ibid.*)

J.E. also noted that she would not automatically vote for the death penalty in every case where the defendant was found guilty of first degree murder with a special circumstance (question 31). (CT 1476.) During voir dire, the court explained the difference between the guilt and penalty phases to J.E. (RT 422.) The court then asked:

> Q. Okay. If you found the defendant guilty under the circumstances of this particular case and found the special circumstances to be true, is there any feeling in your mind that you would automatically vote for the death penalty without listening to the evidence in aggravation and mitigation?
>
> A. No.
>
> Q. On the other hand, is there any feeling in your mind that if you found the defendant guilty, that you would tend to vote. . . for life without possibility of parole as opposed to death and without listening to the circumstances in aggravation and mitigation?

A. No.

Q. And if you . . . felt that the circumstances in aggravation, that is, the factors that make this crime or the defendant's background worse, outweighed the factors in mitigation, which means that the factors which make this crime or the defendant's background better, would you have any hesitancy in voting for the death penalty?

A. I don't quite understand. What do you mean?

Q. Well, if you found . . . that the circumstances in aggravation outweighed the circumstances in mitigation, would you have any hesitancy to vote for the death penalty?

A. No.

Q. On the other hand, if you found the circumstances in mitigation outweighed the circumstances in aggravation, would you have any hesitancy in voting for life without possibility of parole?

A. No.

(RT 422-423.)

Defense counsel subsequently asked the following questions:

BY MR. SPOKES: Q. [J.E.], in the questionnaire, the following question is asked, and you responded to it in the following manner:

"What would you want to know about the defendant before deciding whether to impose the death penalty or life imprisonment without possibility of parole? Please. . . explain."

. . .

Your response was, "I don't know. I really"–or "I don't really think personal circumstances is an excuse."

(RT 424.)

Defense counsel continued:

During the penalty phase, the circumstances in mitigation, generally speaking, are personal circumstances surrounding the defendant's life. Did you mean by your answer to this question

that regardless of the amount of circumstances in mitigation that may be presented during the penalty phase that you don't think they're an excuse and that you would be more inclined to vote for death?

A. Well, I don't know, like, what circumstances you would be talking about.

I'm–what came to my mind when I read that was like the Menendez trial, that they said that they had been abused, and that was why they committed the crime. And I don't think that's an excuse.

Q. In the Menendez trial, the brothers in the first trial attempted to use child abuse as an excuse for doing the crime.

In this particular case, the circumstances in mitigation would be only presented to the jury after the jury had found the defendant guilty, if that's what they're gonna do, okay?

A. Uh-huh.

Q. And only after he's been found guilty beyond a reasonable doubt.

Rather than—circumstances in mitigation are not presented to excuse the defendant's behavior but are offered to provide evidence to the jury to determine whether the death penalty's appropriate or not appropriate, and those circumstances in mitigation frequently involve the personal circumstances of the defendant.

Would you be inclined to disregard the personal circumstances of the defendant in determining what penalty is appropriate in this case?

A. I don't think so.

Q. Do you know?

A. No. How do you know until you're faced with something that you're going to decide? I mean, I don't. I've never had to decide something like this, so I don't know.

Q. I understand that. Fortunately, it's very rare that people get placed in a position where they have to serve their community by sitting on a death penalty case.

But on the same token, both sides need to know what your mind set is in coming into a case. And this question concerns me, because in the penalty phase, the circumstances in mitigation that are presented, by and large, are the personal circumstances of the defendant.

And my question to you is: Based on your beliefs about the Menendez case, would you be inclined to disregard evidence that's presented about the defendant's background?

For example, suppose it was presented that the defendant was abused as a child. Is that something you'd disregard and vote for the death penalty because–

A. Probably.

Q. So you believe . . . , any evidence of the defendant's personal history or personal events that occurred to him during his life which might be considered by other jurors as a circumstance in mitigation, that you would automatically disregard that evidence if it was about his person?

A. It's hard to answer I can't say I would automatically do it. I would probably lean that way.

Q. As you sit there today, you're more inclined to vote for the death penalty than you would be to vote for life without possibility of parole if the defendant were convicted of murder, robbery, and the special circumstance of having committed the murder during the course of the robbery?

A. I think so.

Q. Can you think of any circumstances under which you would not vote for the death penalty if the defendant were convicted of those charges?

A. I don't–I don't know.

Q. Can you think of anything that would cause you to believe that the penalty of life without possibility of parole would be appropriate if the defendant were convicted of those charges?

A. Not really.

Q. So, in other words, there's no evidence that would cause you to vote for life without the possibility of parole?

A. I don't know. But I'm saying I would lean toward that. I really don't know what the evidence could be to make me vote one way or the other.

I mean, I know that's not what you want, but I don't know how to answer it, because I don't know what I would do. I'm just saying what I think, that I would lean that way.

Q. That's not what I'm–I appreciate that answer. But I think the real question that I'm trying to find out from you is can you think of any evidence that could be presented by a person who's been convicted of murder in the course of a robbery and special circumstances, can you think of any evidence that might cause you to vote for life without possibility of parole?

A. Well, right now, no.

MR. SPOKES: Challenge for cause, Your Honor.

(RT 424-427.)

Before the court ruled on the challenge for cause, the prosecutor asked the following questions.

BY MR. PALMISANO: Q. I'm just going to make up some stuff. Let's assume that you found the defendant guilty and that you found the special circumstances true beyond a reasonable doubt and that you're in the penalty phase deliberation and evidence starts getting presented to you.

You get the crime which, is the death of the victim during the course of a robbery, and you get some other stuff about the defendant that says, you know, look it, he's got a lot of traffic tickets, he's a drunk driver, he's done bad stuff before.

And then Mr. Spokes starts putting on his case and tells you that the defendant has, you know, saved children from a burning orphanage or he is a decorated war hero. His problems didn't start until after the war and after his war experiences.

If . . . psychiatric evidence was presented and a professional, whom you from their testimony trusted a lot, in their judgment said to you that they thought that likely, given a good long time, is that Mr. Whalen could turn into a productive and useful citizen, even if he were going to be productive and useful in state prison for the rest of his life and he was never gonna hit the street again, if you were presented with that kind of evidence, could you consider imposing life without possibility of parole as opposed to the death penalty?

A. Yeah. Whenever you explain what you're talking about, what kind of circumstances you're talking about, then that, yeah, I think I could consider that.

Q. And assume that we would get to a penalty phase. Would you make your best effort to listen open mindedly, not just to the evidence I would be presenting, but to the evidence that Mr. Spokes would be presenting?

A. Yes.

(RT 429.)

Defense counsel subsequently asked:

BY MR. SPOKES: Q. Let's assume–again, these are all hypothetical. We don't even know we're going to get to a penalty phase.

A. Yes.

Q. But what we're trying to find out is what your mind set is, should we get there, since it is a possibility in this case.

Suppose you found the defendant guilty of murder and robbery and the special circumstance that the murder occurred in the course of the robbery, and the prosecution didn't put on any evidence of aggravating circumstances, and the defendant didn't put on any evidence of mitigating circumstances, and you just went back into the jury room to vote. Would you vote for life or

> would you vote for death? Understanding that the Court will instruct you that if the circumstances in aggravation outweigh the circumstances in mitigation, you're to vote for death, if the circumstances in mitigation are to outweigh the circumstances in aggravation, you'd vote for life, and you haven't heard either one, all you've heard about is the crime.
>
> A. Then I guess I would have to vote for life.
>
> MR. SPOKES: Thank you. No further questions.

(RT 429-430.)

Defense counsel did not renew his challenge for cause. (RT 430.) During the final round of jury selection, appellant exercised a peremptory challenge to remove J.E. from the jury panel. (RT 1188.)

By not renewing his challenge for cause, appellant waived his objection to the court's denial of his challenge. (See *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650 [the objecting party must do something to precipitate an actual ruling, or be deemed to have waived or abandoned the issue]; *People v. Obie* (1974) 41 Cal.App.3d 744, 750, overruled on other grounds by *People v. Rollo* (1977) 20 Cal.3d 109, 120, fn. 4.)

In any event, the above record demonstrates that the trial court did not improperly attempt to rehabilitate J.E.[4] Rather, the court, appellant and the prosecution questioned her at length during voir dire. Their questions were tailored to determine whether she could be fair to appellant. J.E.'s answers demonstrated that she was not predisposed in favor of the death penalty (RT 430), but would follow the court's instructions regarding the weight to be given aggravating and mitigating circumstances when determining the penalty. (RT 429.) The above questions and answers were proper under *Wainwright v. Witt* (1985) 469 U.S. 412, at pages 424-425. There the Court noted:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough

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

The Supreme Court found that for these reasons, great deference must be given to the trial judge to ask questions and listen to the juror's answers in order to determine if the juror can be fair and unbiased. (*Id.* at p. 425.) Here, the trial court properly questioned J.E. and listened to her responses. Appellant can show no error in the voir dire conducted by the court. Indeed, as noted above, defense counsel did not renew his challenge for cause because J.E.'s responses to questions by the court, defense counsel and the prosecution indicated that she would follow the court's instructions and do her best to be fair.[9] (RT 430.)

E. Prospective Juror M.E.

Appellant claims that prospective juror M.E. gave several answers in her questionnaire that would have caused her to be subject to a challenge for cause by the defense. She contends that the court improperly rehabilitated her by asking leading questions. (AOB 86-89.) To the contrary, M.E.'s questionnaire answers did not subject her to a challenge for cause. The trial court properly conducted follow-up voir dire of M.E. outside the presence of the other jurors and denied a challenge for cause to M.E. based on her answers, which indicated that she could be fair and follow the court's instructions.

In her juror questionnaire (CT 2878-2907), M.E. checked the box stating that she supported the death penalty (question 9). She expressed her

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[9] In Argument II, appellant claims that the court erred in denying the challenge for cause to J.E. (AOB 176.) However, as noted above, defense counsel never renewed his challenge. (RT 430.)

opinion that if one deliberately, "with forethought, killed someone then they're (sic) life should be forfeit." (Question 10). (CT 2880-2881.) However, in answering Question 12, M.E. answered that she did *not* think everyone convicted of a murder committed during a robbery should receive the death penalty. She explained, "I need to know more about it." (CT 2881.) With respect to Question 13, she affirmed that she would agree to listen open-mindedly to any evidence submitted about the penalty and base her decision solely on the evidence and instructions provided by the court. She added, "My decision always would be based on the evidence and the judge's instructions." (*Ibid.*)

In Question 14, she expressed her view that the death penalty was used too seldom, especially in cases involving torture. (CT 2882.) She thought the death penalty should be mandatory for "certain types of murder," and that it should be a possible sentence for terrorism (question 15). (CT 2882.) M.E. expressed her view that the death penalty would be inappropriate in cases of "accidental death, mentally incompetent." (Question 18.) (CT 2882.) When asked in Question 19 whether she would automatically vote for the death penalty and against life without the possibility of parole if the defendant was convicted of first degree murder, she was uncertain, writing "I don't know." (CT 2883.) In Question 20 she indicated that she would not automatically vote against the death penalty and vote for life in prison because she believed in the death penalty. (*Ibid.*)

During voir dire, the court asked M.E. the following questions:

> Q. First of all, in answer to question 15 you indicated that you thought –well, the question was, "Do you feel that the death penalty should be mandatory for certain types of crimes? Please explain." You said, "Yes. Certain types of murder."
>
> You understand–did you understand by the term "mandatory" that any person who is convicted of that crime would automatically be put to death?

A. Yes, sir.

Q. Okay. What kind of murder did you have in mind exactly?

A. When he murders somebody deliberately. You set out to kill him.

Q. Okay.

A. I think you should be put to death.

Q. Okay. Do you feel–you understand that in this particular casethere are two phases. Right?

Q. First phase is the guilt phase where evidence would be brought in to show that the whether (sic) the defendant did or did not commit the crime?

Q. Okay. And whether the special circumstances are true, and in this case the special circumstances is (sic) that the defendant committed the crime during a robbery, you understand that?

A. Yes.

Q. Okay. And if the jury found the defendant did commit the crime and that it was during a robbery as a special circumstance, you would then get to the penalty phase where you would have to decide whether the punishment for that crime would be life without possibility of parole or the death penalty. You understand that?

A. Yes.

Q. Okay. Are your feelings about the particular crime that's alleged here, that is a murder that was committed during a burglary or robbery, I should say as you understand it, are your feelings such that you believe that the death penalty should be mandatory? In other words,that you would automatically vote for it?

A. I would need to know a little bit more about it. You know, did he bring the gun with him? Did he know the guy was going to be there? Was it accidental? Were they fighting over the gun? You know. I just need to know a little bit more.

Q. Well, assume for the moment that you found that the defendant brought the gun with him–well, in any event, do you feel–do you feel that if the evidence showed that the crime was premeditated that you would automatically vote for the death penalty?

A. Yes, sir.

Q. And that would be regardless of whatever evidence was introduced during the penalty phase? That is, factors in aggravation and mitigation. Aggravation being those things that tend to indicate that the penalty should be imposed, and mitigation, tend to indicate that it should not be imposed. In other words, you feel–you feel that regardless of those factors if you believe that the crime was premeditated you would vote for the death penalty?

A. I think–yeah, if it was premeditated it would be the death penalty, yes.

Q. And that's regardless of these other factors?

A. I don't know what other factors you would be referring to.

Q. Well, things about the defendant's background?

A. No. Would have no bearing on it.

Q. Nothing about the defendant's background would have any bearing at all?

A. No.

Q. So he could bring in any kind of evidence that he wanted about how tough life he's had and so forth and so on and you would not take that into consideration?

A. No.

(RT 687-689.)

The defense then challenged this prospective juror for cause. (RT 689.) Before the court responded to the challenge for cause, the prosecutor requested to voir dire M.E., and the court agreed. The prosecutor then

asked the following questions:

> MR. PALMISANO: Ma'am, do you understand that the law in the State of California is that before you make the decision on the death penalty you're supposed to weigh the factors in mitigation against the factors in aggravation?
>
> A. Well, I do now. I didn't then, but, yes.
>
> Q. Okay. If His Honor told you that the law was that if you find the defendant guilty beyond a reasonable doubt and that you find the special circumstance true that the murder occurred during the robbery beyond a reasonable doubt, and if he informed you that at that point before you decide whether or not what the appropriate penalty is, that you have to examine the factors in aggravation on the defendant which would be some, perhaps, of his past history, the facts of this particular crime against whatever evidence in mitigation might be presented, okay, would you accept that as the law?
>
> A. If the judge told me to.
>
> Q. Okay. If he told you that was the law could you follow that law regardless of your feelings?
>
> A. Yes.

(RT 689-690.)

The defense questioned her:

> MR. SPOKES: As you sit there right now is it your belief that premeditated, deliberate first-degree murder should be punished by death?
>
> A. Yes.
>
> Q. The law says that deliberate, premeditated first-degree murder by itself isn't punishable by death. It takes what's called special circumstances. And one of the special circumstances which allows the death penalty is the murder which is committed during the course of a robbery. If you found the defendant guilty of premeditated, deliberated first degree murder and found it true the special circumstances of robbery, would

you believe that the death penalty should be automatic in that case?

A. If I understood it correctly that made it special circumstances, yes.

MR. SPOKES: Renew the challenge, your Honor.

(RT 690-691.)

The prosecutor then asked M.E.:

Q. –the last question I think you were asked if you believed that it [a murder] occurred during the course of a robbery, was found guilty, should it be the death penalty, okay? Automatically. Do you understand that that's not the law as it presently exists?

A. Yes.

Q. Would you follow the law as it presently exists regardless of what you think the law should be?

A. Yes.

(RT 691.) Defense counsel renewed his challenge for cause based on M.E.'s answers to questions 15 and 29. (*Ibid.*) At this point, the prosecutor made the following argument:

MR PALMISANO: Your Honor, the problem with the questions is not for all of the respondent's (sic) to the questionnaire but obviously .... For M.E., that the questions are phrased in a way that they are asking for the personal opinions of the jurors, which is fine, but you need to indicate to the jurors that how they feel isn't necessarily the law, and if they are indicating that they can put aside their personal feelings and follow the law and I don't think that the challenge for cause exists just because in a general sense they feel that the law should be something different than it is.

(RT 691-692.)

The trial court subsequently questioned M.E. as follows:

Q. [M.E.], is there any doubt in your mind that you would be able to listen to my instructions on the law and follow the law as

it relates to the question of penalty and punishment in this matter, and specifically, that you would be instructed that the death penalty is to be imposed only if you found that the factors in aggravation here outweighed the factors in mitigation?

A. Yes, sir. I'd follow your instructions.

Q. And that would be regardless of the fact, if I understand you correctly, that it is your belief that it automatically should be imposed?

A. Yes, sir.

Q. Under the circumstances. And you don't have any doubt in your mind that you could put that aside and follow my instructions on the law?

A. No doubt, sir.

Q. And that your views will not influence your decision and tend to make you vote for the death penalty even though the instructions say otherwise?

A. No. I would tend to follow your instructions.

(RT 692-693.)

The court thereafter denied the challenge for cause. (RT 693.) The defense subsequently exercised a peremptory challenge to excuse M.E. from the jury. (RT 1187.)

Although M.E.'s written statements on her questionnaire, in isolation, seemingly indicated a pro-death-penalty bias, her voir dire responses negated that inference. Her oral responses indicated that she did not initially understand the law regarding the penalty phase. Once she understood that the death penalty was not automatic, but a juror would be required to follow the court's instructions in arriving at a penalty, she conveyed a willingness to put aside her personal feelings and follow the court's instructions. (RT 690-693.) The above discussion demonstrates that the court did not ask improper questions during voir dire, and both

defense counsel and the prosecutor had opportunities to explore M.E.'s opinions. On this record, appellant cannot show that the court abused its discretion in questioning M.E. during the sequestered voir dire session.

In Argument II, appellant claims that the court erred in denying his challenge for cause to M.E. (AOB 177.) However, he cannot complain on appeal about the trial court's ruling unless he meets the following requirements: (1) he used a peremptory challenge to remove the juror in question; (2) he exhausted his peremptory challenges or can justify his failure to do so; and (3) he was dissatisfied with the jury as selected. (*People v. Lewis* (2001) 25 Cal.4th 610, 634; *People v. Ochoa* (1998) 19 Cal.4th 353, 444; accord, *Ross v. Oklahoma* (1988) 487 U.S. 81.)

Appellant did not exhaust his peremptory challenges. He exercised 16 of his 20 peremptory challenges (see Code of Civ. Proc. § 231), then passed. (RT 1181-1193.) At trial, he indicated no dissatisfaction with the jury that heard his case. This jury included none of the persons he unsuccessfully sought to challenge for cause. (See AOB 176-180.) Therefore, appellant can show no prejudice from his contention that the trial court erred in denying challenges for cause to various prospective jurors. (See *Jackson v. Superior Court* (1937) 10 Cal.2d 350, 358 [defendant suffered no prejudice from irregularity in parties' use of peremptory challenges where defendant accepted the jury before exhausting his peremptory challenges.)

F. Prospective Juror J.J.

Appellant claims that prospective juror J.J. gave answers in her juror questionnaire (CT 2368-2395), that would have caused her to be subject to a defense challenge for cause. He argues that the trial court improperly rehabilitated her by asking leading and suggestive questions. (AOB 92-

100.) In Argument II, he contends that the court erred in denying a challenge for cause to J.J. (AOB 177.) These contentions lack merit.

In her questionnaire, J.J. checked the box indicating that she strongly supported the death penalty and explained that her views had grown stronger over time. (CT 2370-2371.) She felt the death penalty is used "too seldom" (question 14) and that it should be mandatory punishment for murder and available for child molestation (questions 15 and 16). (CT 2372.)

In Question 21, J.J. noted that in deciding what punishment to impose, she would like to know what kind of home the defendant came from and whether he had any religious background. (CT 2373.) She indicated in Question 29 that the costs of keeping a person in prison for life would be a consideration in deciding on the penalty because "why keep someone in prison for the next 30-40 years when they are going to die in there anyway?" (CT 2375.) In the same question, J.J. objected to the cost of providing appellate process for the defendant, as "when I'm a tax-paying citizen I look at the most cost effective." (CT 2375.)

The court questioned J.J. out of the presence of the other jurors. The court initially explained to her the difference between the guilt and penalty phases of the trial, and informed her of the special circumstance charged. (RT 592-593.) The following discussion then took place.

> THE COURT: . . .Do you feel that if you were to find the defendant guilty and to find the special circumstances true that you would, when you got into the penalty phase, that you would automatically vote for the death penalty or would you have to listen to the evidence that would be presented during the penalty phase at first?
>
> J.J.: I would listen to the evidence but more than likely for the death penalty.
>
> THE COURT: Okay. All right. You understand that during the penalty phase evidence would be introduced in what's called

aggravation, which would mean evidence which the prosecution believes would indicate that the death penalty should be imposed, and evidence would be introduced in what's called mitigation, which means that evidence or factors which the defense believes the jury should consider in which would tend to indicate that the sentence should be life without the possibility of parole. Do you understand those?

J.J.: Yeah.

THE COURT: Do you believe that you would be able to listen to those various factors that are presented and determine whether the factors in aggravation outweigh the factors in mitigation?

J.J.: I'd listen to it, but like I said, I'd probably pick the death penalty.

THE COURT: Okay. Well, I'm going to ask you one more thing. You understand that this is a crime which the death penalty is authorized but it is not mandatory. Do you have a problem with that?

J.J.: No.

THE COURT: Okay. You understand that if the defendant's found guilty and if the special circumstances are found true, then he would be put to death only if the factors in aggravation were found to outweigh the factors in mitigation and the jury so found?

J.J.: Yeah.

THE COURT: You understand that?

J.J.: UM-hmm.

THE COURT: You believe you'd be able to objectively weigh those factors, or do you believe that you would tend, because of the way you feel about it, to weigh the factors in aggravation more and vote towards the death penalty?

J.J.: I think I could be objective, do it, whatever.

> THE COURT: In other words, are you saying, so I'm clear about this, you understand that the death penalty is not mandatory in this case?
>
> J.J.: Right.
>
> THE COURT: It would be imposed only if you found, as a juror and the rest of the jurors, found that the factors in aggravation outweigh the factors in mitigation?
>
> J.J.: Um-hmm.
>
> THE COURT: You understand that?
>
> J.J.: Um-hmm.
>
> THE COURT: Now once again, I'm going to ask you do you feel that you would be objective about it? Given the way you've answered previously, do you feel you could be objective about it, listen to those factors, weigh them and see whether those factors weigh more heavily than the factors in mitigation that you would be told about?
>
> J.J.: Yeah, I would be objective.

(RT 593-595.)

The court continued questioning J.J. as follows:

> THE COURT: In answer to question 29 you said, "In deciding penalty, that is life in prison without possibility of parole or death, would the cost of keeping someone in jail for life be a consideration for you?"
>
> And you said, "Yes. Why keep someone in prison for the next 30 to 40 years when they're going to die in there anyway."
>
> We need to know whether that's—or I need to know whether that's a consideration that you'd exercise or whether that is something-a simple-simply a general feeling that you have about such matters?
>
> J.J.: It's just a general opinion.
>
> THE COURT: In other words, in deciding this case are you telling me that if you got to that point you would dismiss from

your mind any thoughts about the cost of keeping the defendant incarcerated?

J.J.: Pretty much, if I was instructed to do so. I mean, I would be objective.

THE COURT: And you believe that you could do that?

J.J.: Um-hmm, yes.

THE COURT: Likewise you answered: "Would the cost of providing appellate process be a consideration?" And you said, "Yes. I'm a tax paying citizen. I look at most cost effective." Is that a statement have something that you consider in this case or is this again a general statement?

J.J.: Again just a general opinion.

THE COURT: Okay. Is it your representation to the court that you would not let that factor enter into your deliberations in deciding what the appropriate penalty is in this case?

J.J.: No.

THE COURT: You would not?

J.J.: No, it would be just.

THE COURT: You would just consider it on solely on the aggravating and mitigating factors and not on the question of. . .

J.J.: Right.

(RT 596-597.)

The trial court asked the attorneys if either had any questions of J.J., and neither asked any questions. (RT 597.) Defense counsel challenged J.J. for cause, and the court denied the challenge. (*Ibid.*) The defense later exercised a peremptory challenge to excuse J.J.. (RT 1189.)

The court's questions properly inquired whether J.J. would be able to set aside her personal opinions and follow the court's directions. J.J.'s responses confirmed that she could set aside her opinions regarding

the death penalty and be objective. (See *People v. Stewart* (2004) 33 Cal.4th 425, 447 [a juror might have strong personal opinions for or against the death penalty, and yet such a juror's performance would not be substantially impaired unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law].)

The trial court also properly denied appellant's challenge for cause, since J.J. repeatedly assured the court that she could put aside her personal views and be objective. (RT 595-597.) In any event, appellant cannot complain about the trial court's ruling denying his challenge for cause to J.J. because he did not exhaust his peremptory challenges and did not object to the jury as selected. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 634.)

G. Prospective Juror R.L.

Appellant contends that the court improperly rehabilitated prospective juror R.L. by asking him leading questions during voir dire after R.L. had given "disqualifying" questionnaire answers. (AOB 128-135.) In Argument II, he claims that the court erred in denying his challenge for cause to R.L.. (AOB 178.) These contentions are groundless.

In his questionnaire, R.L. checked the box indicating that he strongly supported the death penalty. (CT 3630.) He believed that one should receive the death penalty if he takes another's life with premeditation or while committing another crime (Question 10). (CT 3631.) On Question 13, R.L. affirmed that he would listen open-mindedly to any evidence submitted about the penalty and base his decision solely on such evidence

and the court's instructions. (*Ibid.*) As to his attitudes about whether the death penalty was used too frequently or not enough (Question 14), R.L. answered "I feel it is not used too often. If it is imposed I think it should be carried out quickly." (CT 2632.)

In Question 19, R.L. wrote that he would automatically vote for the death penalty and against life imprisonment, referring to his answer to Question 10. (RT 3832-33.) In Question 21, which asked what he would want to know about the defendant before he voted to impose sentence, R.L. wrote, "Nothing—people must be responsible for their actions." (RT 3633.) As to Question 22, whether he believed in the adage "an eye for an eye," R.L. wrote, "If someone kills someone else on purpose or while committing a crime they should lose their life." (RT 3633.) R.L. felt that he could not put the "eye for an eye" principle out of his mind and apply the law the Court will give him. (RT 3634.) He further indicated that the costs of keeping a person in prison for life would be a consideration in deciding the penalty (Question 29). (CT 3635.)

The trial court conducted voir dire of R.L. out of the presence of the other jurors as follows. The court initially explained the difference between the guilt and penalty phases of a capital trial to R.L. (RT 877-879.) The following discussion then ensued.

> Q: In your mind if you listen to the evidence in the guilt—in the penalty phase of the trial, if you got there, in your mind, the factors in mitigation indicating it should not be imposed outweighed those factors in aggravation which indicate that it should, would you have any hesitancy in voting for life without possibility of parole as opposed to death?
>
> A: Yes. I would have a little problem with that.
>
> Q: You feel that regardless of what evidence was put in about mitigation you would vote for the death penalty anyway?
>
> A: I would lean heavily towards that way. Yes.

Q: And you don't—you don't believe that you would be able to impartially weigh the various factors and make a decision based on those factors as opposed to your preconceived beliefs about this?

A: Well, I think I could consider them, but I still would be very heavily influenced the other way.

Q: Under those circumstances do you believe that you could fairly try this case if you got to the penalty phase?

A: To the penalty phase?

Q: Yes.

A: I think so.

Q: Well, do you think you would be fair?

A: I think so.

Q: Assuming that the only factors you knew about were that the defendant had committed the crime that he's charged with, and the special circumstances were true, in other words, that the crime was committed during a robbery and it did involve what we know about it, the killing of an elderly man with a shotgun, assuming there was no other evidence in aggravation, in other words, no other factors were introduced about, that the defendant was a bad person or anything like that. Assuming that there was evidence introduced that the defendant had some mental problem which caused him to not fully—well, which in your mind indicated to you that maybe he should not be held as fully responsible as you would otherwise think, do you believe under those circumstances you could vote for life without possibility of parole?

A: In those circumstances, possibly, yes.

Q: With respect to your answer to Question 15, the question was: "Do you feel the death penalty should be mandatory for any particular type of crime? Please explain."

You say: "See the answer to Number Ten," which was your feelings about the death penalty.

Do you mean by that, sir, that you feel that if the defendant were convicted in this case it's your view that he should be put to death automatically without any kind of a further hearing as to what penalty was appropriate?

A: Not automatically. No I think—

Q: So when you said, "mandatory"—

A: —process—

Q: —mandatory, did you mean that it should be always imposed or did you mean that that is one of the sentences that could be imposed?

A: Did I put "mandatory?"

Q: Well, that was one of the—a lot of people had difficulty with this question. You would not be the first to misunderstand.

Did you mean anyone convicted should be automatically put to death or did you mean that should be one of the punishments which should be available?

A: I think that should be one of the punishments which should be available.

Q: Okay. Do you believe, and I have to answer—to ask you this, do you believe that you could fairly listen to the evidence, if you got to the penalty phase, listen to the evidence from both sides and make your decision based on the evidence that you hear at that time, in a fair and impartial manner?

A: I think so. Yes.

Q: In answer to Question 23, Question 23 was: "California law has not adopted the "eye for an eye" principal. Will you be able to put the "eye for an eye" concept out of your mind and apply the principals [sic] that the Court gives you?"

You checked, "No."

Is that still your answer to that question?

A: What was the last part of that—

Q: "Would you be able to put that concept, the "eye for an eye" concept, out of your mind and apply the principals [sic] of law"—doesn't say, "of law," but the principals [sic] that the Court gives you?

A: Yes, I think I could.

Q: In answer to Question 29, you said: "In deciding penalty, that is, life in prison without the possibility of parole or death, would cost of keeping someone in jail for life be a consideration for you?"

You said, "Yes. We waste too much money on death row inmates now. Unfair to victims' families."

I think actually what the intent of the question was probably was would you vote for the death penalty just to avoid the cost of having somebody kept in prison for the rest of their lives. I think that was what counsel were trying to get at. But in any event, regardless of what the intent of the question was, if you get to that phase, penalty phase, you would be instructed on what you can and—what you can consider in determining death versus life without the possibility of parole. I think that you will find that none of the factors have anything to do with how much it would cost to keep a person if you voted for life without possibility of parole.

Can you promise me that if you got to that phase you would not consider that as a factor in making your life or death decision?

A: Putting it that way, no, I would not.

Q: You would not consider it?

A: Consider it. No.

Q: All right. In answer to Question 30. You said, the question was: "Knowing that a first degree murder verdict with a special circumstance found to be true, could cause the jury to enter a second penalty phase and cause the jury to have to consider life without the possibility of parole or death, would you for any reason hesitate to vote for first degree murder or for special circumstances if the evidence proved either such thing true

beyond any reasonable doubt just to avoid the task of deciding the penalty?"

You said, "Yes. No need to decide penalty if verdict is"—

MR. SPOKES: "Decided."

THE COURT: Q: "Decided,:

Well, did you understand or do you understand that question now that I have—

A: Well, it sounds like kind of a contradiction because it seems like, yes, he's guilty; yes, he's special circumstances and then, but would you do the other thing?

Q: Well, it's a very convoluted question, but the basic idea of this is this: If—are you so bothered by having to decide the question of life versus death that you would refuse to vote to find the defendant guilty or refuse to find the special circumstances true just so you wouldn't have to get to that question?

A: No, I don't think so.

Q: In answer to Question 32 you said: "Are your feelings about the death penalty such that if there were a penalty phase of a trial you would in every case automatically vote for the death penalty rather than life in prison without the possibility of parole?"

You checked, "Yes. See Number Ten."

Is that still your answer?

A: Well, again, if—if all the circumstances were the same and the results were the same, and it was—it leads to the same thing, of course I would.

Q: Well, see, the question, this question was paired with the one in the previous thing. They're mirror images of each other. What they ask, are you automatically going to vote for the death penalty in every case if—if the defendant is found guilty, if the special circumstances are found true.

We have had some discussion here in which you indicated or at least I think you have indicated that you would not. I just want to clarify—

A: Well, I said that it depends. The way the question was presented and the way you just described it seem, you know, a little bit different. But again, my answer probably would be yes, I would, if the situations were the same—

Q: What do you mean by, "the situations being the same," sir?

A: Well, I think we are getting questions confused here again. But if—if they were convicted, special circumstances, and, you know, it follows down that same line again, I would be weighted towards the—

Q: Yeah. You indicated you were weighted towards it, but that's not exactly the same thing as saying in every case that you would.

A: No, not in every case I would not.

Q: In other words, it would depend not only on whether the defendant was guilty, found, guilty, and where the special circumstances were found true, but what evidence was presented afterwards about what should happen to him?

A: I think so. Yes.

Q: Is that correct?

A: Yes.

THE COURT: All right. I don't think I have any other questions, counsel?

MR. SPOKES: I have no questions, Your Honor.

MR. PALMISANO: Pass for cause?

MR. SPOKES: I would challenge for cause based on Questions Eight, ten, 12, 13, 15, 17, 19, 20, 23, 29, 30, 32, 78 and 87.

THE COURT: Well, I better take a look at 78 and 87, I think, just to see what those are.

That's: "Do you have an opinion regarding validity of psychiatric opinions?"

"Yes. Depends on whose witness the opinion comes from."

Q: Can you elucidate about that, what you have in mind in saying that?

A: I'm sorry. I didn't follow that one.

Q: Question was: "Do you have an opinion regarding the validity of psychiatric opinions? Please explain."

"Yes. Depends on whose witness the opinion comes from."

Can you explain that?

A: Well, it just seems like, from my very limited experience, that psychiatric evaluations can go pro, if they're for the defendant they're usually pro. If they're for the plaintiff they're usually pro that way.

Q: So in other words, . . . what you're saying that you're going to look at the witness and keep in mind when you're listening to him which side of the case he's testifying for and that's going to form part of your—

A: I think little bit. Yes.

Q: —opinion?

Does that mean that you're automatically going to believe or tend to believe the ones who testify for the prosecution over those who testify for the defense?

A: Well, no. It's just the opposite of that. It—

Q: All right. And with respect to Question 87. Said: "Will you be able to set aside any feelings of pity or sympathy you might feel for the victim or the defendant and decide the case solely on the evidence?"

You checked, "No. Compassion is hard to overcome."

If you are a juror—have you ever been a juror before? I don't remember from looking—

> A: No. Actually, no.
>
> Q: Okay. If you are—the standard jury instruction will instruct you that you are not to be influenced by sympathy, compassion, pity, prejudice, public opinion, public feeling. In other words, any number of any outside factors. You're supposed to decide the case based on the evidence that is presented in trial without regard to any of those things.
>
> So, I guess the question, that's what this question is driving at. Do you think you would be able to do that or not?
>
> A: I think I could.
>
> THE COURT: All right. Anything further?
>
> MR. SPOKES: Renew the challenge.
>
> THE COURT: All right. The Court feels that the juror has indicated that he will follow the law and follow the instructions and would under . . . what he believed to be proper circumstances be able to vote for life without possibility of parole. Therefore, the challenge for cause is denied.

(RT 881-889.)

The defense later exercised a peremptory challenge to excuse R.L. (RT 1183.) The court's questioning reveals that R.L. was willing to follow the court's instructions and put aside his personal opinions regarding the death penalty if selected as a juror. (RT 883-884.) R.L. represented that he could fairly listen to the evidence and make his decision on penalty after weighing evidence from both sides. (RT 883.) He denied that he would automatically vote for the death penalty, but maintained that his decision would depend on the evidence presented during the penalty phase. (RT 887.)

The court's questioning of R.L. revealed that he did not fully understand the questions in the questionnaire. His answers on voir dire showed that he was not inflexible, but would listen to the court's instructions and base his decisions on the evidence presented. For these

reasons, the court properly denied the challenge for cause. In any event, under *People v. Lewis*, *supra*, 25 Cal.4th at page 634, appellant cannot complain about the trial court's ruling denying his challenge for cause to R.L. because he did not exhaust his peremptory challenges and did not object to the jury as selected.

H. Prospective Juror L.V.

Appellant contends that the court improperly rehabilitated prospective juror L.V. by asking him leading questions during voir dire after he had given disqualifying questionnaire answers. (AOB 165-167.) In Argument II, he complains that the court erred in denying his challenge for cause to L.V.. (AOB 179.) Similar to the above analyses, the record demonstrates that these contentions lack merit.

In his questionnaire, L.V indicated that he would "consider" imposing the death penalty (Question 9). (CT 3180.) He noted that he believed in it, and he thought those that commit first degree murder should receive the death penalty (Questions 10 and 12). (CT 3181.) L.V. represented in Question 13 that he would "listen open mindedly too [sic] any evidence submitted, before deciding penalty." (*Ibid.*) He would not "automatically" vote for the death penalty (Question 20). (CT 3183.) Although L.V. believed in the principle of "an eye for an eye," he asserted that he could put this concept out of his mind and apply the principles given to him by the court (Questions 22 and 23). (CT 3183-3184.) L.V. also noted that he would be able to set his personal feelings regarding the death penalty aside and follow the court's instructions. (CT 3184.)

At voir dire, the court explained the two phases of the trial to L.V. (RT 784-786.) The following discussion then ensued:

> Q. If you felt that the factors tending to show the [sic] was the appropriate penalty outweighed the factors tending to show that life without possibility of parole was the proper sentence, do you

have any hesitancy in voting for the death penalty under those circumstances?

A. No.

Q. On the other hand, if you felt that the circumstances in aggravation, in other words, those factors tending to indicate that the death penalty was appropriate, did not outweigh those that tended to indicate life without possibility of parole was appropriate, would you have any hesitancy in voting for life without possibility of parole?

A. No.

Q. So would it be fair to say then that you would not automatically vote for the death penalty just because the defendant was convicted of the crime?

A. No.

Q. Okay. In answer to question 15 you said, "Do you feel that the death penalty should be mandatory in particular types of crime?" You said, "Yes. First degree murder."

By that did you mean that if anyone is convicted of a first-degree murder you should automatically be put to death, or there should be a penalty option?

Do you understand the question?

A. I'd have to consider all of the—

Q. Circumstances?

A. –And the evidence.

Q. Okay. In other words, you didn't mean by that that anybody convicted of a crime should automatically be put to death. You meant that it should be considered?

A. Yes.

(RT 786-787.)

Following the court's voir dire, neither attorney asked L.V. any questions. (RT 787-788.) Defense counsel made a challenge for cause

based on L.V.'s answers to questions 12, 15 and 19. The court denied the challenge. (RT 788.) The defense later exercised a peremptory challenge to excuse L.V.. (RT 1186.)

The court properly denied the challenge for cause. Throughout L.V.'s questionnaire, he repeatedly indicated that he would listen to the evidence and the court's instructions before reaching a penalty. He confirmed that he would not automatically vote for death, and he would put aside his personal views regarding the death penalty and follow the court's instructions. (CT 3181-3184.) L.V.'s answers to the court's voir dire questions reflected his same willingness to listen to the court's instructions and weigh the evidence, before determining a penalty. (RT 786-787.)

This record demonstrates that the court did not improperly rehabilitate L.V. Likewise, appellant cannot complain about the trial court's ruling denying his challenge for cause to L.V. because he did not exhaust his peremptory challenges and did not object to the jury as selected. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 634.)

II. APPELLANT RECEIVED A FAIR TRIAL BEFORE AN UNBIASED JURY

In Argument III, appellant claims he was deprived of a fair trial because his jury was composed of biased and pro-death jurors. (AOB 181-208.) He contends that the trial court and trial counsel failed to adequately voir dire the prospective jurors to ensure an impartial jury. He further argues that the trial court "improperly 'rehabilitated' many death-prone jurors who would otherwise have been successfully challenged for cause by the defense." (AOB 181.) These contentions are groundless.

Appellant forfeited this claim of error by not objecting to the jury that heard his case. (See *People v. Weaver* (2001) 26 Cal.4th 876, 910-911 [to challenge on appeal the denial of a challenge for cause defendant must

express dissatisfaction with the jury as finally constituted]). As set forth above, the trial judge properly sequestered individual prospective jurors during voir dire and asked them questions designed to determine whether each could set aside his or her personal views in order to be fair and follow the court's instructions. The court's questions were appropriate to isolate jurors excludable for cause because of their absolute bias for or against the death penalty. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-523.) Contrary to appellant's contention, the voir dire by the trial court on Witherspoon grounds did not induce a pro-guilt and pro-death bias in the jurors. (See *People v. Balderas* (1985) 41 Cal.3d 144, 190-191.)

In addition, the voir dire inquiry was not conducted by the judge alone. Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias. Both the prosecutor and defense counsel took advantage of that opportunity. Under these circumstances, appellant can show no error in the way in which voir dire was conducted. (See *Mu'Min v. Virginia*, *supra*, 500 U.S. at pp. 425-426 [unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal].)

All members of the jury insisted that they could follow the law on guilt and penalty. Appellant did not challenge for cause any of the jurors who sat on the jury, and he accepted the jury before exhausting his peremptory challenges. Accordingly, appellant received a fair trial before an unbiased jury, and his challenges to the jury's composition must be rejected.

III. THE COURT PROPERLY EXCUSED PROSPECTIVE JURORS M.F. AND B.H. FOR CAUSE

In Argument IV, appellant contends that the trial court committed reversible error by excusing prospective jurors M.F. and B.H. based on their written answers to the questionnaire and answers during voir dire, without any efforts to rehabilitate them. (AOB 211-223.) This contention should be rejected. The record demonstrates that the court conducted follow-up voir dire of M.F. and B.H. based on their questionnaire responses. The court then properly excused both of these jurors, since they maintained that they would not be able to impose the death penalty under any circumstances.

A. The Facts

Prospective juror M.F. provided the following responses in his questionnaire. He wrote, "I oppose the death penalty because I feel by the time the accused is put to death he must be tried over and over again. Life imprisonment seems more economical." (CT 2251.) In response to Question 13, M.F. wrote that he would not agree to listen open-mindedly to any evidence submitted about the penalty. (*Ibid.*) He wrote in answer to Question 14 that the death penalty is used too often. (CT 2252.) He stated in Question 17, "I am opposed to the death penalty but I don't know how I would feel if the crime involved one of my family." (*Ibid.*) In Question 18, M.F. declared, "death penalty is inappropriate. I believe in life imprisonment." (*Ibid.*) When asked in Question 27 if he could set aside his personal feelings regarding what the law should be regarding the death penalty, M.F. replied, "No," and he explained, "Can't see spending tax dollars on appells [sic] for death penalty verdicts." (CT 2254.) With respect to Question 31, M.F. represented that in every case he would automatically vote against the death penalty. (RT 2250.)

The court conducted the following voir dire:

THE COURT: Hi, M.F. How are you?

We're just going to ask you a couple of questions in this matter.

You indicate that you . . . oppose the death penalty?

A. Right.

Q. Correct?

A. Yes.

Q. Okay. Do you feel that there are any circumstances under which the–if the defendant were found guilty of the crime that he is charged with and the special circumstances are proved, do you feel that there are any circumstances which you would vote for the death penalty?

A. No, I don't.

Q. In other words, if the evidence, and I'm not saying that it would, showed that this crime was exceedingly vicious and callous and horrible, and if the evidence, and I'm not saying that it does, were to show that the defendant was a particularly vicious, brutal and horrible person, under no circumstances do you believe that you could impose the death penalty; is that correct?

A. I don't believe I could.

MR. PALMISANO: Move to excuse for cause, Your Honor.

THE COURT: All right. You're excused. Thank you, M.F..

(RT 524-525.) Defense counsel made no objection, nor did defense counsel request an opportunity to further voir dire M.F.

B.H. provided the following responses to the questionnaire. She opposes the death penalty (question 9). (CT 3060.) With respect to Question 18, she indicated that she did not believe the death penalty was appropriate under any circumstances. (CT 3062.) B.H. explained in

Question 31 that she would automatically vote against the death penalty in every case. (CT 3066.)

The court questioned B.H. as follows:

> [THE COURT:] All right. First of all, in answer to Question 9, you indicated that you oppose the death penalty, correct?
>
> A. Yes.
>
> Q. And then in 10 and 11, . . . you were asked to explain your views on the death penalty. You left that blank.
>
> A. Uh-huh.
>
> Q. And can you explain either, A, why you left it blank, or, B, what your views are?
>
> A. Because I didn't know what to put down.
>
> Q. Okay. So you just weren't sure what to say?
>
> A. Uh-huh.
>
> Q. And have your views on death penalty changed over time?
>
> A. No.
>
> Q. I'm not clear here on some of your answers exactly what you feel here.
>
> Is your feeling about the death penalty such that under no circumstances could you vote to approve it?
>
> A. Under no circumstances.
>
> Q. None whatsoever?
>
> A. None whatsoever.
>
> Q. Okay. So if–even if this were the most horrible crime in history?
>
> A. Even if.
>
> Q. And even if the defendant was the worst person in history, you could not–

A. I don't believe in it.

Q. All right. Thank you, ma'am. You're excused.

(RT 669.) Defense counsel did not object to the court's action, nor did counsel request to voir dire B.H..

B. Discussion

In *Wainwright v. Witt, supra*, 469 U.S. at page 424, the Supreme Court determined that a prospective juror may be challenged for cause based upon his or her views regarding capital punishment if those views would "prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath." (Accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Crittenden* (1994) 9 Cal.4th 83, 121.) A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*Cunningham, supra*, 25 Cal.4th at p. 975; see also *People v. Heard* (2003) 31 Cal.4th 946, 958.)

The *Wainwright* Court noted that

> . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.

(*Wainwright, supra*, at p. 425; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 987 [the reviewing court will accept as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous].)

Appellant contends that the evidence failed to establish a proper basis upon which to excuse prospective jurors M.F. and B.H. for cause. (AOB 215-221.) He argues that their responses during voir dire do not indicate that their views on capital punishment would have substantially

impaired the performance of their duties as a juror. He maintains that the trial court could have asked follow-up questions designed to probe beneath the surface questionnaire responses of these prospective jurors. (*Ibid.*) These contentions are groundless.

The jurors' voir dire responses established that they were each unwilling to impose the death penalty under any circumstance. These unequivocal answers made it unmistakably clear that M.F. and B.H.'s views against the death penalty would force them to vote against death regardless of the law or evidence. They would thus be unable to follow the court's instructions. On this record, the court properly excused each for cause. (See *People v. Holt* (1997) 15 Cal.4th 619, 652-653 [where juror could not impose death for a killing that was not intentional and simply occurred in the course of the felonies set out in the charged special circumstances, court properly excused juror for cause].

The instant case is distinguishable from *People v. Stewart, supra,* 33 Cal.4th at pp. 441-445, 451, where this Court reversed the penalty judgment when the trial court granted five challenges for cause based solely on somewhat ambiguous responses in the jury questionnaires. Unlike *Stewart*, here the court conducted oral voir dire of prospective jurors M.F. and B.H., respectively, out of the hearing of the other prospective jurors. The trial court was thus able to observe the demeanor of the jurors and conduct clarifying follow-up examinations. These examinations revealed that M.F. and B.H. were unwilling to impose the death penalty for even the most heinous and horrible crimes imaginable because they disagreed with it. Thus, under *Wainwright*, *supra*, 469 U.S. at page 424, their attitudes and opinions would prevent them from performing their duties as jurors in accordance with the trial court's instructions. The court properly excused each juror for cause.

IV. THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR A DIRECTED VERDICT SINCE THERE WAS SUFFICIENT NON-ACCOMPLICE CORROBORATING EVIDENCE

In Argument V, appellant contends that the trial court erred in denying a defense motion for a directed verdict based on the fact that there was insufficient non-accomplice corroborating evidence. (AOB 224-227.) To the contrary, the court properly denied the motion and found sufficient non-accomplice corroborating evidence.

A. The Facts

Following the prosecution's case, defense counsel moved for a directed verdict under section 1118.1 as follows:

> In this case, we have labored all along under the assumption that the corroborating evidence was the testimony of John Richie testifying that the defendant had told him that he'd fired the shot.
>
> That was sufficient and adequate corroborating evidence up until the point in time when Michelle Joe testified that John Richie got her a pair of gloves.
>
> During Mr. Richie's testimony, he told us that he knew that they were planning on doing a robbery, and he told Mr. Whalen not to go. That didn't bother me too much.
>
> But once he aided and abetted by providing one of the participants with an instrumentality to do the crime, he became an aider and abettor, and therefore, a principal, . . . a person who could be charged with the identical offense.
>
> And the rules of evidence require that corroboration cannot be done by one co-conspirator to corroborate the testimony of another co-conspirator.
>
> Without Mr. Richie's testimony, the only thing you have putting my client, Mr. Whalen, anywhere around this time is Rick Sasso testifying that he was present when he gave up the dope for the guns.

> Now, Mr. Sasso says that he handed it [the methamphetamine] to Mr. Whalen. But all the other evidence, Miss Fader and Michelle Joe, was that it was on a mirror . . . on the . . . said counter, and I think the other one said table top, and I can't recall without going back to the dailies, and that Mr. Whalen was present.
>
> Mere presence at the scene of a crime does not tend to connect one to the crime. It takes more than that.
>
> Mr. Sasso's testimony was quite succsisent (sic) that his negotiations for the purchase of the guns was done primarily with John Richie, and to a lesser extent with Michelle Joe, and that Mr. Whalen didn't even come out of the back room until the dope was on the table.
>
> That does not connect him to the sale of the stolen property, which, in effect, would connect him to the crime. And as such, there is no independent corroborating evidence to the testimony of now three co-conspirators in this case, and for that reason, the motion should be granted.

(RT 2097-2098.)

The prosecution maintained that there was no evidence that Richie agreed to participate in the burglary. (RT 2098.) The prosecutor stated:

> . . . [T]here's nothing to connect him with this conspiracy outside of providing the gloves. And so he might fall into the category of maybe he's a co-conspirator, but he doesn't fall into the category of he's clearly a co-conspirator.
>
> And as to Mr. Sasso, Mr. Sasso testified pretty solidly on the point that he gave the drugs to Mr. Whalen. That all by itself, considering that those drugs were being sold for the stolen property coming out of that robbery, would be enough corroboration to get the statements of Melissa Fader and Michelle Joe in.

(RT 2098-2099.)

The prosecutor further noted that the evidence that Richie gave Michelle Joe the gloves was very tenuous and not sufficient to inculpate Richie for the robbery and murder. (RT 2099-2100.)

The trial court denied the motion as follows:

> THE COURT: Well, all right. The motion is denied. I don't believe that . . . the evidence shows Mr. Richie to be a conspirator, co-conspirator. And, also, there's further corroboration of the testimony of Mr. Sasso. So the motion is denied. . . .

(RT 2100.)

B. Discussion

In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged. [Citations.] Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point. [Citations.] (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.)

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. . . .

The corroborating evidence must tend to connect the defendant to the crime, but it has to neither establish every element of the offense nor corroborate all of the accomplice's testimony. (*People v. Heishman* (1988) 45 Cal.3d 147, 164- 165.) Corroborating 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. Fauber* (1992) 2 Cal.4th 792, 834; see *People v. Frye* (1998) 18 Cal.4th 894, 966 [corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense].)

Here, the trial court properly denied the section 1118.1 motion, since there was ample non-accomplice corroborating evidence connecting appellant to Sherman's murder. The court relied in part on the testimony of John Richie in making this ruling. Richie's testimony regarding appellant's admissions about committing a murder (RT 1353-1354) and appellant's involvement in trading the stolen guns and other items from the Nebraska residence for drugs (RT 1344-1350) sufficiently corroborated the accomplice testimony of Michelle Joe and Melissa Fader. In particular, Richie testified that appellant admitted he had shot the man in the forehead after tying him up. (RT 1395, 1415.) Richie also provided testimony corroborating their accounts by describing a letter appellant wrote Richie from jail in which he complained that Michelle and Melissa were both "telling on" him. (RT 1764.)

In making this ruling, the court properly determined that the following evidence was insufficient to prove that Richie was an accomplice. Michelle Joe denied discussing her plan to burglarize the Nebraska residence with either Richie or Sasso. (RT 1853.) She explained that she contacted appellant at John Richie's apartment and asked him if he would help her burglarize the Nebraska residence, and appellant agreed to assist. (RT 1860-1861.) Joe then left Richie's apartment. When she returned, she asked Richie to go get appellant. (RT 1863.) The prosecutor asked her on direct examination, "At that point, do you know if John Richie knew what you and Whalen were up to?" Joe responded that she did not know if Richie was aware of the plan to commit the burglary. (RT 1863-1854.) The prosecutor then asked Joe the following questions:

> Q. Did you have any conversation about gloves or equipment or guns or anything?
>
> A. About gloves.
>
> Q. Did you have gloves?

A. Yes, I did.

Q. And where did the gloves that you had come from?

A. From Kathy Sisk.

Q. And did Mr. Whalen have gloves?

A. Yes.

Q. And do you know where his gloves came from?

A. No.

Q. When did you get the gloves from Kathy Sisk?

A. I'm not sure.

Q. Did you get them from Kathy Sisk personally?

A. No.

Q. Okay. Did you get them from John Richie personally?

A. I'm not sure.

Q. Did you just pick them up?

A. No, I didn't just pick them up.

Q. Somebody handed them to you?

A. Yes.

Q. Did somebody hand them to you that day?

A. Yes.

Q. Do you know which trip to John Richie's apartment that those gloves were handed to you?

A. The last trip.

Q. The one where you met Mr. Whalen the second time?

A. Yes.

Q. Okay. When those gloves were handed to you, were they handed to you inside the apartment or outside the apartment?

A. I'm not sure.

Q. Did Mr. Whalen hand them to you?

A. I'm not sure.

Q. Once you and Mr. Whalen were in the car, you both have gloves; is that right?

A. Yes.

Q. Did you discuss anything else about the crime other than gloves?

A. I don't remember.

(RT 1864-1866.)

Later, on cross-examination, Joe gave the following responses.

Q. And when you got back to John Richie's house or apartment [prior to the crime], John Richie was out in front, right?

A. Yes.

Q. And you called him over to the car, and you asked him to go get Mr. Whalen; is that correct?

A. Yes.

Q. You also asked him to get you a pair of gloves, didn't you?

A. I'm not sure if I did.

Q. But you got a pair of gloves at that trip; isn't that correct?

A. Yes.

Q. And Kathy Sisk didn't give you those gloves, right?

A. I'm not sure.

Q. You testified yesterday on direct that Kathy Sisk did not give you the gloves personally. Do you recall that testimony?

A. Yes, I do.

Q. Okay. Was that testimony true?

A. Yes, it was.

Q. Kathy Sisk did not give you the gloves; is that correct?

A. Yes.

Q. Mr. Whalen didn't give you the gloves?

A. No.

Q. So the only person who's left was John Richie; is that correct?

A. Yes.

Q. Did you get the gloves from John Richie?

A. Yes.

(RT 2005-2006.)

Michelle Joe's testimony demonstrates that she did not remember and was confused about who had given her the gloves. She only conceded that Richie may have provided her with the gloves after defense counsel suggested that he was the only person who could have done this. (RT 2006.)

According to John Richie, he did not assist in the plan to burglarize the Nebraska residence, but tried to talk appellant out of assisting Joe. Richie learned of the plan to commit the burglary after overhearing Joe solicit appellant to help her commit the crime. (RT 1342.) Richie dissuaded appellant from helping Joe, and appellant initially assured Richie he would not participate. (RT 1343.) Later that night Richie agreed to watch Joe's daughter for her. He did not see appellant and Joe leave the

apartment, but he assumed that appellant had left with Joe. (RT 1344.) Richie next saw appellant, Joe and Fader when he returned to his apartment the next morning and saw the items that the three had stolen from the Nebraska residence. (RT 1345.)

Thus, aside from the conflicting testimony regarding who gave Michelle Joe gloves prior to the burglary, there was no evidence indicating that John Richie aided and abetted in the crime. Even if Richie did give Joe the gloves, there was no evidence of his intent to assist in the burglary. Nor was there evidence that Richie knew that appellant and Joe needed the gloves to commit a crime. Rather, his involvement began after the murder and robbery were completed when he assisted appellant, Joe and Fader in selling the stolen guns to Rick Sasso in exchange for drugs.

Rick Sasso also provided corroborating testimony linking appellant to the crime. He testified that John Richie came to his house and informed Sasso that he had some guns that he thought Sasso might be interested in buying. (RT 1429-1430.) About an hour after Sasso arrived at Richie's, appellant came out of the bedroom. (RT 1434.) Sasso described his interactions with appellant as follows:

> Q. [by the prosecutor] When Mr. Whalen came out of the bedroom, did you talk to him about the drugs?
>
> A. Yeah.
>
> Q. What'd you say to Mr. Whalen?
>
> A. I told him how much I'd give him for the guns.
>
> Q. Okay. And what'd he say to you?
>
> A. He said he wanted more.
>
> Q. Okay. How much had you offered him?
>
> A. A 16th.

Q. And what did he say he wanted?

A. At least an eight ball, I'm pretty sure.

Q. Okay. And then what happened?

A. Then I think I cheated him a little bit. I think I gave him about a gram and two quarters for it.

(RT 1435-1436.)

Sasso's testimony established that he directly negotiated with appellant regarding the exchange of stolen property for drugs. This evidence was sufficient to connect appellant to the robbery and murder of Sherman Robbins. (*People v. Fauber*, *supra*, 2 Cal.4th at p. 834.)

Lastly, appellant's admission to Detective Giles New at the time of his arrest that, "I was expecting to picked up sooner or later. Sometimes the best place to hide is right under your noses" (RT 2080), corroborated appellant's involvement in the crimes. Accordingly, the prosecutor presented sufficient evidence to corroborate the accomplice testimony of Fader and Joe, and appellant can show no error in the court's ruling.

V. THE COURT PROPERLY INSTRUCTED THE JURY ON ACCOMPLICE TESTIMONY

In Argument VI, Appellant claims that the court erred in failing to instruct the jury that Melissa Fader, Michelle Joe and John Richie were accomplices as a matter of law. (AOB 228-233.) In Argument VII, he contends that the trial court erred in not instructing the jury that the accomplice testimony of Michelle Joe, Melissa Fader, and John Richie should be viewed with distrust. (AOB 233-237.) These contentions are groundless. The court correctly instructed the jury that accomplice testimony ought to be viewed with distrust. It further instructed the jury that Melissa Fader and Michelle Joe were accomplices as a matter of law,

and that it was up to the jury to determine whether John Richie was an accomplice.

A. The Facts

The trial court gave the jury the following instructions on accomplice testimony:

> If the crime of murder and robbery were committed by anyone, the witnesses Michelle Joe and Melissa Fader were accomplices as a matter of law, and their testimony is subject to the rule requiring corroboration.
>
> You must determine whether the witness John Richie was an accomplice as I have defined . . . that term.
>
> The defendant has the burden of proving by a preponderance of the evidence that Mr. Richie was an accomplice in the crime charged against the defendant.
>
> "Preponderance of the evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you're unable to find the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> Testimony of an accomplice ought to be viewed with distrust. 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 with care and caution and in the light of all the evidence in the case.

(RT 2227-2228.)

B. Discussion

If the evidence establishes as a matter of law that the witness was an accomplice, the court must so instruct the jury. However, whether a witness is an accomplice is a question of fact for the jury in all cases unless "there is no dispute as to either the facts or the inferences to be drawn

therefrom." (*People v. Garrison* (1989) 47 Cal.3d 746, 772; accord, *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) At the time of this trial, the law required the court to instruct the jury that the testimony of an accomplice is to be viewed with distrust and that the defendant may not be convicted on the basis of an accomplice's testimony unless it is corroborated.[11] *People v. Guiuan, supra,* 18 Cal.4th at p. 558 (See *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

As set forth above, the trial court specifically instructed the jury that both Fader and Joe were accomplices in the robbery and murder as a matter of law. (RT 2227-2228.) As to John Richie, the judge refused a defense request for the same instruction and instructed the jury that it must decide if he was an accomplice. (*Ibid.*) The court did not err.

An accomplice is 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. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114.) The witness must be considered a principal under section 31 to be chargeable with the identical offense. (*Ibid.*) Section 31 defines principals as "[a]ll 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. . . ." An aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. (*People v.*

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[11] In *People v. Guiuan* (1998) 18 Cal.4th 558, 569, this Court recognized that the instruction to view accomplice testimony with distrust is not appropriate in all circumstances and suggested a modified instruction that the testimony be viewed with "caution" when offered by the prosecution.

Stankewitz (1990) 51 Cal.3d 72, 90-91; see *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

Joe's testimony indicated that Richie was not involved in the plan to burglarize the Nebraska house. (RT 1853) Rather, the evidence showed that his involvement did not begin until after the robbery and murder were completed when he assisted appellant, Joe and Fader in trading the items they had stolen for drugs from Rick Sasso. (RT 1345-1347.) The debatable testimony that Richie provided Michelle Joe with gloves prior to the crimes (RT 2006) does not compel a conclusion that he was an accomplice. As noted earlier, accomplice status is a jury question unless there can be no reasonable dispute as to the facts or the inferences to be drawn therefrom. (*People v. Fauber, supra,* 2 Cal.4th at p. 834; *People v. Stankewitz*, *supra*, 51 Cal.3d 72, 91.) On these facts, the trial court properly directed the jury to decide whether Richie was an accomplice.

The court properly instructed the jury that Melissa Fader and Michelle Joe were accomplices as a matter of law, and their testimony should be viewed with distrust. It also correctly instructed the jury that it had to determine whether John Richie was an accomplice.

VI. APPELLANT HAD A FAIR TRIAL AND THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT

In Argument VIII, appellant claims that the prosecutor engaged in numerous acts of misconduct, which deprived him of a fair trial. (AOB 238-249.) To the contrary, the following analysis demonstrates that the prosecutor did not commit misconduct, and appellant received a fair trial.

A prosecutor's conduct violates the federal Constitution when it "'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Young* (2005) 34 Cal.4th 1149, 1184-1185, quoting *People v. Morales* (2001) 25 Cal.4th 34, 44.) "Conduct by a

prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*Morales*, at p. 44.) A defendant is barred from complaining on appeal of prosecutorial misconduct unless in a timely fashion and on the same ground the defendant objected to the misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Navarette* (2003) 30 Cal.4th 458, 506; *People v. Farnam*, *supra*, 28 Cal.4th at p. 167.)

A. Conduct During Voir Dire

Appellant contends that the prosecutor committed misconduct when he mentioned appellant's prior convictions in front of prospective juror T.P. (AOB 238-240.) To the contrary, the prosecutor's inadvertent mistake in mentioning appellant's prior convictions during the individual and sequestered voir dire of a prospective juror did not constitute misconduct.

1. The Facts

During the sequestered and individualized voir dire of prospective juror T.P., T.P. indicated that he has problems with reading and writing. (RT 462.) He also noted that he has difficulty remembering names. (RT 462-463.) T.P. represented that he would not feel bad asking for help from other jurors if he had difficulty reading exhibits. (RT 463.) The prosecutor asked T.P. the following questions:

> MR. PALMISANO: Assuming, sir, that at some point in the trial you got handed, oh, a ton, maybe not a ton, but a stack, oh, yay-high, documentary evidence, primarily court papers, okay? Is your difficulty with reading such that you would not be able to read those for yourself?
>
> A. I don't think so. But it would take me a long time to do it.

Q. Okay. And then let me ask you something then about the name confusion thing. Besides Mr. Whalen, the People's case basically is going to present evidence that there were two other people at the scene of the robbery who were basically conspirators in the robbery, that they were aiders and abetters, they were helping out in the robbery and by and large they're pretty much as guilty as Mr. Whalen is. One of them's name is Melissa Fader and the other is Michelle Joe.

I'm a little bit concerned from what you said that two or three weeks down the road when you get back in the jury room and people start talking about Melissa and Michelle, are you going to get confused about which one of those two women is which?

A. Yes, I probably would, would be confused. Okay.

MR. PALMISANO: Thank you. I have no further questions.

THE COURT: Well, if when you got back there you said well, which one's–which one's Melissa you asked and somebody said, "Well, she's the short one with the brown hair," would you then be able to recollect who that was?

A. I probably could, yes.

Q. In other words, the other jurors could help you out with that problem if necessary?

A. My biggest problem would be a big stack if–if I didn't have enough time to go through it.

Q. It would take you a while to read them?

A. Yes.

Q. Okay. Thank you.

(RT 465-466.)

Defense counsel passed on a challenge for cause. The prosecutor asserted a challenge for cause, which the court denied. (RT 466.) The prosecutor then made the following comments:

MR. PALMISANO [the prosecutor]: May I address the point your honor?

THE COURT: Briefly.

MR. PALMISANO: Thank you. The Court has indicate [sic] to [T.P.] twice that he can get the assistance of other jurors to tell them what the evidence is. And I don't think that he gets the services of a reader in jury deliberations to decide on the validity of the prior convictions. That troubles me greatly.

THE COURT: Well–

MR. SPOKES: Now I'm going to have challenge for cause because the subject matter of prior convictions has come up in voir dire.

THE COURT: Okay.

MR. PALMISANO: I apologize. I didn't realize I had said it that way.

THE COURT: All right sir. You're excused Please go back and see the jury commissioner before you leave.

(RT 466-467.)

2. Discussion

This above statements show that the prosecutor did not intend to prejudice appellant by mentioning his prior convictions. Rather, he was concerned about T.P.'s ability to read documentary evidence. The prosecutor's comments were made outside the presence of all the other prospective jurors. Any harm caused by the prosecutor's unintentional conduct was immediately cured when the court excused this juror. Under these circumstances, the prosecutor's brief and unintentional remark did not damage appellant's right to receive a fair trial.

B. Examination Of John Richie

Appellant complains that the prosecutor committed misconduct when he elicited testimony regarding appellant's prior record of incarceration. (AOB 240-421.) This contention is groundless.

1. The Facts

The prosecutor asked the following questions during his direct examination of John Richie:

> Q. And Mr. Richie, are you acquainted with the defendant, Daniel Whalen, sitting at the far end of counsel table?
>
> A. I have known him a very short time.
>
> Q. When did you first meet him?
>
> A. At a place called Butler's camp years ago.
>
> Q. About–About how many years ago? Roughly?
>
> A. Five.
>
> Q. Could have been a little earlier than that, in '87 or '88?
>
> A. I'm not sure. I was during my–I was living there.
>
> Q. Now was there some gap of time between the last time you saw him four or more years ago and when you saw him in 1994?
>
> A. Yes. He–mysteriously disappeared.
>
> MR. SPOKES: Objection, Your Honor. Move to strike all after "yes."
>
> THE COURT: Sustained.

(RT 1332-1333.)

2. Discussion

The prosecutor's questions were proper and did not constitute misconduct. The length and nature of Richie's relationship with appellant was a relevant area of inquiry, since Richie was offering testimony against

appellant. The prosecutor's examination was designed to show that Richie and appellant were not close friends, but had only known each other for a short time, even though the two had initially met in 1987. Richie's answer that appellant had "mysteriously disappeared," did not indicate to the jury that appellant had been incarcerated during that time. Moreover, the trial court granted appellant's motion to strike these comments from the record. These facts demonstrate that the prosecutor did not engage in misconduct, and appellant was not prejudiced by the prosecutor's questions.

C. Discovery Of Criminalist Miller's Handwritten Notes and Photographs

Appellant claims that defense counsel was unable to properly cross-examine criminalist John Miller because the prosecutor did not provide timely discovery of Miller's handwritten notes. (AOB 241.) To the contrary, the record discloses that the prosecutor did not have these materials at the time they were discovered. Moreover, there is no evidence that appellant was prejudiced by the late discovery of criminalist Miller's handwritten notes and photographs, since there was nothing in these materials that was exculpatory.

1. The Facts

During the People's case in chief, criminalist John Miller indicated that he had made some sketches at the Nebraska house, taken photographs, performed some reconstruction on a trajectory for firearms, and collected some hairs from various pieces of furniture in the house. (RT 1522.) He also testified that he had found shotgun pellets and a chewed up shotgun casing. (*Ibid.*) Miller described the position of the victim on the couch and the trajectory of the shotgun as being at a 30 degree angle to the floor. (RT 1523.) Miller opined that the shotgun was "fairly close," "within a couple of inches" to the victim's head at the time it was fired. (*Ibid.*)

During cross-examination, defense counsel asked the following questions:

BY MR. SPOKES: Q. You said you did some sketching?

A. Yes.

Q. Do you have those sketches with you?

A. I have a single sketch without measurements in my notes.

Q. May I see that, please?

A. You certainly may. Shall I remove it from the–

Q. No.

A. Okay.

Q. These are your notes?

A. Yes.

Q. If I may have a moment to review these.

Were all of these notes yours?

A. No. There's some notes in there from David Chun, who is a trainee who went out with me to learn a little bit about crime scene processing. And his notes are included in the case file.

Q. Which colored paper are your notes on?

A. The white paper. The lavender or purplish colored paper is David Chun's.

Q. Now, you testified that it was your opinion that the right hand was tied looser than the left hand?

A. It appeared looser to me.

Q. Did you make any notation of that in any of your typewritten reports?

A. I'd have to review my actual typewritten report. I don't believe I did, though.

> Q. Did you make a handwritten report or note that said, "Two bindings," paren, "necktie," close paren, "on wrists," and then the sentence, "Victim could not," underlined not, "have gotten either hand free easily," parenthesis, "no bruising on tissue underneath bindings," close parenthesis?
>
> A. Yes, that's after a conversation with Dr. Thomas Beaver, the pathologist who examined the victim. Those were actually his conclusions.
>
> THE COURT: Do you have any questions, Mr. Spokes?
>
> MR. SPOKES: Well, I'm sorry, Your Honor. Despite numerous requests for all handwritten notes, this is the first time I've ever seen this file. I can't adequately cross-examine this witness without having time to review these notes.
>
> THE COURT: Step down.
>
> Do you have any other questions?
>
> MR. PALMISANO: No, Your Honor.
>
> THE COURT: You can recall him if you wish, if you have any further cross-examination you wish to make of him.
>
> MR. SPOKES: Thank you, Your Honor.

(RT 1526-1528.)

Later in the trial, during Melissa Fader's testimony, defense counsel made a motion for a mistrial outside the presence of the jury as follows:

> MR. SPOKES: The first issue is the issue that came to light with Mr. Miller when he produced a rather fat file that contained a number of handwritten notes, and I noticed some photographs. And as the Court may recall, the Court gave me time to review that stuff before cross-examination.
>
> THE COURT: Right.
>
> MR. SPOKES: Mr. Miller was kind enough to accompany my investigator over to his office. And going through the file and copying the handwritten notes, he discovered seven rolls of film which had been developed and which were contained inside that file. We have since had that film developed–

THE COURT: Which were not developed?

MR. SPOKES: Say again?

THE COURT: They were not developed?

MR. SPOKES: No, they were developed. What I meant was printed so we now have copies of those prints, okay?

THE COURT: Oh, okay.

MR. SPOKES: I am convinced that Mr. Palmisano did not have copies of those prints.

THE COURT: I'm sure he probably didn't.

MR. SPOKES: Okay. However, I had sent, and I can't recall the exact date, I believe it was back in June of last year a rather lengthy, I believe it was 11, 12 pages–does that sound right, Mr. Palmisano? Do you recall the letter that I sent requesting informal discovery?

MR. PALMISANO: I don't remember the length of it.

(RT 1620.)

Mr. Spokes continued:

. . . And I requested everything, including any and all photographs taken at the crime scene, and including any handwritten notes made by any prospective prosecution witness.

I, in fact, received all of the photographs that Mr. Palmisano had and am convinced the ones that were in his possession were provided to me.

And in addition to that, I know Mr. Palmisano inquired of the Sheriff's Department, because I got all of Detective Ed Viohl's handwritten notes.

However, at the same time that I sent that letter requesting informal discovery . . . I sent a similar –an exact duplicate letter to the Department of Justice and to the Sheriff's Department.

The photographs and the handwritten notes were not forthcoming as a request to that.

We had a discovery motion in this courtroom in [the] early part of December at which time the Court granted my request for discovery of all handwritten notes and all photographs of the crime scene and ordered the prosecution to deliver them to me not later than the 29th of December of 1995.

And, yet, the first time I see these handwritten notes and these photographs, including the crime scene photographs, and especially crime scene photographs of areas that were not depicted in any of the photographs that Mr. Palmisano had, is once we're in the middle of the trial.

Therefore, my investigator has absolutely no opportunity to follow up in his investigation to determine the evidentiary value and/or value to the defense of these seven rolls of film and approximately, oh, half an inch thick sheet of handwritten notes.

Especially I did not have the benefit of those handwritten notes at the time that I consulted with a defense criminalist and the prosecution provided transportation to the criminalist of the ballistic evidence that has been described as having been found at the scene, shotgun shells, some pellets, et cetera.

Had those handwritten notes been available to me at that time, I may have been able to direct the criminalist in a new direction.

Without those handwritten notes, the criminalist was unable to reach any conclusion other than that which Duane Lovaas had reached.

THE COURT: That being what, Mr. Spokes?

MR. SPOKES: I'm sorry, Your Honor?

THE COURT: That being what?

MR. SPOKES: Apparently a 20-gauge shotgun shell was loaded into the shotgun, then a 12-gauge shell was loaded on top of it, and the 12-gauge shell went off and hit–torched off the 20-gauge shell.

I mean, it's a rather . . . unique set of circumstances. And we felt there was a possibility that there had been two rounds fired, and that's what we were exploring.

> And having had the benefit of those notes, the criminalist from Forensic Science Laboratory–or Institute, rather, may have had a little bit better direction and knowledge in order to press his investigation.

(RT 1620-1623.)

The court denied the motion for a mistrial and found that there was still time during trial for the defense to become acquainted with the material. (RT 1624.) The court ruled:

> . . . [W]ith respect to the discovery matter, Mr. Spokes, I would suggest that you have–we have some time yet in this trial. I would suggest that you take those films, have them looked at by your investigator, and if necessary, by your criminalist, and we will see what develops. If it turns out there's some exculpatory evidence there, we'll take a look at it at that time.
>
> MR. SPOKES: The only problem that I have with that, Your Honor, is that a number of these photographs are of shoe prints that were apparently taken at the scene of the crime. If we'd have had those back early on, we may have been able to track down some shoes.
>
> Now you're talking two years later. The original photographs were provided to us within–well, I know we had them at the prelim. And that was, what, two months after the crime occurred? June, I think the prelim occurred, and the arrests were in April. So within two months we had all the other photographs.
>
> But there were some very distinctive shoe prints that were photographed, and we've had no opportunity–now it's two years later. There's not much chance we're going to be able to find those shoes.
>
> Secondly, the–as far as the criminalist is concerned, once he had finished viewing the physical evidence that was provided by the District Attorney's Office, it was packaged back up, and it's my understanding that it's now back in the hands of the Stanislaus County Sheriff's Department. So–
>
> THE COURT: That's not insoluble. I'm just saying that if it turns out, I would suggest that you let them take a look at this

> stuff, and if he thinks there's anything that he can do about it, certainly he can make arrangements for him to do whatever it is he thinks he needs to do.

(RT 1624-1625.)

2. Discussion

The prosecutor has a constitutional (*Brady v. Maryland* (1963) 373 U.S. 83, 87) and statutory (§ 1054.1, subd. (e)) duty to disclose to the defense any exculpatory evidence. The prosecution's duty to disclose "extends to all evidence that reasonably appears favorable to the accused, not merely to that evidence which appears likely to affect the verdict." (*People v. Morris* (1988) 46 Cal.3d 1, 30, fn. 14.)

To prevail on appeal from a judgment of conviction on the grounds of violation of the pretrial discovery right of a defendant, the defendant must establish that the information not disclosed was exculpatory and that "'there is a reasonable probability that, had the evidence been disclosed . . . , the result of the proceedings would have been different.' [Citations.]" (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 804.) Evidence is material in the context of review of a discovery violation postconviction if "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citation.]" (*Id.* at p. 805.)

Here, defense counsel emphasized during his oral motion for a mistrial that he did not believe the prosecutor had ever had possession of the photographs and handwritten notes contained in criminalist Miller's files. (RT 1620.) Instead, counsel complained that he had sent a letter for informal discovery to the Department of Justice, and this agency had not complied with his request.

Even though appellant received criminalist Miller's handwritten notes and copies of photographs in the middle of the trial, he had a full and fair

opportunity to review these items. More importantly, appellant cannot carry his burden on appeal to show that his constitutional discovery rights were violated or that the prosecutor committed any misconduct relating to this discovery. He has not demonstrated that the handwritten notes and photographs he obtained from criminalist Miller were exculpatory or that it is reasonably probable the trial result would have been different had the evidence been disclosed in compliance with his pre-trial discovery request. (*People v. Bohannon*, *supra*, 82 Cal.App.4th at pp. 804-805.)

In addition, appellant has not augmented the record with the discovery documents in question. His failure to do so prevents this Court from evaluating them to determine whether they were exculpatory. (See *People v. Alvarez* (1996) 49 Cal.App.4th 679, 694 [the burden is on appellant to affirmatively show in the record that error was committed by the trial court: it is settled that a judgment or order of the lower court is presumed correct].) Accordingly, appellant cannot show prosecutorial misconduct. He also has not met his burden of showing that the trial court committed error or that he was prejudiced by the court's ruling below.

D. Melissa Fader's Testimony

Appellant complains that the prosecutor committed misconduct by failing to disclose evidence that Melissa Fader had alleged appellant raped her. (AOB 243-245.) To the contrary, the record discloses that the prosecutor did not know about this accusation until Fader mentioned it during the trial.

1. The Facts

At trial, Melissa Fader testified that appellant raped her after they returned to the apartment and exchanged the stolen items for methamphetamine. (RT 1610.)

Defense counsel subsequently brought a motion for a mistrial. (RT 1619.) He argued, "It was clear from the testimony of this particular witness that Mr. Palmisano was aware this witness was going to testify that my client raped her on the evening of the event." (RT 1623.) Counsel maintained that appellant was highly prejudiced by this testimony, since he was not charged with rape, and there was not any mention of the rape in any of the police reports. (*Ibid.*)

The prosecutor responded as follows:

> I had no clue. All I was doing, as I went through there [in direct examination], was finding out in as much detail as possible where she was and what she was doing. Because I felt that one of the things I needed to do with Melissa Fader was to corroborate John Richie in terms of setting the time and where different people were at various times. And so I was being as precise with her in that apartment as I was everywhere else.
>
> The first time that I knew about the word rape at all in this case was when Nellie Thompson testified this morning. And I had no idea it had any connection with–to this case. I thought she was just rambling on.
>
> Melissa Fader testified on the stand, I think, the next question or so after she said that–what I asked her was, "Have you ever told anybody about this?
>
> And she said, "No, with the exception of Nellie Thompson."
>
> There are no reports, because we didn't know.

(RT 1623-1624.)

The court denied the motion for a mistrial. The court explained, "I'm not convinced and don't believe that Mr. Palmisano intentionally sandbagged the defense with his information." (RT 1624.)

2. Discussion

The trial court properly denied the motion for a mistrial. The above record supports the court's determination that the prosecutor did not act in

bad faith when questioning Melissa Fader on direct examination. Rather, he learned for the first time during her testimony of the allegation that appellant had raped her. The prosecutor explained that he had known nothing about his allegation, since it was not in any of the police reports or prior statements by Melissa Fader. He indicated that he first heard about this allegation during Nellie Thompson's testimony; however, he did not understand that it had any connection to this case. Following Thompson's testimony, Fader testified that appellant raped her in John Richie's bathroom after the three had divided up the dope. (RT 1610-1611.)

The record demonstrates that the prosecutor was unaware of the rape allegation until after Fader testified at trial. Therefore, the prosecutor did not commit any misconduct, but rather was caught off guard by Fader's statement. While such testimony was unfavorable to appellant, it was not prejudicial in light of the other highly damaging evidence presented at trial. The evidence showed that appellant had shot a defenseless old man at close range during the commission of a robbery. He, Joe and Fader had stolen numerous items from the Nebraska house then exchanged them for a small amount of methamphetamine. Based on this evidence, there is no reasonable probability that appellant was prejudiced by Fader's allegation of rape. Indeed, there is no reasonable probability that if Fader's testimony on this subject had been excluded, the result of the trial would have been different. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

E. Appellant's Lack Of Remorse

During closing argument, the prosecutor asserted, "Here's another aggravating factor. Evidence of the defendant's remorse, which is non existent." (RT 2502.) Appellant contends that by making this statement, the prosecutor indirectly commented on his right to remain silent. He also

argues that this was an improper aggravating factor. (AOB 245.) These arguments should be rejected.

In *People v. Ochoa* (2001) 26 Cal.4th 398, at page 449, the prosecutor similarly highlighted the defendant's lack of remorse for the killings he had committed during the penalty phase. In that case, the prosecutor argued:

> The interesting thing about this defendant's behavior that night [of the Castro murder] is that he felt absolutely no remorse for what he had done. He ran back to the car. He told his friends "Hey, I just shot the guy." [¶] There is some evidence according to the statement of Oscar [Montes] he was bragging about the fact that after he shot the guy, or as he was shooting the man, Joe Castro, that Joe Castro said, Quote "Oh, shit." This was something the defendant was bragging about to his friends. [¶] He was bragging to his friends about the fact that he shot the guy. That he shot Joe Castro. [¶] It shows the type of person that the defendant is and shows the type of murder that this was, and that's why under factor (a) these are things that you should, and I ask you to consider now, in determining the defendant's moral responsibility and the punishment that he deserves.

(*Ibid.*)

This Court found that the prosecutor's argument in *Ochoa* was proper under section 190.3, factor (a), which authorizes the jury to consider the circumstances of the crime. (See *People v. Ochoa*, *supra*, 26 Cal.4th at p. 449 ["The jury may consider the defendant's refusal to show any remorse in the context of the murder as an aggravating factor"]; accord, *People v. Ramos* (1997) 15 Cal.4th 1133,1164; *People v. Sully* (1991) 53 Cal.3d 1195, 1249.)

Likewise, here the prosecutor properly listed appellant's lack of remorse as an aggravating circumstance that the jury could consider under section 190.3, factor (a), in arriving at a penalty. The prosecutor's argument focused on appellant's statement to John Richie that appellant had instructed the victim to "Get right with God," before shooting him.

(See RT 2502.) On this record, appellant cannot show prosecutorial misconduct.

F. The Prosecutor's Listing Of Aggravating Factors

Appellant contends that during the prosecutor's final argument at the penalty phase, he listed many duplicative and improper aggravating factors that likely caused the jury to vote for death. (AOB 245.) The prosecutor listed several aggravating factors as follows:

> An aggravating factor is the fact that Sherman Robbins was a 67 year old man.
>
> An aggravating factor is the fact that at the time he was murdered, Sherman Robbins was a diabetic.
>
> An aggravating factor at the time he was murdered, Sherman Robbins had a useless left hand. He could not even draw his own insulin for his diabetes.

(RT 2500-2501.)

The prosecutor continued:

> . . . The robbery, okay, you can't count that twice but the fact that the robbery occurred inside of a person's home rather than out on the street, that's an aggravating factor. . . .
>
> A circumstance of this case is all that Sherman Robbins was trying to do at the time that he was murdered. . . was trying to help folks out.

(RT 2501.)

The prosecutor pointed out:

> You may consider as a factor in aggravation the fact that Sherman's hands were tied behind his back at the time that he was murdered and that he was helpless on that account.
>
> You may consider what the last ten or 15 minutes of that man's life were like. . . .

> As far as we know, the last thing he ever heard was "Get right with God. I'll be back in a minute," and then his longest minute started. That's an aggravating factor.
>
> Here's another aggravating factor. Evidence of the defendant's remorse which is nonexistent.

(RT 2502.)

The prosecutor noted:

> Here's another circumstance of the offense that you can consider as you go through the weighing process. You can consider the impact of this crime not only on Sherman Robbins 'cause Sherman Robbins had himself a really ugly last ten or fifteen minutes of his life and with luck has gone on to a better world. But you may also consider the impact on his family.
>
> You may consider the impact on his brother, Bill Robbins, and his wife Alvina.
>
> You may consider the impact on Sharon Robbins and her husband Sherman's nephew Gary.

(RT 2503.)

The prosecutor continued:

> That experience for those people mopping up his blood off of the floor, off of the couch, off of wherever it splattered in that room, that's a factor in aggravation.
>
> And there's a factor in aggravation for Sharon Robbins. Sharon Robbins, on the morning of the 22nd of March 1994. . . walks in and she sees that he's lying dead on the couch.

(RT 2504.)

The prosecutor concluded by asking the jury to weigh the factors in mitigation, "which are nearly nonexistent, against the factors in aggravation, and bring back the appropriate verdict." (RT 2505.)

Appellant argues that the prosecutor improperly double-counted the aggravating factors. (AOB 249.) He also contends that almost all of the aggravating factors listed by the prosecutor were elements of the crime

itself. (*Ibid.*) To the contrary, the above record confirms that the prosecutor said nothing that might mislead the jury as appellant suggests. Rather, the prosecutor appropriately pointed out permissible factors in aggravation concerning the circumstances of the crime pursuant to section 190.3, factor (a). (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1179.)

In viewing the penalty phase record, there is no possibility the jurors would have understood that the guilt phase crimes and special circumstances could be counted more than once as aggravating factors. In addition to receiving instructions in the language of section 190.3, the trial court properly cautioned the jurors that they "may not double weigh any prior conviction which may also be a circumstance which you have considered under [factor] (b) above." (RT 2482.) The court also instructed the jurors that they could consider:

> A. The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> However, you may not double weigh any circumstances of the offense which are also special circumstances. That is, you may not weigh the special circumstance more than once in your sentencing determination.

(RT 2482.)

This Court has determined that the standard penalty phase instructions do not inherently encourage the double counting of aggravating factors. (E.g., *People v. Sanchez* (1995) 12 Cal.4th 1, 78-79; *People v. Montiel* (1993) 5 Cal.4th 877, 938-939.) Appellant can point to no improper argument by the prosecutor. Nor did the defense object to the prosecutor's discussion of the aggravating factors at trial.

On this record, appellant cannot show misconduct, and there is no basis for reversing the death judgment.

G. Cumulative Error

Appellant contends that the cumulative effect of the above instances of alleged prosecutorial misconduct deprived him of a fair trial. (AOB 249.) To the contrary, the above analysis demonstrates that the prosecutor did not commit misconduct, and there was no cumulative error.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THAT IN DETERMINING PENALTY, THE JURY COULD CONSIDER THE CIRCUMSTANCES OF THE CRIME AND THE EXISTENCE OF ANY SPECIAL CIRCUMSTANCES FOUND TRUE

In Argument IX, appellant contends that the trial court erred when it instructed the jury as follows during the penalty phase:

> In determining which penalty is to be imposed upon the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter instructed. You may consider and take into account and be guided by the following factors if applicable:
>
> A. *The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.*
>
> However, you may not double weigh any circumstances of the offense which are also special circumstances. That is, you may not weigh the special circumstance more than once in your sentencing determination.

(RT 2482; italics added.) Appellant argues that the above italicized portion of the court's instruction was misleading because it suggested that the jury could consider the fact of appellant's first degree murder conviction with special circumstances as an aggravating circumstance of the crime. (AOB 253.) This contention is groundless.

If appellant believed part of the above instruction was misleading, he was required to object and request clarifying language. (*People v. Johnson* (1993) 6 Cal.4th 1, 53.) Having waived the issue, he may not argue for the

first time on appeal that the instruction was confusing, misleading, and required further clarification. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) "[A] defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

In any event, the above instructions were proper. Section 190.3 of California's capital scheme lists the various factors that the sentencer is "to consider, take into account and be guided by" in deciding penalty. Factor (a) of section 190.3 uses clearly understandable terms to designate for jury consideration in sentence selection, "[t]he 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. . . ." (§ 190.3, factor (a).) In the above instruction, the court specifically directed the jury that it could not double weigh any circumstances of the offense which are also special circumstances. (RT 2482.)

In *People v. Bacigalupo* (1993) 6 Cal.4th 457, at pages 478-479, this Court pointed out that in any criminal case, "the circumstances of the crime of which the defendant stands convicted are the single most pertinent sentencing consideration." This Court further found that by directing the sentencer to consider the circumstances of the capital crime, factor (a) of section 190.3 embodies a consideration that the United States Supreme Court has identified as "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" (*Id.* at p. 479, quoting *Johnson v. Texas* (1993) 509 U.S. 350, 360; accord, *People v. Proctor* (1992) 4 Cal.4th 499, 551.)

Accordingly, appellant waived any objection to the above instructions. The instructions correctly directed the jury to consider the circumstances of the crimes of which the defendant was convicted and the

existence of any special circumstance in arriving at penalty. As set forth in Argument VI(F), the prosecutor committed no misconduct during his penalty phase argument, but listed appropriate factors in aggravation.

VIII. THE PENALTY INSTRUCTIONS WERE PROPER

In Argument X, appellant argues that the penalty phase instructions were defective and death-oriented because they failed to properly describe or define the penalty of life without possibility of parole. (AOB 262-270.) This argument is without merit.

This Court has repeatedly rejected the claim that a jury should be instructed on the meaning of the term "life imprisonment without the possibility of parole." (See *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Earp* (1999) 20 Cal.4th 826, 903; *People v. Arias* (1996) 13 Cal.4th 92, 172.) This Court found in *Arias* that the omission of an instruction informing the jury that a sentence of life imprisonment without the possibility of parole means the defendant will spend the rest of his life in prison and will not be paroled is "entirely proper" since such an instruction is inaccurate. (13 Cal.4th at p. 172.) "The Governor may ameliorate any sentence by use of the commutation or pardon power, and it is thus '"incorrect to tell the jury the penalty of . . . life without possibility of parole will inexorably be carried out" [citation].'" (*Ibid.*)

To the extent appellant contends that the omission of the instruction constituted federal constitutional error under the Supreme Court's decision in *Simmons v. South Carolina* (1994) 512 U.S. 154 (AOB 264-265), this Court has rejected the claim. (See *People v. Arias*, *supra*, 13 Cal.4th at pp. 172-173.)

Finally, any error in failing to instruct the jury that appellant would never be released on parole was harmless because there was no reasonable possibility of a more favorable penalty verdict absent the error. (See

People v. Jackson (1996) 13 Cal.4th 1164, 1232.) During closing argument, defense counsel explained to the jurors that life in prison without the possibility of parole meant that appellant would never be released from custody:

> As I said, life without possibility of parole doesn't condone or doesn't excuse Danny Whalen for this horrible crime. But when he leaves this county to go to state prison sentenced to life without possibility of parole, it's as though they put a big sign over the prison door just as Dante said, "Abandon all hope all ye who enter here." Because life without possibility of parole is a sentence without hope. There is no hope for ever seeing the outside of the prison.

(RT 2509.)

Counsel's argument clearly conveyed to the jury that if it chose life without possibility of parole, appellant would never be released from prison. On this record, any instructional error was harmless.

IX. THE COURT WAS NOT REQUIRED TO DEFINE "AGGRAVATING" AND "MITIGATING" FOR THE JURY

In Argument XI, appellant claims he was denied due process and a reliable sentencing determination by the trial court's failure to instruct the jury on the meaning of the words "aggravating" and "mitigating." (AOB 272.) This Court has repeatedly held that "aggravating" and "mitigating" are commonly understood terms that need not be defined for the jury. (See *People v. Williams* (1997) 16 Cal.4th 153, 267; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1018.) There was no error.

X. THE DEATH SELECTION PROCESS WAS CONSTITUTIONAL

In Argument XII, appellant contends that the death selection process used to condemn him to death violated his state and federal constitutional

rights. (AOB 272-301.) He claims that the penalty selection factors upon which the jury relied were vague and overbroad, and the court's instructions favored aggravating evidence and disfavored mitigating evidence. (AOB 273.) Not only did appellant waive these constitutional claims by failing to object below (see *People v. Stankewitz, supra,* 51 at p. 106), but his arguments have been rejected by this Court and by the United States Supreme Court.

A. Section 190.3, Factor (a)

Appellant contends that his constitutional rights were violated when the court instructed the jurors that they could consider the circumstances of the crimes against him. (See § 190.3, factor (a); RT 2482, CT 868.) He maintains that neither the statute nor CALJIC No. 8.85 provided a standard to guide the jury's discretion. He claims that the prosecutor exploited this flaw by arguing that the victim's old age and diabetes, and the callous manner in which appellant shot him should be considered factors in aggravation. (AOB 275; RT 2500, 2502.) He also argues that section 190.3(a) improperly directed the jury to consider the presence of any special circumstance findings. Thus, he contends that "the sentencer's discretion was weighted in favor of death solely due to the fact that a defendant has been convicted of a capitally eligible murder." (AOB 275.)

These arguments have already been rejected by this Court. (See *People v. Osband* (1996) 13 Cal.4th 622, 703; *People v. Berryman* (1993) 6 Cal.4th 1048, 1096-1097, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800 [referring to the Eighth Amendment's cruel and unusual punishments clause]; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976 ["The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the

circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence"].)

As for the prosecutor's argument, appellant waived any claim of error by failing to object below. (*People v. Benson* (1990) 52 Cal.3d 754, 794.) In any event, the prosecutor's arguments that the victim was old and diabetic (RT 2500) and the crime was cold, vicious and uncaring (RT 2502) were proper. These statements clearly fell within the wide range of permissible argument at the penalty phase. (See *People v. Thomas* (1992) 2 Cal.4th 489, 537.)

B. Section 190.3, Factor (b)

Appellant claims that his constitutional rights were violated by instructing the jurors that they could consider

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

(See § 190.3, factor (b).) He asserts that pursuant to this factor, the prosecution was allowed to present evidence of past convictions years before the present offenses. During the penalty phase, the prosecution introduced appellant's prior convictions, which consisted of two counts of robbery in 1970 arising from the same incident, and a 1976 robbery and a 1988 robbery. (RT 2498-2501.) Appellant argues that factor (b) did not provide an objective standard to channel the sentencer's discretion, but "allowed each juror to impose the death penalty based on that juror's idiosyncratic assessment of what constitutes violent criminal conduct." (AOB 277.)

In *Tuilaepa v. California*, *supra*, 512 U.S. at page 976, the Court upheld factor (b). It found that "in conventional and understandable terms"

it properly asks the jury to consider matters of historical fact concerning the defendant's prior history of violent crime. (Accord, *People v. Cain* (1995) 10 Cal.4th 1, 69.) Contrary to appellant's argument, factor (b) appropriately instructed the jury to consider the "presence or absence" of appellant's prior criminal activity which involved the "express or implied threat to use force or violence."

C. Section 190.3, Factors (d), (g) and (h)

Factor (d) directs the jury to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (§ 190.3, subd. (d); RT 2483.) Factor (g) directs the jury to consider "[w]hether or not defendant acted under extreme duress or under the substantial domination of others." (§ 190.3(g); RT 2483.) Factor (h) directs the jury to consider "[w]hether 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." (§ 190.3(h); CT 869; RT 2483.)

Appellant argues that inclusion of the adjectives "extreme" and "substantial" in the above factors acted as constitutional barriers to consideration of mitigation. (AOB 278-279.) He also contends that "there is a substantial and impermissible risk that the jury would understand the temporal language in factors (d) and (h)–i.e., at the time of the offense–to mean that evidence otherwise related to such factors could not be given mitigating weight if it did not influence the commission of the crime." (AOB 279-280.)

This Court has rejected appellant's argument and found that factors (d) and (g) do not prevent the jury from consideration of relevant mitigating evidence. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1196; *People v. Kipp*

(2001) 26 Cal.4th 1100, 1138.) In *People v. Hughes* (2002) 27 Cal.4th 287; 116 Cal.Rptr.2d 401, 404-405 at fn. 33, this Court found that the temporal language in section 190.3, factors (d) and (h) (consideration of any extreme mental or emotional disturbance or impairment from mental disease or defect or the effects of intoxication at the time of the offense),

> did not preclude the jury from considering any such evidence merely because it did not relate specifically to defendant's culpability for the crimes committed. As the People observe, the jury also was instructed, pursuant to section 190.3, factor (k), that it could consider, if applicable, "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial."

The jury was similarly instructed in this case. (See RT 2520.) Accordingly, appellant's contention must be rejected.

D. Labeling Factors As Aggravating Or Mitigating

During the penalty phase, appellant requested the following instruction:

> The permissible aggravating factors which you may consider are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented to you regarding defendant's background which does not fall into one of the limited aggravating factors may only be considered by you as mitigating evidence.

(CT 861.) Appellant also requested a version of CALJIC No. 8.85 that "delineate[d] between circumstances in aggravation and circumstances in mitigation. (CT 871; RT 2473.) The trial court rejected appellant's request. (CT 871; RT 2476.) The court subsequently instructed the jury pursuant to CALJIC No. 8.85 as follows:

> In determining which penalty is to be imposed upon the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you

may be hereafter instructed. You may consider and take into account and be guided by the following factors, if 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 present proceedings, 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, other than the crimes for which the defendant has been tried in the present proceedings.

Again you may not double weigh any prior conviction which may also be a circumstance which you have considered under (b) above.

The factors in the above list which you determine to be aggravating circumstances are the only ones that the law permits you to consider. You're not allowed to consider any other fact or circumstance as the basis for deciding that the death penalty would be appropriate punishment in this case.

The list of circumstances which you may consider in penalties continues as follows:

(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 that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(RT 2482-2484.)

Appellant complains that this instruction was improper because it did not indicate which statutory factors are considered aggravating and which are considered mitigating. (AOB 283.) He also contends that the court erred in failing to delete inapplicable factors from the above list. (AOB 280-282.) These arguments lack merit.

This Court has consistently held that a trial court in a capital case need not instruct the jury on whether any of the various statutory penalty factors is potentially aggravating or mitigating. (*People v. Prieto* (2003) 30 Cal.4th 226, 271-272; *People v. Earp, supra,* 20 Cal.4th at p. 899; *People v. Frye, supra,* 18 Cal.4th at pp. 1026-1027.) This Court found in *People v. Jackson* (1980) 28 Cal.3d 264 at page 316, with respect to the 1977 death penalty law, "'the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case.'" (Quoting *People v. Cox* (1991) 53 Cal.3d 618, 675.) Moreover, this Court recently found no error in a trial court's refusal of a

proposed instruction that was similar appellant's proposed special instruction. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1230 & fn. 26; see also *People v. Osband, supra*, 13 Cal.4th at pp. 704-705.) Finally, the trial court was not required to delete any inapplicable factors from CALJIC No. 8.85. (*People v. Farnam, supra*, 28 Cal.4th at pp. 191-192.)

E. Various Other Contentions

Appellant advances a number of other claims that this Court has also repeatedly rejected. He argues that the court's failure to delete irrelevant factors permits the jury to rely on factors that should not play a role in the sentencing process, and artificially inflates the factors favoring death. (AOB 280-282.) He maintains that the court's failure to identify those factors which are mitigating and those which are aggravating renders the death penalty statute impermissibly vague, arbitrary, and capricious because it fails to give the jury any meaningful or principled guidance, leaving the jury with complete discretion as to the appropriate penalty. (AOB 282-285.)

Appellant contends that the court's penalty phase instructions failed to limit the aggravating evidence to those factors enumerated in the statute. (AOB 285-286.) He argues that the court erred in not defining a "mitigating circumstance." (AOB 286-289.) Appellant further contends that the court's penalty phase instructions were inadequate in directing the jury that it must weigh aggravating circumstances against mitigating circumstances. (AOB 290-292.)

Appellant argues that his due process rights were violated by the trial court's failure to allow an instruction that would enable the jury to consider the co-defendants' sentences at the penalty phase. (AOB 293.) He contends that the court's penalty phase instructions failed to inform the jury

that it could return a life-without-parole verdict even if the circumstances in aggravation outweighed those in mitigation. (AOB 294-295.)

Appellant further claims that the trial court erred in not requiring a written "statement of findings and reasons" for the jury's death verdict (AOB 295-300) and failing to instruct on the true meaning of "life without possibility of parole" (AOB 300-301). (*People v. Frierson* (1979) 25 Cal.3d 142, 178-180 [written statement]; *People v. Sanchez, supra,* 12 Cal.4th at pp. 77-78 [lingering doubt]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1277 [meaning of "life without possibility of parole"].)

Appellant finally argues that the "multiple use and counting" of the facts and circumstances that the murder was committed during a robbery and with a firearm as aggravating factors under section 190.3, factor (a) (circumstances of the crime), artificially inflated the statutory factors favoring death. (AOB 301-302.)

These challenges to the validity of the 1978 death penalty law and procedures outlined above have all been repeatedly rejected in past decisions of this Court and the United States Supreme Court. (See, e.g., *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 976-977; *Pulley v. Harris* (1984) 465 U.S. 371; *People v. Jackson*, *supra*, 13 Cal.4th at pp. 1245-1246; *People v. Arias*, *supra*, 13 Cal.4th at pp. 187-188, 190; *People v. Medina* (1995) 11 Cal.4th 694, 772; *People v. Hawkins* (1995) 10 Cal.4th 920, 964; *People v. Crittenden*, *supra*, 9 Cal.4th 83, 156; *People v. Turner* (1994) 8 Cal.4th 137, 207-209; *People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1018; *People v. Berryman*, *supra*, 6 Cal.4th at pp. 1101-1102, 1109; *People v. Wash* (1993) 6 Cal.4th 215, 272; *People v. Webb* (1993) 6 Cal.4th 494, 532-533; *People v. Wader* (1993) 5 Cal.4th 610, 670; *People v. Espinoza* (1992) 3 Cal.4th 806, 827; *People v. Keenan* (1988) 46 Cal.3d 478, 505.) Under these cases, appellant's contentions should be rejected.

XI. THE COURT HAD NO DUTY TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF THEFT

In Argument XIII, appellant contends that the trial court's failure to instruct on theft as a lesser included offense of robbery requires reversal of the robbery and murder convictions, the robbery-murder special circumstance finding, and the death judgment. (AOB 302-311.) To the contrary, under the facts of the case, the court had no duty to instruct on theft.

A trial court has an obligation to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present and there is substantial evidence to justify a conviction of the lesser offense. The trial court has no such obligation when there is no evidence that the offense is less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162; *People v. Barton* (1995) 12 Cal.4th 186, 195.) The existence of any evidence, no matter how weak will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is substantial enough to merit consideration by the jury. (*Breverman*, at p. 162.) "Substantial evidence" in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Id.* at p. 162.) Mere speculation is an insufficient basis for the giving of a lesser included offense instruction. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

Theft is a lesser included offense of robbery. (*People v. Ortega* (1998) 19 Cal.4th 686, 694-695.) However, this does not mean that a trial court must give instructions on any or all forms of theft in each robbery case. Rather, if there has been sufficient evidence presented at trial to support a finding by the jury that the defendant was guilty of the lesser included offense of theft under any of the possible theories (e.g., by trick or

device or grand theft person) rather than the offense of robbery, the trial court would have had a sua sponte duty to instruct the jury on the lesser offense of theft. (*People v. Breverman*, *supra*, 19 Cal.4th 142, 160, 162 [a trial court is required to instruct sua sponte only on lesser included offenses, or theories thereof, that are supported by substantial evidence]; *People v. Barton*, *supra*, 12 Cal.4th 186, 198; *People v. Eilers* (1991) 231 Cal.App.3d 288, 292.) Here, there was insufficient evidence of theft in the record to merit consideration by the jury. (*Breverman*, at p. 162.)

The offense of theft is defined in section 484 as the taking, carrying, stealing, leading, or driving away the personal property of another, or one who fraudulently appropriates "property which has been entrusted to him or her, or who knowingly and designedly, by any false or fraudulent representation or pretense, defraud[s] any other person of money . . . ." (§ 484, subd. (a).) The offense of grand theft person is defined in section 487 as the taking of real or personal property valued in excess of $400. (§ 487.) "Theft in other cases is petty theft." (§ 488.)

The offense of robbery is defined in section 211 as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) As stated above, theft is a necessarily included offense of robbery; it is the element of force or fear that distinguishes a robbery from a theft. (*People v. Ortega*, *supra*, 19 Cal.4th at p. 699.)

In the present matter, there was insubstantial evidence that appellant, Joe and Fader took property from Robbins without the use of force or fear. Indeed, Fader tied Robbins's hands behind his back, and appellant pointed a gun at Robbins, and ultimately shot him, while Joe and Fader assisted in carrying items from the house. Michelle Joe (RT 1898, 1902, 1905-1909) and Melissa Fader (RT 1568-1577) provided consistent testimony on these points.

Accordingly, substantial evidence established that appellant, Joe and Fader took possessions from the Nebraska house by force and fear. There was no evidence to the contrary. There also was no evidence that appellant committed grand theft, petty theft or theft by trick or device. The undisputed evidence at trial demonstrates that what took place was a robbery and not merely a theft. Thus, the trial court did not err in failing to instruct on the lesser offense of theft, because the evidence did not support such instruction.

Assuming arguendo that the court erred by not giving a lesser included instruction on theft, any error was harmless. On the evidence presented in this case, it is not reasonably probable that a jury would actually conclude that this was merely a theft. Indeed, the evidence overwhelmingly established that appellant directed Fader to tie up Robbins while appellant continued to yell at Robbins and point a gun at him. (RT 1568.) Fader and Joe both indicated that appellant was yelling for Robbins to tell him where his wallet was located while pointing a gun at the elderly man. (RT 1570, 1898.) Appellant also directed Fader and Joe to take numerous items from the house while pointing the gun at Robbins. (RT 1574, 1904-1909.) Contrary to appellant's claim that he shot the victim before items were taken from the house (AOB 309), and contrary to appellant's representation of the record regarding the timing of the taking relative to the application of force (see AOB 305), Fader and Joe both testified that they moved items to the car while appellant was pointing the gun at Robbins. (RT 1577-1581, 1902.) Based on the evidence adduced at trial, there is no reasonable probability that the failure to instruct on theft affected the outcome of this case, and appellant's contention must be rejected. (*People v. Breverman*, *supra*, 19 Cal.4th 142, 165, 178.)

XII. THE COURT PROPERLY DENIED APPELLANT'S MOTIONS AT THE PENALTY PHASE

In Argument XIV, appellant argues that the court erred in denying his motions to strike the "notice of aggravation" and the prior convictions and to have the jurors make a special finding as to the factors in aggravation and mitigation. (AOB 312-315.) This contention lacks merit.

A. The Facts

On October 30, 1995, appellant filed a motion to strike the "Notice of Aggravation" filed by the prosecutor pursuant to section 190.3. He also moved that the prosecution give the defense pre-jury selection notice of all evidence it intended to present in aggravation at the penalty phase of the trial. (CT 679-692.) The motion also requested that the court strike appellant's prior convictions on the basis that the prosecutor had not provided discovery of many of the facts and circumstances surrounding the incidents described in the "Notice of Aggravation." (CT 680.)

On November 20, 1995, the court conducted a hearing on appellant's motion. (RT 60, 90.) During the hearing, defense counsel complained that the notice of aggravation did not contain notice of the particular witnesses that the prosecutor was planning on calling during the penalty phase. Counsel also noted that the notice did not provide the addresses of any of the witnesses. (RT 91.)

The prosecutor responded that he had provided the witnesses' addresses in discovery that he had. However, he indicated that he did not have several witnesses' addresses with respect to the prior convictions that were alleged in the notice of aggravation. (RT 91-92.) He explained:

> I assume that where their primary objection is goes to the Los Angeles County, Long Beach City, I believe robbery and the Tulare City robberies. As to those, they also have every report that I have which gives addresses. The problem is those

> addresses are 20 years old or better depending upon which case it is. We are at the moment trying to track those down. As soon as we have addresses they will have addresses.

(RT 92.)

The court denied appellant's motion. It stated:

> THE COURT: I don't know what to tell you folks. He's trying, you know, if he's in the process of preparing this trial I assume that, you know, pursuant to continuing discovery that as soon as he gets the addresses and finds the addresses and telephone numbers of any of these people, if he does then he'll provide them to you. I think that's appropriate.

(RT 95-96.)

B. Discussion

As relevant here, section 190.3 provides that "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the trial court, prior to trial."

In the notice of aggravation, the prosecution gave notice of its intent to present evidence of appellant's five prior robbery convictions during the penalty phase as aggravating circumstances. (See CT 687-691.) That notice adequately advised appellant of the evidence he would be facing if the case went to a penalty phase. Appellant now argues that because the notice failed to identify the specific evidence that the prosecution planned to introduce–for example, the testimony of a particular witness and that witness's address–the notice was deficient, requiring reversal of the penalty phase judgment.

This Court has repeatedly rejected arguments similar to that made by appellant here. (See, e.g., *People v. Hart* (1999) 20 Cal.4th 546, 637; *People v. Pride* (1992) 3 Cal.4th 195, 259; *People v. Visciotti* (1992) 2 Cal.4th 1, 71; *People v. Miranda* (1987) 44 Cal.3d 57, 96-97.) The purpose

of the notice required by section 190.3 is to advise the accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty phase. (*People v. Miranda*, *supra*, 44 Cal.3d at p. 96.) A capital defendant is entitled to notice of other violent crimes or prior felony convictions offered in the prosecution's penalty case-in-chief before the cause is called to trial or as soon thereafter as the prosecution learns the evidence exists. (*People v. Daniels*, *supra*, 52 Cal.3d at p. 879; *People v. Jennings* (1988) 46 Cal.3d 963, 987.) However, the prosecutor is not prevented from introducing all the circumstances of a duly noticed incident or transaction simply because each and every circumstantial fact was not recited therein. (See, e.g., *People v. Howard* (1988) 44 Cal.3d 375, 424-425.) The notice is sufficient if it gives appellant a reasonable opportunity to prepare a defense to the allegations. (*People v. Pride*, *supra*, 3 Cal.4th at p. 258.)

Here, the prosecution's notice of aggravation complied with section 190.3. It was filed well before the commencement of the guilt phase proceedings, and it adequately apprised appellant of the evidence in aggravation that the prosecution intended to introduce. Appellant previously entered a plea to his 1980 conviction for possession of a firearm by a felon (CT 972), his 1986 conviction for escaping from custody (CT 986), and his 1989 conviction for attempted robbery (CT 984). His pleas to these crimes indicated that he had already admitted his guilt. Thus, he can show no prejudice in not obtaining witness addresses with respect to these crimes.

For these reasons, the trial court properly denied appellant's motion to strike the notice of aggravation and the prior convictions.

XIII. THE COURT PROPERLY INSTRUCTED THE JURY ON PROOF BEYOND A REASONABLE DOUBT

In Argument XV, appellant contends that the court's instructions impermissibly undermined and diluted the requirement of proof beyond a reasonable doubt. Without objection, the trial court gave the standard instructions on (1) the respective duties of judge and jury (CALJIC No. 1.00; RT 2203); (2) circumstantial evidence (CALJIC Nos. 2.01 [sufficiency of circumstantial evidence generally] (RT 2207-2208), 8.83 [sufficiency of circumstantial evidence to prove the special circumstance] (RT 2221), 8.83.1 [sufficiency of circumstantial evidence to prove mental state] (RT 2222); (3) the credibility of witnesses and weight of the evidence (CALJIC Nos. 2.21.1 [discrepancies in testimony] (RT 2211-2212), 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony] (RT 2212), 2.27 [sufficiency of testimony of one witness] (RT 2212); (4) motive (CALJIC No. 2.51 (RT 2225); and (5) the definition of reasonable doubt (CALJIC No. 2.90) (RT 2214). Appellant claims that those instructions given, singly and collectively, impermissibly diluted the reasonable doubt standard. (AOB 318-329.) Appellant's contention that these instructions violated his constitutional rights is erroneous and should be rejected.

The due process clause of the Fourteenth Amendment protects the accused against conviction except on proof beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 361-364.) The United States Constitution does not require jury instructions to contain any specific language, but they must convey both that the accused is presumed innocent until proven guilty and that he may be convicted only upon a showing of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5.) When reviewing the correctness of reasonable-doubt charges, the proper constitutional inquiry is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof

insufficient to meet the *Winship* standard." (*Id.* at p. 6.) "[T]he [challenged] instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) It is assumed that jurors are intelligent persons capable of understanding and following all instructions. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

Here, pursuant to CALJIC No. 1.00, the trial court instructed the jurors that they

> [m]ust not be influenced by pity for or prejudice against a defendant. You must not be biased against the defendant because the defendant has been arrested for this offense, charged with a crime or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than innocent.
>
> You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.
>
> Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

(RT 2204.)

Appellant contends that this instruction was misleading because it instructed the jury that it had to decide whether he was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. (AOB 323.) In *People v. Wade* (1995) 39 Cal.App.4th 1487, at page 1491, the court rejected the instant contention. The court explained:

> the jury would not have construed the instruction [CALJIC No. 1.00] in the manner suggested by defendant. A reasonable juror would understand this instruction as an advisement to disregard the facts that defendant had been arrested, charged, and brought to trial, and to presume the defendant innocent. "Constitutional jurisprudence has long recognized the [instruction on the presumption of innocence] as one way of impressing upon the

> jury the importance of the right to have one's guilt "determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. . . ." [Citation.]' (*People v. Hawthorne* (1992) 4 Cal.4th 43, 72 [omission of CALJIC No. 1.00 was error but harmless], citing *Cupp v. Naughten* (1973) 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368.)

The *Wade* court noted that the jury received instructions on the prosecutor's burden of proof beyond a reasonable doubt and was told to consider the instructions as a whole. (39 Cal.App.4th at p. 1492.)

Here, appellant's jury similarly was instructed that the burden of proof for proving the charges was the reasonable doubt standard. The instruction was given before jury selection. and was reiterated at the close of the evidence. (RT 172-173, 2214.) Each attorney emphasized the reasonable doubt burden in argument. CALJIC No. 1.00 did not contradict the court's instructions on CALJIC No. 2.90.[12] Rather, it simply cautioned jurors not to consider certain irrelevant, and potentially inflammatory, facts. On this record, it is not reasonably likely that CALJIC No. 1.00 caused the jury to misapply the law regarding the prosecution's burden of proof. (*People v.*

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[12] The court instructed the jury on the requirement of proof beyond a reasonable doubt pursuant to CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving the defendant's guilt beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (RT 2214.)

Wade, *supra*, 39 Cal.App.4th at p. 1492; accord, *People v. Frye*, *supra*, 18 Cal.4th at pp. 957-958.)

Regarding the instructions on circumstantial evidence, this Court has repeatedly rejected appellant's argument that CALJIC Nos. 2.01 [sufficiency of circumstantial evidence generally], 8.83 [sufficiency of circumstantial evidence to prove the special circumstance], and 8.83.1 [sufficiency of circumstantial evidence to prove mental state] alter the prosecutor's burden of proof. This Court has found that those instructions, which refer to an interpretation of the evidence that "appears to you to be reasonable" and are read in conjunction with other instructions, do not dilute the prosecution's burden of proof beyond a reasonable doubt. (*People v. Maury*, *supra*, 30 Cal.4th at p. 439; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 346-347; *People v. Riel* (2000) 22 Cal.4th 1153, 1200; *People v. Osband*, *supra*, 13 Cal.4th at pp. 678-679; *People v. Ray* (1996) 13 Cal.4th 313, 347-348; *People v. Crittenden*, *supra*, 9 Cal.4th 83, 144; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634; *People v. Jennings* (1991) 53 Cal.3d 334, 386].) Appellant has presented no persuasive reason for this Court to change its decisions in those cases.

Regarding CALJIC No. 2.22[13], appellant argues that it impermissibly dilutes the reasonable doubt standard because it allows the jury to resolve

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[13] CALJIC No. 2.22 provides:

You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence.

conflicting testimony by weighing "the convincing force of the evidence." However, reviewing courts have found that when this instruction is considered with CALJIC Nos. 1.01 and 2.90, "'[I]t is apparent that the jury was instructed to weigh the relative convincing force of the evidence (CALJIC No. 2.22) only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt. . . .'" (*People v. Clay* (1984) 153 Cal.App.3d 433, 461-462; *People v. Salas* (1975) 51 Cal.App.3d 151, 157; see *People v. Nakahara* (2003) 30 Cal.4th 705, 714 [CALJIC No. 2.22 is appropriate and unobjectionable when it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof].)

Appellant's contention that CALJIC Nos. 2.21.1[14] [discrepancies in testimony], 2.21.2[15] [witness willfully false], 2.22[16] [weighing conflicting

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[14] CALJIC No. 2.21.1 states:

Discrepancies in a witness's testimony or between a witness's testimony and tht of other witnesses, if there were any, do not necessarily mean that [any][a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.

[15] CALJIC No. 2.21.2 provides:

A witness, who is willfully false in one material part of his or o=her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

[16] CALJIC No. 2.22 provides:

You are not required to decide any issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which you find more convincing. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a

(continued...)

testimony], and 2.27[17] [sufficiency of testimony of one witness] "lessen the prosecutor's burden of proof by allowing the jury to credit prosecution witnesses by finding only a 'mere probability of truth' in their testimony," (AOB 327), also lacks merit. Rather, these instructions informed the jury that it was the sole judge of a witness's believability. They contained no language altering the court's instructions on the burden of proof beyond a reasonable doubt and thus did not violate *Winship*. On these principles, this Court has rejected appellant's argument. (See *People v. Nakahara*, *supra*, 30 Cal.4th at p. 714, and cases cited therein.)

Appellant argues that CALJIC No. 2.51 was objectionable because it informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. In *People v. Estep* (1996) 42 Cal.App.4th 733, at page 738, the defendant raised this same argument. Disagreeing, the *Estep* court concluded that a reasonable juror would understand that the language in CALJIC No. 2.51 could not be considered a standard of proof instruction apart from CALJIC No. 2.90, which plainly put the burden on the prosecution. (*Estep*, *supra*, at pp. 738-739.)

Accordingly, appellant's claims of instructional error must be rejected. The jury was charged fully and explicitly about the presumption of innocence and the prosecution's duty to prove guilt beyond a reasonable

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(...continued)
desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence.

[17] CALJIC No. 2.21 states:

You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

doubt. (See *Cupp v. Naughten* (1973) 414 U.S. 141, 149-150 [". . . [i]rrespective of the myriad of theories appellant conjures regarding the existence of 'problematic phrases,' in the end there is nothing more to say" as the instructions were in line with the Constitution].)

XIV. THE COURT'S INSTRUCTIONS ON MOTIVE WERE PROPER

In Argument XVI, appellant contests the court's giving of CALJIC No. 2.51, which instructed the jurors that

> [m]otive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT 822; RT 2225.)

Appellant argues that the wording of this instruction that "[p]resence of motive may tend to establish guilt" improperly instructed the jury that it could determine guilt based on motive alone. (AOB 334-335.) He further contends that the instruction impermissibly lessened the prosecutor's burden of proof and violated due process. Appellant asserts that his motive to kill the victim in order to steal from him would have been the same as his "intent" to do the same acts. Since the prosecutor was not required to prove motive as an element of the crime, he claims that the above instruction reduced the prosecutor's burden of proof. (AOB 336.) Finally, appellant contends that the instruction shifted the burden of proof to imply that he had to prove innocence. He argues that since the court instructed that the "[a]bsence of motive may tend to establish innocence," the instruction placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. (AOB 448-339.)

Appellant waived this claim by failing to object to CALJIC No. 2.51 below. In *People v. Cleveland* (2004) 32 Cal.4th 704, at page 750, the defendant similarly waived this argument. The *Cleveland* Court rejected appellant's claim that CALJIC No. 2.51 implied that motive alone was sufficient to prove guilt as follows:

> We find this claim not cognizable. This argument merely goes to the clarity of the instruction. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." [Citation.] If defendants had thought the instruction should be clarified to avoid any implication that motive alone could establish guilt, they should have so requested. They did not. [Citation.]"

(*Ibid.*)

Here, too, if appellant believed the instruction improperly implied his guilt could be conclusively determined through a showing of motive alone, he should have requested clarification from the trial court. Because appellant failed to do so, he has waived his objection on appeal.

Appellant's contentions also fail on the merits. CALJIC No. 2.51 tells the jury that motive is not an element of the crime charged (murder during the course of a robbery) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of murder. This Court found in *People v. Snow* (2003) 30 Cal.4th 43, 97-98, that when CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.31) (see RT 2231; CT 831) and the instruction outlining the elements of the crimes and requiring each of them to be proved in order to prove the crimes (CALJIC No. 8.10) (see RT 2216-2217, 2223-2224, 2230), "there is no reasonable likelihood [citation] it would be read as suggesting that proof of motive alone may establish guilt of murder."

As in *Snow*, in this case there is no reasonable likelihood the jury would have understood CALJIC No. 2.51 to suggest that proof of appellant's motive alone could establish his guilt for either of the crimes which the jury considered. For these same reasons, the instruction did not impermissibly lessen or shift the prosecutor's burden of proof, nor did it violate due process. (*People v. Frye*, 18 Cal.4th at p. 958; see also *People v. Cleveland*, *supra*, 32 Cal.4th at p. 750; *People v. Prieto*, *supra*, 30 Cal.4th at p. 254.)

XV. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

In Argument XVII, appellant raises numerous challenges to the constitutionality of California's death penalty law "to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration," even though he is aware that this Court has previously rejected his arguments. (AOB 339-416.) Because appellant offers no compelling reasons for reconsideration, his claims should be rejected.

In Argument A,[17] appellant contends that California's death penalty statute is impermissibly broad because it does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 341-346.) This argument has been previously rejected and should be rejected here. (*People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Prieto*, *supra*, 30 Cal.4th 226, 276; *People v. Stanley* (1995) 10 Cal.4th 764, 842.)

In Argument B, appellant contends section 190.3, subdivision (a), allows arbitrary and capricious imposition of the death penalty. (AOB 347-354.) This argument has been previously rejected and should be rejected

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[17] Respondent will refer to appellant's subheading notations in his Argument XVII. (AOB 339-415.)

here. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 439; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1050-1053.)

In Argument C, appellant begins with an assertion that there are insufficient safeguards against arbitrary and capricious sentencing. (AOB 354-355.) Insofar as he incorporates the preceding argument regarding the alleged infirmities of section 190.3, subdivision (a), that claim has been rejected in the cases cited. The following claims also have been previously rejected by this Court: the requirement of written findings by the jury (see *People v. Snow*, *supra*, 30 Cal.4th at p. 126); the necessity for jury unanimity as to aggravating factors (see *People v. Maury*, *supra*, 30 Cal.4th at p. 440); a proof-beyond-a-reasonable-doubt requirement for finding the existence of an aggravating circumstance (see *People v. Snow*, *supra*, 30 Cal.4th at p. 126); that aggravating circumstances outweigh mitigating ones (*ibid.*); that death is the appropriate punishment (see *People v. Box*, *supra*, 23 Cal.4th at p. 1216; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418); and lack of intercase proportionality review (see *People v. Snow*, *supra*, 30 Cal.4th at pp. 126-127)

Appellant continues in Arguments C-1, C-2, C-3, C-4, and C-5 by claiming that the jury should have been instructed on some standard of proof, even if not proof beyond a reasonable doubt, to guide its decisions on whether aggravating circumstances existed, whether aggravating circumstances outweighed mitigating ones, and whether death was the appropriate sentence. (AOB 354-388.) These claims have been rejected in prior decisions of this Court, and should be rejected here. (*People v. Box*, *supra*, 23 Cal.4th at p. 1216; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418.) Insofar as appellant contends that *Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, compel a different conclusion (see AOB 247-256), he is incorrect. This Court has

found that *Ring* and *Apprendi* "do not affect California's death penalty law." (*People v. Smith* (2003) 30 Cal.4th 581, 642.)

In Argument C-1(b), appellant contends jury unanimity is required as to aggravating factors. (AOB 356-377.) This claim has been previously rejected and should be rejected here. (See *People v. Maury, supra*, 30 Cal.4th at p. 440.)

In Argument C-6, appellant complains about the lack of written jury findings on aggravating factors. (AOB 388-392.) This claim has been previously rejected and should be rejected here. (See *People v. Snow, supra*, 30 Cal.4th at p. 126.)

In Argument C-7, appellant challenges the lack of intercase proportionality review. (AOB 393-397.) This Court has previously rejected the claim that such review is required. (See *People v. Snow, supra*, 30 Cal.4th at pp. 126-127.)

In Argument C-8, appellant contends that any use of unadjudicated crimes was improper, and even if proper, the jury was required to unanimously find any such crime had been proven beyond a reasonable doubt. (AOB 398.) These claims have previously been rejected by this Court and should be rejected here. (See *People v. Prieto, supra*, 30 Cal.4th at p. 276; *People v. Hart, supra*, 20 Cal.4th at p. 549.) As previously noted, appellant's reliance on *Ring* and *Apprendi* (see AOB 256) is misplaced, as neither case affects California's death penalty law. (*People v. Smith, supra*, 30 Cal.4th at p. 642.)

In Argument C-9, appellant argues that use of the word "extreme" in section 190.3, subdivisions (d) and (g), and the word "substantial" in subdivision (g), was error. (AOB 399.) This claim has been previously rejected by this Court and should be rejected here. (See *People v. Smith, supra*, 30 Cal.4th at p. 642.)

In Argument C-10, appellant claims that the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators was error. (AOB 399-401.) Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1383.) As this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating was not error." (*People v. Williams*, *supra*, 16 Cal.4th at p. 269, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1192.)

In Argument D, appellant contends the alleged absence of procedural safeguards resulted in a denial of equal protection, because, according to appellant, those safeguards are provided to non-capital defendants. (AOB 402-411.) Insofar as these unspecified "procedural safeguards" relate to penalty phase procedures, capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.) Insofar as appellant argues the lack of intercase proportionality review in capital cases amounts to a violation of equal protection, this Court has previously rejected this claim and should do so here. (See *People v. Cox* (2003) 30 Cal.4th 916, 970.)

In Argument E, appellant contends California's use of the death penalty violates international norms and violates the federal constitutional ban on cruel and unusual punishment under the Eighth and Fourteenth Amendments. (AOB 411-415.) Appellant's claim should be rejected, because this Court has previously held that international law does not compel the elimination of capital punishment in California. (See *People v. Snow*, *supra*, 30 Cal.4th at p. 127; *People v. Ochoa, supra,* 26 Cal.4th at p. 462; see also *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 370-376.) This Court also has rejected the contention that California's use of the death

penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the federal Constitution. (See *People v. Boyette* (2002) 29 Cal.4th 381, 465; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865.)

For the foregoing reasons, appellant's challenge to California's death penalty procedures should be rejected.

XVI. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant contends that his death sentence violates international law, particularly the International Covenant on Civil and Political Rights ("ICCPR"). He also contends that the use of the death penalty violates evolving international norms of human decency and, to the extent such international norms of human decency inform its scope, the Eighth Amendment. (AOB 416-419.) This Court, however, has rejected the contention that the death penalty violates international law, evolving international norms of decency, or the ICCPR. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown, supra,* 33 Cal.4th at pp. 403-404; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Accordingly, appellant's claim should be rejected.

XVII. THERE WERE NO ERRORS IN EITHER THE GUILT PHASE OR THE PENALTY PHASE THAT HAD A CUMULATIVE PREJUDICIAL EFFECT

Finally, appellant claims reversal is warranted based on the cumulative effect of errors that undermined the fundamental fairness of the trial and the reliability of the death judgment. (AOB 422-425.) Appellant's claim is meritless since, as explained above, there were no errors, and, to the extent there was error, appellant has failed to demonstrate prejudice. (See *People v. Cole*, *supra*, 33 Cal.4th at pp. 1235-1236 ["'We have either

rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors'"]; *People v. Seaton* (2001) 26 Cal.4th 598, 692 ["The few minor errors, considered singly or cumulatively, were harmless"].) A defendant is entitled to a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at p. 1214.) Appellant received a fair trial.

CONCLUSION

Based on the foregoing, respondent respectfully asks this Court to affirm the judgment.

Dated: January 11, 2012

Respectfully submitted,

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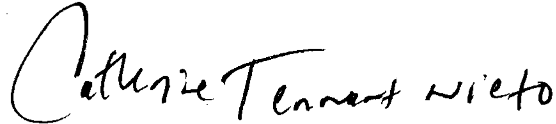
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REDACTED BRIEF** uses a 13 point Times New Roman font and contains 34,343words.

Dated: January 11, 2012

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Daniel Lee Whalen** No.: **S054569**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 12, 2012, I served the attached **RESPONDENT'S REDACTED BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, 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 January 12, 2012, at Sacramento, California.

Signature

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